

Judges Can Demand Diversity In Rule 23(g) Applications

By **Kellie Lerner and Chelsea Walcker** (August 15, 2018, 10:50 AM EDT)

U.S. District Judge Manish S. Shah recently joined the ranks of numerous federal judges across the country who have asked law firms to expand the leadership opportunities available to women and attorneys of color in the courtroom. During a hearing last month, Judge Shah, who is overseeing multidistrict litigation — in which one of the undersigned authors is counsel of record — concerning alleged manipulation of the Chicago Board Options Exchange’s volatility index,[1] stated that he would like to see details on team diversity and the potential for substantive work for junior attorneys in the plaintiffs’ lead counsel applications.[2]



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In response to Judge Shah’s remarks, University of Chicago Law School faculty member J.B. Heaton published an article in Law360 criticizing Judge Shah’s directive on leadership as an improper “politically correct browbeating of counsel.”[3] As described below, Heaton’s article, while perhaps well-intentioned, is misguided under the applicable Federal Rules of Civil Procedure and reinforces archaic misconceptions about the role of women and minorities in the courtroom.



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Heaton begins his critique of Judge Shah’s directive by attempting to garner credibility for his viewpoint. He describes himself as a “pretty liberal guy” who not only “supported Hillary” but who also has defended female colleagues victimized by sexual harassment at some risk to himself professionally. While taking no position on whether Heaton deserves special recognition for behaving decently in the face of unlawful conduct, his attempt to legitimize his views falls flat when he asserts his strong belief “that young, female and minority lawyers are *as* capable (and sometimes as incapable) as old/middle-aged, male and white lawyers.” What Heaton seems to miss (and by contrast, what the federal judiciary appears to grasp) is that women and attorneys of color can actually be *more* capable than their nondiverse counterparts, but face structural barriers that prevent them from offering these talents to their clients.[4]

Heaton then proceeds to criticize Judge Shah’s directive based on a total misapprehension of the federal rules governing the appointment of interim and lead counsel in MDL and class action litigation. Heaton argues that the decision-making authority to select counsel “is a client’s prerogative, not the place of a court,” and adds that the court “is not the client.” To the contrary, the Federal Rules of Civil Procedure strip the ability of class plaintiffs to choose their own counsel and empower the courts with the exclusive authority to select interim and lead counsel in MDL and class action litigation.[5] Unlike other

civil litigation, in MDLs and class actions, the district court is the effective client for purposes of selecting counsel who will fairly and adequately represent the interests of the class. If there were any ambiguity under the federal rules, the Manual for Complex Litigation also makes clear that appointing lead counsel is one of the district court's key organizational tools, and encourages judges to take an active role in the decision-making process.[6]

This is for good reason. Judges are in fact the best equipped to choose who is most qualified to represent the class. Judges observe firsthand how a lawyer's overall experience impacts his or her advocacy, as well as how diversity can impact the effectiveness of a legal team's client representation. That a federal judge has concluded that client advocacy is enhanced with greater diversity in leadership should not be surprising to Heaton or anyone else. While Heaton writes, "[t]here is simply no reason I know of to believe that diversity is 'pertinent' to an adequate representation of the class," he ignores the large body of empirical evidence that demonstrates how diversity actually improves a case team's results.

For example, in *Why Diverse Legal Teams Perform Better*, this publication reported on a study by Acritas that concluded mixed-gender case teams "significantly" outperformed single-gender teams across a dozen different performance measurements of success.[7] This is consistent with other research that shows that non-repeat players in the courtroom "add value by offering a fresh perspective, challenging the status quo, and injecting new information into the discussion." [8] In another study of the 200 highest-grossing law firms, the most diverse law firms reported, on average, the highest profits per partner and revenue per lawyer.[9] It is also well recognized that diverse teams lead to better outcomes beyond the courtroom. In the corporate world, a number of studies by management consulting firm McKinsey & Co. demonstrate that greater gender, racial and ethnic diversity is closely correlated with increased profitability. For example, in a report titled "Delivering Through Diversity," companies in the top 25th percentile for gender diversity on their executive teams were 21 percent more likely to experience above average profits.[10]

