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Distorting the Purposes of Multidistrict Litigation: Reflections on Noll and Zimmerman

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The January 2023 Texas Law symposium on multidistrict litigation ("MDLs") brought together an amazing group of scholars, whose papers and commentary encompassed empirical inquiry on the uses of MDLs in federal complex litigation, policy analysis, and normative discussion. Together these papers constitute an important contribution to the literature on approaches to resolving large-scale mass litigation. I was asked to comment on David Noll and Adam Zimmerman's paper on judicial appointments to MDL leadership committees.[1]

The composition of these committees has increasingly provoked controversy in the academy and among practitioners and led to calls to diversify both judicial appointments of MDL transferee judges and judges' appointments of lawyers to Plaintiff Steering Committees.[2] However, to date there has been little systematic evidence on the extent or lack of such diversity. Noll and Zimmerman's paper goes a good ways toward filling this gap, a fact that I applauded in my oral comments at the symposium. Generally, their work supports the assertion that MDL leadership has been homogeneous with regard to gender, race

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1. *See* David L. Noll & Adam S. Zimmerman, *Diversity and Complexity in MDL Leadership: A Status Report from Case Management Orders*, 101 TEXAS L. REV. 1679 (2023).

2. *See id.* at 1685–86, 1685 n.29 (summarizing the debate and providing examples of academic and practitioner critiques).

and ethnicity.[3] However, given the limitations of their data,[4] their work tells us little about the consequences of such a lack of diversity. Understanding the consequences of the composition of leadership committees is, in my view, essential to determining whether diversification would benefit the parties to the litigation, whose interests should be the focus of policy reform. At the symposium, I devoted my comments, which I summarize here, to questioning the normative assumptions underlying the call for diversification.

A variety of objectives have been articulated for the MDL leadership diversification project that animates Noll and Zimmerman's analysis, some of which I think are more legitimate that others:

Professional Development

A common goal that pervades the literature on diversification is that a lack of diversity of appointments to MDL leadership committees denies opportunities to younger, more demographically diverse lawyers to learn new skills, acquire more status (and presumably achieve more affluence).[5]

While I appreciate generally the value of diversifying the bench and bar, I reject the notion that this should be a goal of either transferee judge appointments or judicial appointments to Plaintiff Steering Committees. Litigation should serve the interests and needs of parties. The courts' proper role is to protect parties' interests and assure they receive due process, not to promote the interests of individual judges or lawyers. More

3. *Id.* at 1705–06; *see also* Diandra D. Zimmerman and Grant Patterson, A Blueprint for Cracking the MDL Diversity Barrier, *Westlaw Today* (Feb. 16, 2023), https://today.westlaw.com/Document/I96e04868ae4911ed8636e1a02dc72ff6/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)&firstPage=true [https://perma.cc/Y787-TSX9].

4. *Id.* at 1700 (acknowledging that their data is a limited "snapshot" of MDL practice over one summer and that the study is a "quasi-longitudinal" analysis rather than a "true longitudinal study").

5. Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 360, 362 (2014).

generally, it is not a proper purpose of MDLs or any court procedure to enhance judicial careers or improve the state of the profession.

Diversifying transferee judge appointments could serve parties interests if demographically homogeneous judges exhibit bias against lawyers or parties with particular demographic characteristics, such as female lawyers or parties or lawyers or parties of color. I am not aware of any systematic data that support this proposition. I do believe that a more diverse bench, comprising judges with different personal backgrounds benefits all of us over time, and especially those in our society who are less powerful. But I am not at all clear about how that might play out in MDL case management practices and decisions and would like to see a lot more evidence of positive consequences of judicial diversity on MDL outcomes before accepting the idea that the Judicial Panel on Multidistrict Litigation ("JPML") should take diversity into account in transferee judge appointments.

Diversifying Plaintiff Steering Committee membership could serve parties' interests if lawyers' demographic characteristics made them more likely to pursue the interests of parties who share those characteristics—for example, if female-led plaintiff counsel do a better job of representing the interests of female plaintiffs who are often parties to mass product liability suits. I am prepared to believe this is the case, but I am not aware of data to support this hypothesis. Moreover, to enhance faithful representation of parties' interests, I think we need to focus on the *processes* involved in developing and resolving claims in MDLs at least as much on who the lawyers are. I want to know what those women who appear in Noll and Zimmerman's dataset are actually doing to advance the interests of female (or male) plaintiffs before I sign on to the diversification project. I wish we also had data on the involvement of lawyers of color in MDL leadership, but when we do, I will also want to know how their involvement benefits parties from underrepresented ethnic and racial groups.

In sum, I do not think the role of MDLs is to diversify the federal bench or the profession. The first is the job of the President and Senate and the second is the job of the leaders of the

profession, including law firm partners and the legal professorate.

Repeat Players

Separate from, albeit related to, the diversification project, is critics' attack on repeat players.[6] When evaluating this critique, I start by reminding myself that "repeat players" is another term for experts. We likely all agree that in complex litigation, parties benefit from being represented by experts, people who are capable of designing sophisticated strategies to develop (and defend) claims and move them towards resolution. Parties also benefit from having judges who understand the consequences of different management strategies, settlement approaches, etc.

To counter the considerable benefits of expertise and argue for placing newbies in positions of power, we need a theory of repeat player *costs.* Supporters of diversity reasonably argue that because the baseline condition is nondiversity—a bunch of white guys running things—we need to diminish if not eliminate the repeat player phenomenon.[7] Since I am not enthusiastic about the diversification project, I want us to think harder about the alleged ills of a system dominated by repeat players. One argument in the literature is that the same old folks will simply do the same old things—that is, you need new players to produce innovation.[8] However, I have not seen evidence that lack of innovation is a critical problem in MDLs.

