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Where Neutrality Stops and Reality Begins: Why Considering Identity Is Vital to Lead and Class Counsel Selection

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When courts consider a choice of class or lead counsel in multidistrict litigation ("MDL") or class action suits, they often follow the idea of a neutral partisan model. Such a model idealizes lawyer conduct as a blank conduit for client interests. In theory, lawyers should be able to bring their legal expertise absent any personal experiences, individualized identity, and morality outside of practice. But the reality is that neither lawyers nor their clients can fully divorce their identities or moral viewpoints from the legal system.

This Essay argues that an identity-blind choice of class or lead counsel, grounded in a version of lawyering rooted in neutral partisanship, is indefensible in the context of complex litigation. Complex litigation systems ask for a great deal of blind trust from clients because the dilution of the lawyer-client relationship in this type of litigation is severe. In MDL or class action practice, lawyers often must wear two hats—their own and that of the traditional client. The shift of power and control away from the individual client to the lawyer means that oversight falls almost exclusively to the court, various state bar associations, and individual lawyers through self-regulation. This warrants a practice model that accounts for identity and viewpoint alignment in selection. In order to protect clients' interests—where the vast majority of the class is represented in absentia—it is essential that courts consider the identities of lawyers and their specific views when certifying adequacy of counsel and selecting lead counsel in MDLs. As such, courts should cease the practice of identity-blind choice of class or lead counsel and instead consider the whole person of the lawyer when evaluating petitions to lead such cases.

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INTRODUCTION

Courts and existing rules governing the selection of lawyers in class actions and multidistrict litigation ("MDL") treat the identities of lawyers (race, gender, sexual orientation, viewpoint, or otherwise) as officially irrelevant to the choice of counsel.[1] However, in these contexts, few things could be further from the truth. Consider the NFL concussion class action litigation.[2] There, appointing counsel without consideration of lawyer identity didn't serve the clients or the legal process. In that case, the class, NFL athletes suffering from concussions, was largely composed of African American men. Class counsel and the lawyer team representing the class were white. Experts hired by class counsel (in collaboration with opposing counsel) created a guidebook for doctors assessing the damages to potential class members that required a practice called "race-norming" in the assessments.[3] Race-norming adjusts the cognitive damage scores of individuals based on race.[4] This practice systematically depressed or eliminated qualifying payouts to African American players.[5]

When challenged, class counsel resisted removing "race-norming" criteria for two years.[6] Now, years after the initial settlement, hundreds of players have been retested and requalified.[7] However, the lawyers in the case not only failed to identify how race-norming in assessment would undermine their clients, but also how it would jeopardize the legitimacy of the process and settlement finality. This was, at minimum, poor lawyering; lawyering that likely would have been substantially improved with a team of lawyers with varied experiences, backgrounds, and viewpoints, including their racial and gender identities.

Selecting class counsel in class actions and lead counsel in MDLs impacts the outcomes of cases, the likelihood and shape of settlements, the burden on courts, and the legitimacy of complex litigation. It also shapes the voice of the claims brought, access to power, which arguments are articulated, and which

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1. The time-honored paradigm of role-differentiated practice enables lawyers to represent clients they may not agree with and with whom they share no significant identity overlap, even in cases where the client base is fundamentally different from the lawyer base engaged in advocacy.

2. *In re* Nat'l Football League Players' Concussion Injury Litig., No. 12-md-02323 (E.D. Pa.).

3. Will Hobson, *How 'Race-Norming' Was Built into the NFL Concussion Settlement*, WASH. POST (Aug. 2, 2021, 11:00 AM), https://www.washingtonpost.com/sports/2021/08/02/race-norming-nfl-concussion-settlement/.

4. *Id.* ("As early as May 2019, Seeger and NFL lawyers were made aware race-norming was contributing to denials and that the practice might be discriminating against Black former players. That month, a lawyer representing one player—in a document sent to both NFL lawyers and Seeger—wrote that race-norming violated the civil rights of Black players because the practice makes 'it harder for blacks to qualify for the Settlement than whites' and 'is discriminatory on its face.' The league and lawyers for the players didn't agree to remove the practice for another two years.").

5. *Id.*

6. *Id.*

7. Will Hobson, *Hundreds of Black Former NFL Players Get Awards After End of 'Race-Norming*,*'* WASH. POST (Aug. 12, 2022, 4:16 PM), https://www.washingtonpost.com/sports/2022/08/12/nfl-race-norming-settlements/.

views permeate and stand in for the group. Current systems of complex litigation rely on courts' ability to select lawyers who will faithfully channel and represent client interests in this brave new world where lawyers and judges wear all the hats. Such complex litigation formats create a strained and abnormally attenuated type of lawyer-client relationship. While the stakes are high, guidance for courts is low. Federal Rule of Civil Procedure 23(g) and parallel practices in MDLs set out a limited set of criteria for selecting class counsel and even less clear direction for selecting lead counsel.[8]

This Essay argues that an identity-blind choice of class or lead counsel, grounded in a version of lawyering rooted in neutral partisanship, is indefensible in the context of complex litigation. Multiple factors collide into nudging the court to adjust these practices to consider the whole person of the lawyer when evaluating their petitions to lead such cases. The dilution of the lawyer-client relationship in mass litigation is severe. The scale of what is at stake in class actions and MDLs is often exponential to that in a single action. There are additional difficulties of meaningful back-and-forth communication with and within large groups of plaintiffs and lawyers. The shift of power and control away from the individual client to the lawyer means that oversight falls almost exclusively to the court, various state bar associations, and individual lawyers through self-regulation. This warrants a practice model that accounts for identity and viewpoint alignment in selection. In order to protect clients' interests—where the vast majority of the class is represented in absentia—it is essential that courts consider the identities of lawyers and their specific views when certifying adequacy of counsel and selecting lead counsel in MDLs.

This proposal does not require that judges seek an ideal lead counsel or class counsel who is a one-to-one demographic reflection of the class or group. Rather, this Essay argues that courts should consider the identities and viewpoints of attorneys in selecting the optimal legal team to helm such cases, and that this practice best serves both complex litigation clients and the legal system. To truly be adequate or effective counsel in these cases, lawyer teams should include some lawyers who empathize directly with their clients, can personally connect to and communicate well with clients, reflect or channel their interests and perspectives, and with whom the class members can trust and identify.

Moreover, the practice of systematically claiming to disregard the identity of lawyers in these MDLs and class actions is increasingly out of touch with the modern understanding of the lawyer-client relationship and growing public sentiment regarding judicial legitimacy, which demands legal representation that is more reflective of the democratic polity. That said, courts must be cognizant, as they pivot, to not overcompensate—this is a tightrope, and overcompensation will lead to different allegations of bias. Here, clear expectations are useful, and

8. FED. R. CIV. P. 23(g); *see also infra* Parts I.B, II.

narrow tailoring is key to avoid backlash that can limit the impact and scope of this proposal.

Part I begins by briefly outlining the neutral partisan paradigm. Presumptions of the current counsel-choice process rest on this theoretical underpinning. Absent a particular articulation otherwise, courts assume that adequacy and fairness can be determined without considering who a specific attorney is as a person or what they personally believe. This is a tacit assimilation of the neutral partisan norm. To change that starting point is to upend, at least in a small part, this core expectation. Part II then explores the principal mechanics and standards governing counsel selection in both the class action and MDL contexts and continues to discuss why attorney selection in these areas is of particular import. Part III focuses on the normative argument for why considering identity—particularly race, gender, sexual orientation, and viewpoint—is necessary in the class context. In doing so, this Part unpacks doctrinal developments in this space, recent trends in judicial action, as well as professional ethics–based rationales supporting the Essay's principal assertion: that courts must consider lawyer identity, including race, gender, sexual orientation, disability, and viewpoints when appointing counsel in the class action and MDL contexts.

Additionally, Part III focuses on how to operationalize its principal recommendation to consider a lawyer's whole person when matching them to a class or appointing them to a lead counsel role. In doing so, this Part creates two possible paradigms—a "client affinity" model and a "remedial equity model"—and attempts to demonstrate how each would work. Part III then concludes with several specific, granular interventions. First and foremost, MDLs need explicit standards for selecting lead counsel, and those standards should align with the adequacy language of class action counsel selection in Rule 23.[9] Second, the Federal Rules Advisory Committee should add a note to the committee comments to Federal Rule of Civil Procedure 23(g) explicitly stating that full consideration of adequacy must include consideration of the identity and views of lawyer applicants. Moreover, an amendment to the text of Rule 23(g) itself would solidify and render uniform the application of this standard. Additionally, to empower clients and courts to weigh risk of mixed loyalties, the Model Rules of Professional Conduct ("Model Rules") should be modified. Model Rule 2.1 should be modified from permissive to mandatory disclosure of non-client-aligning economic, political, moral, or social views in the complex litigation context.[10] Alternatively, Model Rule 1.4 delineating the duty to communicate

9. FED. R. CIV. P. 23(g)(1)(B).

10. All such nonalignments should still be waivable, but these modifications would give clients the power to decide if such a conflict is material or not, depending on how much they trust a given lawyer or legal team to role-differentiate. *See* MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

with clients could clarify a duty to communicate such dissonance.[11] This is particularly important given the attenuation of day-to-day communication, decisionmaking, and monitoring of clients in the complex litigation context.

