

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 have developed plans and programs to provide concrete advancement opportunities for these groups. These programs are based on established public policy and on 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 -² and;
- 2) the 2018 Guidelines and Best Practices for Large and Mass-Tort MDLs (“2018 MDL Guidelines” or “2018 Guidelines”)³ as amended by the 2021 Inclusivity and Excellence Guidelines.(“2021 Inclusivity Guidelines”).⁴

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

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.”⁵

The 2018 MDL Guidelines as amended by the 2021 Inclusivity Guidelines are standards developed by judges, scholars and practicing lawyers intended 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 insure that diverse counsel are appointed 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, veterans are never mentioned in the Mansfield Rule, the 2018 MDL Guidelines or the 2021 Inclusivity Guidelines. 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 treatment. In fact the public policy of this country for over 200 years has expressly provided advantageous treatment to veterans.⁶

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

The Act⁷ 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.”⁸

Additionally, the same type of demographic data that the Mansfield Rule and the 2018 MDL Guidelines rely upon shows that veterans are underrepresented in coveted positions in the legal field including large law firm partnerships and judicial clerkships.⁹

By decoupling diversity and inclusion efforts from established public policy, the 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 well intentioned efforts and salutary purposes of the Mansfield Rule and the 2018 MDL Guidelines are undermined by the omission of veterans. The author suggests that veterans should be included in these programs.

I. Background on the Mansfield Rule

The Mansfield Rule originated at the 2016 Women In Law Hackathon.¹⁰ The 2016 Women In Law Hackathon was a competition among nine team “consisting of 54 high level law firm partners, 18 expert advisors and 9 Stanford Law students”¹¹. Based on a review of publicly available media¹², none of the 81 law firm leaders, attorneys, consultants and law students competing in the 2016 Women In Law Hackathon was a veteran.¹³

The Mansfield Rule was not the winning proposal but it was deemed “Crowd Favorite”.¹⁴ 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.”¹⁵ 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.”¹⁶

The Mansfield Rule uses law firm financial dynamics to pressure law firms to meet the Mansfield Rule metrics. Diversity Labs 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”¹⁷

“Include diversity at the lead partner and senior associate levels as an explicit requirement on RFPs/pitch teams before you make new hiring decisions”¹⁸

“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.”¹⁹

“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.”²⁰

“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.”²¹

“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.”²²

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.²³ By 2020, 117 law firms agreed to comply.²⁴ Law firms must 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.²⁵ Law firms that are certified as compliant with the Mansfield Rule are permitted to 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 diverse²⁶ 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.²⁷

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 more diverse following the adoption of Mansfield.²⁸

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.”²⁹
- “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.”³⁰
- “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.”³¹
- “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.”³²

In 2020, Diversity Labs expanded the Mansfield Rule from large law firms to mid size law firms – firms with 150 or fewer lawyers.³³ In 2020, Diversity Labs also expanded the Mansfield Rule to legal departments at large corporations.³⁴ 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+).³⁵

II. Background on 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”)³⁶. The Duke Law Center for Judicial Studies (“Center for Judicial Studies”) calculated that MDL cases made up 42% of federal civil cases pending in federal court.³⁷ Excluding prisoner and social security cases from the total elevates the number of federal civil cases pending in MDLs to 52%. That number has risen dramatically in the past 20 years.³⁸

Moreover, most of the civil cases pending in MDLs -- 90% --were consolidated in just 24 MDLs.³⁹ Although, theoretically, MDL courts are only intended for pretrial management (with remand for trial to the original transferor courts when pretrial management is completed) nearly all MDL cases – 96% -- are resolved in the MDL, not the original court.⁴⁰

The power of MDL courts has motivated scholars, judges and practitioners to make efforts to formalize MDL procedures.⁴¹ To that end, the Center for Judicial Studies convened a series of bench-bar conferences starting in 2013.⁴² The 2013 bench-bar conference included more than thirty-five practitioners (balanced between the plaintiffs’ and defense bar) as well as several judges.⁴³ The work of the participants was assembled into a report by the Center for Judicial Studies and published as the 2014 MDL Standards and Best Practices for Large and Mass-Tort MDLs. (“2014 MDL Guidelines”)⁴⁴.

The 2014 MDL Guidelines discussed, extensively, the criteria for selecting leadership in MDL litigation with an emphasis on past experience and ample financial resources.⁴⁵ 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.”⁴⁶.

