

Diversity, Inclusion and Veterans in the Law

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THIS article examines recent diversity and inclusion efforts in the law and their relationship to veterans. In recent years, the legal community has turned its focus to diversity and inclusion. Judges, lawyers, scholars and clients have examined the role of women attorneys, attorneys of color, LGBTQ attorneys and disabled attorneys and developed plans and programs to provide concrete advancement

opportunities for these groups. These programs are based on established public policy and statistical analyses that suggest that these groups are underrepresented in the more coveted positions of the legal field.

Two such programs are:

- 1) The Mansfield Rule,¹
and;

¹ See Diversity Lab, *Mansfield Rule 2021*, <https://www.diversitylab.com/mansfield-rule-4-0/#:~:text=The%20Mansfield%20Rule%2C%20inspired%20by,partner%20promotions%2C%20formal%20client%20pitch> (last visited November 22, 2022) (hereinafter, "Mansfield Rule").

- 2) the 2018 Guidelines and Best Practices for Large and Mass-Tort MDLs (“2018 MDL Guidelines” or “2018 Guidelines”),² as amended by the 2021 Inclusivity and Excellence Guidelines (“2021 Inclusivity Guidelines”).³

The Mansfield Rule is a popular diversity metric that, at this writing, dozens of large corporations and over 117 large law firms have adopted.

The Mansfield Rule “measures whether law firms have affirmatively considered at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.”⁴

The 2018 MDL Guidelines, as amended by the 2021 Inclusivity Guidelines, are standards judges, scholars and practicing lawyers developed to improve the diversity of court-appointed panels in MDL and class action litigation. The

2018 Guidelines, as amended by the 2021 Inclusivity Guidelines, spell out concrete steps that MDL and class action judges should take to ensure that courts appoint diverse counsel to significant positions in MDL and class litigation panels.

Both the Mansfield Rule and the 2018 MDL Guidelines are merited efforts to bring diversity to the more coveted positions of the law. Unfortunately, both efforts fail to include veterans in their efforts to improve diversity. Indeed, neither the Mansfield Rule, the 2018 MDL Guidelines, nor the 2021 Inclusivity Guidelines ever mention veterans. This omission undermines these well-intentioned efforts by decoupling the efforts from established public policy.

There is a well-grounded public policy rationale for advantageous treatment of women, persons of color, and those with disability based on a lattice-work of statutes, regulations, and state and federal court decisions. There is a developing public policy rationale for advantageous treatment of LGBTQ+ persons based on federal regulations and state laws. There is no rationale for excluding veterans from similarly advantageous

² DUKE LAW SCHOOL BOLCH JUDICIAL INSTITUTE, GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS (2nd ed., Sept. 2018), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1004&context=bolch> (hereinafter, “2018 MDL Guidelines”).

³ James F. Humphrey Complex Litigation Center, *Inclusivity and Excellence: Guidelines*

and Best Practices for Judges Appointing Lawyers to Leadership Positions in MDL and Class-Action Litigation (March 11, 2021), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Inclusivity_and_Excellence_Master_Draft.pdf (hereinafter, “2021 Inclusivity Guidelines”).

⁴ See *Mansfield Rule*, *supra* note 1.

treatment. In fact, the public policy of this country for over 200 years has expressly provided advantageous treatment to veterans.⁵

This long-standing public policy was aptly described by Justice William O. Douglas 75 years ago:

The Act⁶ was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his

country an advantage which the law withheld from those who stayed behind... This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”⁷

The same type of demographic data that the Mansfield Rule and the 2018 MDL Guidelines rely upon also shows that veterans are underrepresented in coveted positions in the legal field including large law firm partnerships and judicial clerkships.⁸

⁵ See, e.g., H. Doc. 21-40 - Navy hospital, Norfolk, and Asylum, Philadelphia. Documents to accompany Bill H.R. No. 170 (1829), available at https://www.govinfo.gov/app/details/SERIALSET-00196_00_00-018-0040-0000/context (last visited January 21, 2023). The United States Congress first authorized Veteran's homes and medical facilities in 1811. An array of statutes followed that authorized Veteran pensions, Veteran healthcare, Veteran insurance, Veteran housing and Veteran education. President Franklin D. Roosevelt described the Serviceman's Readjustment Act of 1944 (more commonly known as the 1944 GI Bill of Rights) as having “had more effect on the American way of life than any other legislation – with the possible exception of the Homestead Act.” Centre for Public Impact, “The US' GI Bill: the “New Deal for Veterans”, Sept. 2, 2019, available at <https://www.centreforpublicimpact.org/case-study/us-gi-bill-new-deal-veterans> (last visited January 21, 2023).