I. TODAY'S LAWYER-CLIENT RELATIONSHIP IN THE CONTEXT OF COMPLEX LITIGATION

A. THE NEUTRAL PARTISAN MODEL: THE MYTH OF A "STANDARD CONCEPTION"

The concept of neutral partisanship is built into the heart of the modern conception of legal practice—so much so, that it has led many to refer to it as the "traditional conception" of lawyering.[12] This "traditional" conception intuits that lawyers can (and should) bifurcate their personal selves from their advocacy, and that the client is the center of legal practice.[13] This way of thinking about legal practice seeks to morally distance lawyers from their clients' chosen ends while facilitating acting as a partisan in favor of their clients' legal interests.[14] Lawyering in a role-differentiated way theoretically renders all lawyers interchangeable, as their personal views, identities, and experiences are presumptively irrelevant.[15] Lawyers are not required to disclose anything about their personal backgrounds, identities, or views to their clients, let alone the public, since these factors are not relevant to their representation.[16] In turn, under this model, lawyers are not morally responsible for the acts that they engage in during the representation; rather, moral responsibilities lie with the clients.[17]

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11. *Id.* r. 1.4 (duty to communicate with clients).

12. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060–61 (1976) (describing neutral partisanship as the standard conception of American lawyering).

13. *See* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 369–71, 373 (2006) (noting client-centricity as the "most prevalent theory of lawyering taught in law school clinics").

14. *See* Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1378 (2008) ("[T]he . . . role of morality[] [is] the idea, much maligned by legal ethicists, that lawyers should receive some degree of immunity from the general requirements of conscience on account of their distinctive social role."). *See generally* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RSCH. J. 613 (describing this concept as the "amoral lawyering model" and highlighting the empowerment of clients as the chief moral justification for this practice).

15. "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2023).

16. Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. 151, 180–81 (2014) ("[Under] the Model Code . . . , neutral partisanship obscures a lawyer's actual agenda and views, again disadvantaging clients. By allowing lawyers to claim moral distinction from their client's ends, lawyers inhabit a professional identity steeped in ambiguity. The client ought to be able to choose counsel knowing what [their] lawyer actually thinks of the moral content of the suit at hand.").

17. RICHARD L. ABEL, AMERICAN LAWYERS 247 (1989) ("Lawyers *are* hired guns: they know they are, their clients demand that they be, and the public sees them that way.").

This conception of lawyering requires significant trust and deference on the part of clients, who must rely on norms of conduct to secure fidelity to their cause. Rules of professional conduct like those pertaining to confidentiality or conflicts of interest seek to codify, emulate, and enforce practices like trust and loyalty that might otherwise stem organically from relationships and interest alignment.[18] Trust by clients in this context is supported and brokered by clear communication and strong levels of client autonomy, which keep lawyers from making decisions that may not accurately reflect their clients' divergent views or goals.[19] This type of client oversight is not present in mass litigation contexts.[20]

Advocates of role-differentiated models of lawyering justify this system on both moral and pragmatic advocacy-oriented terms. Moral justifications of neutral partisanship laud the idea that this model empowers clients by removing a lawyer's ability to filter (legal) client aims.[21] This in turn recognizes the client's dignity and autonomy and avoids an "oligarchy" of the lawyer class.[22] This view is grounded in the idea that the best way to defend and respect people as individuals is to be both neutral to their aims and partisan in their favor.[23] In this way, a lawyer adds value and "is a good person in that he provides access to the law; in providing such access without moral screening, he serves the moral values of individual autonomy and equality."[24]

Other advocates for the standard conception tout the advantages of having a dispassionate advocate who can argue without the distraction of feelings muddling their thought process. Here, proponents argue against a "thickly professional identity" where too much personal interest in the outcome of a client's case can develop into a "self-interested perversion of the service

18. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2023) (confidentiality); *id.* r. 1.7 (conflicts of interest for current clients).

19. *Cf.* Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129, 184 (2018) (discussing client relationships in "traditional" litigation models versus mass litigation and noting that in the traditional model, "[t]he client possesse[s] a high degree of litigant autonomy, exercised through various means").

20. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 144 (2015) ("All of this [on the attenuated nature of the attorney-client relationship] is to say that MDL muddles the traditional relationship between attorney and client, creating new adverse incentives."); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 95 (2011) ("[A]ttenuated attorney-client relationships inhibit a client's ability to monitor her case as she would in an individual lawsuit.").

21. Pepper, *supra* note 14, at 613 (stating that neutral partisanship is moral, "primarily upon the values of individual autonomy, equality, and diversity").

22. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 10–11 (1975) ("If lawyers were to substitute their own private views of what ought to be legally permissible and impermissible for those of the legislature, this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers.").

23. MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9–12 (1975) (emphasizing the importance of partisanship and neutrality in protecting the fundamental rights of individuals).

24. Pepper, *supra* note 14, at 634.

norm."[25] The concern is that when lawyers are personally invested in cases, they lose the ability to clearly see the analytical options at play and therefore fail to provide sound advice.[26]

B. BASIC MECHANICS IN CLASS ACTION STRUCTURE AND MDL LEADERSHIP SELECTION

In both class actions and MDLs, courts are intimately involved in brokering the lawyer-client relationship and doing so in a way that modifies that relationship from its usual dynamic and institutional structure. Both situations require selecting counsel for parties who are, as a daily matter, not present.[27] No longer is the client intimately involved and regularly apprised of movements and issues in the case. In these cases, significant decisions about the goals of a legal action (particularly terms of settlement) are entrusted to the attorneys. In complex litigation settings, the role of lawyers as not only partisans but also representatives of substantive claims and arguments of the litigants is heightened. Thus, counsel selection can be pivotal in the outcome of cases as lawyers take on the primary role for directing the course of legal action.[28]

Federal Rule of Civil Procedure 23(g) provides guidance on how to select adequate class counsel. In certifying the adequacy of class counsel, a court "must consider" a variety of factors:

> (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 counsel will commit to representing the class.[29]

In selecting counsel, the court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class" and "order potential class counsel to provide information on any subject pertinent to the appointment."[30]

In selecting counsel, the court must choose not only qualified parties, but the best representation available under the circumstances. The 2003 Federal Rules Advisory Committee notes make clear that where there are multiple

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25. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 7 (2003).

26. *Id.* at 22.

27. David J. Kahne, *Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers*, 19 GEO. J. LEGAL ETHICS 741, 743–44 (2006) ("As a procedural safeguard, the adequacy of representation requirement is particularly pertinent in the class action context because class action judgments may have a preclusive effect on absent and future claimants.").

28. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1443 (2006) (outlining the expansive influence lawyers have over litigation, particularly in the class action context).

29. FED. R. CIV. P. 23(g)(1)(A)(i)–(iv).

30. FED. R. CIV. P. 23(g)(1)(B)–(C).

different class counsel, the court must engage in comparative analysis that selects the optimal choice for the client among the options: "When there is only one applicant the court must determine that the applicant is able to fairly and adequately represent class interests. When there is more than one applicant the court must appoint the applicant best able to represent class interests."[31] The Rules Committee further clarified that when selecting class counsel, the Federal Rules require that "in the multiple applicant situation[,] the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants."[32]

MDLs are governed by 28 U.S.C. § 1407 and have long been criticized as carrying many of the trappings of class actions with few of the protections.[33] What governs selection of lead counsel is significantly less clear than in the class action context, as it is a matter of case law and practice more than any enumerated procedure. Here, the statute is silent on selection of lead counsel but opens the door to the court crafting alternative procedural methods so long as they generally comport with the law and existing civil procedure.[34] Courts have interpreted this provision over time to include the ability of the Judicial Panel for Multidistrict Litigation ("JPML") to assign lead counsel, although this determination was not a forgone conclusion.[35] Historically, assignment of lead counsel had been rare and limited to cases brought pursuant to Federal Rule of Civil Procedure 42(a).[36] However, in the late 1970s, two cases influentially upheld the ability of MDL judges to appoint lead counsel, without a statutory hook or clear procedural charge.[37] From this point onward, appointment of some form of lead counsel in MDLs has become commonplace. When judges select lead counsel, however, plaintiffs lose many of their rights to choose their attorney and attendant controls over attorney conduct.[38] Some have noted that the structure of the lawyer-client relationship and the centrality of the court in giving out these plum assignments may incentivize attorneys to be more loyal to the judge than their client.[39]

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31. FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

32. *Id.*

33. Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011).