The Center for Judicial Studies held more bench-bar conferences in 2015 and 2016 which considered improvements to the 2014 MDL Guidelines.⁴⁷ 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.⁴⁸ The group was organized into eight teams and team leaders were appointed⁴⁹. The teams worked through 2016 and 2017 and in early 2018, submitted a revised draft of the MDL Guidelines to the seven judges involved in the 2016 bench bar conference.⁵⁰ The end product of these efforts was the 2018 MDL Guidelines.⁵¹ The stated purpose of the 2018 MDL Guidelines is to provide “concrete guidance to judges and lawyers handling an MDL.”⁵²

The 2018 MDL Guidelines contain a much more robust discussion of diversity in the selection of MDL leadership appointments than did the 2014 MDL Guidelines. The 2018 MDL Guidelines adopted 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 case”⁵³. The 2018 MDL Guidelines cite to Duval, “Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases” which recommends that “there should be diversity in gender, racial and geographic terms” in the selection of MDL counsel.⁵⁴ The 2018 MDL Guidelines elaborated that “Judges 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.**”⁵⁵

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.⁵⁶ Those attending 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 2016.⁵⁷ This improvement was attributed, primarily, to two judges who appointed majority-female plaintiffs’ steering committees.⁵⁸

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.”⁵⁹

The new working group consisted of 25 practitioners divided into five teams.⁶⁰ 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.⁶¹ 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.⁶²

The working group received comments from more than 35 judges as well as individuals and organizations.⁶³ The comments were carefully reviewed, revisions were made and a final draft was submitted to the working group.⁶⁴ 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.⁶⁵ No such amendment was made to include veterans in the enumerated diversity categories. In fact, the word “veteran” never appears in the 2020 draft Inclusion and Excellence Guidelines or the 2021 (final) Inclusion Guidelines.

The 2021 Inclusion Guidelines define “diverse” as “those lawyers 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.”⁶⁶

The 2021 Inclusion 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.⁶⁷ However, the Guidelines also emphasize that reliance on gender diversity data “should not be construed as an admission that only gender diversity is lacking.”⁶⁸ The 2021 Inclusion Guidelines state that “[p]eople of color, disabled individuals and LGBTQ lawyers are equally, if not more, underrepresented in these leadership positions.”⁶⁹ The Guidelines conclude that these categories should be included in diversity initiatives because “there is simply not comparable data on their underrepresentation among leadership appointments in the MDL and class action to address this issue specifically.”⁷⁰

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. 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.”⁷¹

Each of the Guidelines is supported by several Best Practices with more concrete recommendations. For example, Guideline 1 is supported by Best Practices IE and IF

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 for and encourage efforts to create a more diverse pool of applicants for leadership position.⁷²

Guideline 2 is supported by concrete recommendations in Best Practice 2B:

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.⁷³

Guideline 3 includes an oversight recommendation in Best Practices 3A:

BEST PRACTICE 3A: The transferee or presiding judge should remain vigilant that appointments and work assignments made throughout the litigation take diversity into account.⁷⁴

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.”⁷⁵ (As noted above, the Mansfield Rule omits veterans from the category of diverse lawyers and from the advantageous treatment provided by the Rule.⁷⁶)

The 2021 Inclusivity Guidelines do not reference veterans or veterans status in any way. Thus, the 2021 Inclusivity Guidelines are no different from the 2014 MDL Guidelines and the 2018 MDL Guidelines which, also, do not reference veterans in any way.

The invisibility of veterans in the major programmatic efforts to improve diversity in counsel appointments appears to illustrate the very point made in these efforts: That 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 factors.”⁷⁷

“As judges become more aware of the repeat-player 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”⁷⁸

“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.”⁷⁹

“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”⁸⁰

“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.”⁸¹

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.

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

III. Veterans

Veterans of the uniformed services are protected in their employment by an array of federal and state statutes.⁸² The United States Congress first authorized special benefits for veterans in 1811.⁸³ The most recent comprehensive veteran benefit statute is the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”)⁸⁴ 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”.⁸⁵

In enacting USERRA, the United States Congress decreed that the statute’s “Purposes” and the “Sense of Congress” 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.”⁸⁶

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 of service, application for service, or obligation.”⁸⁷

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.⁸⁸ 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.”⁸⁹

Related statutes characterize veterans as “specially protected” and require affirmative action to advance the employment of “covered veterans”⁹⁰. “Covered veterans” are defined broadly and include essentially all veterans who have separated from service since 1990⁹¹.

