

GUIDELINES AND BEST PRACTICES ADDRESSING FAILURE TO INCLUDE WOMEN,  
DIVERSE, AND LGBT LAWYERS IN MDL AND CLASS ACTION LEADERSHIP  
POSITIONS

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## CALL FOR JUDICIARY TO ENSURE THAT DIVERSE LAWYERS HAVE EQUAL OPPORTUNITY AND THAT PARTIES HAVE OPTIMAL REPRESENTATION

Today, we announce the JUDICIAL INCLUSIVITY IMPERATIVE with accompanying GUIDELINES AND BEST PRACTICES. Together, they address the judiciary's responsibility to ensure that all lawyers have an equal opportunity to be appointed to MDL and CA leadership positions.

### JUDICIAL INCLUSIVITY IMPERATIVE

**RULE OF INCLUSIVITY:** An MDL transferee judge or presiding CA judge must uphold the integrity of the federal judiciary and demonstrate to parties, counsel, and other participants and stakeholders in the judicial process that invidious discrimination, bias, and exclusion have no place in the federal judiciary.

**GUIDELINE 1:** When making an appointment to a leadership position, membership on an administrative committee, or an office such as referee, commissioner, special master, receiver, or guardian, an MDL transferee judge or a presiding CA judge shall exercise the power of appointment fairly, transparently, and on the basis of merit. The judge shall make an affirmative effort to prevent implicit bias from infecting the appointment process and unintentionally prejudicing qualified applicants based on race, color, gender, sexual orientation, or similar prohibited factors. The judge should also recognize that diversity is a legitimate factor to consider because it enhances the quality of the decision-making process in MDL or CA proceedings.

**GUIDELINE 2:** An MDL transferee judge or a presiding CA judge shall promptly consult with counsel about what administrative structure will best serve the needs of the particular case, while assuring that counsel who are qualified and willing to work hard are not denied opportunities to perform substantial, meaningful work on account of race, color, gender, sexual orientation, or similar prohibited factors.

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

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## CONCLUSIONS

The bench and bar have persistently failed to include diverse lawyers in positions of leadership. Their failure is well documented, and it is unacceptable. Increasing the numbers will require coordinated, comprehensive, and resolute action by both.

The Code of Conduct for United States Judges requires that judges fairly and diligently perform their duties, which include appointing lawyers to MDL and CA leadership positions. The spirit, if not the letter, of the Code calls on judges to avoid appointments based on favoritism, including unintentional favoritism caused by implicit bias.

The status quo is universally condemned. The JUDICIAL INCLUSIVITY IMPERATIVE and the accompanying GUIDELINES AND BEST PRACTICES are intended to implement the directives of the Code of Conduct by suggesting a road map for how the Canons should guide the exercise of judicial discretion in the appointment process. We call on the judiciary to honor its inclusivity imperative and encourage individual judges to lead the profession by example. Congress and various Judicial Conference rules committees are currently considering enacting laws and promulgating rules that govern MDLs and CAs. For this reason – and many others – the time is right to move forward.

These GUIDELINES AND BEST PRACTICES set out an overarching rule and three guidelines that, we believe, derive authority from existing codes of conduct. If followed, they would avoid appointments based on favoritism that could materially level the opportunity for all lawyers and improve the quality of representation for litigants. Best practices provide detailed guidance implementing the guidelines.