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Inadequate Adequacy?: Empirical Studies on Class Member Preferences of Class Counsel

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INADEQUATE ADEQUACY?: EMPIRICAL STUDIES ON CLASS MEMBER PREFERENCES OF CLASS COUNSEL

Alissa del Riego[*] & Joseph Avery[**]

INTRODUCTION

An automaker and an automaker supplier knowingly sold millions of consumers a vehicle with a life-threatening defective airbag.[1] The same airbag in other vehicles had seriously injured and killed other consumers.[2] A hotel company requested that its guests enter personally identifiable information into its reservation system, insisting such information would remain protected.[3] Instead, the company had been warned previously that its security measures were inadequate, and it later became the victim of a breach that exposed its customers' data on the black market, making them vulnerable to identity theft and other privacy breaches.[4] A social media company with over a billion users that targeted minors failed to disclose that it was collecting and employing facial recognition data in its algorithms.[5] This data was allegedly sold to third parties.[6]

Victims of corporate malfeasance in these cases find relief, if any, as members in a class action lawsuit. But practicalities afford class members no control over the litigation.[7] Instead, the claims pursued, injuries sought to be redressed, litigation strategies employed, and relief obtained (if any) is decided solely by the attorneys prosecuting the litigation. The "quality of . . . counsel," as Professor William B.

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[1] *See* Third Amended Consolidated Class Action Complaint at 12–13, *In re* Takata Airbag Prod. Liab. Litig., No. 1:15-md-02599 (S.D. Fla. July 15, 2017) ECF No. 1895.

[2] *Id.* at 16.

[3] *See* First Amended Complaint at 1–4, *In re* Marriott Int'l, Inc., Customer Data Sec. Breach Litig., No. 8:19-md-02879 (D. Md. June 20, 2019), ECF No. 294.

[4] *Id.* at 9–13.

[5] *See* Consolidated Amended Class Action Complaint at 1–5, *In re* TikTok, Inc. Consumer Priv. Litig., No. 1:20-cv-04699 (N.D. Ill. Dec. 18, 2020) ECF No. 114.

[6] *Id.* at 3–4.

[7] *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 4 (1991) (noting "the fact that plaintiffs' attorneys—not the client—controls the litigation"); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677, 681 (1986) (asking "[w]hat happens when client control [over class counsel] is so weak as to make the attorney virtually an independent entrepreneur") [hereinafter Coffee, *Understanding the Plaintiff's Attorney*].

Rubenstein observes, "is therefore paramount, as an entire class's claims might succeed or fail depending on their abilities."[8] But class members cannot hire, fire, or choose their attorneys.[9] Instead, attorneys file claims on behalf of class members and essentially hire themselves as counsel for the class.[10] In larger federal cases, where multiple attorneys seek to represent the same class members, courts are tasked at the outset of the litigation with appointing the attorney or attorneys best able to represent the interests of the class.[11] Once appointed, it is class counsel that speaks solely for and on behalf of the class.[12]

While similar circumstances exist in other contexts where an individual is unable to choose the attorney(s) or representative(s) of their preference, in the class-action environment, agency problems exacerbate the disconnect between "client" and counsel.[13] A criminal defendant without financial means, for example, may not have the ability to choose his public defender, but such an attorney is obligated to consult with his client.[14] And the client has the right to participate in his defense[15] before, during, and after trial. Injured class members typically do not have these opportunities; they have virtually no communication with their attorneys and are often unaware a suit has been filed—purportedly on their behalf—until it is either successful or a settlement is reached.[16] If unsuccessful, a class member may not even know her claims have been legally extinguished by the courts.[17] Although "a fundamental premise of American legal ethics is that clients, not their attorneys,

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[8] WILLIAM B. RUBENSTEIN, NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 3:72 (6th ed. 2022).

[9] *See id*. at §§ 3:72, 3:82.

[10] Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 7, at 685 (noting "a serious principal-agent problem that gives the plaintiff's attorney, not the client, the real discretion as to whether to commence suit"); Macey & Miller, *supra* note 7, at 21 ("The attorneys themselves are responsible for initiating the litigation and do not rely on clients to come to them with cases."); *see also* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064–65 (1995).

[11] FED. R. CIV. P. 23(g)(2).

[12] *See* RUBENSTEIN, *supra* note 8, at § 3:82.

[13] John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883–89 (1987); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3167 (2013).

[14] *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (noting that professional standards require that the attorney must consult with a criminal defendant on important decisions and keep the defendant informed of important developments).

[15] *See* Sara R. Faber, *Competency, Counsel, and Criminal Defendants' Inability to Participate*, 67 DUKE L.J. 1219, 1259 (2018).

[16] *See* Macey & Miller, *supra* note 7, at 20 (noting class members "are often entirely unaware that the litigation is pending until after a settlement has been reached").

[17] *See* Claridge v. N. Am. Power & Gas, LLC, No. 15-cv-1261, 2016 WL 7009062, at *7 (S.D.N.Y. Nov. 30, 2016).

should define litigation objectives," "clients" in class actions do not.[18] This fact has led scholars to conclude that class counsel have no true identifiable clients.[19]

And, in other circumstances, where a guardian, trustor, or executor makes decisions on behalf of another, these individuals were either chosen by their principal or underwent great scrutiny to be appointed.[20] This decision-making power, moreover, is not without limit and can be legally revoked by the principal or trustee.[21] Such is not really the case in class actions. Courts often engage in little to no analysis of whether counsel is capable of effectively representing the interests of class members at the outset of the litigation.[22] And when they do, their barometer, under Rule 23 of the Federal Rules of Civil Procedure, is adequacy. Courts must determine whether this attorney or these attorneys adequately represent the class. In answering this question, district courts consider counsel's experience, knowledge of the law, access to resources, and investment in the litigation.[23] Courts' application of these and other undisclosed criteria had traditionally resulted in the appointment of the same White, male, repeat players.[24]

This fact did not go unnoticed. And in recent years, courts' class counsel appointments have received greater attention and faced more scrutiny. Study after study reflected previous anecdotal observations that courts were consistently appointing the same male, White, middle-aged attorneys to represent class members, even among diverse and female class members.[25] Propelled by academics, scholars,

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[18] Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 7, at 677.

[19] *Id.* at 678; Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 132 (2001).

[20] *See* Lawrence K. Marks, *Court-Appointed Fiduciaries: New York's Efforts to Reform a Widely-Criticized Process*, 77 ST. JOHN'S L. REV. 29, 37–40 (2003).

[21] *See* Banks v. N. Tr. Corp., 929 F.3d 1046, 1052 (9th Cir. 2019); Gov't Guarantee Fund of Republic of Fin. v. Hyatt Corp., 95 F.3d 291, 300 (3d Cir. 1996).

[22] Alissa del Riego, *Driving Diverse Representation of Diverse Classes*, 56 U. MICH. J.L. REFORM 67, 79 (2022) (noting that caselaw interpreting Rule 23(g) is scant, "as courts often issue appointment orders without specifically discussing adequacy") [hereinafter del Riego, *Driving Diverse Representation*].

[23] FED. R. CIV. P. 23(g)(1)(A).

[24] del Riego, *Driving Diverse Representation*, *supra* note 22, at 70 (noting courts' application of Rule 23(g) factors has resulted "in the continued appointment of the same usual white male suspects" as class counsel).

[25] *See* DANA ALVARÉ, TEMP. U. BEASLEY SCH. L., VYING FOR LEAD IN THE "BOYS' CLUB": UNDERSTANDING THE GENDER GAP IN MULTIDISTRICT LITIGATION LEADERSHIP APPOINTMENTS 6 (2017); STEPHANI A. SCHARF & ROBERTA D. LIEBENBERG, AM. BAR FOUND., FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 12 (2015), https://www.americanbar.org/content/dam/aba/administrative/women/first_chairs_final.pdf [https://perma.cc/N2A4-E7JC]; Amanda Bronstad, *Despite Diversity Efforts, Fewer than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White*, LAW.COM (last visited Sept. 28, 2023), https://www.law.com/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/https://www.law.com/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/ [https://perma.cc/NEF7-SM9D].

members of the legal profession, and certain members of the judiciary, courts have undoubtedly made concerted efforts to appoint more diverse attorneys to represent class members in the last decade.[26] In doing so, they have rationalized that diversity is relevant to whether an attorney is best able to represent the interests of class members.[27] As a result of courts' concerted efforts and the profession's response to the same, gender diversity in the role of class counsel has considerably increased in the last few years.[28]

But do class members value diversity? Or do they believe counsel's expertise, resources, knowledge, or investment in the litigation are more important to assess? Which of these Rule 23 criteria do class members value most? Would class members' application of these criteria lead to the same selection of counsel as the courts? Do they find other factors relevant to an attorney's ability to best represent the interest of the class? Neither courts nor legal scholars to date have queried, perhaps because they believe courts are simply better equipped than class members to determine which attorneys would best represent class members' interests.[29] Or perhaps because the practicalities of class action litigation weigh against class members' involvement in the class counsel selection process.[30] By attempting to answer these questions, we do not take direct issue with that assumption or practicability; rather, as discussed below, we believe courts can make better, more informed decisions with class members' input in mind.

We focus, particularly, on three questions: (1) Do class members value the same criteria courts are obligated to consider under Rule 23 in appointing counsel? (2) Does gender or counsel's diversity factor into class members' choice of counsel? and, (3) Do courts' appointment decisions correlate with class members' preferences? We run a series of human tests based on the three class action cases briefly described above—the Takata defective airbag litigation, the Marriott data breach litigation, and the TikTok consumer privacy litigation—and the attorneys that sought and were ultimately appointed to represent class members in those cases to attempt to answer these questions. Our results show that survey participants (1) *do* value *most* of the criteria Rule 23 requires courts to consider in appointing counsel; (2) claim not to factor in gender or diversity in their evaluation of counsel,

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[26] *See, e.g.*, *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. July 14, 2020); City of Providence, R.I. v. AbbVie, Inc., No. 20-cv-5538, 2020 WL 6049139, at *6 (S.D.N.Y. Oct. 13, 2020) (finding counsel's gender and racial diversity relevant for appointment); *In re* Stubhub Refund Litig., No. 20-md-02951-HSG, 2020 WL 8669823, at *1 (N.D. Cal. Nov. 18, 2020) (noting counsel's efforts to create a diverse legal team as a reason for appointment).

[27] *Robinhood*, 2020 WL 7330596, at *2; *AbbVie, Inc.*, 2020 WL 6049139; *Stubhub Refund Litig.*, 2020 WL 8669823, at *1.

[28] *See* ALVARÉ, *supra* note 25, at 8; Alissa del Riego, *The MDL Class Counsel Draft Gender Gap: An Analysis of Class Counsel Applicants*, at 31 MICH. J. GENDER & L., Part II (forthcoming 2024) [hereinafter del Riego, *The MDL Class Counsel Draft*].

[29] *See* Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. 611, 635–38 (2023).

[30] *Id.* at 639–43.

but perhaps do; and (3) despite valuing the same criteria courts consider, choose different attorneys than the courts.

We begin, in Part I, by describing how class counsel typically gets "hired" to represent injured class members in a federal case. Specifically, we discuss how attorneys came to serve as class counsel prior to Rule 23(g), how remnants of that system remain, and how courts have practically and procedurally employed Rule 23's adequacy criteria in appointing counsel more recently. We also discuss how courts have more recently used Rule 23 to address the fact and criticism that class counsel appointments have gone repeatedly to the same attorneys, most of whom are male and White.[31] In response to studies and criticisms calling attention to this stark gender and racial gap, we note that courts have made a concerted effort to appoint more diverse counsel. But it is unclear whether this effort or more traditional approaches in appointing counsel reflect class members' actual preferences.

We continue in Part II by explaining class members' inexistent role in class action litigation, and why, as a result, class members' preferences are difficult to divine. Finding a void in the scholarship that provides any insight into class members' preferences, we turn to existing literature and research that specifically discusses the attorney-client relationship and preferences individuals and entities, outside the class action environment, value in an attorney.[32] While this research provides some insight, it fails to consider the class action environment specifically, where class members have little to no opportunity to communicate with their attorneys and express their goals during the class litigation.[33] This agency problem makes deciphering class members' preferences all the more important.

Part III discusses our empirical work: the surveys we constructed and disseminated, their results, and their broader implications. We chose three existing and prominent class action cases where various attorneys vied for the position of lead class counsel: a product defect case,[34] a data breach case,[35] and a privacy case.[36] We anonymized the attorneys and described their qualifications to serve as class counsel, based largely on the information they each highlighted in their own applications to the court in each case. We asked participants to do the following: choose and rank criteria they would value in the attorney that would represent them; rank each attorney's level of qualification to represent the class; select the attorney

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[31] *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 87 (2017); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016).

[32] *See, e.g.*, Tamara Relis, *"It's Not About the Money!": A Theory of Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 68 701, 702 (2007).

[33] *See* Almendares, *supra* note 29, at 613.

[34] *See generally In re* Takata Airbag Prods. Liab. Litig., 193 F. Supp. 3d 1324 (S.D. Fla. 2016).

[35] *See generally In re* Marriott Int'l Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447 (D. Md. 2020).

[36] *See generally In re* TikTok, Inc., Consumer Priv. Litig., 617 F. Supp. 3d 409 (N.D. Ill. 2022).

they believed would best represent the interests of the class; explain why they believed their chosen attorney was the best; and select a second attorney they would also retain if they could hire an additional attorney. Our results, which are also discussed in Part III, are interesting. We found that participants valued much of the same criteria that courts consider prior to appointing counsel, but when applying those criteria, they almost invariably selected different attorneys than those appointed by the courts. And—in addition to valuing Rule 23(g)'s criteria—participants also wanted an attorney that would take the time to listen to them, a finding that reflects previous attorney-client research in the individual context. Finally, we found that participants professed not to place too much value on counsel's gender or diversity (only 0.4% of participants indicated that the lawyer's demographics were the most important factors in their choice of attorney), but free responses suggested that perhaps they did consider at least gender diversity.

Part IV proposes a mechanism by which to incorporate class members' preferences when choosing counsel in class action cases. We recognize it would be chaotic, if not impossible, to have class members elect their attorney or attorney team of preference. We thus do not advocate revolutionizing the class counsel selection process by removing the decision from district courts' hands. However, we argue that courts *should* take into account class members' preferences, both generally and in each case specifically. We propose that prior to the appointment of counsel, courts require defendants to identify known class members and have plaintiffs' counsel fund a survey approved by the court and sent out by a third party that asks class members to indicate their preferences of counsel and general relief class members would like counsel to consider. We term this novel procedure representational notice. The court would not be bound by these preferences but should be mindful and reflective of them in appointing counsel.

Finally, the Article concludes by noting that while our research provides some insight into class members' evaluation of counsel and how it may vary from at least some courts', much about the relationship between class counsel, class members, and class member preferences in terms of the goals of class litigation remain to be explored.

I. CLASS COUNSEL YESTERDAY AND TODAY

We define class counsel as the attorneys that spearhead and prosecute the litigation on behalf of class members. Courts often appoint more than one attorney or firm to serve as class and lead counsel.[37] Indeed, depending on the size and

[37] *See, e.g.*, Case Management Order #2 Appointing Lead Counsel, Liaison Counsel, and Steering Committee, *In re* Marriott Int'l Customer Data Sec. Breach Litig., No. 8:19-md-02879-PWG (D. Md. Apr. 29, 2019), ECF No. 238 (appointing team of three attorneys to serve as lead counsel and several others to form part of the class counsel team); Order No. 8 at 3, *In re* General Motors LLC Ignition Switch Litig., No. 1:14-cv-06018 (S.D.N.Y. Aug. 15, 2014), ECF No. 12 (same); Order No. 2: Adoption of Organization Plan and Appointment

demands of the litigation, anywhere between a few to dozens of attorneys or firms may form part of the class counsel team. Some scholars have delineated between what they term as tier 1 and tier 2 class counsel positions or roles—defining tier 1 appointments as lead counsel and tier 2 positions as plaintiff steering or executive committee members, liaison counsel, or specially tasked counsel.[38] This Article focuses on tier 1 or lead-counsel appointments.

Tier 1 appointments consist of attorneys who are primarily responsible for coordinating the prosecution of the litigation, including the drafting of pleadings and presenting of class's position on substantive and procedural issues in both written and oral arguments.[39] They are typically tasked with primary responsibility for creating and implementing a litigation strategy, coordinating discovery, employing experts, managing and assigning tasks to other attorneys that form part of the class-counsel team, negotiating settlements on behalf of class members, and, when necessary, prosecuting the case to trial.[40] Typically, between one and three attorneys or firms serve as lead counsel.[41]

Conversely, tier 2 appointments can vary in size and duties. In some cases, there can be multiple plaintiffs' committees[42] or one committee with numerous attorneys.[43] In other cases, the court may not appoint a plaintiffs' committee or

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of Counsel at 2, *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Prac., & Prod. Liab. Litig., No. 8:10-ml-02151 (C.D. Cal. May 14, 2010), ECF No. 169 (appointing two attorneys to serve as lead counsel and represent consumer plaintiffs).

[38] *See* ALVARÉ, *supra* note 25, at 5.

[39] *See, e.g.*, Outten v. Wilmington Tr. Corp., 281 F.R.D. 193, 202 (D. Del. 2012); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. MDL 05-1720, 2005 WL 2038650, at *5 (E.D.N.Y. Feb. 24, 2006); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

[40] MANUAL FOR COMPLEX LITIGATION, *supra* note 39, at § 10.221, § 40.22; *see also* Order No. 8 *supra* note 37, at 3–4; Order [Resolving ECF Nos. 6, 16, and 22] at 3–6, *In re* Ford Motor Co. Spark Plug & Valve Engine Prod. Liab. Litig., No. 1:12-md-2316 (N.D. Ohio May 4, 2012), ECF No. 29.

[41] It is worth noting that in some cases, courts do not appoint nor do attorneys assign themselves lead counsel positions; instead, they have a plaintiffs' committee assume the responsibilities of lead counsel. In these cases, the committee members effectively function as lead counsel and have been treated as other tier 1 positions. *See* ALVARÉ, *supra* note 25, at 5.

[42] *See, e.g.*, Order Consolidating Related Actions and Appointing Interim Co-Lead Plaintiff's Counsel and Executive and Steering Committees at 3–7, *In re* Apple Inc. Device Performance Litig., 5:18-md-02827 (N.D. Cal. May 15, 2018), ECF No. 99 (appointing a plaintiffs' executive committee and a plaintiffs' steering committee with over 30 attorneys between the two).

[43] *See, e.g.*, Pretrial Order No. 7: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel, *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices & Prod. Liab. Litig. at 2–4, No. 3:15-md-02672-CRB (N.D. Cal. Jan. 21, 2016), ECF No. 1084 (appointing plaintiffs' steering committee with twenty-two members).

liaison counsel.[44] Similarly, in some cases, courts provide clear assignments for members of plaintiffs' committees, liaison counsel, and special counsel.[45] And in other cases, courts leave these attorneys' assignments largely to the discretion of lead counsel.[46] In these cases, it is difficult to gather what role, if any, these other attorneys had in the litigation. Their role can be extensive, but it can also be delegated to that of merely assisting with funding the litigation. As such, it is difficult to assess what impact, if any, these attorneys have on the litigation.

Lead counsel's role and influence over the litigation, on the other hand, is clear. Regardless of other attorneys' roles in the litigation, lead counsel is ultimately responsible for all strategic decisions. They may consider the opinions of others and ultimately delegate tasks to other members of the team. But the few attorneys spearheading the litigation decide, on behalf of the class, the claims pursued, the injuries for which a remedy is sought, the discovery requested, the litigation strategies employed, the experts engaged, the resources deployed, and the relief that would be acceptable to the class.[47] These decisions are not without check, as the court, for example, has the final determination of whether a settlement is fair and adequate, and class members can object or opt out of a settlement. But these checks do not materialize during the course of the litigation. Given lead counsel's significant influence over the litigation and its outcome and other attorneys' indeterminate impact, we focus on lead counsel appointments in this Article.

