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# JUDICATURE

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# equal opportunity?

Does jurisprudence prohibit judges from considering diversity when appointing lawyers to lead roles in complex litigation? Here's a legal strategy judges can use to help give women and minority lawyers an equal chance at leadership in class actions and MDLs.

BY MICHAEL BAYLSON AND CECILY HARRIS

**H**ow do we improve the severe underrepresentation of female and minority counsel among attorneys appointed to leadership roles in complex litigation? Following discussion at the Duke Law Center for Judicial Studies' conference *Increasing the Number of Women and Minority Lawyers Appointed to Leadership Positions in Class Actions and MDLs*, we suggest a novel legal strategy. Our proposed strategy relies on the reasoning and analytical frameworks set forth in three Supreme Court cases barring racial discrimination by courts: *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).<sup>1</sup>

We additionally briefly explore the merits of an application process wherein the judge supervising a given class action or multi-district litigation ("MDL") would solicit applications from

attorneys interested in leadership positions and would decide who to appoint based on those applications as well as oral testimony from the applicants. This procedure would take control over the selection process from the plaintiffs' bar and place it in the judge's hands, in so doing lessening the power of the "old boys' club" to choose lead counsel and likely resulting in appointments more evenly spread across women and minority groups.

## IMPORTANCE OF SHELLEY AND BATSON

*Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits judicial enforcement of restrictive real estate covenants based on race, provides the most promising avenue for increasing the diversity of lead or class counsel. *Id.*

at 20. *Shelley* has been applied outside the real estate context, in a case regarding discrimination by a privately owned restaurant located in a state-owned parking garage, for example. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961). Decisions citing *Shelley* tend to focus on whether the state action component is present as a predicate to finding the discriminatory agreement at issue actionable under the Fourteenth Amendment. *See Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1284 (7th Cir. 1990) (stating that "[t]he crucial question is whether the [plaintiffs] can establish . . . [that] the party charged with the deprivation appropriately be characterized as a 'state actor'"); *Burton*, 365 U.S. at 724 (engaging in fact-intensive inquiry regarding the "degree of state participation and involvement in discriminatory action which it was the design of the ▶

Fourteenth Amendment to condemn”). Judicial conduct is clearly “state action.” *Shelley*, 335 U.S. at 20.

In 1986, the Supreme Court decided *Batson*, holding that a prosecutor could not make race-based peremptory challenges in jury selection. *Batson*, 476 U.S. at 89. Although both *Batson* and *Shelley* deal with discrimination in the judicial system, *Batson* neither relies on nor even references *Shelley*, presumably because in *Batson* there was no question that the decision-making involved (by prosecutors) was the state’s, which had been the crux of the Court’s analysis in *Shelley*. See *id.* at 86 (stating that “[t]he Equal Protection Clause guarantees the defendant that *the State* will not exclude members of his race from the jury venire on account of race”) (emphasis added). Nevertheless, both decisions focused on the same evil: state action “effecting . . . prohibited discrimination” and thereby resulting in the denial of equal protection. *Id.* at 88 (quoting *Norris v. Alabama*, 294 U.S. 587, 589 (1935)).

*Batson* has been extensively applied in the *voir dire* of criminal cases where a prosecutor exercises a peremptory challenge as to an African American venire person. To successfully lodge a *Batson* challenge requires the following three steps:

“First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, [i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.” *Johnson v. California*,