The underpinnings of this massive body of research are often attributed to the fact that diverse teams draw upon a wider collective pool of life experience when working together to solve a problem.[11] Further, teams with diverse voices may be more capable of communicating in terms that resonate with a broader spectrum of courtroom decision-makers.[12] In the face of this growing body of research and likely his own experience, it is reasonable for Judge Shah to conclude that case teams are disadvantaged when only represented by a slate of nondiverse lawyers who all draw from similar backgrounds and experiences when advocating for their clients, and who may connect with only a limited demographic in any juror pool.

Heaton also argues that Judge Shah "improperly usurps the rights of absent class members to have the best litigators." This argument, of course, fails to recognize that having a woman or attorney of color represent the class is not an either/or proposition when it comes to selecting the best legal team. According to a draft paper published by the Duke Law Center on Judicial Studies, more women in leadership may enhance client advocacy because of, among other reasons, "the common view that women are considered better listeners, more empathetic, and less apt to possess the over-active ego that may sometimes interfere with constructive problem solving and consensus building." [13] While Heaton references the all-white male defense team to buttress this point, Judge Shah's directive is consistent with the growing trend among Fortune 500 companies to demand diversity on their outside legal teams. For example, Facebook requires outside counsel to both staff teams with 33 percent women and ethnic minorities and to also demonstrate that they are creating meaningful leadership opportunities for these lawyers.[14] Microsoft has gone as far as offering 2 percent bonuses on annual

legal spending to law firms that meet certain diversity-focused goals.[15] These corporations (who all have fiduciary duties to maximize shareholder value) deeply understand how diverse legal teams will improve the legal representation they receive. Perhaps this is also why more than 80 companies have signed on to the pledge for ABA Resolution 113, which encourages in-house law departments to expand opportunities for women and attorneys of color, including among the outside counsel they hire.[16]

Finally, recycling arguments against judicial activism that harken back to attacks on the Warren Court, Heaton claims that federal judges should not be tempted to impose their own “social preferences” on the class. By skimming the current statistics in the profession, anyone can see why there is a need for change. In a country that prides itself on equal opportunity, it is jarring to discover that nearly 75 percent of all pending class actions are being led by men, even though women and men enroll in law school in relatively equal numbers.[17] Last year, the Bureau of National Affairs reported that between 2011 and 2015, women made up a mere 16.55 percent of all plaintiffs’ MDL leadership appointments.[18] And according to the Bureau of Labor Statistics, law is among the least racially diverse professions in the country.[19]

Beyond leadership appointments, reports indicate that women and attorneys of color face many other disparities in the profession, including less access to mentorship, less access to client-facing interactions, and less access to resume-building work opportunities. With this grim outlook, we agree with Heaton in his implicit concession that some change is certainly needed to improve equity in the profession. But Heaton is plainly wrong in attacking Judge Shah for requiring diversity in the slate of lawyers he gets to select. Judge Shah should be lauded, not criticized, for acting within his authority to request that women and attorneys of color be included in any proposed slate of interim lead counsel to advance the best interests of the class under Rule 23(g).

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Disclosure: Author Kellie Lerner is among the counsel of record in In re Chicago Board Options Exchange Volatility Index Manipulation Antitrust Litigation, the central case discussed in this article.

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[1] See In re: Chicago Board Options Exch. Volatility Index Manipulation Antitrust Litig., No. 1:18-cv-04171, MDL No. 2842 (N.D. Ill.).

[2] See Lauraann Wood, VIX MDL Lead Should Have Young, Diverse Attys, Judge Says, Law360 (July 11, 2018), <https://www.law360.com/articles/1062197/vix-mdl-lead-should-have-young-diverse-attys-judge-says>.