A. Self-Appointments: A Negotiated Ascension to Class Counsel

Attorneys have competed to serve as class counsel in large federal class actions for decades.[48] In the past, courts had no involvement in these competitions, and attorneys would individually come to an agreement outside the limelight as to who would run a litigation.[49] These deals often impacted future cases, where attorneys

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[44] *See, e.g.*, Order on Appointment of Interim Class Counsel, *In re* Dollar General Corp. Motor Oil Mktg. & Sales Pracs. Litig., No. 4:16-cv-00607 (W.D. Mo. June 22, 2016), ECF No. 11 (showing the court not appointing plaintiffs' committee); Case Management Order No. 2 – Plaintiffs' Leadership Structure, *In re* Recalled Abbott Infant Formula Prod. Liab. Litig., No. 1:22-cv-04148 (N.D. Ill. Sept. 8, 2022), ECF No. 23 (showing the court not appointing liaison counsel).

[45] *See* del Riego, *Driving Diverse Representation*, *supra* note 22, at 83–84.

[46] *Id.*

[47] *See, e.g.*, Outten v. Wilmington Tr. Corp., 281 F.R.D. 193, 202 (D. Del. 2012); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. MDL 05-1720, 2005 WL 2038650, at *5 (E.D.N.Y. Feb. 24, 2006); *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 39, at § 10.221.

[48] THIRD CIRCUIT TASK FORCE, SELECTION OF CLASS COUNSEL FINAL REPORT 6 (2002), https://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf [https://perma.cc/DR6R-2LUV] (noting competition to control common fund class action litigation amongst lawyers has existed for over a quarter of a century).

[49] ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS 90 (2019); del Riego, *Driving Diverse Representation*, *supra* note 22, at 76.

that ceded a position in one case would be compensated by receiving a lead position in other cases.[50] It is possible to see, of course, how these backroom negotiations did not always serve class members' best interests, as an attorney that may have been qualified to manage a products liability class action may not be qualified to manage an antitrust class action arising later that year. The process, moreover, favored seasoned repeat players and allowed little entry to new attorney participants.[51] Nevertheless, the process operated nearly unchecked for years. Courts, in these earlier days, would make no opinion or comment on counsel, until the time of class certification. Typically, if a class was certified, the court would appoint the attorneys managing the litigation as class counsel, and if the class was not certified, the attorneys' bid would end there.

In more recent decades, however, courts have appointed counsel at the outset of the litigation before class certification. This earlier appointment trend has happened for two primary reasons: (1) unresolved competition amongst counsel and (2) class certification occurring much later in the litigation process. In larger class action lawsuits or suits filed in multiple districts on behalf of the same class members that are consolidated by the Judicial Panel for Multidistrict Litigation, courts have appointed counsel earlier in the litigation. Indeed, it would be impractical, inefficient, and chaotic to have multiple and uncoordinated plaintiffs' counsel trying to manage the same litigation. Because of this and the fact that class certification today occurs only after extensive litigation on the pleadings, discovery, and even sometimes summary judgment, it became impractical to appoint counsel two to three to perhaps even more years into the litigation.

With this trend in mind, in 2003, Congress amended Rule 23 of the Federal Rules of Civil Procedure to add subsection (g), which focuses on the appointment of class counsel[52] and contemplates the appointment of interim class counsel prior to class certification.[53]

B. Court Class Counsel Appointments Under Rule 23(g)

1. Appointment of Counsel per Rule 23(g)'s Mandatory Adequacy Considerations

Per Rule 23, courts can only appoint class counsel if they are adequate. To determine adequacy, under the Rule, courts *must consider*: (1) the work counsel has put forth to date identifying or investigating claims in the case;[54] (2) counsel's experience handling class actions, other complex litigation, and claims of the type

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[50] *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 93 (2015) [hereinafter Burch, *Judging Multidistrict Litigation*].

[51] *See* Brooke D. Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 IND. L.J. 617, 649 (2018).

[52] THIRD CIRCUIT TASK FORCE, *supra* note 48, at 65 n.191.

[53] FED. R. CIV. P. 23(g)(3).

[54] FED. R. CIV. P. 23(g)(1)(A)(i).

asserted in the action;[55] (3) counsel's knowledge of the applicable law;[56] (4) the resources counsel will commit to representing the class;[57] and (5) counsel's ability to fairly and adequately represent the interests of the class.[58] If only one attorney applies to serve as class counsel, the court must still ensure that attorney is "adequate" prior to appointment.[59] If more than one attorney applies that is "adequate," "the court must appoint the applicant best able to represent the interests of the class."[60]

Rule 23(g)(1)(C) permits courts to request from counsel interested in representing the class information pertinent to their appointment.[61] Courts typically issue an order requiring attorneys interested in representing the class to submit a short statement as to their qualifications to serve as class counsel, including work they have done in investigating claims in the present litigation, prior relevant class action and litigation experience, and a commitment of time and resources to the litigation.[62] After reviewing these submissions and perhaps granting oral argument on the same, courts determine which counsel to appoint as interim counsel to manage the litigation.

When decided or redecided at the class-certification stage, Rule 23(g)'s adequacy factors are undoubtedly easier to evaluate. By the time class certification occurs, counsel has often performed significant work conducting discovery into the factual allegations in the complaint and researching and litigating the validity of the claims asserted. Counsel's knowledge of the law will also have become more apparent by this stage, having litigated before the court for a longer period and briefed various legal issues. The resources counsel has dedicated to prosecuting claims on behalf of the class are also more concrete at the class-certification stage. Whether counsel was able to fairly and adequately represent the interests of the class can also be more fully evaluated at this stage. The only factor that courts can decide just as well *ex ante* when appointing interim class counsel, as opposed to class counsel, is counsel's prior litigation experience. Nevertheless, courts appointing interim counsel are required to make such adequacy determinations at the outset of the litigation.

Caselaw interpreting Rule 23(g)'s mandatory criteria is not particularly extensive and provides only little guidance, as courts often issue appointment orders

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[55] FED. R. CIV. P. 23(g)(1)(A)(ii).

[56] FED. R. CIV. P. 23(g)(1)(A)(iii).

[57] FED. R. CIV. P. 23(g)(1)(A)(iv).

[58] FED. R. CIV. P. 23(g)(2) (citing FED. R. CIV. P. 23(g)(1) and (4)).

[59] *Id.*

[60] *Id.*

[61] FED. R. CIV. P. 23(g)(1)(C).

[62] *See, e.g.*, Order Setting Case Mgmt. Conference, *In re* ZF TRW Airbag Control Units Prod. Liab. Litig., No. 2:19-ml-02905 (C.D. Cal. Sept. 6, 2019), ECF No. 5; Pretrial Order No. 1: Initial Conference at 5, *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prod. Liab. Litig., No. 3:17-md-02777-EMC, (N.D. Cal. Apr. 14, 2017), ECF No. 6 [hereinafter Pretrial Order No. 1].

without specifically discussing counsel's adequacy.[63] Generally, however, courts considering the work counsel has done identifying and investigating claims focus on counsel's efforts researching relevant caselaw and reviewing all relevant publicly available information. Courts also consider whether counsel consulted industry experts, the time counsel dedicated to such endeavors, whether counsel was the first to file a lawsuit, the hours counsel has spent on the action to date, and any efforts counsel to date has employed to prosecute or resolve the litigation after filing its complaint.[64] However, the firm or attorney to have performed the most work on the case to date is not necessarily the best suited to represent the class. Perhaps some of the work was unnecessary or economically unwise at an early stage of the litigation.

Analysis of proposed counsel's experience is most heavily weighed[65] and usually understandably conflated with discussion of counsel's knowledge of the law.[66] In discussing both, courts typically find counsel adequate when they have some prior experience in class action or complex litigation or litigation involving the types of claims asserted in the instant action.[67] In making these determinations, courts look to the quality of the pleadings filed by counsel, declarations filed or statements made in filings by proposed counsel, and counsel's curriculum vitae or letters submitted to the court, along with counsel's law firm's overall experience in similar types of litigation.[68] Sometimes courts will also discuss counsel's successes or achievements in prior, similar cases.[69] But experience may be an inexact measure of competency as younger—and perhaps more capable—attorneys may prosecute the action more effectively.[70]

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[63] del Riego, *Driving Diverse Representation*, *supra* note 22, at 79 (noting "courts often issue appointment orders without specifically discussing adequacy").

[64] *See, e.g.*, Smallman v. MGM Resorts Int'l, No. 2:20-cv-00375-GMN-NJK, 2021 WL 326135, at *3 (D. Nev. Feb. 1, 2021) (noting counsel's failure to identify particular balancing test applied in complaint indicated that investigative factor did not weigh in their favor); City of Providence, R.I. v. AbbVie, Inc., No. 20-cv-5538 (LJL), 2020 WL 6049139, at *4 (S.D.N.Y. Oct. 13, 2020); Bernstein v. Cengage Learning, Inc., No. 18 Civ. 7877 (VEC) (SLC), 2019 WL 632476, at *1 (S.D.N.Y. 2021); Bounasera v. Honest Co., 318 F.R.D. 17, 18–19 (S.D.N.Y. 2016); *In re* Municipal Derivatives Antitrust Litig., 252 F.R.D. 184, 186 (S.D.N.Y. 2008).

[65] del Riego, *Driving Diverse Representation*, *supra* note 22, at 119 (finding in sample of surveyed cases that "[t]he most cited reason for appointing counsel was experience").

[66] *See, e.g.*, *AbbVie Inc.*, 2020 WL 6049139, at *5–6; *Bernstein*, 2019 WL 632476, at *5–8.

[67] *See, e.g.*, Bounasera, 318 F.R.D. at 19.

[68] *See, e.g.*, *In re* Municipal Derivatives Antitrust Litig., 252 F.R.D. at 186; Anderson v. Fiserv., Inc., Nos. 09 Civ. 5400 & 09 Civ. 8397, 2010 WL 571812, at *2 (S.D.N.Y. Jan. 29, 2010).

[69] *See, e.g.*, Pretrial Order No. 3: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel, *In re* Chrysler-Dodge Jeep EcoDiesel Mktg., Sales Prac., and Prod. Liab. Litig., 3:17-md-02777-EMC, at 2 (N.D. Cal. June 19, 2017), ECF No. 173 [hereinafter Pretrial Order No. 3].

[70] *See* Macey & Miller, *supra* note 7, at 95.

When evaluating the resources counsel will commit to representing the class, courts focus on the number of attorneys at each of the prospective appointees' law firms, the firm's financial resources and history of employing these resources in past litigation, the number of offices the firm has, the location of those offices, counsel's commitment to employing the necessary human and financial resources, and the work counsel has committed to representing the class to date.[71] Typically, the court relies on counsel's self-serving statements that they will commit the resources necessary to the litigation.[72] While relevant to the prosecution of the litigation and litigation funding, lead counsel's resources may not be a great adequacy measure. A plaintiffs' committee could also provide funding, without sacrificing the quality of representation. Indeed, the richest, best-funded attorneys may not necessarily be the "best."

Few courts discuss counsel's ability to represent the interests of class members fairly and adequately. Most courts make this finding with little to no discussion.[73] The few opinions addressing this finding focus on situations where "class counsel represents parties whose interests are fundamentally conflicted,"[74] counsel commits an ethical violation,[75] and counsel's pleadings appear incompetent.[76]

Outside of these instances, courts seemingly presume that counsel that otherwise meets Rule 23's other requirements will also fairly and adequately represent the interests of the class. Indeed, some scholars have argued that Rule 23(g)'s requirements are "easily met" allowing any attorney in good standing to be deemed adequate to represent the class, absent any evidence to the contrary.[77] At least a few court opinions are in accord, stating that "[i]n the absence of a showing to the contrary, adequacy of counsel is often presumed."[78]

According to courts, the best counsel to adequately and fairly represent the interests of class members appears to be the one that courts believe best meets Rule 23(g)(1)(A)'s four requirements (time expended to date, experience, knowledge of

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[71] *See, e.g.*, *AbbVie Inc.*, 2020 WL 6049139, at *4; Bounasera, 318 F.R.D. at 19.

[72] *See, e.g.*, Ames v. Robert Bosch Corp., No.1:07-CV-03426, 2009 WL 803587, at *7 (N.D. Ohio Mar. 24, 2009).

[73] *See, e.g.*, Earl v. Boeing Co., 339 F.R.D. 391, 447 (E.D. Tex. 2021); Rescigno v. Statoil USA Onshore Prop., Inc., 2020 WL 383303, at *5 (M.D. Pa. July 16, 2020).

[74] W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co., 737 F. App'x 457, 464 (11th Cir. 2018); *see also In re* Pharma. Indus. Average Wholesale Price Litig., 588 F.3d 24, 36 n.12 (1st Cir. 2009).

[75] *See, e.g.*, Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 919 (7th Cir. 2011) (noting that counsel "demonstrated a lack of integrity that casts serious doubt on their trustworthiness"); J.S.X. *ex rel.* D.S.X. v. Foxhoven, 330 F.RD. 197, 216–18 (S.D. Iowa 2019).

[76] *See* Gustafson v. Travel Grp., Inc., No. 20-2272-KHV, 2021 WL 1694029, at *3 (D. Kan. Apr. 29, 2021); Kulig v. Midland Funding, LLC, No. 13 Civ. 4715(PKC), 2014 WL 5017817, at *3–4 (S.D.N.Y. Sept. 26, 2014).

[77] RUBENSTEIN, *supra* note 8, at § 3:72.

[78] International Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Kelsey-Hayes Co., No. 2:11-cv-14434, 2015 WL 1906133, at *3 (E.D. Mich. Apr. 28, 2015) (quoting Abby v. City of Detroit, 218 F.R.D. 544, 548 (E.D. Mich. 2003)).

the law, and resources).[79] The best counsel, however, can also be determined by turning to Rule 23(g)'s discretionary considerations, which are discussed in the section below.

2. Rule 23(g)'s Discretionary Adequacy Considerations

In addition to the mandatory criteria discussed above, under Rule 23(g) courts "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[80] And courts—at least in some instances—do. Courts have, for example, considered the amount of fees or percentage of the fees counsel would request in a settlement or successful trial;[81] arrangements or agreements negotiated with other counsel;[82] the level of support counsel receives from other attorneys that have filed claims in the case;[83] the attorneys' commitment to cooperate and coordinate with other attorneys involved in the case;[84] and the gender and racial diversity of applicants or their respective law firms.[85] The weight courts give to these additional factors, however, is not clear, as appointment orders often offer little explanation for the court's choice of counsel.[86] However, this section briefly discusses some of the ways courts have considered these factors.

Perhaps the most discussed discretionary factor to date is prospective counsel's attorneys' fees. Rule 23(g) authorizes courts to ask prospective counsel about the

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[79] *See, e.g.*, Khan v. Bd. of Dirs. of Pentegra Defined Contribution Plan, No. 20-CV-07561, 2021 WL 663386, at *2–3 (S.D.N.Y. Feb. 19, 2021); Hodges v. Bon Secours Health Sys., Inc., Nos. RDB-16-1079 & RDB-16-1150, 2016 WL 4447047, at *2 (D. Md. Aug. 24, 2016).

[80] FED. R. CIV. P. 23(g)(1)(B).

[81] Several courts inquire into attorneys' fees prior to appointing counsel. Such an inquiry was contemplated in Rule 23(g), which allows courts to order prospective counsel "propose terms for attorney's fees and nontaxable costs." FED. R. CIV. P. 23(g)(1)(C).

[82] *See* FED. R. CIV. P. 23(g)(1)(C) advisory committee's notes to 2003 amendment ("[T]he court may direct applicants to inform the court concerning any agreements about a prospective award of attorney's fees or nontaxable costs, as such agreements may sometimes be significant in the selection of counsel"); *see also* RUBENSTEIN, *supra* note 8, at § 3.82.

[83] *See, e.g.*, Benkle v. Ford Motor Co., Nos. CV 16-1569-DOC (JCGx), SA CV 17-0281-DOC (JCGx), SA CV 17-0290-DOC (JCGx), SA CV 17-0292-DOC (JCGx), 2017 WL 8220707, at *5 (C.D. Cal. Apr. 28, 2017) (noting that counsel had received support from twenty-one other attorneys of record).

[84] *See, e.g.*, Order (1) Appointing Lead Plaintiffs' Counsel and (2) Setting Date for Objections to Common Benefit Work and Expenses Order, *In re* Gen. Motors Corp. Air Conditioning Mktg. & Sales Pract. Litig. at 3, No. 2:18-md-02818 (E.D. Mich. Apr. 11, 2018), ECF No. 13 (noting counsel's ability to cooperate with other attorneys).

[85] *See generally* Martin v. Blessing, 571 U.S. 1040, 1041 (2013) (Alito, J., statement); *see also* Pub. Emps.' Ret. Sys. of Miss. v. Goldman Sachs Grp., Inc., 280 F.R.D. 130, 142 n.6 (S.D.N.Y. 2012); Spagnola v. Chubb Corp., 264 F.R.D. 76, 95 n.23 (S.D.N.Y. 2010).

[86] del Riego, *Driving Diverse Representation*, *supra* note 22, at 119 (finding that of class action MDLs surveyed only 25% of courts' "appointment orders contained any significant explanation for appointments").

attorneys' fees they will seek in the event of a settlement or successful trial,[87] presumably assuming the same is relevant to counsel's ability to fairly and adequately represent the class. The thinking behind such an inquiry is that individual and corporate plaintiffs are usually cost sensitive and consider attorneys' fees and hourly rates prior to hiring counsel as these fees offset any recovery.[88] The practice has sometimes resulted in a reverse auction of sorts, where counsel bid with lower fees to represent the class, and courts appoint counsel with the lowest fee. This practice, however, has not been without controversy. Although courts must nonetheless find counsel adequate under Rule 23(g), critics have noted that the attorneys are often not the best counsel.[89] It is also often difficult to predict at the outset of the litigation what fair fees might be, leading to an over or under estimation of fees. An overestimation charges the class too much, but an underestimation is worse because it disincentivizes counsel to put forth the resources necessary to successfully prosecute the action. Moreover, courts ultimately decide at the end of the litigation what fees to award, such that an inquiry prior to appointing counsel is rather unnecessary.[90]

Courts have also inquired into arrangements counsel may have struck with other attorneys regarding splitting fees or costs.[91] This inquiry may be relevant, as it could involve deals counsel has made in the present case or in previous cases with other counsel. Practically, however, it is unclear how helpful this inquiry might be. Counsel is aware that courts inquire into any arrangements, and, as such, these become verbal, vague, or implied but unstated. Attorneys thus silently trust that within the small repeat player community they will be compensated, and unspoken agreements are understood but not made, preventing any such disclosure to the courts.

Courts also often consider the level of support candidates receive from other attorneys involved in the litigation.[92] Several have criticized courts' inquiry into the same as a remnant of private ordering that the more transparent, court-led application process and Rule 23(g) were meant to eliminate. Presumably courts consider attorneys' support as a testament both to counsel's competence and ability to work cooperatively with other attorneys. However, as critics have noted, support is not

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[87] *See* FED. R. CIV. P. 23(g)(1)(C).

[88] *See, e.g.*, *In re* Auction Houses. Antitrust Litig., 197 F.R.D. 71, 82–83 (S.D.N.Y. 2000); *In re* Oracle Sec. Litig., 131 F.R.D. 688, 693 n.12 (N.D. Cal. 1990); *see also* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 670 (2002).

[89] THIRD CIRCUIT TASK FORCE REPORT, *supra* note 48, at 23.

[90] del Riego, *Driving Diverse Representation*, *supra* note 22, at 134 ("Courts must ultimately approve attorneys' fees . . . .").

[91] *See, e.g.*, Order, *In re* Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig. at 1, No. 2:11-md-02233 (S.D. Ohio July 26, 2011), ECF 19.