A greater concern, also in the literature, is that repeat players are more likely to engage in cartel behavior.[9] This seems far more likely to me. For example, repeat player lawyers and law firms may make backroom deals to yield leadership in one particular MDL in exchange for a promise from their counterparty to yield

6. *See* Noll & Zimmerman, *supra* note 1, at 1684–85, 1684 n.24–1685 n.27.

7. *See* Alissa del Riego, *Driving Diverse Representation of Diverse Classes*, 56 U. MICH. J. L. REFORM 67, 135 (2022).

8. Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 86, 88–89, 102 (2015).

9. Elizabeth Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 73 (2017).

leadership in the next. Myriam Gilles[10] as well as Elizabeth Burch[11] have written about this phenomenon but the evidentiary basis for this concern is thin. I understand that such evidence is difficult to gather, but before signing on to the diversify-and-get-rid-of-repeat-players project I would like to know more about the conditions that produce such cartel behavior, how prevalent it is, and what form it takes.

In any event, however common such lawyer behavior may be, there is no reason to believe it is an argument for parceling out MDLs to different *judges* to avoid "repeat player" effects. There is anecdotal evidence that many federal judges view presiding over MDLs as a nice career step, but I know of no evidence of judges wheeling and dealing to secure MDL judge transferee appointments. The more reasonable concern regarding repeat player judges is that they get into a rut and simply manage each MDL as they ran the last. However, there is little empirical evidence that that is the case. Instead, judges who have been interviewed about their MDL experiences tend to emphasize differences among cases necessitating different management strategies.[12]

Complexification of Leadership

A third strand in the literature on diversification and repeat players that Noll and Zimmerman's paper addresses is the idea that complexifying the leadership of MDLs—adding more lawyers in more leadership positions and more lawyer run committees—is a good way to achieve diversification and diminish repeat player effects.[13] That may be, but even if so, the idea that complexification is a good thing ignores the likely effects on cost

10. Myriam Gilles, Comment, *Tribal Rituals of the MDL: A Comment on Williams, Lee and Borden Repeat Players in Multidistrict Litigation*," 5 J. TORT L. 173, 177–78 (2012).

11. ELIZABETH BURCH, MASS TORT DEALS: BACK ROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019).

12. Abby Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1688–89 (2017).

13. Noll & Zimmerman, *supra* note 1, at 1687.

and time to resolution and frankly runs counter to common sense if our goal is to provide fair, expeditious and as inexpensive as possible dispute resolution processes to parties. Given my views on this, I was pleased to see that Noll and Zimmerman's data do not show a rush to complexification.

It is tempting to believe that the continuing lack of diversity of MDL leadership reflected in Noll and Zimmerman's data is caused by judicial bias against women lawyers and lawyers of color. However, it is important to put this lack of diversity in perspective: in the time period Noll and Zimmerman studied, there also was not much change in the percentage of women in leadership roles in big law firms. The 2021 Vault survey of law firm diversity found that in a sample of nearly 200 law firms—almost entirely big law firms (and so more representative of lawyers on the defense side of MDLs)—only 27 percent of partners were women and only around 11 percent were lawyers of color,[14] a modest increase from 10 years earlier when approximately 20 percent of partners were women and approximately 8 percent were lawyers of color.[15] The percentages of both women and lawyers of color among non-partners and associates were higher,[16] but I would expect MDL leaders to come from the senior ranks of firms, meaning that the pool of "diverse" candidates for MDL positions is still non-diverse. (I searched for but could not find comparable data on women and lawyers of color at plaintiff firms, but it is possible that those statistics are even worse, despite law firm leaders like Elizabeth Cabraser, Yvonne Flaherty, Jane Conroy, Diane Nast, and others. One blog post asserted that

14. VAULT, VAULT LAW FIRM DEI SURVEY 2021 HIGHLIGHTS 2, 17–19 (2022); *see also* Travis Whitsitt, *Key Findings from The Vault Law 2021 Diversity Survey-Part 2*, VAULT (Apr. 7, 2022), https://legacy.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/key-findings-from-the-vault-law-2021-diversity-survey-part-2 [https://perma.cc/4NED-H6RH].

15. Law Firm Diversity Database, MCCA, https://diversitydatabase.mcca.com/diversity/summary/11[https://perma.cc/ZVY8-PAUT].

16. Whitsitt, supra note 14.

only 24 percent of lead trial counsel are women.[17]) We should be working harder on this issue, but again, I do not think it is the role of MDLs to transform law firm hiring and promotion practices.

In my view, those of us who support diversification of the bench and bar ought to be concentrating on issues other than MDL leadership. We ought to be pressing the Chief Justice to diversify the membership of Advisory Committees on the Rules,[18] and we should continue to applaud President Biden's diversification of nominees to the federal bench.[19] MDL litigation is rife with issues for study—issues that directly affect parties, like the lack of opportunity for plaintiffs to participate in the process, the veil of secrecy that obscures settlement administration, and the lack of information about compensatory outcomes for plaintiffs who prevail. I think those of us in the academy should be turning our attention to those problems.

17. Deborah Chang, *The Athea Principle*, BEST LAWYERS (June 21, 2021), https://www.bestlawyers.com/article/athea-principle/3753 [https://perma.cc/9HUK-XXK8].

18. Brooke Coleman has written extensively about the continuing homogeneity of the Chief Justice's appointments to the civil rules advisory committee. *See, e.g.*, Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 370, 388 (2018).

19. Carrie Johnson, *Biden Had a Productive Year Picking Federal Judges. The Job Could Get Tougher in 2022*, NPR (Dec. 28, 2021, 5:00 AM), https://www.npr.org/2021/12/28/1067206141/biden-federal-judges-nominations-diverse [https://perma.cc/G2JX-HWZJ].