545 U.S. 162, 168 (2005) (internal citations and quotations omitted).

The Supreme Court extended *Batson* to civil matters in *Edmonson*, in a decision relying in part on *Shelley*. In *Edmonson*, the Court held that “courts must entertain a challenge to a private litigant’s racially discriminatory use of peremptory challenges in a civil trial,” notwithstanding the lack of an overt state actor decision-maker in such situations. *Edmonson*, 500 U.S. at 630. The requisite state action component was established via reliance on the analysis set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) for determining when a private citizen can be considered a government actor, which first asks “whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority,” and second requires consideration of “whether the private party charged with the deprivation could be described in all fairness as a state actor.” *Edmonson*, 500 U.S. at 620 (citing *Lugar*, 457 U.S. at 939-42). The Court held that both prongs of *Lugar* were satisfied: the first, because without statutory authorization for peremptory challenges, attorneys and parties would be unable to accomplish the discriminatory acts, and the second, partially based on the fact that “the injury caused is aggravated in a unique way by the incidents of governmental authority,” a proposition for which it cites *Shelley*. *Id.* at 622-24 (noting that “[w]ithout the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose” and that “[b]y enforcing a discriminatory peremptory challenge, the court ‘has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind

the [alleged] discrimination”) (quoting *Burton*, 365 U.S. at 725).

#### APPLICATION TO JUDICIAL APPOINTMENTS OF CLASS OR LEAD COUNSEL

We discuss *Shelley*, *Batson*, and *Edmonson* to show instances in which the Supreme Court examined judicial involvement in the allegedly discriminatory practices of state actors and private citizens, and found such involvement contrary to the dictates of the Fourteenth Amendment. Because appointment of class counsel under Federal Rule of Civil Procedure 23(g) is accomplished by the district judge who certified the class, the requisite state action element is easily satisfied in those cases. Similarly, in the MDL context, the Manual for Complex Litigation provides that designation of lead counsel is accomplished by the district judge supervising the case. Therefore, in both situations, the mere agreement among plaintiffs’ counsel, whether implicit or explicit, to exclude individuals from leadership positions on account of their race or gender would have no real-world implication absent the judge’s participation and approval.

Bearing that in mind, we propose using a similar analysis as undertaken in *Shelley*, *Batson*, and *Edmonson* to determine whether the appointment of class or lead counsel violates the constitutional rights of passed-over minority attorneys.<sup>2</sup> Specifically, employing the procedure set forth in *Batson*, counsel would file a motion with the supervising judge arguing that she, a minority attorney, was competent and able to handle the role of lead counsel, but was either excluded or otherwise passed over for no legitimate reason. The motion would primarily focus on establishing the attorney’s competency, as that is the paramount consideration in choosing class counsel under Rule 23(g)(1)

(A). Counsel would further show that a leadership position was requested, with appropriate documentary support, and proffer any available evidence of discrimination in the decision-making among plaintiffs' counsel that resulted in her non-selection. The thrust of the motion would be an argument that, under *Shelley, Batson*, and *Edmonson*, the court's appointment of the attorney(s) requested would constitute judicial enforcement of the discrimination of private counsel. If the judge, considering the attorney's motion and the response of the plaintiffs' group, finds that the attorney has shown facts giving rise to an inference of discrimination, then the burden would shift to the selected leadership to offer a race- and gender-neutral reason for its actions. Finally, if the plaintiffs' group proffers a neutral explanation, the judge would then determine whether counsel has established purposeful discrimination. See *Batson*, 479 U.S. at 97-98.

Some attorneys and/or judges may view such motion practice as overly aggressive, and downstream repercussions could therefore dissuade minority counsel from pursuing this tactic. Nevertheless, the mere availability or threat of it might cause some favorable results.

#### APPLICATION ALTERNATIVE

Another possibility for combating the lack of diversity in class action and MDL leadership positions would be to put more of the decision-making power in the hands of the supervising judge, via an application procedure whereby plaintiffs' attorneys apply directly to the court for positions as lead counsel or steering committee members. That approach would supplant the status quo in many instances in which the plaintiffs' attorneys involved in a given litigation coalesce and come to internal agreements regarding who to put

forward to the court as lead counsel. Judge Charles Breyer in the Northern District of California used such an application procedure to decide who to appoint as lead counsel and steering committee member in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, a large-scale MDL.