[92] *See, e.g.*, Pretrial Order No. 1, *supra* note 62, at 3; Pretrial Order No. 2: Applications for Appointment of Plaintiff's Lead Counsel and Steering Committee Members, *In re* Volkswagen Clean Diesel Mktg., Sales Pracs. & Prod. Liab. Litig. at 2, No. 15-md-02672 (N.D. Cal. Jan. 21, 2016), ECF No. 336.

necessarily a testament of counsel's competence, but rather of deals counsel make to gain support for appointment in other litigations.[93] Counsel's cooperative tendencies, while not necessarily counterproductive, can also have the same effects as consensus bias—the false consensus effect that causes individuals to see their own judgments or assumptions as common and appropriate.[94]

Finally, courts have made a concerted effort in the last decade to consider diversity prior to appointing counsel.[95] Several recent studies confirmed what was already being anecdotally observed—White male repeat players dominated appointments in class actions and multidistrict litigations ("MDLs"). One study, for example, found that between 2011 and 2015 women were appointed to less than 17% of leadership positions in MDLs.[96] Another 2013 study that focused on the Northern District of Illinois found that only 13% of lead lawyers in class actions were women.[97] A study that looked at seventy-three products liability and sales practices MDLs pending in 2013 (spanning from 1991 to 2013),[98] found that 62.8% of leadership roles went to the same repeat players, who were mostly male and White.[99] And a more recent study also found that from 2015 to 2019, approximately only 5% of lawyers appointed to leadership positions in MDLs identified as non-White.[100]

These observations and sobering statistics did not go unnoticed. Practitioners and academics have proposed different ways to narrow the diversity gap in class-counsel appointments. Many of these proposals have been summarized in a collaborative report recently updated in March 2021 by the Complex Litigation Center at the George Washington Law School aimed at creating better class counsel appointment practices that increase diversity in the role of class counsel.[101] Similarly, courts have made a concerted effort to appoint more diverse counsel. In 2020, for example, one district court denied an application for class counsel because it was concerned by the legal team's lack of diversity—all eleven attorneys put

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[93] *See* Burch, *Judging Multidistrict Litigation*, *supra* note 50, at 140; del Riego, *Driving Diverse Representation*, *supra* note 22, at 127 (noting considering support "thwarts the competitive process and encourages attorneys and firms to form coalitions that are based on the same considerations seen in slate appointments").

[94] Burch, *Judging Multidistrict Litigation*, *supra* note 50, at 98.

[95] *See, e.g.*, *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. 2020); Pretrial Order No. 3, *supra* note 69, at 4.

[96] ALVARÉ, *supra* note 25, at 5–6.

[97] SCHARF & LIEBENBERG, *supra* note 25.

[98] BURCH, *supra* note 49, at 77; Burch & Williams, *supra* note 31, at 1450; Burch, *Judging Multidistrict Litigation*, *supra* note 50, at 95–96.

[99] *See* Burch & Williams, *supra* note 31, at 1471.

[100] Bronstad, *supra* note 25.

[101] JAMES F. HUMPHREYS COMPLEX LITIG. CTR., G.W. L. SCH., INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP POSITIONS IN MDL AND CLASS-ACTION LITIGATION (2021), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Diversity%20Master%20Revised_1123.pdf [https://perma.cc/S2VD-GF99].

forward were male.[102] Other courts have similarly called for diversity in class counsel applications.[103] And it seems apparent that these concerted efforts are making a difference and female attorneys are being appointed to more class counsel positions.[104]

But do class members value the same criteria that courts use to evaluate and appoint class counsel? Are there other qualities in counsel that class members value? Do they support courts' efforts to appoint more diverse counsel? In Part II, we look into the relationship between class counsel and class members and existing literature in search for answers to these questions.

II. LEGAL REPRESENTATION PREFERENCES

We begin Part II by discussing class members' relationship, or rather lack of a relationship, with class counsel and why such renders class members' preferences impossible to discern. We then turn to the existing literature on clients' attorney preferences. As there is scant information on class action plaintiffs' preferences for attorney selection, we expand our review to include other types of litigation: when an individual plaintiff or defendant hires an attorney, what characteristics or qualities matter most?[105] Embedded within this analysis is the matter of representation: in a class action, counsel literally represents a group, and thus we draw on the representational literature[106] to further explore class action legal representation.

A. Class Members: A Disenfranchised Class with Unknown Preferences

Foundational to understanding class action representation is understanding the key relationship between attorneys and plaintiffs. In a class action, no class member, including the named plaintiff, can order counsel to do something.[107] In essence,

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[102] *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. July 14, 2020).

[103] *See, e.g.*, Pretrial Order No. 3, *supra* note 69, at 2–4; Jody Godoy, *Ohio Judge Calls for Diverse Counsel to Lead First Energy Shareholder Lawsuit*, REUTERS LEGAL (Nov. 17, 2020), https://static.reuters.com/resources/media/editorial/20210125/firstenergy--godoy.pdf [https://perma.cc/QN3B-EJ3V].

[104] *See* del Riego, *The MDL Class Counsel Draft*, *supra* note 28.

[105] *See, e.g.*, Clark D. Cunningham, *What Do Clients Want from Their Lawyers*, 2013 J. DISP. RESOL. 143 (2013) (discussing social science research of causes of client dissatisfactions); Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011).

[106] *See generally* Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POLS. 628 (1999); Leslie A. Schwindt-Bayer & William Mishler, *An Integrated Model of Women's Representation*, 67 J. POLS. 407, 410 (2005); Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORD. L. REV. 3042 (2013).

[107] *See* FED. R. CIV. P. 23(g)(1)(B), Notes of Advisory Committee on Rules – 2003 Amendment.

lawyers representing a class act as independent actors or trustees, not necessarily as agents.[108] This mirrors the political system, where legislatures represent their constituents but are not beholden to constituents' specific demands. Indeed, in the political domain, many people come together to further their individual and group interests—not unlike what's seen in class actions. But even in politics, constituencies have the opportunity to vote on their representatives and communicate with them. In class actions, class members do not.

Class members do not get to choose their counsel at the outset of the litigation.[109] They thus have no opportunity to evaluate the criteria courts consider when appointing counsel. Although adequacy of representation, as discussed above,[110] is required, it fails to take into account the expressed individual and possibly collective preferences and interests of class members.[111] Further, the majority of class members have no interaction with class counsel throughout the entirety of the litigation.[112] Even class members that serve as class representatives rarely hire or choose their attorneys.[113] Instead, attorneys identify and search for class members. Other times class members have contact with referral counsel or other attorneys that filed claims (but that are not ultimately appointed class counsel), and class members never communicate with class counsel.[114] To the extent that any class representatives actually sought and retained class counsel, they are rarely—if ever—informed that other attorneys are also interested in representing them in the litigation, even during the courts' appointment process.

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[108] Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1987 (2011).

[109] *See* Macey & Miller, *supra* note 7, at 21 ("[C]lients do not pick their attorneys in class . . . suits . . . .").

[110] *See infra* Part I.B.

[111] *See, e.g.*, David A. Dana, *Adequacy of Representation After* Stephenson*: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279 (2006); Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1852–59 (1998); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687 (2004); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997).

[112] *See* Alissa del Riego & Joseph Avery, *The Class Action Megaphone: Empowering Class Members with an Empirical Voice*, 76 STAN. L. REV. ONLINE 1, 3 (2023) ("Class members are sidelined at all points in the litigation process.").

[113] *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 7, at 679–82 (noting "the pattern is typically one of the lawyer finding the client, rather than vice versa").

[114] *See id.* at 681–83; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1364–65 (1995) [hereinafter Coffee, *Class Wars*].

In the event of a settlement, class members can raise objections related to the attorneys that served as class counsel.[115] But these objections must attack counsel's adequacy,[116] a finding already made by the court if it appointed counsel on an interim basis. This makes any objection as to adequacy an uphill battle unless the objection can point to specific misconduct or incompetency in the current litigation.[117] Objections relating to counsel are rare and typically limited to counsel representing conflicting class member interests.[118] Thus, voicing an objection that other, more qualified or "better" attorneys should have managed the litigation is simply not a valid objection. Indeed, such an objection would attack the court's appointment, rather than counsel's adequacy. Class members thus have no meaningful opportunity to hire or object to the attorneys that courts appoint to represent them at the outset or culmination of the litigation.

Moreover, while class counsel's interests are seemingly shared with class members (i.e., their shared interest in recovery), critics have noted several instances when interests are not aligned, and class members' interests can be sacrificed by counsel in exchange for a larger fee, less effort to obtain a fee, and reputational victories.[119] And even though class members can, as noted, object to a settlement and particular terms within a settlement, they are not aware of settlement offers that were previously rejected, nor can they easily question counsel's decision to go to trial instead of pursuing a settlement.[120] Moreover, critics of class counsel's unfettered role have noted that other principles, such as monitoring and bonding that reduce agency costs, are simply not present in class actions.[121] This is because class members and representatives are not sufficiently informed, educated, nor financially invested to monitor counsel. And the constituencies class counsel is most concerned about impressing are co-counsel who have some sway over fees, cost recovery, and participation in future litigation;[122] defense counsel with whom reputation for settlement matters;[123] and the court that ultimately approves counsel's appointment

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[115] *See* FED. R. CIV. P. 23(e)(2)(A).

[116] *See id.*; *see also* RUBENSTEIN, *supra* note 8, at § 13:49.

[117] *See* FED. R. CIV. P. 23(e)(2), Notes of Advisory Committee on Rules – 2018 Amendment.

[118] *See, e.g.*, Rutter & Willbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187–88 (10th Cir. 2002).

[119] *See, e.g.*, Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 7, at 712–20; Coffee, *Class Wars*, *supra* note 114, at 1367–68.

[120] *See* Wal-Mart Stores, Inc. v. Visa USA, Inc., 396 F.3d 96, 116–17 (2d Cir. 2005) ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (quoting *Ir re* PaineWebber Ltd. P'ships Litig., 147 F.3d 132, 138 (2nd Cir. 1998)); *In re* Advance Battery Tech., Inc. Sec. Litig., 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions . . . where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation.").

[121] *See* Macey & Miller, *supra* note 7, at 19–22; *see also* Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 917 (7th Cir. 2011).

[122] *See* Macey & Miller, *supra* note 7, at 21.

[123] *See id*.

and fees—not class members. And even class representatives, who are more involved in the litigation, fair no better, making virtually no litigation decisions.[124] Class members thus have no real voice or representation in the litigation purportedly conducted on their behalf.

Given the lack of communication between class members and class counsel, it is unclear what *class members'* representational preferences are. We thus turn to existing research and literature for the answer, as little evidence exists in practice.

B. Clients' Attorney Preferences

In thinking about what clients want *in* their attorneys, we might divide the literature in a few ways. First, there is literature that directly takes up clients' beliefs and judgments: whether they like their attorneys; whether they are satisfied with their attorneys; whether they eventually file malpractice suits against their attorneys; and so on. Second, there is literature that indirectly takes up the topic: whether other parties, such as jurors, have positive or negative views of the attorneys with whom they have interacted. While juror beliefs and judgments might not perfectly cohere with those of clients, they certainly provide some worthy insight, and thus, we also discuss them in this Section.

So, what do clients want of and from their attorneys? The obvious answer—the traditional one—is that they want money. This is not such an outlandish supposition as the legal system, especially the civil legal system, is designed to provide resolution largely in terms of money. To a lesser extent, it provides resolution in the form of changed behavior, that is, either specific performance or injunction. This understanding of clients and what they want (the best possible financial result) is the understanding adopted by the bulk of attorneys.[125] But it has been shown, again and again, to be in tension with the actual aims and preferences of plaintiffs and defendants. According to Professor Relis, only a minority of plaintiffs say that financial compensation was even a secondary aim of theirs.[126] Rather, plaintiffs largely wanted extra-legal aims, such as admissions of fault, explanations, apologies, and the like.[127] These findings cohere with our intuition that, while the dollar amounts of outcomes matter, clients tend to care most—or perhaps foremost—about having a voice in the process and being heard.[128] As Professor Tyler put it, "[c]lients care most about the process," especially "having their problems or disputes settled

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[124] *See id.* at 5 (noting class representatives are a "mere figurehead" and usually do nothing to monitor attorneys or ensure zealousness of representation); Almendares, *supra* note 29, at 613 (same).

[125] *See* Relis, *supra* note 32, at 702–05.

[126] *See id.* at 702.

[127] *See id.*

[128] *See, e.g.*, Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008); Cunningham, *supra* note 105, at 146–51; *see also* Farshad Ghodoosi & Monica M. Sharif, *Justice in Arbitration: The Consumer Perspective*, 32 INT' L J. CONFLICT MGMT. 626, 633 (2021).

in a way that they view as fair. The second most important issue to clients is achieving a fair or equitable settlement. The least important factor is the number of assets they end up winning."[129]

A recent study by the Institute for the Advancement of the American Legal System nicely summarized the space:

> Clients are, of course, satisfied when their lawyers are knowledgeable about the law, advocate effectively on their behalf, and bring about desired case outcomes. But clients value more than just legal acumen. They want a lawyer who communicates effectively, understands how clients want to be treated . . . lawyers also need to think like a client.[130]

This disparity between what clients want and what attorneys think clients want is perhaps what is driving discontent in the space. For example, an American Bar Association ("ABA") report concluded that a majority of corporate counsel do not like the firms with which they work.[131] The ABA report cited drew upon a BTI Consulting survey that included over 1,000 interviews with general counsel at large corporations.[132] The main complaints of counsel consisted of poor communication (failure to keep clients adequately informed) and poor representation (lack of client focus).[133] As one general counsel put it: attorneys need to do a better job of "[p]aying attention to the overall philosophy and goals of the client."[134]

How about the attorneys themselves? Do their demographic characteristics—such as sex, gender, race, age—matter to clients? We know that the obverse is true: demographic characteristics of clients seem to matter to attorneys. Professors Eisenberg and Johnson surveyed 238 capital defense lawyers and found that the White attorneys showed White preference implicit bias.[135] Similarly, Professor Edkins surveyed ninety-five criminal defense attorneys, and she found that plea bargains recommended for Black clients contained more severe sentences than did

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[129] Tom Tyler, *Client Perceptions of Litigation – What Counts: Process or Result?*, TRIAL MAG. 40 (July 1988).

[130] LOGAN CORNETT, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, THINK LIKE A CLIENT 1, 19 (2019), https://iaals.du.edu/sites/default/files/documents/publications/think_like_a_client.pdf [https://perma.cc/9678-DGM3].

[131] Cunningham, *supra* note 105, at 143 (quoting Sandra Prufer, *In-House Counsel Axing Law Firms, Survey: 70 Percent of Big Companies Dissatisfied with Primary Outside Counsel*, ABA J. REP. (Sept. 8, 2006)).

[132] *Id.* at 144 (citing BTI CONSULTING GRP., HOW CLIENTS HIRE, FIRE AND SPEND: LANDING THE WORLD'S BEST CLIENTS (2006)).

[133] *Id.* (citing BTI CONSULTING GRP., HOW CLIENTS HIRE, FIRE AND SPEND: LANDING THE WORLD'S BEST CLIENTS 42 (2006)).

[134] *Id.* (citing BTI CONSULTING GRP., HOW CLIENTS HIRE, FIRE AND SPEND: LANDING THE WORLD'S BEST CLIENTS 31 (2006)).

[135] Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1546, 1552–53 (2004).

those recommended for White clients.[136] Professor Avery and colleagues provided rather definitive evidence of such biases and how they impact interpersonal attitudes between attorneys and their own clients.[137] Additional scholars have also speculated that implicit bias drives unequal treatment of criminal defendants by their attorneys.[138]

But what about the demographics of the attorneys? Research on jurors provides some clues. Extralegal characteristics of attorneys appear to impact jurors' decision making.[139] Much research has shown that, when it comes to persuasion contexts, males tend to be viewed as more credible than females,[140] and credibility is central to an attorney's role. Through an experimental design, psychologists Hahn and Clayton examined the influence of defense attorneys' gender on verdicts and ratings.[141] Participants read a summary of a case, viewed a video of either a passive or an aggressive male or female attorney interrogating a witness, and rendered a verdict. Participants also rated the attorneys on various characteristics. The results showed that male attorneys fared better (in terms of obtaining acquittals), and this seemed to be owing to expectations that male attorneys should be more aggressive.[142] Even worse, aggressive female attorneys appeared to be penalized, such that their clients had higher rates of being convicted.[143]

Psychologists Hodgson and Pryor also investigated the relationship between an attorney's gender and various outcomes, including perceived credibility, verdicts, and attitudes toward retaining the attorney.[144] The results showed that female jurors rated female attorneys as significantly less credible, while male jurors' ratings did not show differences across sex. Across all participants, defendants represented by female attorneys were more likely to be found guilty, and male attorneys were more likely to be retained than female attorneys. While this study is a few decades old, it

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[136] Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & HUM. BEHAV. 413, 413, 417 (2011).

[137] *See* Joseph J. Avery, Jordan Starck, Yiqiao Zhong, Jonathan D. Avery & Joel Cooper, *Is Your Own Team Against You? Implicit Bias and Interpersonal Regard in Criminal Defense*, 161 J. SOC. PSYCH. 543 (2021).

[138] *See, e.g.*, Jessica Blakemore, *Implicit Racial Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833 (2016); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); L. Song Richardson & Phillip A. Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

[139] *See* Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 L. & HUM. BEHAV. 533, 550 (1996).

[140] *See, e.g.*, Charles Elliott, *Juries, Sex, and Emotional Affect*, 35 L. & PSYCH. REV. 37, 57 (2011); Hahn & Clayton, *supra* note 139, at 537; Elizabeth J. Parks-Stamm, Madeline E. Heilman & Krystle A. Hearns, *Motivated to Penalize: Women's Strategic Rejection of Successful Women*, 34 PERSONALITY & SOC. PSYCH. BULL. 237 (2008).

[141] Hahn & Clayton, *supra* note 139, at 533.

[142] *Id.*

[143] *See id.* at 548–49.

[144] *See generally* Shari Hodgson & Bert Pryor, *Sex Discrimination in the Courtroom: Attorney's Gender and Credibility*, 55 PSYCH. REPS. 483 (1984).

is affirmed by more recent work, including Professors Kay and Gorman's research on female attorneys, wherein they averred that, owing to sex and gender stereotypes, female attorneys who do not fit within their imputed roles are penalized.[145]

As far as attorney race, Professor Phillips conducted a survey to measure the degree of bias held against Hispanic, Asian American, and African American attorneys. The study, which spanned a two-month period, showed that participants tended to endorse beliefs that others in society hold biases against ethnic minority attorneys.[146] That is, they believed that the dominant social stereotypes cut against ethnic minority attorneys. That said, participants did not personally endorse such biases, although their overall patterns of response indicated, according to the author, that moderate biases were held by a sizable portion of the participant population.

On the other hand, there are some reasons to think that, as of 2023, clients might favor minority gender or race attorneys. They may seek to redress historical disadvantage. In other parallel domains, however, such as human resources, research has shown "that people are less likely to choose candidates whose gender would increase group diversity when making" a single hire than when making multiple hires.[147] This is called the "isolated choice effect."[148] Mediation and moderation studies suggest that people do not attend as much to diversity when making isolated selection choices, which drives this effect. Extrapolating to the legal context, and especially to the class counsel context, perhaps diversity is prioritized when multiple attorneys are selected to comprise the legal team.

In adjacent fields, such as political science, reasons for favoring same-race representatives have been shown. For example, Professor Broockman conducted a field experiment in Maryland, where several districts have both Black and White representatives.[149] Nearly 9,000 residents of these districts were given an opportunity to communicate with one of their actual representatives, whose race Broockman randomized. Both Black and White residents were less likely to communicate with representatives who were of a different race.[150] Because racial minorities are more likely to have different-race representatives, Broockman argued, these results suggest that and help explain why racial minorities have diminished substantive representation.[151] Other research from political science finds that

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[145] *See generally* Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. L. & SOC. SCI. 299 (2008) (discussing the evolution and persistence of gender bias in the legal profession).

[146] Mark R. Phillips, *Jurors' Perceptions of Ethnic Minority Attorneys: Are We in a Post-racial Era?*, MINORITY TRIAL L., Summer 2010, at 1, 1–2.

[147] Edward H. Chang, Erika L. Kirgios, Aneesh Rai & Katherine L. Milkman, *The Isolated Choice Effect and Its Implications for Gender Diversity in Organizations*, 66 MGMT. SCI. 2752, 2752 (2020).