34. 28 U.S.C. § 1407(f).

35. Class counsel is subject to the adequacy requirements outlined in Federal Rule of Civil Procedure 23(g)(1), but no such explicit provision exists for MDLs.

36. *See* MacAlister v. Guterma, 263 F.2d 65, 68 (2d Cir. 1958) (assigning lead counsel in a Rule 42(a) consolidated action).

37. Vincent v. Hughes Air W., Inc., 557 F.2d 759, 774 (9th Cir. 1977) (finding district court's appointment of lead counsel appropriate); *In re* Air Crash Disaster on Dec. 29, 1972, 549 F.2d 1006, 1011–12 (5th Cir. 1977) (upholding lead counsel appointment).

38. Charles Silver, Some Questions About Lead Counsels' Appointment, Duties, and Compensation 1 (unpublished manuscript), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/silver.mdl%20paper.pdf/ [https://web.archive.org/web/20220203070057/https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/silver.mdl%20paper.pdf/] ("This nullifies the structures that the market and the law have put in place to encourage lawyers to serve plaintiffs well.").

39. *Id.* ("It also institutionalizes a conflict of interests by making lead attorneys beholden to MDL judges.").

Functionally, designation of lead counsel in an MDL is part of pretrial motion practice. Once an action is recognized as part of an MDL and consolidated before the JPML, the court usually accepts motions regarding MDL counsel, which can be constituted in a number of ways—as an executive panel, selection of a few key lead lawyers, or both. Given the importance of the choice of lead counsel and the fact that this has been common practice for decades, it is shocking (and perhaps dismaying) that the JPML Rules still fail to detail the terms and mechanisms for lead counsel selection.[40] The only significant mention of counsel in the Rules states that service requirements can be met by serving all parties to the action and all "liaison counsel" appointed by the district court.[41] After receiving all JPML panel orders, the liaison counsel is required to distribute them to all the parties they serve in this capacity.[42]

To some extent, separating class actions from MDLs is complicated by the fact that they often overlap factually and analytically.[43] Factually, over seventy-five percent of MDLs include class actions.[44] Some MDLs are even explicitly formed to avoid certification of conflicting classes.[45] The void of a distinct procedural structure for counsel selection for MDLs coupled with a statutory charge referencing alignment with the Federal Rules of Civil Procedure leads to doctrinal cross-pollination.[46] Analytically, class action adequate-counsel selection and MDL lead-counsel selection is intertwined by the fact that courts often look to class action practices to provide guidance in MDLs.

C. THE PIVOTAL CHOICE: LEAD AND CLASS COUNSEL

It is nearly indisputable that "the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action."[47] Being counsel for a class is distinct and separate from being any individual party's lawyer, as the obligation that attaches to that representation is

40. In fact, these rules make no mention of lead counsel at all. *See generally* U.S. JUD. PANEL ON MULTIDIST. LITIG., RULES OF PROCEDURE OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2016).

41. *Id.* r. 4.1(d).

42. *Id.* ("Liaison counsel shall receive copies of all Panel orders concerning their particular litigation and shall be responsible for distribution to the parties for whom he or she serves as liaison counsel.").

43. Some argue that because MDLs function similarly to class actions in consolidating similarly oriented parties yet lack many of class actions' precise procedural safeguards, they are "quasi-class actions." *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 122 (E.D.N.Y. 2006) ("[MDLs] may be properly characterized as . . . quasi-class action[s] . . . .").

44. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1695 (2017).

45. *In re* Litig. Arising from Termination of Ret. Plan for Emps. of Fireman's Fund Ins. Co., 422 F. Supp. 287, 290 (J.P.M.L. 1976) ("Another compelling reason for transfer of these actions to a single district for coordinated or consolidated pretrial proceedings is the need to eliminate the possibility of overlapping or inconsistent class determinations by courts of coordinate jurisdiction.").

46. 28 U.S.C. § 1407(f) ("The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.").

47. FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

one of a fiduciary to the class as an entity.[48] The preclusive impact on future plaintiffs or those presently represented in absentia further heightens the impact of counsel selection.[49]

Selection of MDL leadership is of central importance to the civil legal system and the adjudication of individual civil claims.[50] In order to understand why, one must recognize how the MDL process functions and how pervasive the MDL practice is in the modern American legal system. An MDL takes hundreds, even thousands, of lawsuits brought against a defendant and consolidates them into a single pretrial proceeding.[51] One might assume, given the massive impact on a plaintiff's ability to bring their own case and shape the nature of the arguments, that MDLs would be rare. But they are not. MDLs make up a steadily growing fraction of the federal docket, at approximately one-third of the federal civil docket.[52] Another assumption might be that given this enormous power, surely MDLs would be subject to close procedural oversight. There too, the answer is counterintuitive: there is very little procedural guidance.[53]

Once the individual cases are consolidated into the MDL, the court selects the MDL lead attorneys, the sole parties who can negotiate a global settlement and make general litigation decisions.[54] These appointed counsel essentially replace plaintiffs' chosen counsel in the litigation, outside their chosen forum, raising the arguments they think are relevant and important. "Instead of facing many plaintiffs with many strategies and approaches to discovery and motion practice, the defendant faces a steering committee of plaintiff attorneys selected by the judge who, often, is focused on protecting judicial resources and encourages broad settlements."[55] This institutional structure highlights why shared identity between lawyer and clients is vital in this context: to increase the likelihood that the attorneys appreciate plaintiffs' injuries and perhaps are less quick to settle. Some courts have observed that the inability of plaintiffs to try

48. *Id.* ("The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it.").

49. Kahne, *supra* note 27, at 743–44 ("As a procedural safeguard, the adequacy of representation requirement is particularly pertinent in the class action context because class action judgments may have a preclusive effect on absent and future claimants.").

50. Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 777–78 (2019) ("Appointment of counsel also limits the claims and arguments of plaintiffs, making it easier for transferee judges to generate broadly applicable procedural, substantive, or evidentiary rulings that can channel the litigation into a global summary judgment or settlement.").

51. For example, one opioid MDL drew together over 1,500 cases. *See, e.g.*, Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 176 (2019).

52. Tidmarsh & Welsh, *supra* note 50, at 769.

53. MDLs have a very limited subset of procedural rules that provide no reference to lead counsel. *See generally* U.S. JUD. PANEL ON MULTIDIST. LITIG., *supra* note 40.

54. D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176 (2017) (noting that negotiating parties who create a global settlement in an MDL are the defendant and the lead lawyers for the plaintiffs, who are appointed by the MDL judge to the plaintiffs' steering committee).

55. Michalski, *supra* note 51, at 180.

their cases before local factfinders skews the proceedings in favor of defendants.[56] Past case norms can put a heavy hand on the scale for repeat players in the lead counsel space and incentivize lead counsel to "privilege self-interest over clients' interests" when it comes to motions that may antagonize the court.[57]

Attorneys are particularly influential during settlement talks. The ability of the lawyers to craft the shape of settlement, even in their own favor, places clients in a vulnerable position where they must rely profoundly on fiduciary-based loyalty. Settlements can include many terms, including provisions that can augment lead counsel's attorneys' fees in exchange for other value to the defendant.[58] Yet in the MDL context, it isn't even clear that any fiduciary duty runs from lead counsel to plaintiffs other than their own immediate client.[59]

The power of leading attorneys in both MDLs and class actions is further heightened by the fact that the selection of lawyer by the client is inverted: ostensibly lawyers pick clients, or at least have a strong hand in picking the ones whom they are obligated to interact with regularly. Because these class representatives or lead clients are appointed by motion to the court, attorneys play a key role in selecting the most visible and influential clients.[60] Some have even gone so far as to argue that these "clients" are little more than figureheads controlled by class counsel.[61] There can also be a financial component to this reversed lawyer-client relationship, where clients may be influenced by individualized compensation.[62] Legal counsel can advocate for and secure differing compensation for class representatives or lead plaintiffs distinct from the common fund as an incentive award.[63] Despite the Eleventh Circuit's recent

56. DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 153–55 (D. Mass. 2006) ("[M]arginalization of juror fact finding perversely and sharply skews the MDL bargaining process in favor of defendants."). Moreover, once an MDL is recognized, the likelihood of the case returning to the plaintiff's original forum choice is exceptionally rare. *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1206 (2018) (finding that only 3% of such cases are returned back to their court of origin).

57. Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1447 (2017).

58. *In re* Vioxx Prods. Liab. Litig., 802 F. Supp. 2d 740, 763 (E.D. La. 2011) (altering a 2% attorney's fee to 8% through terms of settlement); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 682174, at *2–4, *12 (D. Minn. Mar. 7, 2008) (altering a 2% attorney fee cap to more than 14% through settlement agreement).