In that case, the court issued a pretrial order requiring each attorney seeking either position to submit an application including a resume and a letter addressing several criteria. See Pretrial Order No. 2: Applications for Appointment of Plaintiffs' Lead Counsel and Steering Committee Members, *In re: Volkswagen "Clean Diesel" Marketing*, No. 15-MD-2672 (N.D. Cal. Dec. 22, 2015), ECF No. 336. The criteria reflect the court's interest in appointing competent counsel who is able to both commit herself to a time-consuming litigation and provide the resources necessary to prosecute that litigation expeditiously. Judge Breyer further gave applicants the opportunity to present oral testimony to the court regarding their applications. On January 21, 2016, the court appointed Elizabeth Cabraser, a well-known and skilled attorney, as lead counsel and chair

of the plaintiffs' steering committee in a short memorandum that cited her extensive experience with multi-district litigation, the support her application received from other counsel, and the court's familiarity with her from her role as lead counsel in a separate case. See Pretrial Order No. 7: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel, *In re: Volkswagen "Clean Diesel"*, No. 15-MD-2672 (N.D. Cal. Jan. 21, 2016), ECF No. 1084.

The method used by Judge Breyer — ordering counsel to submit applications detailing their qualifications for the leadership position sought and allowing for oral argument in support of such applications — has the potential to increase diversity among lead counsel because it would place in the hands of the judiciary, rather than the plaintiffs' bar, the selection process. In so doing, such an approach would preclude the "old boys' club" from controlling which attorneys are submitted to judges as candidates for leadership positions in class actions and MDLs. A key benefit of this method is that it does not require the judge to take race or gender into account in any way, in contrast to

## WE DISCUSS *SHELLEY, BATSON, AND EDMONSON* TO SHOW INSTANCES IN WHICH THE SUPREME COURT EXAMINED JUDICIAL INVOLVEMENT IN THE ALLEGEDLY DISCRIMINATORY PRACTICES OF STATE ACTORS AND PRIVATE CITIZENS, AND FOUND SUCH INVOLVEMENT CONTRARY TO THE DICTATES OF THE FOURTEENTH AMENDMENT.

## ... WE BELIEVE THAT THE JUDICIAL INVOLVEMENT REQUIRED BY RULE 23 AND THE MANUAL FOR COMPLEX LITIGATION PROVIDE AN OPENING FOR COUNSEL WHO FEEL THEY HAVE BEEN PASSED OVER FOR A CLASS ACTION OR MDL LEADERSHIP POSITION...

other proposals for increasing diversity among class counsel which require overt preference based on race and/or gender, which therefore implicate constitutional concerns.<sup>3</sup>

Judge Harold Baer in the Southern District of New York has required a certain level of racial and gender diversity among class counsel. For instance, in *Blessing v. Sirius XM Radio Inc.*, No. 09-10035, 2011 WL 1194707 (S.D.N.Y. Mar. 29, 2011), Judge Baer ordered lead counsel on an antitrust class action to “ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics.” *Id.* at \*12. *Blessing* is one order of at least seven in which Judge Baer has imposed a diversity requirement on proposed class counsel. See *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) (due to the “arguabl[e]” diversity of the proposed class of plaintiffs in ERISA class action, mandating “evidence of diversity, in terms of race and gender, of any class counsel [appointed by the court]”); *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 95 n.23 (S.D.N.Y. 2010) (refusing to certify putative class based partly on proposed counsel’s failure to provide information concerning the race or gender of the attorneys assigned to the case); *Pub.*

*Emps. Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc.*, 280 F.R.D. 130, 142 n.6 (S.D.N.Y. 2012); *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, Nos. 08-8781, 08-5093, 2012 WL 4865174, \*5 n.5 (S.D.N.Y. Oct. 15, 2012); *In re Gildan Activewear Inc. Sec. Litig.*, No. 08-5048 (S.D.N.Y., Sept. 20, 2010).