[148] *Id.* (emphasis removed).

[149] David E. Broockman, *Distorted Communication, Unequal Representation: Constituents Communicate Less to Representatives Not of Their Race*, 58 AM. J. POL. SCI. 307 (2014).

[150] *Id*. at 316.

[151] *Id*. at 317–19.

women[152] and racial minorities have a greater preference for descriptive representation,[153] i.e., representation by "individuals who in their own backgrounds mirror some of the more frequent experiences and outward manifestations of belonging to the group."[154]

To conclude, based on the existing literature, it is indisputable that there is somewhat of a gap between what attorneys think clients want and what individual clients actually want. While outcomes, especially financial results, matter, clients also care deeply about the process, feeling that their wishes are being honored, and having a robustly communicative legal partner.

Rule 23(g), however, does not require courts to consider whether class counsel would be responsive to class members or dedicate time and resources to receiving input from class members. And the class counsel-class member relationship all but extinguishes any active role class members might have in the litigation. Moreover, it appears likely that attorney demographics matter to individual clients, but do they matter in class action litigation that is less personal in nature? It is possible that there is bias against minority race and gender attorneys, but that, conversely, clients are beginning to prioritize race and gender or to use it as a "plus" when similar attorneys are present. Even more, race and gender may stand as a form of representation, such that female clients may prefer to have female attorneys voice their demands, push their claims—that is, represent them.

While these studies shine some light on what class members' representational preferences may be, that light is dim: the conclusions are unconfirmed. In Part III, we seek to explore these unanswered questions in the specific class action context.

III. GATHERING CLASS MEMBER PERSPECTIVES

The following studies were designed for two purposes. First, they show how courts—and others—might gain an understanding of particular classes of plaintiffs and those plaintiffs' preferences vis-à-vis their class action counsel. Second, they explore our three research questions: (1) whether class members value the same criteria courts are obligated to consider under Rule 23 in appointing counsel; (2) whether gender or counsel's diversity factors into class members' choice of counsel; and (3) whether courts' appointment decisions correlate with class members' preferences. Our studies provide answers to these questions. That said, we argue that generally applicable answers for questions like these are hard to garner; answers to

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[152] *See* Rosie Campbell & Philip Cowley, *What Voters Want: Reactions to Candidate Characteristics in a Survey Experiment*, 62 POL. STUD. 745, 746 (2014); Cindy Simon Rosenthal, *The Role of Gender in Descriptive Representation*, 48 POL. RSCH. Q. 599, 607–09 (1995).

[153] *See* Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 717–18 (2002); Adrian D. Pantoja & Gary M. Segura, *Does Ethnicity Matter? Descriptive Representation in Legislatures and Political Alienation Among Latinos*, 84 SOC. SCI. Q. 441, 455–56 (2003).

[154] Mansbridge, *supra* note 106, at 628.

such questions should be case- and class-specific. Thus, we designed these studies to form a blueprint to show how the questions might be answered—with particularization—in legal matters that will arise in the future. We begin this Part by discussing the survey designs and participants and conclude by reporting the findings as they relate to our three research questions and later discussing their significance.

A. Survey Designs

We conducted three primary surveys, each of which was based on a different class action: the Takata defective airbag litigation,[155] the Marriott data breach litigation,[156] and the TikTok consumer privacy litigation.[157] All of the surveys were approved by the University of Miami's Institutional Review Board.

The general design was as follows:[158] participants read about one of the three class actions, and they were asked to imagine that they qualified as a potential class member. For example, in the Takata version, participants read the following:

> You own a BMW X5, a mid-size to larger luxury SUV. You purchased your BMW X5 new for $65,000 from a BMW dealership two years ago. . . . Earlier this year, you learned that your BMW X5 is equipped with dangerously unsafe airbags that, instead of protecting you in a collision, may explode and expel metal pieces that would tear through the bag and could seriously injure or kill vehicle occupants. Furthermore, there is evidence suggesting that BMW knew about this dangerously unsafe defect before it sold you the vehicle. . . . You reach out to the BMW dealership about replacing the airbags in your vehicle, but BMW informs you that it does not have available parts yet, and because your vehicle is newer, replacing the airbags in your vehicle is not a priority. You decide to sell your vehicle and receive less than the expected fair market value because of the defect.[159]

Participants then were told that various attorneys were interested in representing them (and the other members of the class) on a contingency fee basis. Further, they should select the attorney they believed would best represent their interests in the lawsuit. Participants then answered general questions regarding what they were looking for in an attorney. For example: "If you were to describe your

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[155] *See In re* Takata Airbag Prods., 193 F. Supp. 3d 1324 (S.D. Fla. 2016).

[156] *See generally In re* Marriott Int'l Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447 (D. Md. 2020).

[157] *See generally In re* TikTok, Inc., Consumer Priv. Litig., 617 F. Supp. 3d 409 (N.D. Ill. 2022).

[158] *See* Alissa del Riego & Joseph Avery, Study Materials & Data, https://osf.io/c8t5b/ (on file with author).

[159] We also tested a version involving a used Toyota Camry that yielded results without significant differences.

ideal lawyer for this lawsuit, which of the following adjectives would you be most likely to use?" They were asked to choose between the same required adequacy considerations provided by Rule 23(g) (i.e., resources dedicated to the litigation to date, experience, knowledge of the law, and access to resources to fund and prosecute the litigation); other factors courts have considered as relevant to attorneys' ability to fairly and adequately represent the class (i.e., diversity, the amount of support the attorney received from other attorneys involved in the litigation, and cooperative tendencies); factors discussed in Part II that individual clients seemed to value in attorneys;[160] and some additional factors we decided to test based on information we saw attorneys include in the applications to serve as counsel they submitted to the court (i.e., attentiveness to the client, motivations, educational background, accolades and awards, and personal background).

In all three of these cases (Takata, Marriott, TikTok), a number of attorneys vied for the position of lead class counsel.[161] Thus, we showed participants some of the actual information these attorneys highlighted in their applications to the courts and some additional criteria we wanted to test. We anonymized the bios, labeling the attorneys as Mr. P, Ms. R, and so on. These letters never coincided with the attorneys' actual last names. After reading each bio, participants rated the attorney on a 0–6 Likert scale that ranged from 0 = "I definitely do not want to hire this lawyer" to 6 = "I definitely want to hire this lawyer." After participants completed rating the attorneys, they were asked to select one attorney as lead counsel. Then they were asked to select a second attorney to serve as co-lead counsel. They also explained their selections: "In selecting your lawyer, what was most important to you?" Lastly, participants answered demographic information and indicated if they had been involved in or were previously familiar with the underlying litigation.

At various points in these studies, we asked free response questions. These included the following:

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[160] *See supra* Part II.B.

[161] *See, e.g.*, Application for Appointment of Amy Keller & Lesley Weaver as Either Co-Lead Counsel or to the Plaintiffs' Steering Committee, *In re* TikTok, Inc., Consumer Priv. Litig., 617 F. Supp. 3d 904 (N.D. Ill. 2022) (No. 20-cv-04699), ECF No. 51; Application for Appointment as Class Counsel, *In re* TikTok, Inc., Consumer Priv. Litig., 617 F. Supp. 3d 904 (N.D. Ill. 2022) (No. 20-cv-04699), ECF No. 55; Individual Leadership Application for the Consumer Track, *In re* Marriott Int'l Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447 (D. Md. 2020) (No. 19-md-02879), ECF No. 189; Application for Vincent J. Esades for Consumer Plaintiffs' Lead Counsel, *In re* Marriott Int'l Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447 (D. Md. 2020) (No. 19-md-02879), ECF No. 191; Application of Christopher A. Seeger for Leadership Appointment, *In re* Takata Airbag Prods. Liab. Litig., 462 F. Supp. 3d 1304 (S.D. Fla. 2020) (No. 15-md-02599-FAM), ECF No. 297; Application of Adam M. Moskowitz, Esq. for Appointment as Co-Lead Counsel, *In re* Takata Airbag Prods. Liab. Litig., 462 F. Supp. 3d 1304 (S.D. Fla. 2020) (No. 15-md-02599-FAM), ECF No. 307.

- "What quality are you most looking for in the lawyer who will represent you?"
- "If you could ask your potential attorney one question before you decide to hire them, what would that question be?"
- "What was the main reason why you chose this attorney?"

Since free responses are hard to evaluate quantitatively, we refrain from drawing strong conclusions, but note some interesting responses and patterns.[162] These responses, moreover, show thoughtful engagement by the participants, a matter we discuss below.

We also ran variants of the Takata study and the Marriott study. These variants were designed to explore the effects of sex/gender on participant decision-making. In our Takata variant, we flipped the sex of the anonymized attorneys: Mr. P became Ms. P, Ms. R became Mr. R, and so on. Half of the participants were placed in one condition (e.g., they read about Mr. P), and half were placed in the other condition (e.g., they read about Ms. P). The primary dependent measures, such as attorney ratings and lead attorney selection, remained the same. In the Marriott variant, we added new case prompts that created skewed plaintiffs' classes. One was a data breach of a women's healthcare provider (focusing on providing gynecological care); the other was a data breach of a men's well-being provider (focusing on hair loss). Data analysis was performed using the R software/programming language.[163]

B. Participants

Participants were recruited through Prolific,[164] an online platform for human intelligence tasks. Like any source of participants for human intelligence tasks, Prolific and similar sources, such as Amazon's Mechanical Turk, have limitations,[165] but have generally found acceptance and support in the academic community.[166] Separate samples of participants were used for the different studies, and participants were blocked from participating in more than one of the studies. Because we were

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[162] If readers are interested in the free response answers, we recommend perusal of the raw data files. *See* del Riego & Avery, *supra* note 158.

[163] R version 3.6.2, R PROJECT FOR STATISTICAL COMPUTING, https://cran.r-project.org/bin/windows/base/old/3.6.2/ [https://perma.cc/877Y-3YR2] (last visited Oct. 17, 2023).

[164] *See generally* PROLIFIC, https://www.prolific.co [https://perma.cc/A2J3-3K6Y] (last visited Sept. 15, 2023).

[165] *See* Krin Irvine, David A. Hoffman & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL. STUD. 320, 321 (2018) (highlighting concerns about a similar online platform, Amazon's Mechanical Turk).

[166] *See* Michael Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSPS. ON PSY. SCI. 3, 5 (2011); Krista Casler, Lydia Bickel & Elizabeth Hackett, *Separate but Equal?: A Comparison of Participants and Data Gathered via Amazon's MTurk, Social Media, and Face-to-Face Behavioral Testing*, 29 COMPS. HUM. BEHAV. 2156, 2158–59 (2013).

interested in U.S. lay decision-makers, all of the participants were current U.S. residents. Moreover, we attempted to recruit so that the participants would represent the actual classes as nearly as possible, given limitations: class members' demographics are not publicly available and oftentimes difficult to discern. Thus, we recruited according to our best understanding of who might make up each class. So, in the Marriott study, all participants were twenty-one years old or older. In the TikTok study, all participants were TikTok users.

For the three main surveys, the populations were as follows. For Takata, there were 104 participants. These participants were 50% male, 44% female, and 5% selected "Gender Variant/Non-Conforming" or indicated that their gender was not listed in the options given. They ranged from eighteen to eighty-four years old, with an average age of 39.1 years. For Marriott (the primary condition) there were 100 participants. These participants were 50% male and 50% female. They ranged from twenty-one to seventy years old, with an average age of 41.7 years. For TikTok, there were 105 participants. These participants were 47% male and 43% female, with three respondents selecting "Gender Variant/Non-Conforming." They ranged from nineteen to fifty-five years old, with an average age of 34.2 years. For the Takata variant, we recruited an additional 103 participants. These participants were 44% male and 52% female, with two respondents selecting "Gender Variant/Non-Conforming" and two respondents preferring not to disclose. They ranged from eighteen to seventy years old, with an average age of 35.1 years. For the Marriott variant, we recruited an additional 200 participants. These participants were 50% male and 50% female. They ranged from twenty-one to sixty-nine years old, with an average age of 39.3 years.

	Takata	**Marriott**	**TikTok**	**Takata Variant**	**Marriott Variant**
Participants	104	100	105	103	200
Gender Distribution	M = 50% F = 44% NC = 5%	M = 50% F = 50%	M = 47% F = 43% NC = 3%	M = 44% F = 52% NC = 2% ND = 2%	M = 50% F = 50%
Age	Average: 39.1 Range: 18–84	Average: 41.7 Range: 21–70	Average: 34.2 Range: 19–55	Average: 35.1 Range: 18–70	Average: 39.3 Range: 21–69

*Gender abbreviations: M = male; F = female; NC = gender variant/non-confirming; ND = not disclosed.

**Age is in years.

C. Results

Discussion of the study results is parsed according to the three research questions under discussion. The studies' raw data is also accessible digitally.[167]

1. Do Class Members Value the Same Criteria that Courts Are Obligated to Consider Under Rule 23 in Appointing Counsel?

This question was addressed with three items, two of which elicited opinions prior to attorney selection and one of which was backward-looking, that is, reflecting upon the attorney just selected. First, participants were shown a list of adjectives[168] in random order, and asked: "If you were to describe your ideal lawyer for this lawsuit, which of the following adjectives would you be most likely to use? Select three."[169] Second, participants were shown a series of statements[170] (in random order), and asked, "How important to you are the following in selecting your lawyer for this lawsuit?" All were rated on a 0–6 Likert scale that ranged from 0 = "not at all important" to 6 = "very important."[171] Third, after indicating their preferred lead attorney, participants were asked, "In selecting your lawyer, what was most important to you?"

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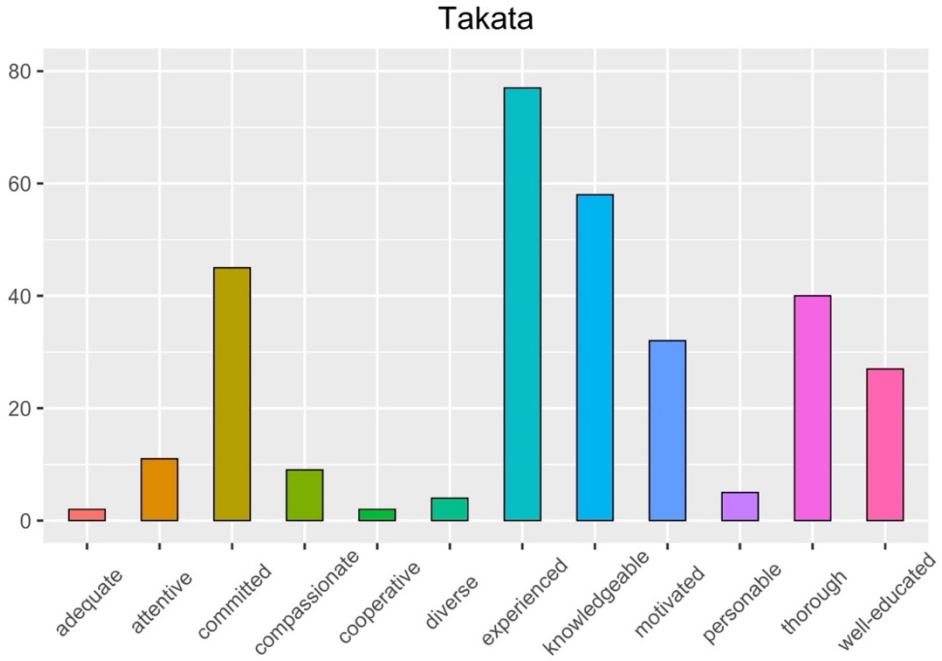
[167] *See* del Riego & Avery, *supra* note 158.
[168] *See infra* Figure 1 and accompanying text for the list of adjectives.
[169] *See infra* Figure 2 and accompanying text for the list of adjectives.
[170] *See infra* Figure 2 and accompanying text for statements.
[171] *See infra* Figure 3 and accompanying text for statements.

Results for these items were relatively consistent across the three surveys.[172]



[172] *See infra* Figure 1.

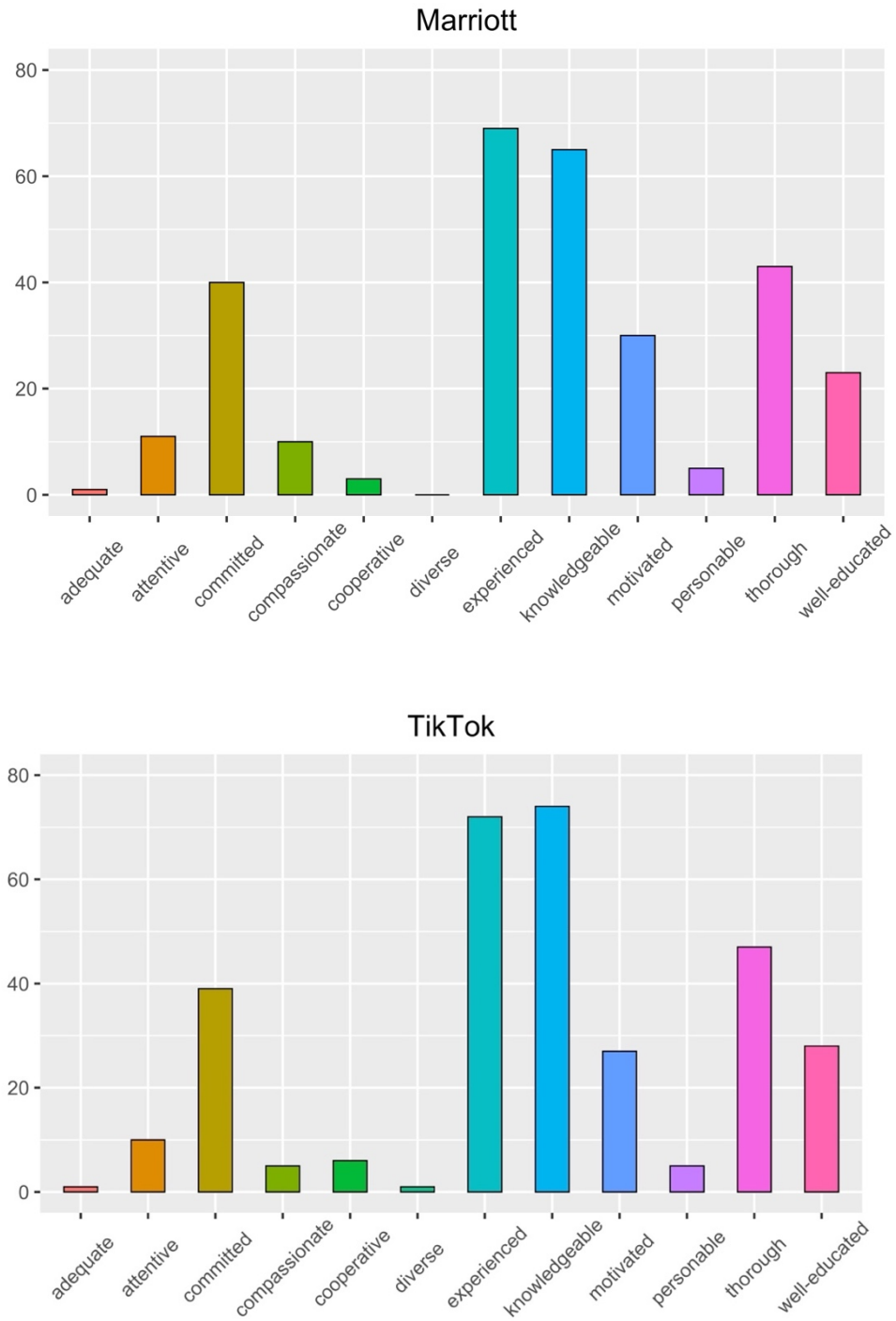


Figure 1. Across the three prompt variants, participants' attorney preferences were relatively consistent. The y-axis represents the count (number of selections), and the x-axis contains the adjective options.

Thus, we combined the three survey results for purposes of displaying and discussing these initial three items. For the first question, see Figure 2.