59. Scholars have argued that MDL lead counsel are fiduciaries to all plaintiffs within an MDL. *See, e.g.*, Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1990 (2011) (asserting that lead attorneys owe duties to all plaintiffs as fiduciaries).

60. Selection of a class representative is part of the class certification process. *See* FED. R. CIV. P. 23.

61. Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 165 (1990) ("[T]he named plaintiff plays almost no role in the actual prosecution of the class action, leaving this function for the class attorney.").

62. This individualized compensation has recently been criticized as creating a "bounty" for class representatives that creates a conflict of interest. Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1258–59 (11th Cir. 2020) (setting aside a $6,000 "incentive payment" awarded to the class representative), *cert. docketed*, No. 22-517 (2022).

63. Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958–59 (9th Cir. 2009) ("Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class, to make up for financial or

ruling skeptical of such payments, compensation for class representatives and lead plaintiffs remains an available and common practice as a general matter.[64]

II. WHEN APPOINTING COUNSEL, RACE, GENDER, AND VIEWPOINT MATTER

A. PLANTING THE SEED: *MARTIN V. BLESSING*

Martin v. Blessing involved the issue of whether to consider the race and gender of lawyers in complex litigation lawyer appointments. This case was appealed up to the Supreme Court when class member Nicholas Martin objected to a settlement offer, which included injunctive but not monetary relief. In his appeal, Martin asserted that the settlement offer should be set aside in part because the district court improperly evaluated adequacy of counsel during certification by relying on race and gender.[65] The Second Circuit affirmed the district court on standing grounds and did not reach the class certification question.[66] The Supreme Court followed suit, denying certiorari.[67] The story doesn't entirely end there, however: Justice Alito took the additional step of writing an opinion to accompany the denial of certiorari, pushing back on some of the assertions in the lower court decision.[68]

At the district court, Judge Baer took an affirmative step of cracking open the neutral partisan fiction and confronting the identity of the specific lawyers in a given case as part of a class action adequacy inquiry.[69] Facially, *Martin* was similar to any other class action: two digital radio companies merged, and subscribers of their various services brought several class actions alleging antitrust violations.[70] As is custom and practice, the plaintiffs took the necessary next steps to proceed with litigation—certifying the class pursuant to Federal Rule of Civil Procedure 23.

Then the proceeding took a less common turn—Judge Baer articulated a decidedly not colorblind judicial interpretation of attributes relevant in determining the adequacy of class counsel. Specifically, Judge Baer asserted that associating the racial and gender identities of lawyers with their clients was important and necessary. He articulated in his certification order that he did so to "ensure that the lawyers staffed on the case fairly reflect the class composition

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reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.").

64. *See, e.g.*, Somogyi v. Freedom Mortg. Corp., 495 F. Supp. 3d 337, 354 (D.N.J. 2020) ("Until and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances.").

65. Blessing v. Sirius XM Radio Inc., 507 F. App'x 1, 5 (2d Cir. 2012).

66. *Id.*

67. Martin v. Blessing, 134 S. Ct. 402 (2013), *denying cert. to Blessing*, 507 F. App'x 1.

68. *See generally id.*

69. Blessing v. Sirius XM Radio Inc., No. 09-cv-10035, 2011 WL 1194707, at *12 (S.D.N.Y. Mar. 29, 2011).

70. *Id.* at *1.

in terms of relevant race and gender metrics."[71] Judge Baer had made such points before in several cases, trying to bring to the forefront of class certification the idea that the identity of lawyers is a needed consideration in selecting class counsel and to push back on stayed ideas of lawyer neutrality.[72]

Justice Alito disagreed vehemently, stating: "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."[73]

B. ADVANTAGES TO CLIENTS

Perhaps the gap between Judge Baer and Justice Alito could be lessened by a clearer delineation of what "fair and adequate" entails. If one takes a limited view, or sets a low bar in this determination, then all a qualifying attorney might need to be is competent and diligent.[74] If true, then Justice Alito's argument might survive, in that it is plausible that any person, regardless of identity, has an equal, objective ability to be competent and diligent in the service of a given client. But even that limited assertion that competency is unaffected is suspect in situations where the beliefs of lawyers and their clients are not aligned: "There are severe limitations on the extent to which a person, particularly a stranger, can understand with any depth the ends of another without actually sharing those ends."[75]

If one understands "fair and adequate" representation to extend beyond competence and diligence to a wider array of professional duties, then assessing a lawyer's ability to meet additional duties, particularly comparatively, warrants consideration of identity factors such as race and gender. Specifically, the duty to counsel, communicate, and be loyal are enhanced in lawyers whose identity and beliefs parallel class composition.[76] Prominent lawyers working in the class action space have noted that understanding members of the class or plaintiff group on a fundamental human level is essential to targeting effective notice, a key component of mass litigation.[77]

The importance of building such a relationship is of central importance to the practice of law, as "basic trust between counsel and client . . . is a

71. *Id.* at *12.

72. *See, e.g.*, Pub. Emps.' Ret. Sys. v. Goldman Sachs Grp., Inc., 280 F.R.D. 130, 142 n.6 (S.D.N.Y. 2012); Spagnola v. Chubb Corp., 264 F.R.D. 76, 95 n.23 (S.D.N.Y. 2010); *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

73. *Martin*, 134 S. Ct. at 403.

74. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023) (competence); *id.* r. 1.3 (diligence).

75. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 59 n.70.

76. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2023) (communication); *id.* r. 1.6 (confidentiality); *id.* r. 1.7–.11 (conflict of interest).

77. Bonnie Eslinger, *Legal Team Diversity Is Good Business, Attys Agree*, LAW360 (Oct. 24, 2022, 11:20 PM), https://www.law360.com/articles/1543030/legal-team-diversity-is-good-business-attys-agree ("If you don't understand where they're coming from, you'll never get to them, that notice will never get to them, what that settlement is all about will never get to them . . . . I'm hopeful that we're all getting better at [having diverse law firms and litigation teams]." (quoting Elizabeth J. Cabraser, class action named partner and legend)).

cornerstone of the adversary system."[78] Scholars have found that client and lawyer trust and candor are supported by identity alignment.[79] Relatedly, clients are more likely to be forthcoming and share information where they trust their lawyer.[80] Clients are more likely to distrust their attorney when the attorney doesn't share the same race or gender.[81]

Trust is also intimately intertwined with effective communication. In her article *Black on Black Representation*, Alexis Hoag relays the experience of a black public defender who found herself acting as a "cultural translator" for her colleagues.[82] There, her white colleagues called on her when they were unable to communicate effectively with black clients who were skeptical of her white counterparts.[83] Professor Hoag relayed that many of the black public defenders she interviewed felt that "same-race clients perceived them to be less a 'part of the system' and thus more trustworthy than their white colleagues."[84]

Having a legal team that includes parties who are racially or ideologically aligned with plaintiffs not only gives the team the appearance of loyalty, which inspires client trust, but also likely increases substantive loyalty by connecting parties who are more likely to empathize with the clients. As an initial matter, steps to match lawyer teams with their plaintiffs' demographics may minimize negative implicit bias.[85] Second, if attorneys identify with plaintiffs on a human level, they are more likely to empathize with their viewpoints and experiences, and channel them accurately and effectively. This common experience can allow such lawyers to better identify when clients require additional communication

78. Morris v. Slappy, 461 U.S. 1, 21 n.4 (1983) (Brennan, J., concurring) (citing Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981)).

79. Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1809–10 (1993) (reporting that differences in race and between clients and their lawyers impede meaningful relationships with clients, who may not be willing to "open up").

80. Roland Acevedo, Edward Hosp & Rachel Pomerantz, *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L.J. 1, 40 (2000) (noting that nearly 60% in a survey of people of color selected agreement with the prompt, "[c]lients are more open with attorneys of the same race as them"); Timothy L. Dupree, *Race and the Attorney-Client Relationship*, 80 J. KAN. BAR ASS'N 9, 9 (2011) ("[Client] distrust is exacerbated when the attorney and the client are of different races . . . . [The client] was further concerned that differences in [their] backgrounds might impede his ability to express his opinions and beliefs.").

81. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 42 (2001) ("Lawyers and clients who do not share the same culture face special challenges in developing a trusting relationship in which genuine and accurate communication can occur.").

82. Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1536–37 (2021).

83. *Id.*

84. *Id.* at 1537–38.

85. Some scholarly studies indicate that lawyers who are racially dissimilar from their clients hold more negative implicit bias. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004) (discussing associative implicit bias study where lawyers associated white faces with "good" and black faces with "bad"); Joseph J. Avery, Jordan Stark, Yiqiao Zhong, Jonathan D. Avery & Joel Cooper, *Is Your Own Team Against You? Implicit Bias and Interpersonal Regard in Criminal Defense*, 161 J. SOC. PSYCH. 543, 544 (2020) (discussing antiblack bias in criminal defense representation).

or to protect their interests from being undersold outside of direct client oversight.