⁶ Selective Training and Service Act of 194, 54 Stat. 885, 50 U.S.C. Appendix, § 301 et seq. (1940) (STSA).

⁷ Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284, 285 66 S. Ct. 1105, 1110-1111 (1946).

⁸ The Mansfield Rule relied on data collected by National Association of Women Lawyers (NAWL) in 2015. See Diversity Lab, “Team 5: Hackathon Proposal and Summary”, at 2 n.5, available at <https://legaltalentlab.app.box.com/v/2016hackathon/file/73319711873> (hereinafter, “Proposal and Summary”). The NAWL 2015 survey analyzed self-reported data from large law firms on women attorneys and, to a lesser degree, attorneys of color. <https://www.nawl.org/2015nawlsurvey>. The NAWL 2015 survey did not analyze data on veteran attorneys. *Id.* Further, it does not appear that any study prior to 2018 ever systematically analyzed veteran attorney data. See Jonathan Vespa, United States Census, *Those Who Served: America's Veterans From World War II to the War on Terror*, Report No. ACS-43 (June 20, 2020),

By decoupling diversity and inclusion efforts from established public policy regarding veterans, proponents of such efforts risk losing public support for those efforts and risk having those efforts mischaracterized as “woke” decrees from disconnected elites. In short, the omission of veterans undermines the well-intentioned efforts and salutary purposes of the Mansfield Rule and the 2018 MDL Guidelines. Veterans should be included in these programs.

I. The Mansfield Rule

The Mansfield Rule originated at the 2016 Women in Law Hackathon.⁹ The 2016 Women in Law Hackathon was a competition among nine teams consisting of “54 high level law firm partners,” 18 expert advisors and 9 Stanford Law students.¹⁰ Based on a review of publicly available media,¹¹ none of the 81 law firm leaders, attorneys, consultants and law students

competing in the 2016 Women in Law Hackathon was a veteran.¹²

The Mansfield Rule was not the winning proposal, but it was deemed “Crowd Favorite”.¹³ The Mansfield Rule patterned itself on the National Football League’s “Rooney Rule” and sought to “introduce individuals into the candidate pool who might otherwise be overlooked as a result of conscious or unconscious bias.”¹⁴ The Mansfield Rule, like the Rooney Rule, assumes that requiring consideration of underrepresented applicants will diversify the pool of successful candidates.

The Mansfield Rule “measures whether law firms have affirmatively considered at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.”¹⁵

The Mansfield Rule uses law firm financial dynamics to pressure law firms to meet the Mansfield Rule metrics. Diversity Labs

<https://www.census.gov/content/dam/Census/library/publications/2020/demo/acs-43.pdf> (providing statistical data on veterans).

⁹ Diversity Lab, *2016 Women in Law Hackathon*, <https://www.diversitylab.com/hackathons/> (last visited November 22, 2022).

¹⁰ *Id.*

¹¹ This assessment relies on a review of LinkedIn and law firm website profiles.

¹² Diversity Lab, *2016 Women in Law Hackathon: The Results Report*, <https://www.diversitylab.com/wp-content/uploads/2015/08/2016-Women-in-Law-Hackathon-Results-Report-All-Ideas-Winning-Teams-Updated-August-2016.pdf> (last visited November 22, 2022).

¹³ *Id.*

¹⁴ *Proposal and Summary*, *supra* note 8, at 1-2.

¹⁵ *Mansfield Rule*, *supra* note 1.

offered tactics for client corporations to use to encourage compliance with the Mansfield Rule:

Consider incentives for achieving goals, holdback of fees until goals are met, public accolades like company recognition awards, or simply moving work away from firms that aren't making progress;¹⁶

Include diversity at the lead partner and senior associate levels as an explicit requirement on RFPs/pitch teams before you make new hiring decisions;¹⁷

Get to know diverse attorneys at your existing firms and staff them at all levels on your matters, especially at the relationship partner level. Inform your firms that you will move work away if diverse teams are not working on your matters — and follow through;¹⁸

Ask your law firms if and how origination credit is awarded to ensure that the diverse lawyers leading your matters are receiving all or partial credit for the engagement;¹⁹

Learn the partnership decision process and timeline as well as the bonus practices for your law firms, and provide meaningful, early feedback for diverse associates and partners you work with, so they get full consideration;²⁰ and

Let your relationship partners know you want to see them mentoring and sponsoring diverse attorneys in their practice groups and more broadly at their firms.²¹

The tactics outlined by Diversity Labs appear to be working. When Diversity Labs first introduced the Mansfield Rule in 2017, 42 law firms agreed to comply.²² By 2020, 117 law firms agreed to comply.²³ Law firms must

¹⁶ Diversity Lab, *Strategies and Tactics For In-House Legal Departments to Improve Outside Counsel Diversity*, at 3, available at <https://www.diversitylab.com/wp-content/uploads/2019/05/Legal-Department-Outside-Counsel-Diversity-Strategies-Tactics-Collaborations.pdf> (last visited November 22, 2022).