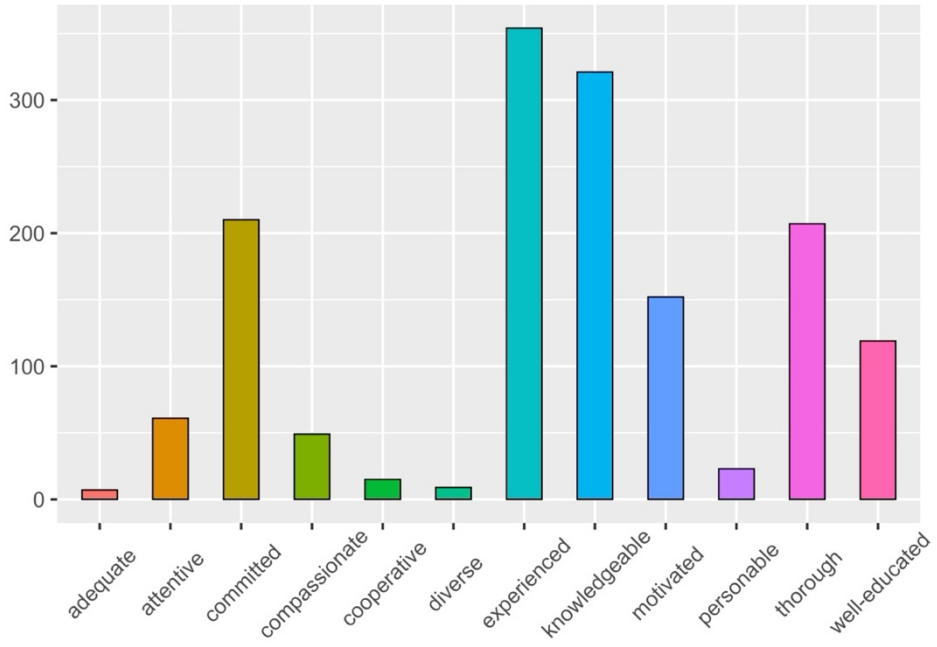


Figure 2. Across the three prompt variants, participants consistently selected "experienced" and "knowledgeable" as characteristics of their preferred attorney.

It is worth noting that participants most selected the adjectives that reflect Rule 23(g): experience, knowledge, thoroughness, and commitment (though commitment can refer to resources as directed in by Rule 23(g) or to other areas of commitment). They did not select more interpersonal traits, such as personable, compassionate, and diversity. That said, as we now see in the second question, while interpersonal traits might not rank among the three most important to respondents, respondents certainly were concerned with being heard and represented.

While participants affirmed the Rule 23(g) factors, it is interesting that their responses mirrored what our review of the literature revealed: participants want a voice, want to be heard by their attorneys, and want to be represented in the sense of true representation as individuals. In this survey question, this option appears as number six below: "The time the lawyer will dedicate to listening to you and the other class members as the case progresses." Participants rated this factor as extremely important, giving it higher ratings than several other factors.

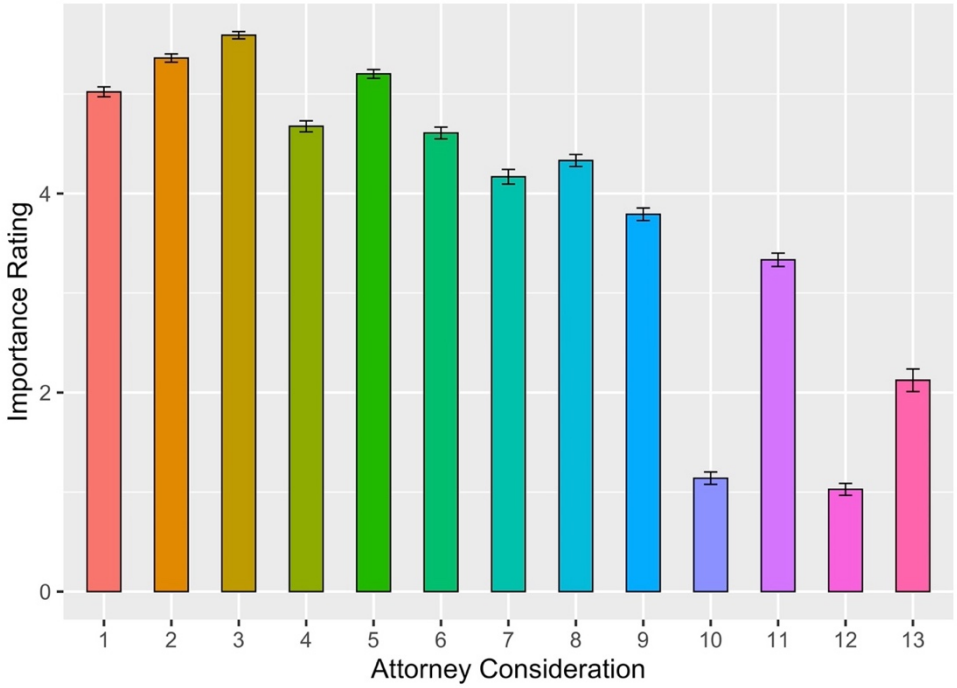


Figure 3. Across the three prompt variants, participants affirmed that all of the listed considerations were important except for attorneys' personal backgrounds (No. 10) and demographic characteristics (No. 12).

Key
1 = The work the lawyer has done in identifying/investigating potential claims in your action
2 = The lawyer's experience in these types of cases
3 = The lawyer's knowledge of the applicable law
4 = The resources that the lawyer will commit to your case (financial resources, human capital, etc.)
5 = The lawyer's willingness and availability to commit to this time-consuming case
6 = The time the lawyer will dedicate to listening to you and the other class members as the case progresses
7 = The lawyer's motivation for taking on the case
8 = The lawyer's ability to work cooperatively with others
9 = The amount of support the lawyer receives from other attorneys that filed claims in the same litigation
10 = The lawyer's personal background (where they grew up, their marital status, whether they have kids, etc.)
11 = The lawyer's educational background (college and law school they graduated from)
12 = The lawyer's demographic characteristics (their gender, their race, etc.)
13 = Something else about the lawyer. Please specify here: [free response]

Participants that chose (13) overwhelmingly provided some variation of the options presented above. However, distinct responses referred to the lawyer's moral character, personality, empathy, overall treatment of clients, aggressiveness, confidence, skills, and passion.

In addition to the above, we asked two free response questions before participants made their attorney selections. One asked participants to identify the qualities they were most looking for in the lawyer that would represent them. Experience was by far the most common response, with 22.6% of participants stating experience or a derivative of experience (i.e., how many similar cases the attorney had worked on, success rate, track record, years in practice, etc.) was most important to them. After experience, however, participants seem to care most about the attorney's honesty, trustworthiness, and integrity, with 20% of all participants citing such qualities. Knowledge of the law (14.9%), the attorney's determination and aggressiveness (13.4%), and willingness to listen (7.9%) came third, fourth, and fifth respectively. Gender and diversity were less than 1% of responses. Notably, 20.8% of free responses could not be categorized. This was not because participants did not meaningfully respond, but rather because they were normative in nature (i.e., the attorney most likely to win or the most competent, intelligent, high-quality attorneys, etc.).

Interestingly, there were noticeable differences in free responses across survey scenarios. For example, 27.6% of TikTok participants thought knowledge of the law was an important quality, but only 10.6% of Takata and 12% of Marriot participants did. Similarly, 23.7% of Marriott participants stated that honesty and integrity were important qualities, but only 12.5% of Takata participants and 17.1% of TikTok participants did. Also 17.1% of Takata participants stated that aggressiveness and assertiveness were important qualities, but only 9.5% of TikTok participants and 13.3% of Marriott participants did.

Participants were also asked the following in a free response manner: "If you could ask your potential attorney one question before you decide to hire them, what would that question be?" The overwhelming majority of questions participants asked (45.4%) were aimed at gathering information on the attorney's experience. The second most frequent question participants asked (19.7%) inquired into their chances of winning the lawsuit. Participants also asked questions that required the attorney to discuss strategy (10%), their motivations for wanting to take on the case (7.3%), and their commitment to the case (6.5%). Few participants asked questions that attempted to derive information regarding the attorney's knowledge of the law, honesty, and responsiveness. Approximately 9% of questions were difficult to categorize, but these mostly involved more open-ended questions asking the attorney to explain why they were the best to represent the respondent in the suit. While the percentages varied across the three cases, they were more uniform than the previous free response questions. For example, questions aimed to assess the lawyer's experience were asked by 47.7% of Marriott participants, 44.8% of TikTok participants, and 39.4% of Takata participants. Similarly, questions regarding chances of winning the suit were asked by 24% of Takata participants, 21.9% of TikTok participants, and 17.3% of Marriott participants.

The third quantitative question was different than the first two in one major sense: it appeared after participants had made their attorney selections. Thus, it was reflective: "In selecting your lawyer, what was most important to you?"

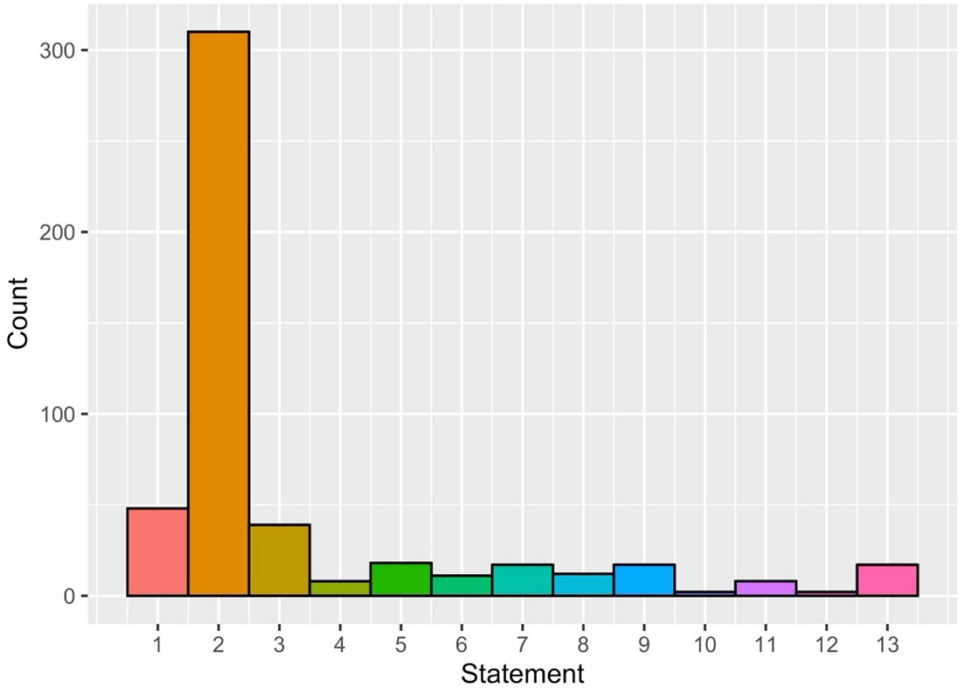


Figure 4. In reflecting on their attorney selection decision, participants indicated that experience was by far the most important factor.

Key
1 = The work the lawyer had done in identifying/investigating potential claims in your action
2 = The lawyer's experience in these types of cases
3 = The lawyer's knowledge of the applicable law
4 = The resources that the lawyer would commit to your case (financial resources, human capital, etc.)
5 = The lawyer's willingness and availability to commit to this time-consuming case
6 = The time the lawyer would dedicate to listening to you and the other class members as the case progresses
7 = The lawyer's motivation for taking on the case
8 = The lawyer's ability to work cooperatively with others
9 = The amount of support the lawyer received from other attorneys that filed claims in the same litigation
10 = The lawyer's personal background (where they grew up, their marital status, whether they have kids, etc.)

11 = The lawyer's educational background (college and law school they graduated from)
12 = The lawyer's demographic characteristics (their gender, their race, etc.)
13 = Something else about the lawyer. Please specify here: [free response]

Sixty-one percent of participants indicated that "The lawyer's experience in these types of cases" was the most important factor precipitating their choice of lawyer. None of the other possibilities (thirteen total) were selected by more than 10% of participants. Less than 4% of participants chose (13) something else about the lawyer, and most of these chose a variant of experience, integrity, and attitude towards the case. Most Takata (13) selections, interestingly, focused on one attorney's relationship with the judge.

Similarly, when asked in a free response manner what their main reason was for selecting the attorney they selected, most respondents (71.9%) referred to the attorney's experience. After experience, respondents focused on the level of commitment they perceived each attorney to have towards the case (9.3%) and the level of support attorneys received from other attorneys involved in the case (7.5%). Other popular responses referenced case-specific or attorney-specific considerations. For example, in the Takata survey, 10.1% of respondents thought the attorney's relationship with the assigned judge was relevant. And in the Marriott survey, several respondents referenced a particular candidate's personal background (i.e., coming from another country, having two kids, etc.), educational background, and statements regarding their commitment or interest in representing consumers. Respondents also seemed to value attorneys' statements of compassion, commitment, empathy, and motivation.

In short, experience, which is a central factor in Rule 23(g), was *the* most important factor, but not the only factor participants valued.

2. Does Gender or Counsel's Diversity Factor into Class Members' Choice of Counsel?

From the responses just described, it would appear that gender and diversity concerns are not important to class members. As evident in Figures 2 through 4, diversity and personal characteristics were seldom selected as the most important factors that participants would consider in making their choice of attorney. For instance, for the third question discussed above (Figure 4), a mere 0.4% of participants indicated that "The lawyer's demographic characteristics (their gender, their race, etc.)" was the most important factor in their choice of attorney.

However, interestingly, these results cut against some of the free responses participants wrote.[173] For instance, one Takata participant wrote, "I like all her qualifications and experience equally with Mr R *but I would choose her because she is a woman*." Another: "*I wanted a woman*." And another: "*As a woman, I think it's important to give other women opportunities*." Conversely, one Takata participant

[173] *See* del Riego & Avery, *supra* note 158.

stated, "*I'd want a personable man with a likeable quirk*[,]" and another "*he has been serving a long time and he is man*." Similarly, a Marriott participant stated, "*I want a man as my lawyer*." While such responses may, of course, represent mere musings, they may also point to factors that are operational, that is, may impact behavior. To vet these gender preferences, we can turn to a study variant. Even though across most studies female participants were more likely to select female attorneys than male participants, this difference did not really rise to a level of significance.

For the second variant, which was conducted concurrently to and within the primary Marriott study that changed the data breach defendant from a hotel to a gynecological provider and a male hair loss provider, we found the following trend, although it also did not rise to significance. As seen in Figure 5, the trend was that females who were members of a female-dominant class (a data breach at a women's healthcare provider) were more likely to select a female attorney; but a corresponding trend for men who were members of a male-dominant class was not evident (a data breach at a men's well-being provider). This coincides with prior literature that found that women value being represented by women more than men value being represented by men.[174]

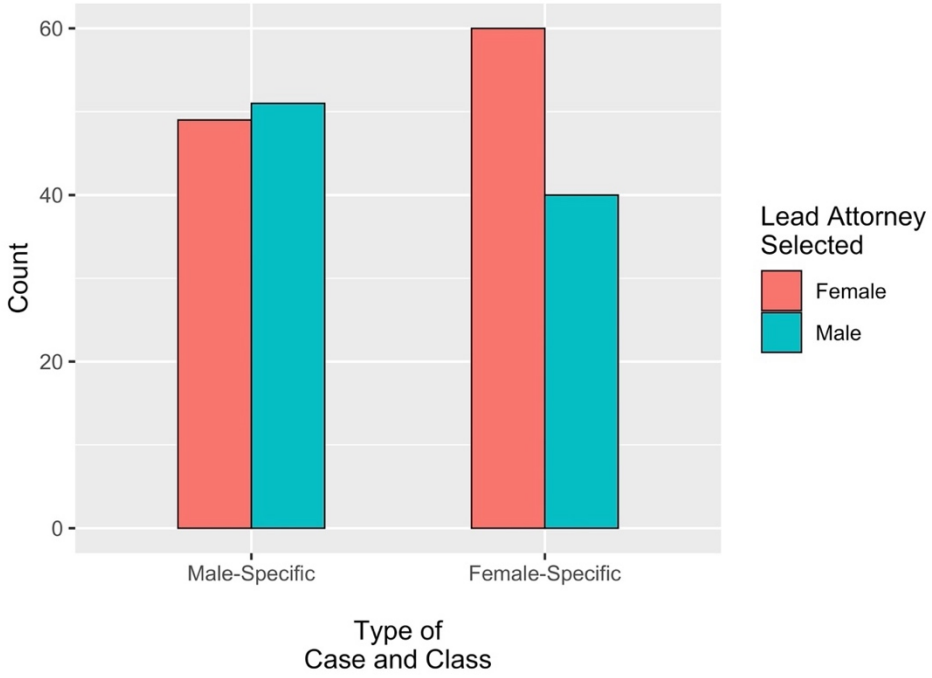


Figure 5. Lead attorney selection (by gender) in male-specific and female-specific litigation. The former refers to a data breach involving a men's well-being provider and the latter a data breach involving a women's healthcare provider.

[174] *See* sources cited, *supra* note 152.

However, we caution against reading too much into these results, as a two-sample two-tailed t-test comparing male/female lead attorney selections across the two groups yielded $t(198) = -1.56$, $p = .12$, Cohen's $d = .22$, a small and technically not significant result. And we note that across most of our studies, any trends for gender-motivated selection were just trends and inconclusive if not potentially misleading. For instance, in the TikTok survey, both male and female participants favored a female lead, but female participants did so to a greater extent (though not a significantly greater extent: a two-sample two-tailed t-test yielded $p = .22$). This trend held in the Marriott primary prompt as well ($p = .11$). But there was virtually no difference across participant sex in the Takata survey ($p = .92$). So, we must leave it as interesting but inconclusive and as a thread we pick up below.

3. Do Courts' Appointment Decisions Correlate with Class Members' Preferences?

Our last question was perhaps the easiest to empirically test. For all three of the prompts—Takata, Marriott, TikTok—we know which attorneys were selected by the courts. Moreover, we presented our participants with actual attorney bios from the courts' selection process, including the attorney(s) actually selected.

For the Takata version, the six attorneys we presented to participants (in anonymized form) were Mr. R, Mr. G, Mr. K, Ms. J, Ms. L, and Mr. D. As lead attorney, the court in the Takata litigation actually chose Mr. R. Our participants, in contrast, were more likely to select Ms. J (34%) or Mr. K (27%), with Mr. R (15%) coming in third. The ratings for the individual attorneys were as follows: Mr. R = 4.52; Ms. J = 4.67; Mr. K = 4.66; Mr. D = 3.46; Ms. L = 3.79; Mr. G = 3.72. A repeated measures ANOVA[175] revealed significant differences across these ratings: $F(5, 618) = 15.32$, $p < .001$. In the actual proceedings, both Ms. J and Mr. G were selected as co-lead counsel for economic damages counsel acting under Mr. R who was appointed chair lead counsel for both economic damages and personal injury claims.

[175] A Repeated Measures ANOVA (Analysis of Variance) is a statistical test used to determine whether there are any statistically significant differences between the means of three or more groups when the same participants are used in all the groups. Repeated Measures implies that the same participants are used in each group. For instance, you might be testing the effect of different types of training on an athlete's performance. Rather than having different athletes in each training group (which would be a regular ANOVA), the same set of athletes might undergo each type of training at different times, and their performance is measured after each training period. And ANOVA (Analysis of Variance) is a statistical method used to analyze differences among group means by examining the variance in the data. ELLEN ROBINSON GIRDEN, ANOVA: REPEATED MEASURES 1–29 (1991).