Research indicates that teams with a mix of experiences and demographics are generally stronger because they are able to be innovative, anticipate counterarguments, and resist being an echo chamber.[86] In discussing complex litigation's repeat-player problem, Professor Elizabeth Chamblee Burch has observed that "diversity typically enhances complex systems' functionality and contributes to innovation and productivity."[87] Practicing attorneys corroborate that diverse legal teams are more effective.[88]

C. SYSTEMIC BENEFITS: JUDICIAL LEGITIMACY AND THE LEGAL PROFESSION

Before delving too deeply into client-based justifications for considering the identity of lawyers in class counsel appointment, it is important to acknowledge that there are also other highly salient arguments that support the assertion that courts can and should consider the identities of lawyers in attorney team selection. How one weighs these considerations and what are the relevant comparison points is contingent on the goal sought. Class actions also rely on a meaningful determination of adequacy of representation to uphold their legitimacy as a litigation mechanism.[89]

Likewise, the efficiency gains to the federal judiciary from MDLs can only be successfully justified insofar as such proceedings remain fair and representative fora. While this Essay tends to focus on narrower benefits and duties to clients given the lack of controversy surrounding client care, for the judiciary and legal profession as a whole, broader goals regarding systemic legitimacy, historical inequity, and wealth distribution may also powerfully animate consideration of identity in counsel selection.

For the American Bar Association ("ABA"), demographic considerations in counsel appointment could support many other laudable public policy–oriented goals, including seeking to change the demographic of the bar itself to be more reflective of the public.[90] Such practices also have the potential to spread the wealth of being lucrative lead and class counsel beyond a few repeat

86. *See, e.g.*, David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter; Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 3 (2009).

87. Burch & Williams, *supra* note 57, at 1529.

88. Eslinger, *supra* note 77 ("The fact that diverse teams are more effective than non-diverse teams shouldn't be forgotten, it's critical." (quoting Sarah Ray, Latham & Watkins LLP hiring partner)).

89. Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1179, 1187 (1998) ("[A]dequate representation, along with notice and an opportunity to participate (and in some cases the right to opt out) are the essential elements that legitimize the class action.").

90. Currently, the ABA's racial composition does not reflect the general population demographic. *See* ABA, ABA PROFILE OF THE LEGAL PROFESSION 33 (2020) ("Nearly all people of color are underrepresented in the legal profession . . . . For example, 5% of all lawyers are African American . . . but the U.S. population is 13.4% African American.").

players. Reexamining the terms of what makes for the best lead or class counsel in a way that increases the pool of attorneys involved has the added potential benefit of increasing collegiality by alleviating socioeconomic disparities and barriers. Because the most well-heeled lawyers are often influential and active in bar participation, this may also have collateral positive impact in the space of professional responsibility.

Minimizing the repeat-player problem not only empowers a broader swath of lawyers, but may also increase judicial legitimacy, which is undermined when courts consistently select lawyers from the same demographic background (or even the same lawyers). At minimum, this practice can give "the appearance of impropriety."[91] Thus, the act of the judiciary, which already substantially modifies the procedural rights of clients in both the class action and MDL contexts, may not only be better served by considering the composition of the client base or subject matter of the litigation, but also may better reflect the demographic balance of the U.S. population or membership at the bar. Normatively, this view enlists the court directly in the project of reforming the bar and public perception of the bench as biased and nepotistic. On a granular level, should the proceeding get before a factfinder, the presence of racially or gender-diverse lawyers in a courtroom can also have a positive impact within that space of mitigating harmful and offensive stereotypes.[92]

The legitimacy of the judiciary is more closely intertwined with the behavior of lawyers in MDLs and class actions, where judicial oversight (or the lack thereof) is perceived as a quiet endorsement. The *Manual for Complex Litigation* encapsulates how this interrelationship between the court and lawyers is heightened in these complex litigation spaces: "[C]omplex litigation places greater demands on counsel in their dual roles as advocates and officers of the court. The complexity of legal and factual issues makes judges especially dependent on the assistance of counsel."

Thus, it is not only clients who rely on the word and workproduct of lawyers, but also the judiciary itself.

D. CURRENT TRENDS: JUDICIAL CONSIDERATION OF RACE & GENDER

There are several indicators that Justice Alito's view in *Martin* has not uniformly persuaded judges, particularly within the JPML, which has more leeway to exercise judicial discretion. In the years since *Martin*, many of the arguments in the case have found some traction in other judicial contexts, including the MDL sphere.[93] A sampling of high-profile cases appears to

91. Int'l Bus. Machs. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) ("The maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice is so important a consideration that we have held that a court may disqualify an attorney for failing to avoid even the appearance of impropriety.").

92. Hoag, *supra* note 82, at 1538–41; L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2645 (2013).

93. *See supra* Part II.A.

indicate an uptick in judicial interest in considering at least race and gender in selecting lead counsel. The judicial practice of explicitly calling for diverse lead counsel and counsel proposals that ask for diverse slates of candidates appears to be increasingly common. However, it wasn't until 2016 that the first majority female MDL conference was convened, which at the time was considered a "milestone."[94]

In 2020, several groups of users of Robinhood, an online securities trading platform, sought class certification alleging damages arising from outages in electronic trading services from March 2, 2020, to March 3, 2020, key dates of COVID-19-related market volatility. In their "Motion for Consolidation and for Appointment of Interim Lead Class Counsel," the petitioning law firms argued that they should be co-lead counsel for the putative class.[95] The motion also asked that the court constitute an "executive committee" of seven additional attorneys from the consolidated action to aid in the representation.[96] All of the suggested attorneys were of the same gender, despite the class including members of all genders.[97] District court Judge James Donato was having none of it. While he was willing to consolidate the classes, he rejected the leadership structure, specifically citing a lack of gender diversity, and articulated a need that "attorneys running this litigation should reflect the diversity of the proposed national class."[98]

Also in 2020, Judge Robin Rosenberg of West Palm Beach cited gender diversity in selecting lead counsel.[99] This MDL involves 229 lawsuits alleging that the heartburn drug Zantac has carcinogenic qualities.[100] Shortly after taking on this MDL, Judge Rosenberg invited applications for appointment as lead counsel. After considering over sixty lead counsel applications, Judge Rosenberg selected a team of twenty-four to lead the case, thirteen of whom were women.[101] In doing so, "[t]he Court sought to appoint a diverse leadership team that is representative of the inevitable diversity of the Plaintiffs and a team that affords younger and slightly less experienced attorneys an opportunity to participate in a leadership role in an MDL."[102]

94. Melinda Vaughn, *A Milestone for Diversity in MDL*, 100 JUDICATURE, no. 1, 2016, at 4.

95. Motion for Consolidation and for Appointment of Interim Lead Class Counsel at 1, *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596 (N.D. Cal. July 14, 2020), ECF No. 38.

96. *Id.* at 12.

97. *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. July 14, 2020).

98. *Id.* ("The Court is concerned about a lack of diversity in the proposed lead counsel. For example, all four of the proposed lead counsel are men, which is also true for the proposed seven lawyers for the 'executive committee' and liaison counsel.").

99. Nate Raymond, *Judge Pushes Diversity in Picking Lawyers To Lead Zantac Litigation*, REUTERS (May 20, 2020, 11:41 AM), https://www.reuters.com/article/products-zantac/judge-pushes-diversity-in-picking-lawyers-to-lead-zantac-litigation-idUSL1N2CT1BD.

100. *See In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-md-02924 (S.D. Fla.).

101. Raymond, *supra* note 99.

102. *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-md-02924, slip op. at 1 (S.D. Fla. Mar. 8, 2020).

These considerations were also expressly raised by the court in a class action case against First Energy Corporation.[103] There, District Judge Algernon Marbley of Columbus, Ohio said he would consider the diversity composition of law firms in rendering a class counsel decision.[104] In asking the various law firms to report the gender and racial composition of their firms, the judge stated that "whether attorneys reflect the fund participants they represent goes to the question of adequate representation, one of the factors courts consider when appointing lead counsel."[105] The list goes on. In *In re Elmiron*, a drug-related product liability MDL, Judge Brian R. Martinotti specifically stated in his case order that "[l]eadership and the committees are expected to be diverse in gender, ethnicity, geography, and experience," citing the *Manual for Complex Litigation* to clarify the centrality and importance of diverse counsel.[106] He subsequently appointed a leadership committee of twenty-five lawyers, eighteen of whom were women, to oversee 140 lawsuits alleging that Elmiron causes ocular damage.[107]

The trend in explicitly considering the diversity of lawyers may be supported in part by the availability of informal guidance documents outlining best judicial practices that support a shift in the use of identity as a salient attorney selection factor. In 2021, the James F. Humphreys Complex Litigation Center at George Washington Law School published a judicial "best practices" guide for MDL proceedings that presents a "judicial appointments inclusivity standard."[108] Guideline 1 in this standard provides, among other things, that "[t]he 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."[109] The report indicates that this proposal was supported by a substantial number of practicing attorneys and legal organizations.[110]

While there appears to be increased judicial interest in examining the demographic composition of lawyer representation, the statutory structure of a

103. Jody Godoy, *Ohio Judge Calls for Diverse Counsel To Lead First Energy Shareholder Lawsuit*, REUTERS (Nov. 17, 2020, 12:23 AM), https://www.reuters.com/article/securities-firstenergy-leadplaintiff/ohio-judge-calls-for-diverse-counsel-to-lead-first-energy-shareholder-lawsuit-idUSL1N2I301E.