¹⁷ *Id.* at 5.

¹⁸ *Id.*

¹⁹ *Id.* at 6.

²⁰ *Id.* at 7.

²¹ *Id.*

²² *Mansfield Rule*, *supra* note 1.

²³ *Id.*

agree to allow Diversity Labs to audit the firm’s compliance with the Mansfield Rule bi-annually in order to be certified annually as compliant with Mansfield Rule.²⁴ Law firms that are certified as compliant with the Mansfield Rule may advertise that fact on their websites and promotional materials.

Diversity Labs summarized law firm compliance with the Mansfield Rule in the first year — 2017— as follows:

- 66% of firms reported a higher percentage of diverse²⁵ attorneys participating in formal pitches.
- 55% of firms reported a higher percentage of diverse attorneys elected or appointed to their Management/Executive Committee.
- 53% of firms increased the percentage of underrepresented lawyers in Office Head positions.
- 50% of firms promoted a higher percentage of

diverse lawyers into equity partnership.²⁶

Recent law firm compliance is even more marked. As of 2020, Diversity Labs reports:

- 96% of firms said that after adopting the Mansfield Rule, their teams of lawyers participating in formal pitch meetings have become more diverse.
- 65% of firms reported that more underrepresented lawyers were appointed or elected to their Management/Executive Committee than prior to adopting Mansfield.
- 63% of firms said they have increased the percentage of underrepresented lawyers promoted into equity partnership since adopting Mansfield.
- 58% of firms reported that their lateral partner hiring pool was

²⁴ Diversity Lab, *Mansfield Rule Overview*, <https://www.diversitylab.com/pilot-projects/mansfield-overview/> (last visited November 22, 2022).

²⁵ Diversity Lab defines “diverse” and “underrepresented” lawyers as women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities. *See Mansfield Rule*,

supra note 1. Veterans are not considered “diverse” or “underrepresented,” notwithstanding the demographic data outlined *supra* at note 8.

²⁶ <https://www.diversitylab.com/mansfield-rule-4-0/>, last visited on April 15, 2021.

more diverse following the adoption of Mansfield.²⁷

Participating law firms announced their progress on Diversity Lab's website:

"57% of Littler's lawyers promoted to equity partner and 36.5% of our equity partners in the US were women, LGBTQ+ and/or lawyers of color in the second year after implementing the Mansfield Rule."²⁸

"Akerman has increased the diversity of firm leadership by adding two seats to the firm's Board of Directors held by the Chairs of our Equality & Inclusion Committee and Women's Initiative Network, has increased Executive Committee diversity from 14% to 42%, and 50% of the firm's equity partner promotions have been women and attorneys of color since

implementing the Mansfield Rule."²⁹

"Among Dentons US' actions since implementing the Mansfield Rule, we are proud to have appointed our first female US managing partner; increased our Board diversity to 41%; and welcomed a newly elected partner class that is 54% diverse."³⁰

"Building on our firm's track record of leadership on diversity and inclusion, our participation in the Mansfield Rule initiative has helped us develop new processes and more thoroughly document our progress. Among the results: diverse lawyers comprise 66% of our firmwide management committee, 48% of practice area leaders, and 46% of participants in new business proposals."³¹

In 2020, Diversity Labs expanded the Mansfield Rule from

²⁷ *Id.*

²⁸ *Mansfield Rule*, *supra* note 1 (quoting Tom Bender and Jeremy Roth, Co-Presidents and Managing Directors, Littler Mendelson).

²⁹ *Id.* (quoting Scott A. Meyers, Chairman & CEO, Akerman LLP).

³⁰ *Id.* (quoting Mike McNamara, CEO, Dentons US).

³¹ *Id.* (quoting Kathy Szmuszkovicz, Managing Principal, Beveridge & Diamond).

large law firms to mid-size law firms – firms with 150 or fewer lawyers.³² In 2020, Diversity Labs also expanded the Mansfield Rule to legal departments at large corporations.³³ Diversity Labs describes The Mansfield Rule metric for corporate legal departments as follows:

This new version of the Mansfield Rule, which initially launched with law firms four years ago, measures whether legal departments have affirmatively considered women, LGBTQ+, lawyers with disabilities, and racial/ethnic minority lawyers — at least 50% of the candidate pool — for the legal department’s top roles and for outside counsel representation.