Veterans compose 7% of the United States population.⁹² Veterans compose 8.5% of the United States workforce.⁹³ The National Association of Law Placement, (“NALP”) first published veteran lawyer employment data in 2020 for the law school class of 2018.⁹⁴ This data indicated that about 3% of recent (2018) law graduates were veterans.⁹⁵ 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 %.⁹⁶ Veteran graduates were three times more likely to be employed in solo practice than the class as a whole (6.6% vs. 2.0%).⁹⁷ 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%).⁹⁸ 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.⁹⁹ 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%.¹⁰⁰

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 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%.¹⁰¹ 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.¹⁰²

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.¹⁰³ However, as with those categories, the evidence indicates that veterans “are equally if not more underrepresented in leadership positions.”¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶ In MDL 2808, In Re National Prescription Opiate Litigation (N.D. Oh.) one veteran was appointed to a leadership position and he -- Don Barrett -- was added to represent the interests of hospitals.¹⁰⁷

While there are certainly veterans in the ranks of those appointed to MDL leadership positions,¹⁰⁸ 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.¹⁰⁹

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.

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.

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² <https://www.diversitylab.com/mansfield-rule-4-0/#:~:text=The%20Mansfield%20Rule%2C%20inspired%20by,partner%20promotions%2C%20formal%20client%20pitch> last visited January 2, 2021

³ <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf> (hereinafter “2018 MDL Guidelines”)

⁴ <https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Inclusivity%20and%20Excellence%20Master%20Draft%204.8.21.pdf> (hereinafter “2021 Inclusivity Guidelines”)

⁵ *Id.*

⁶ https://en.wikipedia.org/wiki/United_States_Department_of_Veterans_Affairs#cite_note-2-9 last visited July 8, 2021. 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. *Id.* President Franklin D. Roosevelt described 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” *Id.*

⁷ Selective Training and Service Act of 1940 (STSA).

⁸ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 285 66 S. Ct. 1105, 1110-11 (1946)

⁹ The Mansfield Rule was developed based on data collected by National Association of Women Lawyers (NAWL) in 2015. See <https://legaltalentlab.app.box.com/v/2016hackathon/file/73319711873> fn. 5. 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 veteran attorney data had ever been systematically analyzed prior to 2018. See n. 90, *infra*

¹⁰ <https://www.diversitylab.com/hackathons/> last visited January 2, 2021

¹¹ *Id.*

¹² Review based on LinkedIn and law firm website profiles.

¹³ <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 July 8, 2021.

¹⁴ *Id.*

¹⁵ <https://legaltalentlab.app.box.com/v/2016hackathon/file/73319711873> last visited July 8, 2021.

¹⁶ <https://www.diversitylab.com/mansfield-rule-4-0/> last visited July 8, 2021.

¹⁷ <https://www.diversitylab.com/wp-content/uploads/2019/05/Legal-Department-Outside-Counsel-Diversity-Strategies-Tactics-Collaborations.pdf> last visited July 8, 2021.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ <https://www.diversitylab.com/mansfield-rule-4-0/> last visited on July 8, 2021.

²⁴ *Id.*

²⁵ <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/> last visited on July 8, 2021.

²⁶ Diversity Labs defines “diverse” and “underrepresented” lawyers as women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities. See <https://www.diversitylab.com/mansfield-rule-4-0/> last visited July 8, 2021. See also n.2; and 13 above. Veterans are not considered “diverse” or “underrepresented” notwithstanding the demographic data outlined below. See § III.

²⁷ <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/> last visited on April 15, 2021.

²⁸ *Id.*

²⁹ <https://www.diversitylab.com/mansfield-rule-4-0/#:~:text=The%20Mansfield%20Rule%2C%20inspired%20by,partner%20promotions%2C%20formal%20client%20pitch>. Last visited April 15, 2021.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ https://www.diversitylab.com/pilot-projects/mansfield_midsize/ last visited on July 8, 2021.

³⁴ <https://www.diversitylab.com/pilot-projects/mansfield-rule-legal-department-2-0-edition/> last visited on July 8, 2021.

³⁵ *Id.*

³⁶ 2018 MDL Guidelines at vi – viii.

³⁷ *Id.* at vii.

³⁸ *Id.* In 2002, the Center for Judicial Studies estimated that only 16% of federal civil cases were in MDLs. *Id.*

³⁹ *Id.* at vii.

⁴⁰ *Id.*

⁴¹ Before the Center for Judicial Studies published the first Guidelines and Best Practices for Large and Mass-Tort MDLs in 2014, standards for managing MDLs were largely extrapolated 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. p. 4 – 7.

⁴² 2018 MDL Guidelines p. i.