104. *Id.*

105. *Id.*

106. *In re* Elmiron (Pentosan Polysulfate Sodium) Prods. Liab. Litig., No. 20-md-02973, slip op. at 1 (D.N.J. Dec. 18, 2020).

107. Amanda Bronstad, *Judge Appoints Elmiron Leadership Team with 'Significant Diversity*,*'* LAW.COM (Jan. 22, 2021, 7:42 PM), https://www.law.com/njlawjournal/2021/01/22/judge-appoints-elmiron-leadership-team-with-significant-diversity/?slreturn=20221119111427.

108. *See generally* JAMES F. HUMPHREYS COMPLEX LITIG. CTR., GEORGE WASHINGTON L. SCH., 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 (2021), https://www.law.gwu.edu/sites/g/files/zaxdzs5421/files/downloads/Inclusivity_and_Excellence_Master_Draft.pdf.

109. *Id.*

110. *Id.* This document was signed by ninety-five different law firms and offices.

law itself can create impediments to judicial consideration of the identity of the lawyers in the appointment process. Some statutes create structures that arguably limit judicial discretion in this space. For example, the Private Securities Litigation Reform Act ("PSLRA") creates a statutory structure that selects lead plaintiffs based in significant part on who has the largest financial interest.[111] The statute also privileges lead plaintiffs' choice of lead counsel.[112]

Underlying claims may put different pressures on the exercise of judicial power in counsel appointment. The potential contrast is perhaps best demonstrated in the cases where there are both securities class action claims and other claims, such as a recent MDL against Robinhood.[113] There, U.S. District Judge Cecilia Altonaga considered antitrust, state law claims, and federal securities claims, and sought to select lead counsel separately for each set of issues.[114] In doing so, she split off selection of lead counsel for securities claims.[115] In relation to the securities claims, neither the briefs on behalf of those petitioning for the position nor the court's own order made mention of diversity.[116] However, in considering counsel appointment for the other claims, the court explicitly asked questions such as, "What can the Court do to promote a diverse and inclusive environment within leadership?" or "What can the Court do to better support an environment to bring in new entrants and others with different perspectives?"[117]

However, even within these securities cases, there is some evidence that some judges navigate the specific limitations of the PSLRA to push back on homogenous repeat players in the lead counsel space within complex litigation structures. In one such case, the judge not only barred discussion of settlement until a class was certified, but also required that the lead plaintiff open applications to select class counsel rather than defaulting to their own counsel.[118] This type of approach leaves open the possibility of considering the identity of individual lawyers even in a restrictive legislative regime. Yet even with these shifts, change is slow and currently has predominately addressed gender inequity in representation—only one type of diversity. While emerging studies indicate

111. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(aa)–(cc).

112. *Id.* § 77z-1(a)(3)(B)(v) ("The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.").

113. Alison Frankel, *As Judges Push for Diverse Lead Counsel in MDLs and Class Actions, PSLRA Is Obstacle*, REUTERS (May 20, 2021, 1:26 PM), https://www.reuters.com/business/legal/judges-push-diverse-lead-counsel-mdls-class-actions-pslra-is-obstacle-2021-05-20/.

114. Nathan Hale, *Diverse Team To Lead MDL Against Robinhood, Other Brokers*, LAW360 (May 18, 2021, 9:58 PM), https://www.law360.com/articles/1386024/diverse-team-to-lead-mdl-against-robinhood-other-brokers ("Miami-based U.S. District Judge Cecilia M. Altonaga, who is overseeing the MDL, divided the litigation into four tranches, or groups, focused on state law claims against Robinhood, similar claims against other brokers, antitrust claims, and federal securities law claims.").

115. *In re* Jan. 2021 Short Squeeze Trading Litig., No. 21-2989, 2021 WL 1997089, at *4 (S.D. Fla. May 18, 2021).

116. *Id.*

117. *Id.*

118. Greene v. Granite Constr., No. C 19-04744, 2019 WL 6327229, *3 (N.D. Cal. Nov. 26, 2019).

that more women are selected as lead counsel in MDLs than previously, people of color continue to be very rarely appointed as lead counsel in these cases, missing out on this distinction, opportunity, and attendant benefits to clients.[119]

III. REPRESENTATIVE REPRESENTATION: REQUIRING JUDICIAL CONSIDERATION OF LAWYER IDENTITY

This Essay attempts to have compellingly argued that a multiplicity of reasons supports considering the identity of lawyers in deciding who should represent clients in the MDL and class action contexts. As demonstrated in the previous Parts, as a matter of judicial practice, the landscape has shifted somewhat from a decade ago in *Martin v. Blessing*.[120] Today, judges in complex litigation cases are increasingly demanding that parties provide information regarding the demographic composition of litigation teams and consider this information as they select lead and class counsel.

However, the fact that there is a trend among certain judges to consider the identity of lawyers in these high-stakes contexts with attenuated client relationships does not safeguard the interests of clients and the judicial system moving forward. These judicial actions still live in the world of discretion rather than of compelled action. As such, they are likely to fall in and out of vogue. If so, then clients cannot count on these safeguards, nor can courts claim the lasting legitimacy of vesting weight in truly representative representation. This can only be accomplished by adopting a legal standard that not only allows but requires courts to consider how a legal team seeking appointment as counsel for a class (or lead in an MDL) "represents" the plaintiffs in terms of race, gender, viewpoint, and other identity considerations germane to the class or MDL. The proposal to require consideration of identity is a modest, incremental nudge; it moves what is now optional into the space of being required.

This is a modest revolution, but any overthrow without a governance plan is asking for a bloodbath. It is not good enough to propose a change without at least attempting to think through the operationalization and administration of that change. In this case, while many parties can agree that courts should consider lawyer identity in selecting lead or class counsel, the devil lies in the details of *how* judges should consider gender, race, viewpoint, and other identity factors in selecting class counsel. This Part proposes, considers, and balances the pros and cons of competing approaches to incorporating lawyer identity in the class and lead counsel context.

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119. Amanda Bronstad, *ALM Study Shows Progress for Women in MDL Leadership. Plus: Bad News for Bayer's Roundup Accord?*, LAW360 (July 8, 2020, 3:34 PM), https://www.law.com/2020/07/08/alm-study-shows-progress-for-women-in-mdl-leadership-plus-bad-news-for-bayers-roundup-accord/ (relaying the results of compiling data for four years of study indicating that significantly more women are receiving MDL leadership roles, while only two people of color total have been appointed in the last four years);

120. 134 S. Ct. 402 (2013); *see also supra* Parts I–II.

A. TALE OF TWO PARADIGMS: CLIENT AFFINITY AND REMEDIAL EQUITY

In considering implementation, the proposal to consider lawyer identity as a salient factor in judicial selection of counsel must square off with an old adversary in the world of legal ethics: the formidable tension in a lawyer's various duties as a fiduciary to clients, officer of the courts, and public citizen. The core justification motivating judicial consideration of the identity of lawyers in the appointment process will dictate (and potentially fundamentally alter) how this consideration is operationalized.

If concerned with client service in terms of quality of representation—which includes increased quality communication, creativity, problem-solving in teams, candor, and even loyalty—then the consideration of the attorney's identity would need to be defined in relation to the identity composition of the group of plaintiffs. Henceforth I refer to this as "client affinity" selection. Under the client affinity model, the defining concern in the judicial determination is to think though the connection between the plaintiff pool, the lawyer pool, and effective representation. Client affinity is, by definition, client-centric—linked irrevocably to a judicial commitment to get plaintiffs the best team possible. Thus, court consideration of lawyer identity here is more fluid than pure demographic mirroring, which would mechanically seek lawyer teams that are exact replicas of client pools.

If one is motivated to change who leads representation in MDL and class action cases to offset historical inequities at the bar, spread socioeconomic access to lucrative cases, and address real and perceived allegations of bias and self-dealing on the part of the courts, then increasing the number of lawyers from historically underrepresented groups in these leadership positions is an absolute goal, divorced from the identity of the underlying class. Institutional reform is the primary motivation and is animated by concerns of both judicial legitimacy and legitimacy of the legal system as a whole. I refer to this paradigm as "remedial equity" selection. Remedial equity does not primarily ask, "How does lawyer selection in this case serve the client?" but instead, "How does lawyer selection here undo or undermine systems of bias and discrimination?" To be clear, both goals are laudable—but there will be times where they cannot both be pursued simultaneously in an equal fashion. Courts will have to choose to put either client-centricity or remedial institutional action first.