For the [corporate legal department] version, the certification period has been extended from one to two years to allow for additional hiring and other activities needed to

successfully implement the Mansfield Rule in a legal department setting. And although tracking of candidate pools for all activities has always been required, the [corporate legal department] version also asks that legal departments track on a disaggregated basis (i.e., women, racial and ethnic minorities, lawyers with disabilities, and LGBTQ+).³⁴

II. The 2018 MDL Guidelines and the 2021 Inclusivity Guidelines

Multi-district litigation exerts a powerful influence on the federal courts. Statistical analysis of federal civil cases shows that many, if not most, civil cases are included in multi-district litigation (“MDLs”).³⁵ Duke Law School’s Borch Center for Judicial Studies (“Center for Judicial Studies”) calculated that MDL cases made up 42% of federal civil cases pending in federal court.³⁶ Excluding prisoner and social security cases from the total

³² Diversity Lab, *Mansfield Rule for Midsize Law Firms Continues Boosting Diversity in Law* (May 5, 2022), https://www.diversitylab.com/pilot-projects/mansfield_midsize/.

³³ Diversity Lab, *Mansfield Rule for Legal Departments Launches 2.0 Cohort to Continue Boosting Diversity in Leadership and Outside Counsel Ranks*, <https://www.>

[diversitylab.com/pilot-projects/mansfield-rule-legal-department-2-0-edition/](https://www.diversitylab.com/pilot-projects/mansfield-rule-legal-department-2-0-edition/) (last visited on November 22, 2022).

³⁴ *Id.*

³⁵ 2018 MDL Guidelines, *supra* note 2, at vi-viii.

³⁶ *Id.* at vii.

elevates the number of federal civil cases pending in MDLs to 52%. That number has risen dramatically in the past 20 years.³⁷

Moreover, most of the civil cases pending in MDLs—90%—were consolidated in just 24 MDLs.³⁸ Although, theoretically, MDL courts are only intended for pretrial management (with remand for trial to the original transferor courts upon completion of pretrial) 96% of MDL cases reach resolution in the MDL, not the original court.³⁹

The power of MDL courts has motivated scholars, judges and practitioners to make efforts to formalize MDL procedures.⁴⁰ To that end, the Center for Judicial

Studies convened a series of bench-bar conferences starting in 2013.⁴¹ The 2013 bench-bar conference included more than thirty-five practitioners (balanced between the plaintiffs' and defense bar), as well as several judges.⁴² The Center for Judicial Studies assembled the work of the participants into a report it published as the *2014 MDL Standards and Best Practices for Large and Mass-Tort MDLs*.⁴³

The 2014 MDL Guidelines discussed extensively the criteria for selecting leadership in MDL litigation, with an emphasis on past experience and ample financial resources.⁴⁴ The 2014 MDL Guidelines had a brief and modest reference to encouraging diversity in the selection of MDL leadership: "The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case."⁴⁵

The Center for Judicial Studies held more bench-bar conferences in 2015 and 2016 to consider

³⁷ *Id.* In 2002, the Center for Judicial Studies estimated that only 16% of federal civil cases were in MDLs. *Id.*

³⁸ *Id.* at vii.

³⁹ *Id.*

⁴⁰ Before the Center for Judicial Studies published the first Guidelines and Best Practices for Large and Mass-Tort MDLs in 2014, courts generally extrapolated standards for managing MDLs from the Manual for Complex Litigation, Federal Rule of Civil Procedure 23, and the Code of

Conduct of United States Judges. *See* 2021 Inclusivity Guidelines, *supra* note 3, at 4-7.

⁴¹ 2018 MDL Guidelines, *supra* note 2, at i.

⁴² *Id.*

⁴³ Available at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf (hereinafter, the "2014 MDL Guidelines").

⁴⁴ *Id.* at 33-65.

⁴⁵ *Id.* at 58.

improvements to the 2014 MDL Guidelines.⁴⁶ The 2016 conference consisted of thirty practitioners, equally balanced between the plaintiffs' and defense bar, and seven judges.