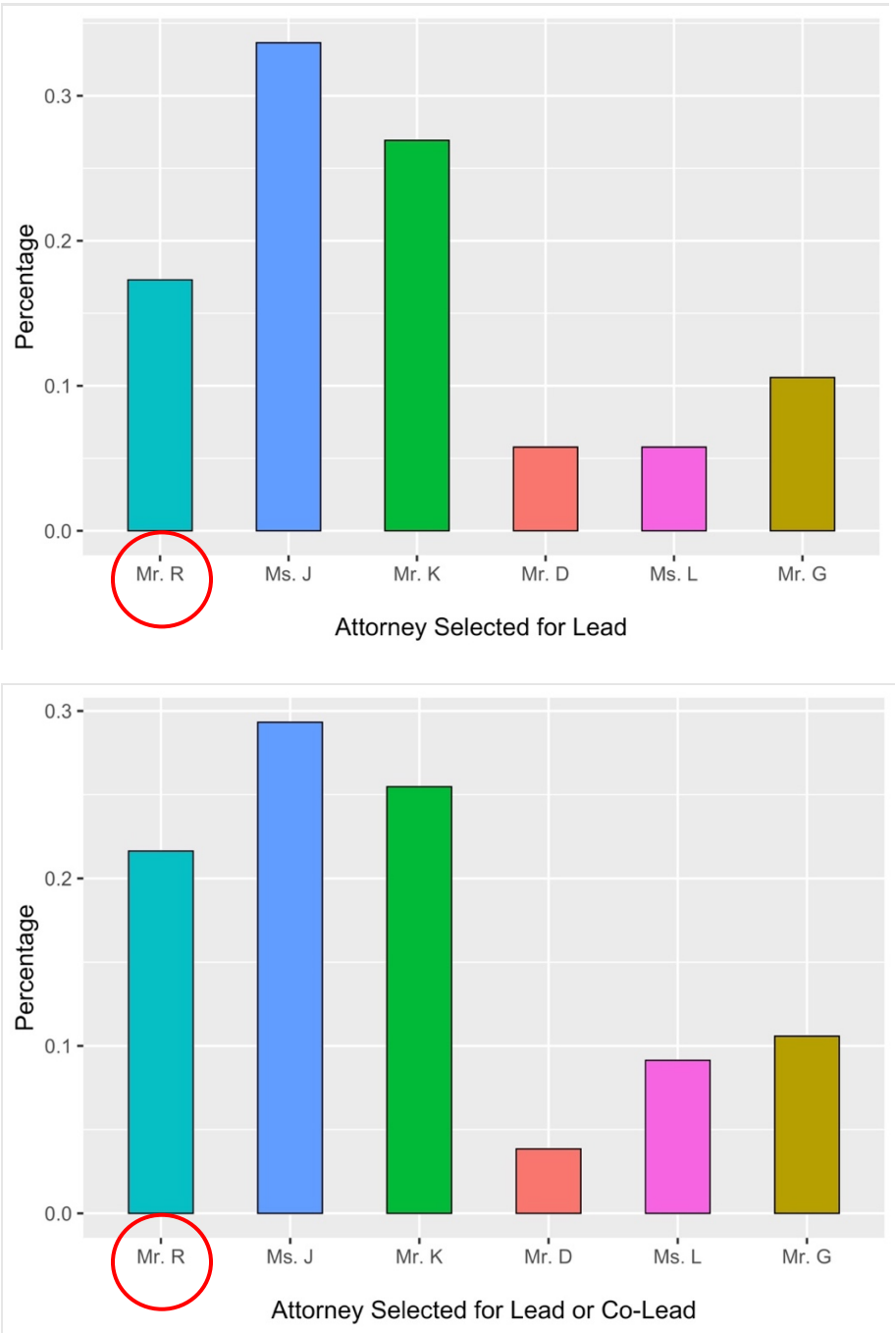


Figure 6. Participants' lead attorney selections (by name) in the Takata litigation context. In the actual litigation, Mr. R was chosen by the court. Participants' lead attorney selections (top) and combined lead/co-lead selections (bottom) in the Takata litigation context. In the actual litigation, Mr. R was selected as lead counsel by the court. Acting under Mr. R, Ms. J and Mr. G were selected as co-lead counsel for economic damages.

While it is difficult to determine without further testing why participants chose one candidate over others, differences between the candidates as well as free responses suggest some possible explanations. Mr. K and Ms. J went to the same, better ranked undergraduate and law schools. Ms. J is currently serving as lead counsel in another auto defect case, while Mr. R and Mr. K were on second-tier committees. Ms. J's firm had over one hundred attorneys, whereas Mr. K's and Mr. R's firms had only forty and fifteen attorneys respectively. Mr. D was described as a younger, well-educated attorney with significant knowledge of the law and ties to the district in which the case was before; Mr. G as a well-educated, nationally acclaimed lawyer who had argued before the Supreme Court; and Ms. L as an experienced and charitable attorney, but without auto defect class action experience.

Participants that chose Ms. J overwhelmingly indicated in their free-response answers that they did so because of her prior experience with auto defect class action cases specifically. Other participants that chose Ms. J cited to the resources she could command and her education. Participants that chose Mr. K cited not only to his experience, but also to the time he had invested in the case and his apparent interest or passion. They also mentioned he was the first to file and had other attorneys' support. Candidates that chose Mr. R overwhelmingly cited to his years of experience as a practicing attorney, the support he received from other applicants, and his familiarity with the judge presiding over the suit. While years of experience and support of other attorneys are items applicants typically disclose, familiarity with the court is not.[176] Curiously, participants seemed to value Mr. R's familiarity with the court more when Mr. R was described as a man than as a woman (41.4% versus 15%).

For Marriott, we displayed bios for Mr. P, Ms. F, Ms. B, Mr. K, Ms. M, and Ms. H. The court actually selected Mr. P and Ms. M. Participants affirmed the court's selection of Mr. P, but less its selection of Ms. M. For lead attorney, the selections were: Mr. P (32%), Ms. F (19%), Ms. B (8%), Mr. K (20%), Ms. M (6%), Ms. H (15%). For lead and co-lead combined, the selections were: Mr. P (25%), Ms. F (16%), Ms. B (14%), Mr. K (19%), Ms. M (15%), Ms. H (14%). The ratings for the individual attorneys were as follows: Mr. P = 4.49, Ms. F = 4.16, Ms. B = 4.06, Mr. K = 4.15, Ms. M = 3.97, Ms. H = 3.99. A repeated measures ANOVA revealed a marginally significant difference across these ratings: $F(5, 594) = 2.35$, $p = .04$. Given that we presented six attorney options, there were fifteen potential combinations for lead/co-lead; in other words, there were fifteen counsel duos that participants could have selected. Participants somewhat agreed with the court: more participants chose Mr. P and Ms. M than any other combination. Notably, however, participants were informed of the fact that Mr. P and Ms. M had applied jointly.

[176] Indeed, it was not in Mr. R's application. It was only a data point added to test such a factor, given his years of practice in the particular district.

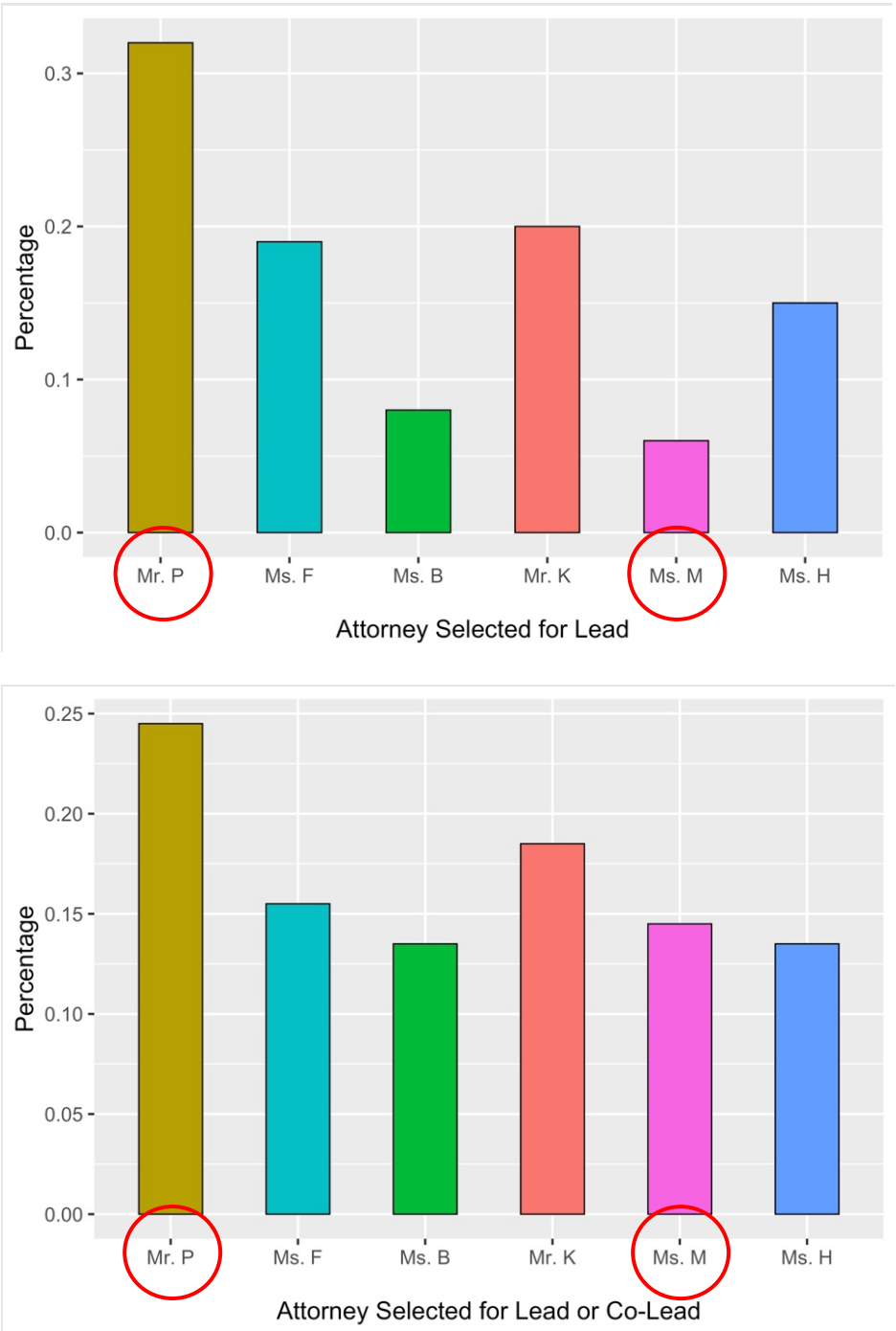


Figure 7. Participants' lead attorney selections (top) and combined lead/co-lead selections (bottom) in the Marriott litigation context. In the actual litigation, Mr. P and Ms. M were selected as co-leads by the court.

We again look to candidates' descriptions and free response answers to determine potential differences between the candidates. Ms. B, Mr. K, and Ms. H arguably had better educational backgrounds than other candidates. Ms. F was a partner at a law firm with the most attorneys, followed by Mr. K, Mr. P, Ms. H, Ms. M, and Ms. B. Attorney experience differed: Mr. P, Ms. B, and Ms. M had experience as lead counsel in another data breach class action case. Ms. F served on a second-tier steering committee in a data breach class action. Mr. K had class action experience, but no data breach class action experience. Finally, Ms. H had class action and data breach experience, but only on a committee. Mr. P and Ms. M applied jointly, and Ms. F, Ms. B, Mr. K, and Ms. H applied individually. Mr. K and Ms. F described work they had already performed on the case. Ms. B described her background escaping from a communist country to the United States. Ms. F provided some family background (i.e., the mother of two boys). And Ms. H discussed the satisfaction she derived from her work representing consumers, as well as other diversity committees she served on.

From participants' free responses, it appears that those who chose Mr. P mostly valued his specific data breach experience and willingness to work with other attorneys and command their resources. Participants who preferred Ms. F focused on her data breach experience and the time she had already dedicated to the case. Those who chose Ms. B focused on the obstacles she had overcome in her life and her education, experience, and drive. Those who preferred Mr. K focused on his experience, his prior work for the Department of Justice, and his work on the case to date. Participants that preferred Ms. M mostly cited her experience and willingness to work with a larger team of attorneys. And those who preferred Ms. H noted her experience, awards, proclaimed desire to help consumers, and passion.

For TikTok, we displayed bios for Mr. Z, Ms. T, Ms. S, Mr. L, Ms. M, and Ms. A. The Court actually selected Mr. Z and Ms. T. For lead attorney, participants' selections were: Mr. Z (14%), Ms. T (19%), Mr. L (5%), Ms. S (16%), Ms. M (25%), and Ms. A (21%). For lead or co-lead attorney, participants' selections were the following: Mr. Z (14%), Ms. T (15%), Mr. L (10%), Ms. S (18%), Ms. M (22%), and Ms. A (22%). The ratings for the individual attorneys were as follows: Mr. Z = 3.81, Ms. T = 4.10, Mr. L = 3.37, Ms. S = 4.01, Ms. M = 4.59, Ms. A = 4.58. A repeated measures ANOVA revealed significant differences across these ratings: $F(5, 624) = 12.15$, $p < .001$; post-hoc comparisons with Tukey's HSD showed that, for some of the ratings, such as for one of the attorneys preferred by the court (Mr. Z) versus those preferred by our participants (Ms. M and Ms. A), the differences were stark: all p-values < .001 and all adjusted p-values < .001. As in the Marriott version, there were fifteen counsel duos that participants could have selected. In this version, though, participants' disagreement with the court was stark: only one participant chose the duo (Mr. Z and Ms. T) that the court chose.

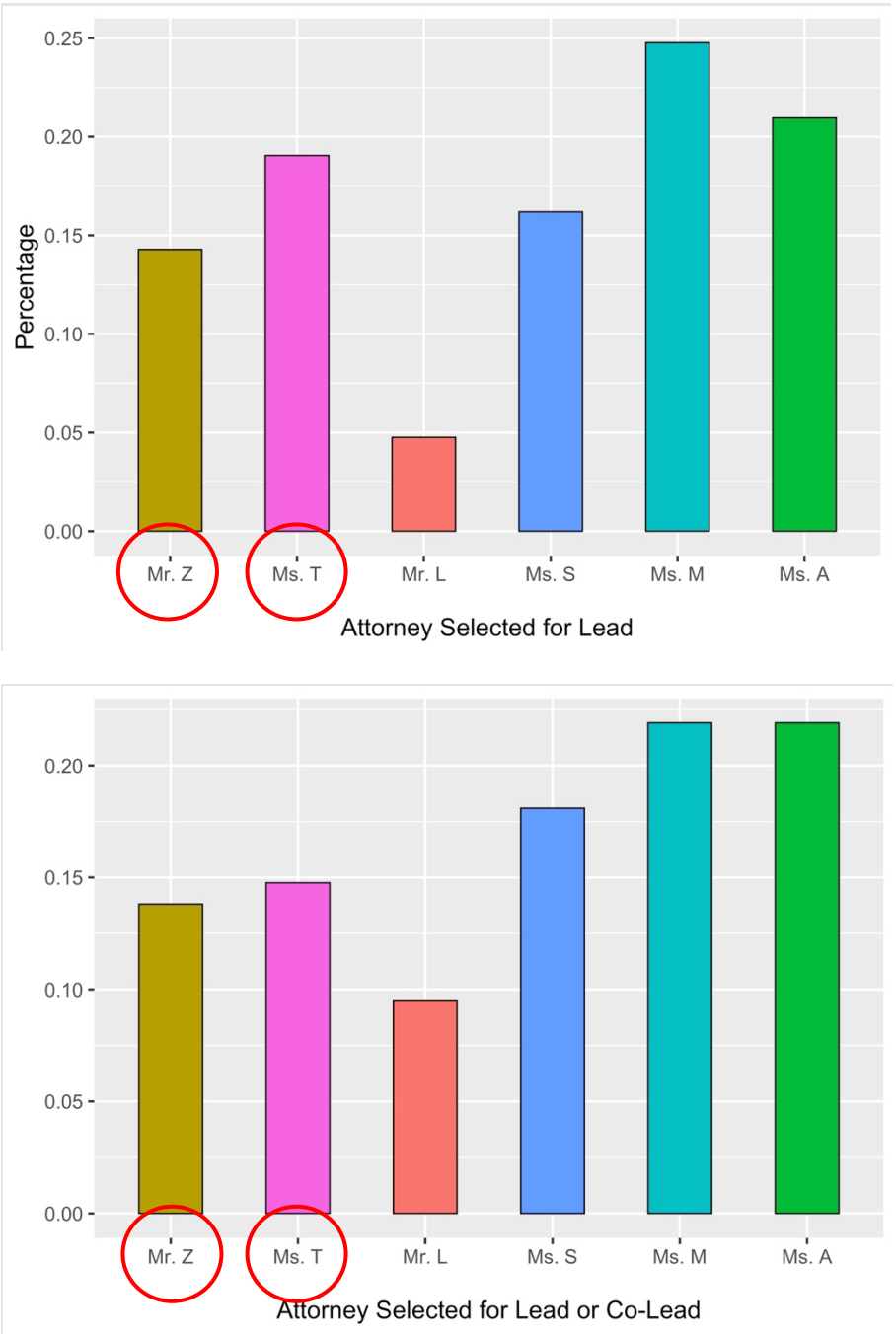


Figure 8. Participants' lead attorney selections (top) and combined lead/co-lead selections (bottom) in the TikTok litigation context. In the actual litigation, Mr. Z and Ms. T were selected as co-leads by the court.

We again turn to attorney descriptions and free response answers for potential answers. Ms. A and Mr. Z had better educational pedigrees than other candidates. Ms. S is a partner at a firm with over 150 attorneys, the other candidates are at firms with forty or less attorneys. Mr. Z lacked class action experience but had expended a significant amount of time analyzing TikTok's source code. Ms. T had experience in privacy biometric class action cases against Amazon, Facebook, Google, etc. Mr. L and Ms. S had antitrust and data breach class action experience. Ms. M filed the first case against TikTok and is serving as lead counsel in data breach class action cases. Ms. A had experience litigating and serving as lead counsel against other social media companies in privacy related actions and against a Chinese-owned technology company. Ms. A, Ms. M, and Ms. S all included statements about their willingness to collaborate with other attorneys. Mr. Z, Ms. T, and Mr. L named specific attorneys they proposed to collaborate with.

Participants that chose Mr. Z focused on the significant amount of time and effort he had expended on the case to date, his knowledge of TikTok and China, and his previous defense work experience. Those that chose Ms. T noted her experience with biometric privacy cases, her willingness to team with other attorneys, and her accolades. Only five participants chose Mr. L, and reasons were non-uniform. Participants that preferred Ms. J focused on her experience, willingness to include a diverse team of attorneys, and accolades. Those that selected Ms. M overwhelmingly focused on her experience and prior litigation against TikTok. And those that who chose Ms. A also overwhelmingly focused on her specific experience with privacy cases against other social media companies and Chinese companies.

D. Discussion of Study Results

> "*I also like her commitment to diversity. Undoubtedly[,] the clients in the class action suit are diverse.*"[177]

The studies yielded a number of important findings. First, we found that participants strongly valued the criteria considered by courts. In other words, Rule 23(g) is not misguided, at least in terms of furthering adequate plaintiff class representation. Participants consistently affirmed the value of experience and knowledge of the law, as well as resources available for the litigation (be they economic or those of human capital), and time attorneys had spent on the litigation to date. We also, however, found that participants valued attorneys' honesty, integrity, ethics, aggressiveness, and personableness.

On quantitative items, participants deemphasized the importance of the attorneys' personal backgrounds and characteristics. Diversity did not seemingly matter to participants. That said, interpersonal and communicative factors did. Participants wanted attorneys who would dedicate themselves to listening to class members, including as a case progressed.

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[177] TikTok survey participant. *See* del Riego & Avery, *supra* note 158. Quotes throughout this Section are pulled from responses of the respective surveys indicated. *See id.*

Second, our results yielded a nuance: while diversity did not seem to matter to participants, at least as an explicitly identified and important factor, it did receive some discussion in participants' free response answers. Specifically, we are referring to gender bias. Gender bias, as discussed above, has been and is an intractable problem in class counsel selection. Some judges are now attempting to correct—or, perhaps, over-correct—for this. Our participants obliquely (in the qualitative responses) professed to paying some attention to attorney gender, but their most limpid professions (those revealed in the quantitative responses) showed that demographic characteristics, such as sex and gender, paled in importance to factors like legal experience and knowledge of applicable law.