Here is an example to illustrate the difference between how the two rationales play out. Imagine an MDL consolidating cases involving the adverse impact of men's Rogaine of people with fair skin (which causes a reaction that makes the fair skin extremely susceptible to sun-induced skin cancer). The plaintiffs harmed are a group of white men. In this fact pattern, assume that the world has changed to adopt this Essay's core recommendation and that the court is required to consider the personhood and identities of the lead attorneys and their teams when selecting lead counsel. Three law firms apply to appear as lead counsel. Assume that all have the same baseline qualifications:

- Firm 1: Headed by two white men, with a team of ten lawyers who include one person of color and one woman.
- Firm 2: Headed by two women of color with a team of ten lawyers composed of six women of color and four men of color.
- Firm 3: Headed by one white woman and one white man, with a team of ten lawyers including four white men, two white women, two men of color, and two women of color.
- Firm 4: Headed by two white men and an all-white male team.

If client affinity is the primary concern at play in counsel selection, then Firm 2 is out of the running. There is no person on that team who maps onto the salient identity features of the underlying group of plaintiffs being represented, and it lacks racial diversity generally. If client affinity meant mirroring the class, then Firm 4 would be the frontrunner. However, it is not—clients are not well served by homogenous legal teams, so Firm 4 falls prey to the same failing as Firm 2. As to Firms 1 and 3, it is the court's judgment call. A court more convinced of the substantive advantages of diverse legal representation would likely select Firm 3 rather than Firm 1. A court more concerned with client trust, perhaps in a particularly vulnerable situation, may place more emphasis on the advantages of demographic parallels—the ability to coax candid factfinding and handle delicate conversations clearly. If that were the case here, a court might lean toward Firm 1 with more white males. In the client affinity model, consideration of identity often will lead to the selection of more lawyers from groups that have been historically marginalized, but it does not always categorically favor such appointment—particularly where this would exclude members of the plaintiff's group, or where it would lead to a relatively homogenous team. In order of preference, the court could most likely choose Firm 3 (first choice), Firm 1, Firm 4, and Firm 2.

However, if remedial equity is the priority framework in the consideration of identity in counsel selection, then Firm 2 is the clear and obvious choice. The team is overwhelmingly composed of people from underrepresented groups, leadership positions are inhabited by a key underserved demographic, and this case provides a strong opportunity to develop diverse leadership at the bar and demonstrate the court's commitment to equity-related reform. Firm 4 would clearly fail under a remedial equity model, as it lacks both gender and racial representation. Firm 1 would not be far behind for similar reasons. Firm 3 could be considered by the court, but it would be an uphill battle to make a case as to why Firm 3 is the best choice if the primary goal is to increase access to address structural inequity. Thus, in a remedial equity context, the representational ranking would likely be Firm 2 (top choice), Firm 3, Firm 1, and Firm 4. Of course, hypotheticals are designed to be straw people, but this demonstration attempts to concretely unpack what is at stake in the choice between client affinity and remedial equity.

B. THE CLIENT AFFINITY MODEL: CLIENT-CENTRIC

The client affinity model has several strengths. It tethers the court's determination of representation to client service, the traditional focus. As such, it is the easiest sell. This model is the most likely to pass constitutional muster; any government action treating people differently based on protected class (lawyers are people too!) must pass constitutional muster. Here, the narrow tailoring of judicial consideration to the arguably compelling interest of protecting the legal rights of parties in absentia is a more likely showing. This is particularly true with a Supreme Court poised to give a hard and withering look at affirmative action programs in the 2023 Term. Finally, the client affinity model preserves courts' ability to pivot over time to respond to demographic shifts in both lawyer and client populations. It does not presume that the existing hierarchy of power is the enduring or eternal reference point.

Few would debate that client-centric client service is a central part of any lawyer's job.[121] While many debate the weight and importance of duties to the profession (is it self-dealing?), duties to the courts (they have so much relative power!), or to society at large (that's the job of the legislature!), even those who would debate the degree of devotion lawyers should have to clients would never discard the core agent-fiduciary relationship.[122] Thus, the strongest case to set aside the neutral partisan shell and require consideration of identity in the selection of counsel is here in the complex litigation context, where doing so protects clients. In this context, the need is pressing and addressable because: (1) clients have weak autonomy or power in the lawyer-client relationship, and thus the ability of "neutral" lawyers to act as only conduits is eliminated or severely diminished; (2) lawyer selection directly impacts client outcomes and rights; and (3) courts have the power to select counsel. Moreover, there is an increasing understanding that lawyer teams with varied identities and backgrounds are substantively better situated to serve clients.

The client affinity model looks to the client base as the starting point for the court's consideration of lawyer identity in appointment. What do the underlying claims allege? Do they focus on a certain demographic? Will a certain demographic be unduly impacted? Or is this a situation where the class is roughly reflective of a general population demographic? Thus, considering identity in the selection of class or lead counsel under a client affinity model is not a client mirror model. This Essay does not suggest under a client affinity

121. While this Essay pushes back on the foundational principles of neutral partisanship (and with them a heavily client-centric model of lawyering), the client affinity model adopts much of the language of that dominant school of thought, client-centrism. Some might even argue that it would be naïve to not argue in terms of service to clients in the context of today's professional ethos, which is dominated by this concern.

122. Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992) ("A fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith—in fact to treat the principal as well as the agent would treat himself. . . . The ward, the client, is in no position to supervise or control the actions of his principal on his behalf; he must take those actions on trust; the fiduciary principle is designed to prevent that trust from being misplaced.").

model that courts should categorially favor a legal team that exactly parallels the client demographic base. Rather, it argues that courts should categorically disfavor a team that *fails* to incorporate lawyers who map onto the plaintiff demographic.

A legal team that purely reflects exact one-to-one identity grouping with clients could have substantive downsides. A legal team with varied personnel is an asset.[123] Additionally, scholars have also exposed the unique pressures and difficulties that intra-race representation presents.[124] Moreover, guidance from the Federal Rules Committee indicates: "In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case."[125] A varied legal team inclusive of members of the class or group of clients, but not an exact parallel reflection of that group, can provide the advantages of identity alignment while offsetting any potential downsides.

Rather, the client affinity model as proposed here supports courts considering race, gender, viewpoint, and other person-specific identity factors to build legal teams that include people who bring demographic, socioeconomic, and viewpoint similarity with the class or plaintiffs. The "best" team need not exclusively be composed of people whose identity exactly mirrors the client group but includes lawyers with other perspectives and strengths such as procedural experience and subject matter expertise. This has the advantage of encouraging all law firms to have broadly diverse lawyer pools to draw from and to build diverse teams.

Constructing the client affinity model in this way also supports a finding that judicial consideration of a constitutionally protected class is justified. If we are dealing with a case involving erectile disfunction, all female attorneys are not categorically barred from representing the class. Rather, an all-female lawyer team would be disfavored over one with some male attorney representation. And an all-male team would be disfavored because clients are better served by teams that are varied and diverse. This has the added virtue of reinforcing the judicial legitimacy and remedial equity concerns, as it strongly incentivizes the hiring, development, and retention of diverse talent.

Fashioned as such, the client affinity paradigm is more defensibly narrowly tailored to withstand constitutional scrutiny. Client affinity should not replace one homogenous team (historically white men) with a different kind of

123. In *Grutter v. Bollinger*, the Supreme Court stated that diversity in the law school educational context increases "'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. 306, 330 (2003). These virtues are equally valid and relevant in the context of legal representation where the broader the collective composition and experience of a litigation team, the more likely the team is able to effectively connect and communicate with various plaintiffs, opposing counsel, and judges.

124. Intra-race legal representation occurs when lawyers represent clients who share the same racial demographics as the lawyer. Julie D. Lawton, *Am I My Client? Revisited: The Role of Race in Intra-Race Legal Representation*, 22 MICH. J. RACE & L. 13, 16 (2016).

125. FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

homogenous team (say women of color), and such attempts to "mirror" demographics may result in increased court scrutiny.[126] This proposal does ask the court, in some cases, to make a decision on selecting counsel who may be adverse to a lawyer in part based on the protected class to which the lawyer is a member. But by focusing narrowly on aligning plaintiffs with lawyers who are more reflective of the plaintiffs' self-identity, the proposal is more likely to withstand heightened constitutional scrutiny.[127]

The benefits of adopting a legal standard that not only allows but requires courts to consider the extent to which a lawyer wishing to represent a class or leading an MDL "represents" the clients in demographic terms of race, gender, and other identity considerations germane to the class or MDL are multifaceted. For clients, this standard protects their interests by better ensuring that their interests will be upheld and that the quality of the work will be high while the clients are, in a large part, in absentia. For courts, it shows a concerted commitment to ensure that clients are seen and their interests are explored in a full and multidimensional way that safeguards their legal rights.