This conference volunteered to update and add new sections to the 2014 MDL Guidelines.⁴⁷ The Center for Judicial Studies organized the group into eight teams and the teams appointed team leaders.⁴⁸ The teams worked through 2016 and 2017, and in early 2018, they submitted a revised draft of the MDL Guidelines to the seven judges involved in the 2016 bench bar conference.⁴⁹ The end product of these efforts was the 2018 MDL Guidelines.⁵⁰ The stated purpose of the 2018 MDL Guidelines is to provide "concrete guidance to judges and lawyers handling an MDL."⁵¹

The 2018 MDL Guidelines contain a much more robust discussion of diversity in the selection of MDL leadership

appointments than the 2014 MDL Guidelines. The 2018 MDL Guidelines adopt Best Practice 4E, which recommends that: "The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case."⁵² The 2018 MDL Guidelines cite Judge Stanwood Duval, who recommends that "there should be diversity in gender, racial and geographic terms" in the selection of MDL counsel.⁵³ The 2018 MDL Guidelines elaborate that "[j]udges should seek to appoint a diverse group, with respect to not only prior experience and skills, but also gender, race and national origin, age, and sexual orientation."⁵⁴

Following the publication of the 2018 MDL Guidelines, Duke University held two conferences focusing on ways to improve diversity and inclusion in leadership appointments to MDL and class action litigation.⁵⁵

⁴⁶ 2018 MDL Guidelines, *supra* note 2, at i.

⁴⁷ *Id.*

⁴⁸ *Id.* at iii (for teams and team leaders) Based on a review of internet resources including LinkedIn and law firm web bios, it does not appear that any of the eight team leaders were veterans. Of the twenty-one contributors, one, Mark Myhra, is a veteran.

⁴⁹ *Id.* at i-ii.

⁵⁰ *Id.*

⁵¹ *Id.* at ix.

⁵² *Id.* at 45.

⁵³ Hon. Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 393 (2014).

⁵⁴ 2018 MDL Guidelines, *supra* note 2, at 46 (emphasis added).

⁵⁵ 2021 Inclusivity Guidelines, *supra* note 3, at i-ii. Editorial control over the diversity and inclusion issues related to the 2018 MDL Guidelines was transferred from the Center for Judicial Studies to the George Washington University James F. Humphreys Complex Litigation Center in August 2020. Following publication of a

Attendants emphasized that, in contrast to the slow pace of change across the legal profession, the appointment of women to leadership positions in MDL and class action cases had improved – from 16% in 2011 to 29% in 2016.⁵⁶ They attributed this improvement, primarily, to two judges who appointed majority-female plaintiffs’ steering committees.⁵⁷

Based on this success, the Center for Judicial Studies formed a new working group with the goal of further increasing diversity in MDL counsel appointments: “If more judges identify diverse lawyers for consideration for leadership appointments, the ripple effect, including on the law firms and corporations involved in these complex litigations, could be significant.”⁵⁸

The new working group consisted of 25 practitioners divided into five teams.⁵⁹ The working group focused on strengthening and formalizing efforts to increase diversity in the appointment of counsel to

influential positions in MDLs and class action lawsuits.⁶⁰ The working group published its draft *Inclusivity and Excellence: Guidelines and Best Practices for Judges Appointing Lawyers to Leadership Positions in MDL and Class Action Litigation* on September 24, 2020 and opened the draft to comments.

The working group received comments from more than thirty-five judges, as well as individuals and organizations.⁶¹ The Center carefully reviewed the comments, made revisions, and submitted a final draft to the working group.⁶² One significant change that was made throughout the 2021 final draft was the express inclusion of “disabled” and “disability” in the list of enumerated diversity categories.⁶³ No amendment was made to include veterans in the enumerated diversity categories. In fact, the word “veteran” never appears in the 2020 draft *Inclusivity and Excellence Guidelines* or the 2021 (final) *Inclusivity Guidelines*.

The 2021 *Inclusivity Guidelines* define “diverse” as “those lawyers

draft on September 24, 2020, the James F. Humphreys Complex Litigation Center incorporated comments that are reflected in the 2021 *Inclusivity and Excellence Guidelines*, *see id.* at ii.

⁵⁶ *Id.* at i-ii.

⁵⁷ *Id.*

⁵⁸ *Id.* at ii.

⁵⁹ *Id.* at iv. Based on a review of internet resources including LinkedIn and law firm

web bios, it does not appear that any of the six team leaders are veterans. Of the nineteen contributors, one, Vance Andrus, is a veteran.

⁶⁰ *Id.* at iii

⁶¹ *Id.* at ii.