One explanation for this divergence is that participants did not think about gender or sex when they thought about diversity. Perhaps diversity—the word itself—suggested race and ethnicity to participants, and this is what they were focusing on. Alas, while this explanation would explain Figure 2, *supra*, it would not account for Figures 3 or 4, in which participants considered the importance of the "lawyer's demographic characteristics (their gender, their race, etc.)." An alternative explanation is that diversity matters, but it matters as a tiebreaker of sorts. As a participant in our Takata version of the study explained, "I like all her qualifications and experience equally with Mr R but I would choose her because she is a woman."

Third, perhaps the most interesting result from the above surveys is that the majority of participants' counsel selections did not accord with those made by courts. This was especially true in the Takata and TikTok versions, where there were deep differences. And participants' free response answers showed that they were engaging thoughtfully with the issues. For example, one TikTok participant wrote, "She has extensive experience with exactly the sort of suit we are filing. Technology and privacy. And has even been successful against a Chinese firm, which tells me she understands the intricacies of Chinese companies and can tackle this case too." Another TikTok participant wrote:

> She has a terrific background, and the relevant experience. She's already going up against Facebook and Google over similar concerns, and successfully sued another Chinese company for privacy violations. She should have a great depth of knowledge about these cases work, and she's willing to work with other lawyers. She sounds perfect.

And another Takata participant explained: "She has not only a strong educational background but extensive work experience in the field for 35 years. Additionally, she has done a similar case like this before and was successful."

Other free response explanations were similar in analysis. For example, another Takata participant stated, "I trust women more than men and she seemed very qualified." Yet another Takata participant stated, "[l]adies are known for influencing a court decision." It appears, therefore, that the divergence with courts was not necessarily a product of participants paying less attention to criteria they valued: they just found that different counsel better met the criteria.

Fifth, participants were seemingly influenced by factors that are either not readily ascertainable or perhaps problematic. For example, participants valued an attorney's familiarity with the judge, but that is not something participants would normally be aware of, and familiarity can cut both ways. A court might prefer attorneys it is familiar with but may also have had a bad experience with an otherwise extremely qualified attorney. Similarly, while it is important that an attorney is honest, it is difficult to objectively evaluate the attorney's honesty and integrity, which is perhaps why it is not a mandatory Rule 23(g) consideration. Several participants also valued attorneys' awards and accolades, and while those can be indicium of competency, they can also be meaningless. For example, certain awards are given to over a thousand attorneys in a particular city; awards can also be peer elected, and all firm attorneys can vote on a candidate. Along a similar vein, participants were influenced by statements made by attorneys regarding their passion, compassion, or motivations. While possibly true, they could be simply self-serving and thus not the best barometer by which to evaluate attorneys. Participants were also influenced by the support particular candidates received from other attorneys. But, as discussed previously, support can be gamed and purchased, and attaining such support can be against the best interests of the class.

Finally, and as discussed further in the succeeding section, our experimental results show how readily feasible it is for courts to gain understanding of what adequate—or preferred—representation might mean for specific plaintiff classes. In short, we showed that class members can meaningfully have a voice in counsel selection, and the process of eliciting and amplifying that voice is not an overly onerous one. In fact, it is feasible to think of the process—survey creation, distribution, results, analysis, and dissemination—in terms of mere weeks.

IV. CLASS COUNSEL APPOINTMENT NOTICE AND ENFRANCHISEMENT: A VOICE, A VOTE, AND A VALIDATION

Our findings suggest that courts are not appointing the same attorneys class members would hire to represent them in class actions. In none of the three sample class actions did participants' selections fully accord with those of the courts.[178] While this is a somewhat troubling finding, it might not be as problematic as it seems. What if courts are simply better equipped to select counsel than lay class members? Courts are, after all, armed with a superior knowledge than most class members as to the law and its practice and may thus be better at determining which counsel will best represent the interests of the class in a given case. Courts, however, are also more prone to bias, as they evaluate and make decisions in a silo.[179] While class members' individual evaluations and decisions may suffer from the same biases, combined, they paint a more holistic picture of the evaluations and preferences of the class. To preserve courts' expertise and avoid actual or apparent biases, preconceived notions, and inclinations, courts should welcome some insight

[178] *See supra* Part III.C.2.

[179] *Cf.* del Riego, *Driving Diverse Representation*, *supra* note 22, at 88–101.

into class members' preferences. And they should take those preferences into consideration prior to appointing counsel. We also note that, like individual clients, survey respondents seemed to value class counsel's responsiveness and willingness to listen to the concerns.

We thus propose a notice-based mechanism that courts would have at their disposal to inform prospective class members of their claims, the pendency of a lawsuit, and the counsel that seeks to represent them in the lawsuit. This notice would also provide prospective class members with an opportunity to evaluate prospective counsel, express their desired litigation objectives, and detail the injuries they believe they sustained as a result of the defendant's alleged conduct. Respondents can also indicate whether they would be willing to serve as class representatives. These prospective class member responses should not only be acknowledged and considered by the court-appointed counsel but can also form part of the directives given to counsel. For example, if prospective class members value preventing identity theft more than financial compensation for a data breach, this is a directive class counsel should be cognizant of when prosecuting the action. Moreover, these directives would be publicly known and could influence the litigation. This proposal, which we roughly sketch below, is made possible and affordable by advances in technology that can reach class members in ways that were not possible a few decades ago.[180]

We recognize that such a proposal is not without its costs and criticisms. But we believe that the benefits associated with enfranchising class members outweigh these concerns. Moreover, while not misplaced, we explain why these potential consequences might not be as problematic in practice as they might seem in theory.

Class members should, as other scholars have sugested,[181] have a voice before litigation has been resolved or dismissed. While it is impractical to have thousands, hundreds of thousands, and, much less, millions of class members collectively "hire" class counsel, direct litigation strategy, and decide the adequacy, acceptability, or reasonableness of any settlement,[182] that should not mean that class members should have no voice or opportunity to articulate their needs and preferences.

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[180] Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849–50 (2017).

[181] *Id*. at 866–67; Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 714, 766 (1989) (arguing some type of class member sampling should occur because "if . . . lawyers did not solicit class member views on the whole range of litigation issues, their lawyering decisions would be less well informed" and "[t]he quality of the lawyering product would suffer"); *see generally* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87 (2022) (arguing for adoption of "a new, participatory framework" in class action litigation).

[182] *See* Almendares, *supra* note 29, at 635–54; Macey & Miller, *supra* note 7, at 20.

A. A Voice: An Opportunity for Class Members to Articulate Preferences Through Notice

When multiple actions are filed, courts should provide identifiable class members with notice that class actions have been filed on their behalf. The burden to identify class members should fall on the party with most knowledge as to class members' identity: defendants. The cost of providing and funding such notice should fall on all prospective plaintiffs' counsel. The content of the notice should be agreed upon by the parties and approved by the court. Notice should then be promptly delivered by a third party shortly after all competing class counsel applications have been filed.

In many, though not all class actions, defendants maintain records that can identify members of the proposed class. In these cases, defendants should supply this information to plaintiffs at the outset of the litigation. While the scope of the class may be disputed, membership should be based on the allegations in the complaint. Where defendants cannot or cannot easily identify members of the class, third parties might be able to do so, or third-party expert notice providers can advertise on mediums that are likely to include prospective class members to reach at least a representative subset of class members.

This notice, which we term representational notice, should not go out to all class members and should be less stringent than the type of notice provided prior to final class certification required under Rule 23. In the event of a settlement, Rule 23(e) requires that notice be directed "in a reasonable manner to all class members who would be bound by the proposal . . . ."[183] And prior to final certification, Rule 23(c) requires that notice should be "appropriate"[184] or "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[185] Courts have not certified classes or approved settlements because notice has failed to meet these standards.[186] But notice at these later stages of the action is more crucial because class members would, unless certification is denied or class members opt out of the class, be bound by any judgment or settlement.[187]

Representational notice, however, would not be class members' final opportunity to opt out of a settlement or judgment or object to a settlement. Notice would serve a much different purpose: affording class members an opportunity to articulate their preferences both in terms of the counsel that would represent them and the goals they would like counsel to achieve. A randomly chosen sample of class members can provide some indication of these preferences. Notice does not, therefore, have to be aimed at all class members. And it does not, as such, have to

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[183] FED. R. CIV. P. 23(e)(1)(B).

[184] FED. R. CIV. P. 23(c)(2)(A).

[185] FED. R. CIV. P. 23(c)(2)(B).

[186] *See, e.g.*, Kaufman v. Am. Express Travel Related Servs. Co., 264 F.R.D. 438, 445–50 (N.D. Ill. 2009).

[187] *See* FED. R. CIV. P. 23(e)(1)(B); FED. R. CIV. P. 23(c)(2)(B)(vii).

be as rigorous as the notice currently provided at certification or in the event of a settlement. Standard and best practices can emerge on the percentage or number of class members that should receive such notice and through what medium it is delivered (individualized physical mailing, individualized electronic mailing, advertisement, etc.). Ultimately, however, notice should only have to be appropriate under the circumstances and reasonably targeted to reach a certain representative sample of class members. It should, however, be tailored to be received by diverse class members.

Similarly, the content of the notice would also be different than the notice currently provided prior to certification and settlement approval. Notice in the event of certification or certification for settlement purposes requires that class members be informed in "plain, easily understood language" of: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, and/or defenses; (4) their right to enter an appearance through an attorney; (5) their right to opt out from the class or settlement class; (6) the opt out procedures; and the (7) binding effect of a class judgment on them.[188] In the event of a settlement, class members must also receive notice of the settlement's terms.[189] This affords them the opportunity to object to the fairness, reasonableness, and adequacy of these terms as well as the class representatives, class counsel, and equal treatment of class members.[190] Most of these data points are not relevant to representational notice.

Class members should receive notice as to the nature of the action. This includes the basic facts giving rise to the lawsuit(s), the claims asserted, the injuries for which a remedy is sought, the remedies sought, and the names and brief description of the qualifications of proposed counsel. These should be described, as Rule 23 requires in other circumstances, in concise and "plain, easily understood language . . . ."[191] The nature of the action should thus be no more than three paragraphs (ideally limited to one), that clearly states the defendant(s)' alleged wrongful conduct and its purported harmful impact on class members. The legal claims, injuries, and remedies should also be plainly described, avoiding complex legalese, in a short, comprehensive manner (i.e., one paragraph, bullet points, a chart). This part of the notice should not exceed a page or a five-minute read.[192]

Finally, class members should be provided notice of the attorneys that seek to represent them. These should be limited to the attorneys vying for lead counsel. Each candidate should be described in a paragraph of no more than five to six sentences. Each paragraph should be generated by the attorney or firm seeking appointment, and should, based on our findings include, at a minimum: work the lawyer had done with respect to the present claims; experience and knowledge in these matters; resources available; and the time the lawyer would dedicate to listening to class

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[188] FED. R. CIV. P. 23(c)(2)(B).

[189] FED. R. CIV. P. 23(e)(1)(B).

[190] FED. R. CIV. P. 23(e)(2) & (5).

[191] FED. R. CIV. P. 23(c)(2)(B).

[192] An example of such representational notice is available. *See* del Riego & Avery, *supra* note 158.

members and the means by which they would do so. These were the criteria survey participants both selected and stated in free response questions that they most valued. Prospective counsel can include additional information they believe relevant to their ability to fairly and adequately represent class members, but only if it does not exceed the maximum length. Notice should randomly list attorneys and change the order to avoid potential order biases.

Armed with such information, class members can provide an informed voice to the court, prospective class counsel, and defendants. Notice must thus be accompanied by an opportunity for voicing such preferences—a ballot of sorts described in our next section.

B. A Vote: An Opportunity for Class Members to Evaluate and Direct Counsel

Class members should have an opportunity to opine on the attorneys that will represent them and prosecute their claims. The central purpose of representational notice is to provide class members with a say on *who* will represent them and *how* they would like to be represented. Therefore, in addition to articulating which qualities they most value in an attorney, selecting their attorney(s) of choice, and ranking the remaining attorneys, class members should also have the ability to articulate how they believe they have been injured by the defendant's conduct and express what they hope will be achieved through the litigation. Class members should also be asked about their willingness to serve as class representatives to avoid the later exclusion of certain similarly injured individuals from the class.

Representational notice should provide a mechanism for recipients to vote. Ideally, this would be done electronically. If notice is provided via e-mail or other electronic means to begin with, such notice would contain a hyperlink that would direct class members to a page where they could verify their information and fill out a survey. The link would again contain the notice and ask participants to confirm that they are likely members of the prospective class by verifying they purchased a particular product, used a particular service, paid for a particular service, purchased a particular stock, attended a particular event or affected area, etc., during the relevant time period. Participants would also be required to attest to the veracity of the information they are providing and confirm they are not completing the form for anyone but themselves. After this initial verification stage, which also asks about class members' demographic information, prospective class members would be granted access to a form or ballot where they would select their preferred attorney(s), articulate injuries, and indicate litigation goals.[193]

Even in cases where attorneys have formed coalitions or submitted joint proposals, the ballot should ask class members to vote on and rank each attorney vying for class counsel individually. As discussed previously, oftentimes coalitions can form that are not in the best interest of the class, but rather reflect deals and

[193] A draft of such a form is available. *See* del Riego & Avery, *supra* note 158.

compromises repeat attorney players strike.[194] Moreover, courts are not obligated to appoint counsel based on any coalitions counsel may form, as courts have a duty to appoint the best counsel able to fairly and adequately represent the interests of the class. Coalitions may also form that are too large or too small based on the anticipated needs of the case, and courts have to appoint less or additional attorneys. For that reason, ranking, as opposed to choosing only one attorney, would provide more useful data for the court. For example, if 80% of class members chose the same attorney if there was a single vote, then only 20% of data would speak to class members' preferences for the remaining attorneys. It is also possible that class members prefer attorney A to attorney B, but attorney B could receive more "first-choice" votes. Ranking thus provides a more accurate reflection of potential class members' preferences.

Courts can also decide to include specific questions for potential class members that would aid it in choosing counsel. These questions should not go to the merits of the claims, alleged injuries, or requested damages, but rather be specifically targeted to class counsel. For example, courts could ask class members which attorney that has applied they believe has the most relevant experience. Courts could also inquire into which three-attorney team class members would choose or what characteristic they believe is most important in the counsel chosen (i.e., experience in prior litigation that involved similar claims, overall experience in class action litigation, time and resources to dedicate to the case, etc.). These inquiries would be directed, per Rule 23, to allow the court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[195]

Class members should also be afforded the opportunity to articulate the injuries they believe they have suffered as a result of the defendant's alleged wrongful conduct that are not included in the notice's description of injury. This ensures that class counsel is not neglecting categories of injuries it did not foresee or address in earlier pleadings. For example, it could be the case that class counsel alleges that a defective car engine resulted in economic loss for the consumer because of overpayment for the product, repair, replacement part costs, rental car costs, and time taken off work to have the repair performed, but did not consider cost of childcare while a class member took the product to be repaired or public transportation costs incurred to have the product repaired. Providing potential class members an opportunity at this early stage in the litigation to articulate injuries they believe they suffered, ensures that injuries more likely suffered by all types of plaintiffs (i.e., parents, lower or higher income individuals, rural versus city residents, etc.) are considered and sought to be remedied by counsel.

Similarly, class members should be asked about the remedies that would make them whole. While settlements and litigation outcomes do not typically reflect the

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[194] *See* THIRD CIRCUIT TASK FORCE, *supra* note 48, at 10 (noting "cartel-like" attorney groupings); Burch, *Judging Multidistrict Litigation*, *supra* note 50, at 93 (discussing "tit-for-tat reciprocity among repeat players" and "'good ol' boy networks" that can result from private ordering).

[195] FED. R. CIV. P. 23(g)(1)(B).

best-case scenario for either party, it is problematic when remedies that could have been achieved are not, not because of financial constraints or hardlines taken by a defendant, but because class counsel did not consider a particular type of remedy. Thus, providing a forum for class members to express which remedies are desirable would at least ensure that these are considered by counsel at the pleading and negotiation stages. Not every remedy of course is achievable, and some may be unreasonable. While class counsel should not be obligated to pursue unreasonable remedies or forgo an otherwise reasonable settlement if a remedy is excluded, affording class members an opportunity to articulate their preferred remedies at least ensures they are considered by the parties.

Finally, class members should also be able to indicate whether they would be willing to serve as class representatives. While in larger class actions, most attorneys vying for lead counsel already have a number of class representatives, these are often not representative of the class. For example, if class counsel taps its contacts for class representatives, these may be more affluent and geographically concentrated than the class. They can also be more White and male than the class. Moreover, class counsel's limited pool of access to representatives can also lead to similarly injured individuals being excluded from the class. For example, some courts have held that individuals that purchased a product or used a service in a particular state can only represent class members from that state, even if the state claims asserted are similar to those of other states.[196] Similarly, other courts have held that even if multiple products made by the same manufacturer suffer the same defect, individuals can only represent those that purchased the same model and model year of the product. For example, even if 2017 through 2022 BMW X3s, X5s, and X7s suffer from the same transmission defect, a 2018 BMW X7 larger engine purchaser can only represent other purchasers in the same state of 2018 BMW X7 larger engine vehicles. They cannot represent 2017, 2019, 2021, and 2022 purchasers of X7s; they cannot represent other 2018 X7 purchasers with smaller or larger engines; and they cannot represent any X3 or X5 purchasers.

These decisions often leave, unless a settlement is reached, a considerable number of individuals that would have been class members excluded. The more efficient solution would undoubtedly be to overturn this precedent. But in the meantime, having potential class members prior to the filing of a consolidated class action complaint indicate their willingness to serve as class representatives would provide counsel with a greater pool of potential representatives that could cover a greater class and reduce geographical, income, or other disparities in relief. It would additionally provide class counsel with arguably more interested or invested class representatives.

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[196] *See, e.g.*, *In re* Flonase Antitrust Litig., 692 F. Supp. 2d 524, 543–49 (E.D. Pa. 2010) (dismissing some state unjust enrichment claims but not others based on distinctions in the caselaw); *see generally In re* Takata Airbag Prods. Liab. Litig., 193 F. Supp. 3d 1324 (S.D. Fla. 2016) (dismissing certain claims of implied warranty of merchantability and unjust enrichment under certain state laws but not others).

C. A Validation: A Consideration Courts Should Discuss Under Rule 23(g)

Courts must acknowledge class members' preferences. Representational notice would otherwise be futile. While courts should not abdicate their responsibility to appoint the best counsel able to fairly and adequately represent the class, they should take into account class members' preferences when making that assessment. It may be the case, for example, that potential class members that respond to the notice choose the least experienced, qualified, or committed attorney. The court should not appoint that attorney; instead, it should explain why the attorney(s) it is appointing to represent the class would better serve the class's interests.

Class members' responses should be quickly calculated and analyzed after they are due. Ideally, this process would be automated, and results quickly reported. On the same webpage respondents voted, the results would be available to add transparency. At a minimum, these results should reflect the attorney that received the most votes from respondents and the order of votes received by the other attorneys. Displayed results should also reflect the attorney that received the most votes from prospective female, male, White, non-White, under age thirty-five, and over age thirty-five class members. Where appropriate, the class can be further divided (e.g., city dwelling versus rural dwelling, residents of a particular state, income, education). These results may be irrelevant, but they may not be, and they should be reported.

Courts must discuss the responses received in appointment orders. They should consider class members' responses as a "matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," under Rule 23(g)(1)(B). That is not to say that potential class members' preferences are of equal value as the adequacy considerations required, but they should be a factor courts acknowledge and consider when appointing counsel. And when courts' appointment decisions diverge from the majority of respondents, which at times they should, courts should articulate and explain why they believe appointed counsel would better serve the interests of the class. Courts should not feel required to find that the counsel class members have expressed a preference for what is inadequate. Instead, they must only explain why their chosen counsel is the best, as opposed to other adequate counsel preferred by class members.