⁴³ *Id.*

⁴⁴ https://judicialstudies.duke.edu/wp-content/uploads/2018/10/standards_and_best_practices_for_large_and_mass-tort_mdls-Bolch-Judicial.pdf (hereinafter “2014 MDL Guidelines”)

⁴⁵ *Id.* at p. 33 – 65.

⁴⁶ *Id.* at p. 58..

⁴⁷ 2018 MDL Guidelines at p. i

⁴⁸ *Id.*

⁴⁹ *Id.* and p. 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.

⁵⁰ *Id.* at p. i-ii

⁵¹ *Id.*

⁵² *Id.* at p. ix.

⁵³ *Id.* at p. 45

⁵⁴ 74 La. L. Rev. 391, 393 Winter 2014.

⁵⁵ 2018 MDL Guidelines at p. 46. (emphasis added)

⁵⁶ 2021 Inclusivity Guidelines, p. 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. The 2021 Inclusivity and Excellence Guidelines were published in draft on September 24, 2020 by the James F. Humphreys Complex Litigation Center. https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/DIVERSITY%20MASTER%20REVISED_0.pdf, (hereinafter “2020 draft Inclusivity and Excellence Guidelines”) The Complex Litigation Center solicited comments on the September 24, 2020 draft which were incorporated by the drafters and are reflected in the 2021 Inclusivity and Excellence Guidelines, see 2021 Inclusivity Guidelines p. ii.

⁵⁷ *Id.* at p. i -ii.

⁵⁸ *Id.*

⁵⁹ *Id.* at ii.

⁶⁰ *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 19 Contributors, one, Vance Andrus, is a veteran.

⁶¹ *Id.* at iii

⁶² See n. 56, *supra*

⁶³ 2021 Inclusivity Guidelines, p. ii.

⁶⁴ *Id.*

⁶⁵ Compare 2020 draft Inclusivity Guidelines at pp iii, 1; 14 and 20 with 2021 Inclusivity Guidelines at pp. iii, 1, 14 and 21.

⁶⁶ 2021 Inclusivity MDL Guidelines p. iii (emphasis added)

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at p. 1(emphasis added)

⁷² *Id.* at p. 19, 20

⁷³ *Id.* at p.22

⁷⁴ *Id.* at p. 23.

⁷⁵ *Id.* at p. 19

⁷⁶ *See* n. 26 *supra*.

⁷⁷ 2021 Inclusivity MDL Guidelines, p. 1.

⁷⁸ *Id.* at p. 4

⁷⁹ *Id.* at p. 7

⁸⁰ *Id.* at p. 12.

⁸¹ *Id.*

⁸² *See* e.g 40 Va. Code § 40.1-27.2; Mass. Gen. Law Chapter 151B § 4. State statutes are further evidence of the well-established public policy favoring advantageous treatment of Veterans.

⁸³ https://en.wikipedia.org/wiki/United_States_Department_of_Veterans_Affairs#cite_note-2-9 last visited July 9, 2021. 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. *Id.* President Franklin D. Roosevelt described 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” *Id.*

⁸⁴ USERRA 38 U.S.C. 4301-4335

⁸⁵ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 285 66 S. Ct. 1105, 1110-11 (1946)

⁸⁶ 38 U.S.C. § 4301(1) and (3)

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

⁸⁸ *Sheehan v. Dep’t of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) citing 38 U.S.C. § 4311(c)(1).

⁸⁹ *Id.* at 1014 (emphasis added).

⁹⁰ *See* 38 U.S.C. § 4212(a).

⁹¹ *Id.*

⁹² <https://www.census.gov/library/publications/2020/demo/acs-43.html> Last visited on July 9, 2021.

⁹³ https://www.bls.gov/careeroutlook/2017/article/veterans.htm?view_full#:~:text=Data%20from%20the%20Current%20Population,civilian%20noninstitutional%20population%20in%202016. Last visited on July 9, 2021.

⁹⁴ <https://www.nalp.org/0220research#table1> last visited on July 9, 2021.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See* fn. 9; 69 *supra*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *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)

¹⁰⁶ *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)

¹⁰⁷ *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 resources including LinkedIn and law firm web bios)

¹⁰⁸ *See* e.g Arnold Levin, Levin, Fishbein Sedran & Berman and Martin Crump, Davis & Crump.

¹⁰⁹ *See* generally, 2021 Inclusivity Guidelines fn. 83; 85; and 86 discussing recent orders encouraging or requiring gender and racial diversity in proposed slate of appointments.