⁶² *Id.*

⁶³ *Compare* 2020 Draft *Inclusivity Guidelines* at iii, 1, 14, and 20 *with* 2021 *Inclusivity Guidelines* at iii, 1, 14 and 21.

who are, or historically have been, underrepresented in the profession generally and in the appointment process specifically, including but not limited to women lawyers, racial and ethnic minority lawyers, disabled lawyers and LGBTQ lawyers, among others.”⁶⁴

The 2021 Inclusivity Guidelines note that the enumeration of diverse categories is shortened to “women and diverse lawyers” in the Guidelines. The Guidelines make clear that the data supporting the Guidelines is drawn from studies of the lack of gender diversity in leadership appointments in MDL and class action cases.⁶⁵ However, the Guidelines also emphasize that reliance on gender diversity data “should not be construed as an

admission that only gender diversity is lacking.”⁶⁶ The 2021 Inclusivity Guidelines state that “[p]eople of color, disabled individuals, and LGBTQ lawyers are equally, if not more, underrepresented in these leadership positions.”⁶⁷ The Guidelines conclude that these categories should be included in diversity initiatives because “[t]here is simply not comparable data on their underrepresentation among leadership appointments in the MDL and class action to address this issue specifically.”⁶⁸

The 2021 Inclusivity Guidelines propose three concrete guidelines for judges to follow to insure diversity:

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

⁶⁴ 2021 Inclusivity MDL Guidelines, *supra* note 3, at iii (emphasis added).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

A judge should avoid an appearance of favoritism when appointing a leadership team for an MDL or a class action made up of a single sex, race, ethnicity, sexual orientation, age range, disability, or similar prohibited basis.

The judge must make a conscious effort to avoid implicit bias and not overlook qualified applicants based on race, color, gender, sexual orientation, or similar prohibited factors.

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

GUIDELINE 3: An MDL transferee judge or judge presiding over a class action has an ongoing duty to monitor the litigation to ensure that counsel, especially those serving in court-appointed roles, are performing their assigned duties in a manner that is free from invidious discrimination and bias and that maintains public confidence in the integrity of the judiciary.⁶⁹

Each of the Guidelines is elaborated by several Best Practices that offer more concrete recommendations. For example, Best Practices IE and IF elaborate on Guideline 1 as follows:

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

...

BEST PRACTICE 1F: As a matter of district-wide policy, judges should look

⁶⁹ *Id.* at 1 (emphasis added).

for and encourage efforts to create a more diverse pool of applicants for leadership position.⁷⁰

Best Practice 2B provides concrete recommendations to explain Guideline 2:

BEST PRACTICE 2B: A transferee or presiding judge should ask about the litigation team supporting lead counsel and how substantive work will be assigned to enhance the benefits of diversity in that team.⁷¹

Best Practices 3A offers an oversight recommendation drawn from Guideline 3:

BEST PRACTICE 3A: The transferee or presiding judge should remain vigilant that appointments and work assignments made throughout the litigation take diversity into account.⁷²

The 2021 Inclusivity Guidelines offer, as a salutary example, the Mansfield Rule, which “calls for at least 30 percent diverse lawyers to be considered for leadership and

equity-partner promotions.”⁷³ As noted above, the Mansfield Rule also omits veterans from the category of diverse lawyers and from the advantageous treatment provided by the Rule.⁷⁴

The 2021 Inclusivity Guidelines do not reference veterans or veteran status in any way. The 2021 Inclusivity Guidelines are no different from the 2014 MDL Guidelines and the 2018 MDL Guidelines. None of these reference veterans in any way.

The invisibility of veterans in the major programmatic efforts to improve diversity in counsel appointments illustrates the very point made in these efforts: unconscious bias is the cause of underrepresentation of diverse attorneys. Ironically, the 2021 Inclusivity Guidelines extensively discuss the pervasiveness of unconscious bias:

The judge must make a conscious effort to avoid implicit bias and not overlook qualified applicants based on race, color, gender, sexual orientation, or similar prohibited factors⁷⁵

As judges become more aware of the repeat-player

⁷⁰ *Id.* at 19, 20.

⁷¹ *Id.* at 22

⁷² *Id.* at 23.

⁷³ *Id.* at 19.

⁷⁴ *See, for example, supra* note 8.

⁷⁵ 2021 Inclusivity MDL Guidelines, *supra* note 3, at 1 (Guideline 1).

pattern in complex litigation and of its effects, judges are also becoming more aware of the risks of implicit bias. Education programs are increasingly available to help understand how implicit bias can affect judicial decisions, even unconsciously, and how it can be mitigated, reduced, or avoided. . . .⁷⁶

Another concern, supported by social science and psychological studies, is that leadership appointments may reflect unintentional implicit bias, both by lawyers putting forward a proposed pool or slate and by judges making appointments. Implicit bias is recognized as an influence to unknowingly favor one group over others. . . .⁷⁷

Implicit bias is increasingly recognized as a basic cognitive function by social scientists. Today, leadership opportunities may be limited or foreclosed by this subtle obstacle, which may influence even those with declared and honestly held

commitments to impartiality. Because implicit bias may lead individuals to relate most easily to those like them. . . .⁷⁸

Confirmation bias is related to implicit bias and may also affect how candidates are evaluated for leadership. People are more likely to recall information that confirms their biases about others and include that information in evaluations.⁷⁹

Notwithstanding the thorough analysis of unconscious bias in the 2021 Inclusivity Guidelines (and in its prior drafts), the drafters never discuss veterans. The same is true for the 2014 MDL Guidelines and the 2018 MDL Guidelines.