This apparently standard practice of Judge Baer has encountered resistance from litigants and the Supreme Court alike. In *Martin*, one of the class participants petitioned the Second Circuit to invalidate the settlement that had been reached due to Judge Baer’s reliance on race and gender in appointing class counsel, which the plaintiff contended rendered the certification order invalid. See *Blessing v. Sirius XM Radio Inc.*, 507 F. App’x 1 (2d Cir. 2012). The Second Circuit declined to reach the merits on standing grounds, and the plaintiff petitioned for certiorari in the Supreme Court. *Id.* at 5. Although the Court denied certiorari, Justice Samuel Alito wrote a short opinion describing his highly negative views on the matter. *Martin v. Blessing*, 134 S.Ct. 402 (2013). The Justice first described Judge Baer’s practice as “[c]ourt-approved discrimination” unlikely to survive a constitutional challenge, and then proceeded to discuss the practical

difficulties inherent in ascertaining “the class composition in terms of relevant race and gender metrics.” *Id.* at 403-04. He hypothesized that, even where such demographics could be determined, “faithful application of [Judge Baer’s] rule would lead to strange results,” such as the need to appoint a firm with a high percentage of male attorneys to represent a class comprised of prostate cancer patients. *Id.* at 404.

Justice Alito’s position in *Martin* points to the vulnerabilities in Judge Baer’s practice and indeed in any practice that requires the district judge certifying a class to take the gender and/or race of counsel into account in the Rule 23(g) decision. It also underscores the viability of other solutions to the lack of diversity among class counsel, such as motion practice based on *Shelley* or the application procedure used by Judge Breyer in *Volkswagen*.

### CONCLUSION

The gender and racial disparities that have stubbornly persisted across leadership positions in the legal profession are well-documented, and it is no surprise that they are reflected in the low number of women and minority attorneys appearing as lead counsel in class actions and MDLs. This important topic has garnered increasing levels of attention over the past several months, including being the focal point of the Duke conference in April 2017 that spurred the instant exploration of the issue. As discussed above, we believe that the judicial involvement required by Rule 23 and the Manual for Complex Litigation provide an opening for counsel who feel they have been passed over for a class action or MDL leadership position to rely on *Shelley* and its progeny to bring their concerns to the supervising judge’s attention. This approach, and the legal community’s awareness of its

availability, could catalyze an increase in the number of women and minority lead counsel and therefore chip away at one of the most visible, and damaging, manifestations of this profession's homogeneity.



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<sup>1</sup> Although these cases pertain to racial discrimination, they would likely also apply to gender discrimination.

<sup>2</sup> In complex cases where, in addition to lead counsel, plaintiffs form a steering committee to decide both how work is assigned among attorneys and the fee structure, the same principles should apply.

<sup>3</sup> Introducing judicial consideration of race in the appointment of class counsel would trigger a strict scrutiny analysis that would be difficult to meet. To satisfy the standard one would have to show that the district judge's classification on the basis of race was supported by a compelling interest and was necessary to achieve that interest. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2419 (2013). In addition, judicial consideration of an applicant's gender would be subject to intermediate scrutiny, requiring proof of an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531 (1996). Application of these standards would require analyzing whether, in the context of race-based classifications, the district

judge "narrowly tailored" the selection process, and, in the case of gender-based classifications, whether the process was "substantially related to the achievement of [important governmental] objectives." *Id.* at 533 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Raising and litigating these issues would take significant time of the court and counsel away from the management of the merits of the case. We do not predict whether judicial consideration of race or gender in the appointment process would withstand these challenges, but merely pause to note that it would be a difficult burden to meet. Putting the focus on discrimination as described above, relying on *Shelley*, is more likely to result in prompt resolution of the issue because, if the facts show discrimination against an otherwise qualified lawyer, the judge can remedy the situation simply by entering an order appointing that lawyer to a leadership role. This would be accomplished in the same fashion as in *Batson* challenges, where the judge simply directs that the minority member of the jury panel who was subjected to a peremptory strike be seated as a juror.

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