This articulated reasoning would add greater transparency to the appointment process and provide at least a subset of class members with an opportunity to evaluate counsel. The court should also, in its appointment order, instruct appointed counsel to investigate and consider pursuing additional injuries and remedies articulated by respondents. Counsel should not be required to pursue injuries for which causation cannot be established or which lack merit, but they should be required to consider seeking relief for injuries they otherwise would not have considered. Class members might propose remedies that counsel had not considered, either because their financial value was low or because they redressed an injury the attorneys had not identified. The court's instruction should not obligate counsel to actively pursue any specific claims or remedies, as counsel should have discretion to ultimately decide which claims are worth prosecuting and which remedies are

worth pursuing but should again instruct counsel to consider them. Indeed, representational notice enfranchising class members would not make class action litigation decisions a democracy.[197] It is a compromise that acknowledges preferences for delegation when the agent has particular knowledge and expertise.[198]

While this may seem like a weak instruction, counsel should feel obligated when making a settlement to explain to the court and class members why it did not pursue certain claims or obtain certain remedies. The explanation could be as simple as settlements are compromises and the defendant's resources are finite, but when relief did not have a financial value or another similar injury was compensated, settlement approval may hang in the balance. Moreover, class counsel can leverage these findings against defendants in settlement negotiations. Ultimately, courts will continue to use their discretion and defer to some extent to class counsel when approving settlements but acknowledging class members' preferences at the outset of a litigation in an appointment order can positively shape settlements where claims prove to have merit.

This representational notice provides several benefits for class members, counsel, and the district courts overseeing class actions. Most importantly, it provides class members with a much lacking voice in the litigation. Specifically, it affords class members an opportunity to learn of their claims before they are dismissed, tried, or settled; weigh in on the counsel that will represent them in the action; and inform counsel of any uncontemplated injuries class members may have suffered as a result of defendant(s)' conduct and remedies they would like counsel to consider. This voice serves to also remind counsel and the courts that the true constituents or principles of the action are class members. It also may provide class counsel with new categories of injuries and remedies to pursue that would raise the value of the litigation and add legitimacy to any result obtained, thereby reducing potential settlement objections. Finally, for courts, it provides another data point to consider and potentially legitimize class counsel appointments. While representational notice has several benefits, we would be remiss not to note its potential drawbacks. These are worth acknowledging and addressing. But, as we explain below, they do not outweigh the benefits of representational notice.

D. A Response to Costs and Other Potential Drawbacks of Representational Notice

Providing representational notice is not without costs and other potential drawbacks. These include, but are not limited to the: (1) actual financial cost of providing such notice; (2) additional resources and time expended in collecting and analyzing responses to the notice; (3) disenfranchisement of certain class members; (4) inclusion of individuals that will not ultimately be class members; (5) increased risk of reputational harm suffered by defendants; (6) further cementing of the repeat

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[197] *Cf.* Almendares, *supra* note 29, at 639 (describing two scenarios where class members vote and control litigation decisions and one where attorneys do so).

[198] *Id.* at 643–48.

player system; (7) potential increase in objections and opt outs of class settlements; and (8) potential delegitimization of courts' appointment decisions. These are worth discussing but are not as concerning as they seem in the abstract and are outweighed by the benefits that providing class members' representational notice creates.

1. Representational Notice Costs

Scholars have criticized class action notice procedures as costly and unnecessary in cases where individual claims are relatively small. Professors Macey and Miller, for example, argue that notice in these cases should be dispensed with as its benefits appear "minimal at best."[199] We disagree. Professors Macey and Miller's primary, if not sole, argument for disposing of notice requirements is the cost of notice.[200] While the cost of notice is not insignificant, it has decreased since 1991, when Professors Macey and Miller made this argument.[201] First, notice does not require massive mailing, as it might have in times past.[202] Second, with the predominant use of electronic databases maintained by defendants, identifying class members and their contact information has become easier and more affordable.[203] Third, third-party companies that are experts in identifying class members and providing notice, not just by physical mail, but also electronically, in publications, and over airtime, such as Epiq[204] and Kroll,[205] have entered the marketplace and eased the burden of the process.[206] And while our proposal does have prospective

[199] Macey & Miller, *supra* note 7, at 27–28.

[200] *See id.* at 27–29 (arguing the cost of notice "can run well over half a million dollars" and is money that could be directed to the class).

[201] Cabraser & Issacharoff, *supra* note 180, at 854–55 (noting communication costs with class members can now be "instantaneous and cheap, if not free—courtesy of the internet, email, Facebook, Twitter, and forms of electronic discourse yet unimagined").

[202] *See In re* Domestic Airline Travel Antitrust Litig., 322 F. Supp. 3d 64, 70–72 (D.D.C. 2018) (program involving e-mail notification was sufficient to satisfy Rule 23); Stuart v. State Farm Fire & Cas. Co., 332 F.R.D. 293, 297–300 (W.D. Ark. 2019) (banner on website about class action constituted reasonable notice under Rule 23); Swinton v. SquareTrade, No. 4:18-CV-00144, 2019 WL 617791, at *14 (S.D. Iowa Feb. 14, 2019) (program involving e-mail notification and a banner on the website was sufficient to satisfy Rule 23).

[203] *See, e.g.*, *In re* Nassau Cnty. Strip Search Cases, No. 99-CV-2844, 2017 WL 1322128, at *1 (E.D.N.Y. Apr. 10, 2017) (discussing accessing defendant's electronic database to obtain contact information for class members).

[204] *Legal Notice of Settlement of Class Action*, EPIQ, https://www.epiqglobal.com/en-us/services/class-action-mass-tort/class-action-administration/legal-notice-solutions [https://perma.cc/JXB2-DSZ6] (last visited Sept. 15, 2023).

[205] *Notice Media Solutions*, KROLL, https://www.kroll.com/en/services/notice-media-solutions [https://perma.cc/5FYW-228R] (last visited Sept. 15, 2023).

[206] *See When Choosing a Settlement Administrator: Do Not Settle for Less*, BLOOMBERG L. (June 27, 2012, 3:14 PM), https://news.bloomberglaw.com/product-liability-and-toxics-law/when-choosing-a-settlement-administrator-do-not-settle-for-less [https://perma.cc/A7CN-NPN8].

class counsel initially fronting these costs, such costs could be recoverable from defendants in a settlement or trial.

Moreover, our proposal envisions that notice would be provided or accessed electronically, which further reduces costs. And unlike in judgment and settlement settings that Professors Macey and Miller discuss, which require notice attempts to reach all class members and be accomplished through the best method practicable, representational notice, as discussed above, would only be required to attempt to target a representative sample of potential class members. As such, notice costs would be significantly reduced from those currently required under Rule 23. That is not to say notice costs would be insignificant, but on the whole, they would not be prohibitive and would initially be funded by a wide team of potential class counsel, dispersing such costs. Even though these costs would be passed on to defendants in the event of a settlement or judgment, class counsel would be judicious with the amounts expended because they would permanently assume these costs should the litigation be unsuccessful.

Finally, Professors Macey and Miller's argument fails to acknowledge that the attorney-class member agency costs, which he rightfully argues are massive, are reduced by providing notice. Perhaps this is because they believe that class members, particularly those in individual low-stakes litigation, are not sufficiently motivated to proactively respond to such notice. At the earlier stages of litigation, however, where recovery is not yet established, prospective class members may be willing to make a thirty-minute or less time investment to attempt to shape litigation conducted on their behalf. These motivations, we argue, are different than the notice class members receive when they have a take-it-or-leave-it minimal recovery settlement or notice that a class has been certified, and they will be bound by a yet-to-be decided outcome.

2. Costs Resources Expended in Analyzing Responses and Associated Delays

Providing notice, an opportunity for class members to act upon such notice, and analyzing class member responses could in theory elongate the appointment process, the litigation, and any relief class members may receive. However, depending on the form of notice provided, and how it is calculated, such delay could be minimal. As proposed above, electronic notice could be provided swiftly without delay.[207] Class members receiving such notice would have no more than two weeks to respond to such notice, and results can be quickly tabulated and analyzed electronically. Indeed, the results can be submitted to the court and public via the same website they were collected within the same day they are analyzed. While the court may understandably take additional time to review and consider the results, this should not practically take more than a day to do so. If conducted as proposed here, the delay should not amount to more than two to three weeks, which is within the normal period of time courts take to appoint counsel after applications are due.

[207] *See supra* Part IV.A.

3. Disenfranchising Certain Class Members

While the use of technology lowers costs, it may also reduce access to lower-income and older class members. Notice in settlement and certification contexts, which is more crucial than representational notice, is undergoing the same dilemma. Courts have found such electronic notice to be adequate, despite these real concerns.[208] To ameliorate these effects, a certain percentage of notices can be delivered via alternative means. Similarly, class members can be given the opportunity to request physical notice that they can mail in. We also recognize that class members may not wish to take the time to provide their preferences, and it is possible that only certain types or demographics of class members respond to representational notice, which could skew overall preferences. But the same is true of traditional notice mechanisms in class actions and any system of voting. A winning candidate or referendum may not be the most popular, but it is the most popular amongst those that expressed their preferences. This is certainly not a reason to take away class members' opportunity to express those preferences wholesale. And, arguably, the most invested class members will accordingly have a larger say.

4. Non-Class Member Responses

In the early stages of litigation, often before a consolidated complaint is filed, the class definition is not settled, and membership is far from established. It is thus very possible that individuals that receive representational notice, vote on counsel, and provide preferences are not ultimately members of the class. This will occur any time the class definition is narrowed. A class might be narrowed by factual issues not known by plaintiffs at the start of the action; for example, when a uniform defect does not exist across all alleged models or model years in a products case, or when customer data that was compromised did not include all or as many individuals as initially believed, or when alleged business practices affected some but not all company consumers. A class can also be narrowed when the court dismisses certain claims. For example, if generic unjust enrichment claims are asserted on behalf of class members of all fifty states in a product-defect case, but the laws of certain states hold that unjust enrichment cannot be established unless a product defect has manifested, these state claims might be dismissed early in the litigation, and product purchasers from these states may no longer be included in the class. But this should not be so troubling.

While it is true that this would result in non-class members opining on counsel and possibly influencing the injuries and remedies pursued, it ultimately does little harm. These individuals have either suffered the same losses and injuries or believed they had when they responded to the representational notice they received. They,

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[208] *See, e.g., In re* Domestic Airline Travel Antitrust Litig., 322 F. Supp. 3d 64, 71–72 (D.D.C. Aug. 22, 2018); Browning v. Yahoo! Inc., No. C04-01463, 2006 WL 3826714, at *8 (N.D. Cal. Dec. 27, 2006).

therefore, had the same interests as other class members. Their opinions and comments should thus not wildly skew results.

More troubling is a scenario where notice is not sufficiently targeted or prospective class members are not required to provide any verification that they are potential members of the class. Here, participants could be aware they are not part of the class or prospective counsel can try to unethically influence results. To avoid such scenarios, notice must be as targeted as possible. This may mean having a smaller sample of potential class members that receive notice and respond. But it is better to have a smaller sample than include individuals with no relation to the litigation. Similarly, the verification process prior to permitting or counting a vote, must be as thorough as practicable under the circumstances and involve an attestation that could lead to perjury charges to discourage individuals or entities that know they are not even potentially part of the class from participating. Such safeguards are feasible. Similar procedures are implemented by third-party administrators to ensure that individuals that are not part of a certified class or a class certified for settlement purposes take funds or remedies away from class members.[209]

5. Reputational and Economic Harms to Defendants

Representational notice could increase the reputational harm caused to innocent defendants or defendants whose claims are dismissed. In failed class actions, prospective class members may never become aware of the defendants' purported wrongful conduct and defendants thus suffer no reputational harm if they are successful in having claims dismissed. Providing a sample of prospective class members with notice earlier in the litigation could thus expose defendants to negative publicity they would not have otherwise suffered. That said, the representational notice we propose would not go to all class members, but rather only a subset of them. Further such notice should contain caveated language that in no way imputes guilt or liability on defendants. It merely states that allegations have been made. While this of course does not cure the negative effects of such publicity, today most large class action litigations that attract multiple filings and counsel already receive significant media attention. Finally, to discourage frivolous claims, courts could require counsel paying for such notice to also issue out remedial notice when claims are found to have been frivolously filed or filed without diligence or proper investigation.

[209] *See, e.g.*, *In re* Apple & AT&T iPad Unlimited Data Plan Litig., No. 5:10-cv-02553-RMW, 2014 WL 12650676, at *2 (N.D. Cal. Mar. 11, 2014) (discussing the employment of a settlement administer to "implement and administer the process of verifying, processing and honoring claims pursuant to the terms set for in the [settlement] Agreement").

6. Further Cementing and Gaming the Repeat Player System

Having class counsel initially front representational notice costs may limit the pool of attorneys that apply to those that have the financial resources, though Rule 23(g) already requires courts to consider counsel's resources.[210] Similarly, allowing class members that appear, as courts, to be most concerned about attorneys' experience further cements the repeat player system that has been criticized to date. While respondents rightfully valued experience, they also valued other criteria that may allow for different, younger, and more diverse attorneys to serve as class counsel. For example, several respondents noted that they "wanted a woman," "someone younger" and arguably more "hungry," or "gay friendly." Representational notice, moreover, can be coupled with other proposals to increase diverse class counsel appointments, such as dual appointments, wherein courts would appoint two attorneys from the same firm that would collectively be the best adequate counsel under Rule 23(g), thus permitting class members to benefit from the experience of a repeat player and the other positive qualities of a newcomer.[211]

Lay class members may also be more susceptible than courts to consider information that may not be relevant to an attorney's ability to best represent the interests of the class (i.e., awards, accolades, self-serving statements, appointment as chair of their firm's technology group, etc.). Attorneys can exploit these preferences by carefully tailoring the information they provide class members. Moreover, law firms can identify "ideal" attorney candidates that they continuously endorse for every class action. But class members do not have the final say on which attorney will represent the class—courts do. Courts serve and should continue to serve as the ultimate gatekeepers and authority in determining adequacy.

7. Increase in Objections and Opt-Outs

Arguably, representational notice could increase opt-outs and objections, particularly when the settlement achieved does not reflect a class member's preferences. Class members may, for example, object as to the adequacy of counsel appointed when class members' collective top choice for counsel was not appointed. They could also object to a settlement that does not compensate the injuries they believe they suffered as a result of the defendant's conduct or that does not provide the remedy they indicated they preferred. Some objections may reflect disappointment caused by unreasonable expectations. These can easily be discarded by courts. Others, however, may have merit. Furthermore, class counsel and defendants should be on notice of these possible objections, as both would have access to the notice responses. They should be mindful of these when reaching a settlement and articulate in any motion for preliminary approval of the settlement why the settlement did not include certain potential class members, did not compensate certain injuries, or did not provide a particular remedy.

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[210] *See* FED. R. CIV. P. 23(g)(1)(A)(iv).

[211] *See* del Riego, *Driving Diverse Representation*, *supra* note 22, at 125–39.

Every settlement is necessarily a compromise. The standard for the courts' review of class settlements under Rule 23(e) should not change in practice. Class counsel and representatives must, amongst other things, have adequately represented the class,[212] and the relief provided to the class must be adequate, considering "the costs, risks, and delay of trial and appeal," the proposed method of distributing relief to the class, proposed terms of attorneys' fees, and any agreements made in connection with the settlement.[213] Class counsel's adequacy is now reviewed *ex post* and should generally detail efforts and resources expended and processes employed in the litigation to represent the class. When explaining the adequacy of the relief obtained, class counsel should note that while relief is a compromise and not whole, practicable remedies suggested by or preferred by class members in response to the initial notice were considered, but not attainable for legitimate reasons. These could include the cost of such relief, the impracticalities associated with providing such relief or identifying class members that would be eligible for such relief, the limited settlement funds available due to an impending bankruptcy, the risks of an elongated trial or appeal, etc.

While the risk of large opt-out numbers in class actions with smaller individual financial claims is low, representational notice could increase opt-outs in settlements with less class members that have larger damages. Alerting class members of their claims and, at least, inferentially of their potential value, may make such prospective class members more invested in the litigation and disappointed when their preferred counsel is not selected to represent them or their preferred remedies are not achieved. This could lead class members to explore the possibility of opting out. But this may not be a bad thing. First, where damages are particularly large, courts are already tentative to certify the class.[214] Second, in these cases, it may be beneficial to have competing litigations. Finally, if this becomes a widespread problem, courts can explicitly prohibit unselected counsel from soliciting survey respondents as clients for an opt-out class.

8. Delegitimizing Courts' Class Counsel Appointments

Courts, as emphasized above, should not simply rubber stamp potential class members' top choice for counsel. Rule 23(g) requires courts to appoint adequate counsel and the best counsel able to fairly and adequately represent the interests of the class. Applying the Rule, courts may disagree with potential class members' preferences, which could in turn reduce the legitimacy of appointments. Courts, however, as mentioned above, should explain when their appointment decisions diverge from class members. Acknowledging respondents' preferences and providing explanations adds transparency and legitimacy to the current appointment process.

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[212] *See* FED. R. CIV. P. 23(e)(2)(A).

[213] FED. R. CIV. P. 23(e)(2)(C).

[214] *See, e.g.*, Bacon v. Stiefel Laboratories, 275 F.R.D. 681, 699 (S.D. Fla. 2011) (denying class certification).

CONCLUSION

> "*Assuming is a form of giving away your power to another regarding an outcome that concerns you.*"[215]

In a quotidian claim, a plaintiff chooses her attorney, and the attorney represents the plaintiff in the legal proceedings, all the while being sensitive to the fact that it is the plaintiff, and not the attorney, who is ultimately in charge. In a class action, the representational relationship is complicated. Rather than one plaintiff, there are many, often hundreds of thousands or millions. Class members do not interview or hire counsel. Counsel is instead appointed by the court. And cohesive decision-making and case management has been argued to be impracticable, if not impossible. As such, rather than beholden to the plaintiffs, attorneys have considerable authority and unilateral decision-making powers.[216] But what if class members could have a voice? Even a faint and limited voice that courts and counsel are not beholden to follow but required to acknowledge and consider? Without revolutionizing the class counsel appointment process or the prosecution of class actions, we argue class members can have such a voice. And it would hold much value to them.

We first demonstrated through our studies why such a voice is informative. Although courts, in applying Rule 23(g) consider many of the same factors class members consider important in appointing counsel, courts' appointment decisions did not coincide with participants'. Courts are thus not always appointing the attorneys class members believe will best represent their interests. Our studies also demonstrated that achieving this type of representation is possible and implementable. Respondents participated meaningfully in the process, expressed reasoned opinions, and did so with little compensation. Furthermore, allowing class members to weigh in on the attorneys that will represent them in a given action at the outset of the litigation, before a consolidated class action complaint is filed, also affords class members a vital and lacking opportunity to communicate with class counsel.

The representational notice mechanism we propose thus serves three distinct purposes: (1) an opportunity to weigh in on prospective class counsel; (2) a vehicle to communicate to counsel class members' preferences in the litigation (the injuries they would like redressed and the remedies they believe would redress those injuries); and (3) a pool of potential class representatives that can ensure all injured parties receive relief. We argue that courts should account for class members' preferences through the representational notice method we propose in this Article. The result would be class action litigation that better accords with foundational understandings of representation.

Class members to date have been completely sidelined in class litigation. Representational notice is one way to provide them with a voice and a seat at the table (albeit a distant one). However, we note that expressing unmandated

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[215] MOLLY FRIEDENFELD, THE BOOK OF SIMPLE HUMAN TRUTHS 226 (2013).

[216] *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 7, at 685–86.

preferences does not solve the agency problem that exists in these actions, nor does it guarantee that class counsel is necessarily operating in class members' best interests during the course of the litigation or in any settlement, even armed with useful *ex ante* information. Much is left to be explored as to whether class members are satisfied with the representation they received or the results achieved after the culmination of the litigation. Gaining greater insight into class members' interests, needs, and preferences narrows agency problems that have plagued class actions and would steer such litigation towards being what at its roots it was meant to be—representational.