The public policy of this nation has held for over 200 years that veterans are a protected class entitled to advantageous treatment. Further, veterans are underrepresented in coveted law firm positions, in judicial clerkships, and in appointments to MDL and class action leadership positions.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* at 7.

⁷⁸ *Id.* at 12.

⁷⁹ *Id.*

III. Veterans

An array of federal and state statutes protect veterans of the uniformed services in their employment.⁸⁰ The United States Congress first authorized special benefits for veterans in 1811.⁸¹ The most recent comprehensive veteran benefit statute is the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”).⁸² USERRA strengthened and clarified a complicated set of previous measures. As noted above, the United States Supreme Court characterized the public policy supporting veteran statutes as being “designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law

withheld from those who stayed behind.”⁸³

In enacting USERRA, the United States Congress decreed that the statute’s “Purposes” is “to encourage non-career service in the uniformed services by eliminating or minimizing disadvantages to civilian careers and employment which can result from such service and . . . to prohibit discrimination against persons because of their service in the uniformed services.”⁸⁴

The statute has a broad anti-discrimination provision:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance

⁸⁰ See, for example, 40 VA. CODE § 40.1-27.2; MASS. GEN. LAW CHAPTER 151B § 4. State statutes provide further evidence of the well-established public policy favoring advantageous treatment of Veterans.

⁸¹ See *supra* note 5.

⁸² USERRA, 38 U.S.C. §§ 4301-4335.

⁸³ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 285 66 S. Ct. 1105, 1110-11 (1946).

⁸⁴ 38 U.S.C. § 4301(1) and (3)

of service, application for service, or obligation.⁸⁵

Courts have held that a veteran can obtain the statute's protections based on proof that discriminatory intent was a "motivating factor," but not the sole factor, in an adverse employment event.⁸⁶

Proof of discriminatory intent can be inferred from many sources, including the disparate impact of a policy on the veteran population:

Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action,

inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.⁸⁷

Related statutes characterize veterans as "specially protected" and require affirmative action to advance the employment of "covered veterans".⁸⁸ "Covered veterans" are defined broadly and include essentially all veterans who have separated from service since 1990.⁸⁹

Veterans compose 7% of the United States population⁹⁰ and 8.5% of the United States workforce.⁹¹ The National Association of Law Placement,

⁸⁵ 38 U.S.C. § 4311(a) (emphasis added).

⁸⁶ Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (citing 38 U.S.C. § 4311(c)(1)).

⁸⁷ *Id.* at 1014 (emphasis added).

⁸⁸ See 38 U.S.C. § 4212(a).

⁸⁹ *Id.*

⁹⁰ Vespa, *supra* note 8, at 1.

⁹¹ Emily Raden, United States Bureau of Labor Statistics, *A closer look at veterans in the labor force*, (Nov. 2017), https://www.bls.gov/careeroutlook/2017/article/veterans.htm?view_full#:~:text=Data%20from%20the%20Current%20Population,civilian%20noninstitutional%20population%20in%202016 (last visited November 22, 2022).

(“NALP”) first published veteran lawyer employment data in 2020 for the law school class of 2018.⁹² This data indicated that about 3% of 2018 law graduates were veterans.⁹³ Thus veterans are underrepresented, as a class, in the practice of law.

In its 2020 survey, NALP concluded that veteran law graduates in the law school Class of 2018 were underrepresented in private practice as compared to the class as a whole – 42.8% vs. 54.8%.⁹⁴ Veteran graduates were three times more likely to be

employed in solo practice than the class as a whole (6.6% vs. 2.0%).⁹⁵ Veteran graduates were more likely to be employed in very small law firms (1 – 10 lawyers) than the class as a whole (36.9% vs. 33.9%).⁹⁶ Indeed, as it analyzed every law firm size gradation from solo practice to 501+ lawyers, NALP found that veteran law graduates were underrepresented as compared to the class as a whole in every category except for solo practice and 1 -10 lawyer firms, where veteran law graduates were overrepresented.⁹⁷ The job classification where veteran graduates were most significantly underrepresented compared to the class as a whole was in judicial clerkships: 7.7% vs. 11.2%.⁹⁸