C. REMEDIAL EQUITY MODEL: THE PROJECT OF INSTITUTIONAL CHANGE

For decades, scholars, courts, and bar associations have tracked the abysmal lack of women and people of color in the legal profession—not only generally, but also specifically in prominent leadership roles.[128] The so-called "glass ceiling" has proven to be shockingly resilient. Moreover, research indicates that access to justice itself is fundamentally different depending on litigants' race, gender, and socioeconomic status.[129] Increasingly, proponents have called upon the judiciary to acknowledge its role in perpetuating inequity.[130] The call is for courts to move from a passive to active reform role,

126. Some have argued that efforts to make any place of employment "mirror"-reflective of the overall demographic composition of the population is itself constitutionally suspect. *See generally, e.g.*, Dawinder S. Sidhu, *Racial Mirroring*, 17 U. PA. J. CONST. L. 1335 (2015). Leaving aside the constitutional question, this Part queries whether as a matter of policy precise mirroring is ideal or can even be counterproductive.

127. I will not address here potential constitutional arguments in detail that could be implicated in this proposal and bracket that for deeper discussion elsewhere. Since such changes would be government action relating to a protected class, it is highly likely that any such revision would be subject to strict scrutiny and would therefore require a showing of narrow tailoring to fit a compelling state interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[G]overnment may treat people differently because of their race only for the most compelling reasons" and that all government imposed racial classifications "must be analyzed by a reviewing court under strict scrutiny.").

128. ABA, *supra* note 90 ("The 8th Circuit Court of Appeals, based in St. Louis, has 18 judges, but only one is female. Alaska's population is 40% non-white, yet all seven of its federal trial judges are white. Sixteen states with a combined 104 federal trial judges have no federal judges of color.").

129. *See generally* Roger Michalski, *The Pro Se Gender Gap*, 88 BROOKLYN L. REV. 563 (2023) (women underrepresented as pro se litigants); Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Court*, 57 WAKE FOREST L. REV. 463 (2022) (rural populations and minorities underrepresented as pro se litigants).

130. *See generally, e.g.*, JAMES F. HUMPHREYS COMPLEX LITIG. CTR., *supra* note 108 ("[T]hese [guidelines and practices] address the judiciary's responsibility for, and role in, giving lawyers across the profession an equal opportunity to be appointed to MDL and class action leadership positions.").

particularly in their own institutions, which have often systematically and historically excluded women, people of color, and other minority groups from powerful positions. This call is tied to concerns over bias and fairness, which form the bedrock of judicial legitimacy.[131]

D. THRESHOLD REFORMS: OUT OF THE WILD WEST AND INTO THE RULES

As an immediate action, regardless of which paradigm is adopted, the Federal Rules Advisory Committee should explicitly add a note to the committee comments to Federal Rule of Civil Procedure 23(g) stating that full consideration of adequacy must include consideration of the identity and views of lawyer applicants. The note should also make clear which rationale—one that is client-oriented or that goes to judicial legitimacy—underlies this rule change. Either justification has been the basis of precedent for both rule reform and in understanding the role of lawyers. Moreover, an amendment to the Rule itself would solidify and render uniform the application of this standard.

In the end, however, no progress on issues of dealing with the ethics of counsel in complex litigation can get far without one simple, obvious, yet sweeping reform: the Federal Rules Committee should promulgate actual rules to govern counsel selection in MDLs. While the applicable statute refers to aligning MDL adjudication with the Federal Rules of Civil Procedure, there are no rules that directly state a process for selection of lead counsel or selection criteria. Given that one-third of the civil docket lives in this space, the sheer volume of cases alone warrants clear and open procedural guidance. Even leaving that numerical magnitude aside, the colossal potential for abuse of plaintiffs' rights in any singular case is so prevalent that this is precisely the place where procedural rules and rules of professional conduct should not be silent.

The natural home for rules to govern the selection of any subset of counsel is the Federal Rules of Civil Procedure, where the Rules Committee could either create a specific provision governing the JPML or amend the class action rules regarding selection of adequacy to make clear that they apply equally to selecting lead or liaison counsel in MDLs. This would align loose practice to clear standards and create a common procedural tether for courts.

A rule amendment offers many opportunities for reform that extend beyond the specific identity-oriented reforms focused on in this Essay. An MDL-specific provision could outline the preferred format for representation structures such as executive committees. Rule reforms could state that repeat representation by the same parties is disfavored within a period of years. Such reforms could also

131. U.S. CTS., CODE OF CONDUCT FOR UNITED STATES JUDGES 5–6 (2022), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf ("A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently . . . . The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased.").

include requirements for court approval of settlement provisions or increased court involvement in selecting lead plaintiffs in other ways. Regardless of where the content of new rules ultimately settles, the presence of explicit rules for MDLs would alleviate inconsistency in different proceedings and create a more transparent pathway to addressing inequity concerns.

There is a role here for the ABA and state bars as well, if they so choose. First, the ABA Model Rules should make clear that in accepting a lead counsel position, a lawyer is also accepting a fiduciary relationship to all plaintiffs. Such a change makes clear that there is an attorney-client relationship in the class action, MDL space, and therefore supports the underlying client-driven rationales of considering identity in selecting lead lawyers. As a matter of rulemaking, this is logistically easy enough to accomplish. One such revision to the Model Rules would be adding an explicit provision on lead counsel appointment under Rule 1.16.[132] This Rule governs the formation of the attorney-client relationship. A revision to this Rule could include an additional provision that explicitly states: "A person who is either a member of a certified class or a plaintiff in an MDL is a client to any person named class or lead counsel." There would also need to be a correlating revision to Rule 1.7, on conflicts of interest, which currently exempts class members from a conflicts analysis.[133] Another modification should be to have the conflicts rules say explicitly that any settlement that raises lead counsel's attorneys' fees is presumptively invalid without a Model Rule 1.8(a)–style conflict waiver.[134]

Certain other rules could also be modified to require more disclosure to clients and to augment fiduciary responsibility in the case of lead counsel to include other plaintiffs. Model Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."[135] Rule 2.1 could be modified from permissive

132. MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2023) (formation of the lawyer-client relationship).

133. *Id.* r. 1.7 cmt. 25 (conflicts of interest).

134. Model Rule 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Id. r. 1.8(a).

135. *Id.* r. 2.1.

to mandatory disclosure of nonaligning economic, political, moral, or social views in the complex litigation context. This is particularly important because such conflict would provide a permissible basis for a lawyer to cease representation of a client at a later date.[136] Moreover, this same obligation that such differences must be discussed explicitly in order to meet client communication requirements finds a natural home in the comments and body of Rule 1.4.[137]

Finally, while statutory and procedural rule reform provides a clear-cut theoretical solution and may be an appealing proposal, it can take time and considerable coalition building to implement. In the interim, clients themselves may be able to spur this change by being a driver in seeking diversity on legal teams and in legal representation. In certain settings, the statutory structure of plaintiffs' claims can amplify client voices and support these types of goals—for example, PSLRA, which empowers clients to more actively seek diversified teams in the class action setting.[138]

CONCLUSION

The neutral partisan model idealizes lawyer conduct as a blank conduit for client interests and eschews personal views and experiences, individualized identity, and viewpoints, including morality, outside of practice.[139] But the reality is that neither lawyers nor their clients can fully divorce their identities or their moral viewpoints from their work within the legal system. In MDL or class action practice, lawyers must wear two hats—their own and often that of the traditional client as well. The complex litigation system asks for a great deal of blind trust from clients. In doing so, courts owe them the best possible representation of their interests—which includes legal interests in context. For all these reasons, courts should not only be allowed, but also required to consider the extent to which a lawyer wishing to represent a class or leading an MDL "represents" the clients in demographic terms of identity: race, gender, sexual orientation, disability and other identity considerations germane to the class or MDL. Often this will be achieved not through selecting one lawyer, but a team of lawyers. This Essay attempts to demonstrate that failing to consider lawyer identity undermines fair and adequate representation and that requiring courts to engage with this inquiry when appointing counsel in complex litigation is a positive step in supporting not only clients, but also the legitimacy of our legal system as a whole.

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136. *Id.* r. 1.16(b)(4) (providing that if lawyers "fundamental[ly] disagree" with or find a client's proposed actions "repugnant," they may withdraw from the representation).

137. *Id.* r. 1.16 (formation of the lawyer-client relationship).

138. Frankel, *supra* note 113 ("The PSLRA puts clients in charge, after all, so clients have to make sure their firms are promoting women and minority lawyers.").

139. Mortazavi, *supra* note 16 ("Neutral partisanship is the dominant moral fiction where all people are expected to behave the same way.").

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