[3] See J.B. Heaton, Op-Ed, Judges Shouldn’t Force Attorneys on Absent Class Members, Law360 (Aug. 3, 2018), <https://www.law360.com/newyork/articles/1070154/judges-shouldn-t-force-attorneys-on-absent-class-members>.

[4] It is indisputable that historically, white male attorneys have disproportionately dominated the

leadership of MDLs and class action litigation relative to other equally qualified diverse legal talent. See, e.g., Amanda Bronstad, 'Boys' Network Slowly Making Room for Gender Diversity in MDL Leadership, Nat'l Law J. (May 29, 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/06/Boys-Network-Slowly-Making-Room-for-Gender-Diversity-in-MDL-Leadership-National-Law-Journal-Amanda-Bronstad.pdf> (discussing MDL leadership statistics).

[5] See Fed. R. Civ. P. 23(g).

[6] See Manual for Complex Litigation, Fourth, §§ 21.11, 21.272, 10.224.

[7] See Why Diverse Legal Teams Perform Better, Law360 (Jan. 30, 2018) <https://www.law360.com/articles/1004773/why-diverse-legal-teams-perform-better>.

[8] Elizabeth Chamblee Burch, Judging Multidistrict Litigation, 90 N.Y.U. L. Rev. 71, 121 (2015); see also Standards and Best Practices for Large and Mass-Tort MDLs, Duke Law Center for Judicial Studies (Dec. 19, 2014), at 46, https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf (recognizing "the strong repeat player dynamic that has historically existed reduces fresh outlooks and innovative ideas, and increases pressure to go along with the group and conform"); see also Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (Princeton Univ. Press 2017); Joe Watson, *Without Excuses, Unleash the Power of Diversity to Build Your Business* (Macmillan 2006).

[9] See Douglas E. Brayley & Eric S. Nguyen, Good Business: A Market-Based Argument for Law Firm Diversity, 34 J. Legal Prof. 1 (2009-2010), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jlegpro34&div=4&id=&page=>.

[10] See Vivian Hunt et al., Delivering Through Diversity (Jan. 2018), <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>.

[11] See David Rock & Heidi Grant, Why Diverse Teams Are Smarter, Harvard Bus. Rev. (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter>; David A. Thomas & Robin J. Ely, Making Differences Matter: A New Paradigm for Managing Diversity, Harvard Bus. Rev. (1996), <https://hbr.org/1996/09/making-differences-matter-a-new-paradigm-for-managing-diversity>.

[12] See NYSBA, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR* (Nov. 2017), at 24, <https://www.nysba.org/WomensTaskForceReport/>; Ann T. Greeley, Trial Teams and the Power of Diversity (2012), at 8, https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/37-2_trial_teams_and_thepower_of_diversity.authcheckdam.pdf.

[13] Guidelines and Best Practices Addressing Chronic Failure to Diversity Leadership Positions in the Practice of Law, Duke Law Center for Judicial Studies (May 10, 2018), at 2.

[14] See Ellen Rosen, Facebook Pushes Outside Law Firms to Become More Diverse, N.Y. Times (Apr. 2, 2017), <https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html>.

[15] See Claire Zillman, After Losing Women, Microsoft Ties Executive Bonuses to Boosting Diversity, *Fortune* (Nov. 18, 2016), <http://fortune.com/2016/11/18/microsoft-diversity-women/>.

[16] See ABA, Model Diversity Survey Resolution 113 Signatories, <https://www.americanbar.org/diversity-portal/diversity-inclusion-360-commission/diversity-survey.html>.

[17] See Stephanie A. Scharf & Roberta D. Liebenberg, First Chairs at Trial: More Women Need Seats at the Table (2015), https://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf.

[18] See Julie A. Steinberg, More Women Plaintiffs' Lawyers Becoming Complex Litigation Leaders, *Bloomberg Law* (Feb. 3, 2017), <https://www.bna.com/women-plaintiffs-lawyers-n57982083338/>.

[19] See Deborah L. Rhode, Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that, *Wash. Post* (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?noredirect=on&utm_term=.b96b141532bf.