In 2020, NALP also included veterans in its more broad-based National Directory of Legal Employers (NDLE). Using 2018 data, the NDLE survey also found a disparity between large law firms (more than 251 lawyers) and small law firms (250 lawyers or fewer). In 2018, veterans were more likely to be partners at smaller law firms than at large law firms: 2.21% vs. 1.83%. In 2019, this disparity worsened with veterans accounting for 1.67% of partners at large law

⁹² National Association of Law Placement, NALP Bulletin, *Two Perspectives on Military Veterans*, <https://www.nalp.org/0220research#table1> (last visited on July 9, 2021).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

firms as compared to 2.28% at small law firms. This disparity also played out in non-partner positions. Veterans were more than twice as likely to be “of counsel” at large law firms rather than partner – 3.66% vs. 1.67%.⁹⁹ Veterans were also overrepresented in the “of counsel” position compared to the firm as a whole – 3.66% vs. 3.54 %.

In short, applying similar metrics to those that animated the Mansfield Rule, veterans are an underrepresented class.¹⁰⁰

There does not appear to be any data tracking veteran appointments to leadership positions in MDLs and class action cases. This absence of data is consistent with the absence of data for “people of color, disabled individuals and LGBTQ lawyers” that was considered in drafting the 2021 Inclusivity Guidelines.¹⁰¹ However, as with those categories, the evidence indicates that veterans

“are equally if not more underrepresented in leadership positions.”¹⁰²

A sampling of some of the larger mass tort MDLs tends to bear this out. For example, in MDL 2672, *in re Volkswagen “Clean Diesel” Marketing, Sales Practices and Products Liability Litigation*, none of the appointments to the Plaintiffs Steering Committee was a veteran.¹⁰³ In MDL 2436, *in re Tylenol (Acetaminophen) Marketing, Sales Practices and Products Liability Litigation*, none of the appointments to the Plaintiffs’ leadership positions was a veteran.¹⁰⁴ In MDL 2808, *in re National Prescription Opiate Litigation*, one veteran was appointed to a leadership position, and he, Don Barrett, was added to represent the interests of hospitals.¹⁰⁵

⁹⁹ *Id.*

¹⁰⁰ See Vespa, *supra* note 8.

¹⁰¹ See *id.*

¹⁰² *Id.*

¹⁰³ See MDL 2672: *in re Volkswagen “Clean Diesel” Marketing, Sales Practices and Products Liability Litigation* Case No. 3:15-md-02672 (N.D. Cal. 2016) Doc. No. 1084 (based on review of available internet resources including LinkedIn and law firm web bios).

¹⁰⁴ See In MDL 2436: *in re Tylenol (Acetaminophen) Marketing, Sales Practices and Products Liability Litigation*. Case No. 2:13-md-02436 Case Management No. 4 (based on review of available internet resources including LinkedIn and law firm web bios).

¹⁰⁵ See MDL 2808, *in re National Prescription Opiate Litigation* (N.D. Oh.) Case No. 1:17-md-02804-DAP Doc. No. 34. (based on review of available internet

While there are certainly veterans in the ranks of those appointed to MDL leadership positions,¹⁰⁶ there does not appear to be an intentional effort to appoint veterans to those positions. This fact stands in contrast to the well-documented and well-coordinated efforts to improve the representation of women, persons of color, disabled attorneys and LGBTQ attorneys in MDL and class leadership positions.¹⁰⁷

In short, surveying some of the more salient MDL appointments, veterans appear to be underrepresented. That fact, combined with the fact that veterans are entitled to advantageous treatment based on 200+ years of public policy supports a revision to the 2018 MDL Guidelines and the 2021 Inclusivity Guidelines to expressly include veterans as a diverse category appropriate for consideration.

IV. Conclusion

The Mansfield Rule and the 2018 MDL Guidelines (as amended by the 2021 Inclusivity Guidelines) are merited efforts to bring diversity to the more coveted

positions of the practice of law. Unfortunately, veterans are never mentioned in these efforts. Veterans are invisible even though they are the oldest protected class and even though public policy has historically extended advantageous treatment to them. There does not appear to be a principled basis to exclude veterans from the diverse categories identified in the Mansfield Rule or the 2018 MDL Guidelines. The remedy for this omission is simple: the Mansfield Rule, the 2018 MDL Guidelines and the 2021 Inclusivity Guidelines should be revised to include veterans.

resources including LinkedIn and law firm web bios).

¹⁰⁶ See for example, Arnold Levin of Levin, Fishbein Sedran & Berman and Martin Crump of Davis & Crump.

¹⁰⁷ See generally, 2021 Inclusivity Guidelines, *supra* note 3, 35-36 at notes 83, 85, and 86 (discussing recent orders encouraging or requiring gender and racial diversity in proposed slate of appointments).