Blind Spot: The Inadequacy of Neutral Partisanship
Melissa Mortazavi

ABSTRACT

The U.S. Supreme Court recently denied a petition for certiorari in Martin v. Blessing, a case challenging a district court judge's consideration of race and gender in determining adequacy of class counsel. In denying Martin's petition, Justice Alito issued a relatively rare written opinion stating that judges can and should evaluate lawyering as distinct from personal identity—reaffirming a commitment to the idea of neutral partisan lawyering. This Essay argues that in the class context, where the lawyer-client relationship is attenuated, considering the race and gender of proposed class counsel is not only a valid exercise of judicial discretion; ignoring such considerations may undermine fair and adequate representation.

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INTRODUCTION

This past term, the U.S. Supreme Court denied certiorari in Martin v. Blessing, a case in which a district court judge required a law firm to staff a case with women and minorities in order to be certified as fair and adequate class counsel. Apart from obvious constitutional concerns, this decision raises a question of professional ethics: Can or should we evaluate the adequacy of lawyering divorced from the identity of the lawyers and the clients they represent? Has the neutral partisan ideal that lawyers should act as blank conduits for clients’ interests and leave their personal views, identities, experiences, and morality outside of the workplace, reached the limits of its utility, at least in the context of class actions?

This essay takes up these questions. It begins by laying out the particular importance of counsel in class actions and then proceeds to discuss the details of Martin v. Blessing. The final section critiques Justice Alito’s opinion written to support the denial of Martin’s petition for certiorari. His opinion, neither joined nor opposed by any other member of the court, vehemently rejects the lower court’s use of race and gender in determining adequacy of class counsel as illegitimate.

I. LAWYERING AND CLASS ACTIONS 101

The concept of neutral partisanship is fairly established; however, practicing law in the modern class action framework is relatively new. While the first

2. That is not to say questions of ethics or professionalism are entirely divorced from the constitutional inquiry; it is simply not the focus of this discussion. The resolution of these ethical questions converses with the constitutional questions as their resolution defines the compelling nature of government’s interest in considering race or gender in this context.
3. The debate over whether these interests are limited to the clients’ legal interests or generalized personal interests is active and as of yet unresolved. See W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 4, 11 (2010) (arguing that a modified version of neutral partisanship that places fidelity to legal entitlements rather than client interests is an essential value in a pluralistic society).
4. Neutral partisanship has a long history in American legal discourse dating back to at least the 1800s, and is now considered the standard conception of lawyering. See GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 26, 29–30 (1854); Gerald J. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L.
version of the Federal Rules of Civil Procedure allowed for class actions in 1938, the modern system that has the ability to bind nonpresent parties came into fruition less than fifty years ago.\(^5\) Today, Rule 23(g) requires that the court appoint counsel for classes of plaintiffs.\(^6\) The validity of such cases rides, in large part, on the proper certification of the class and the adequacy of class counsel.\(^7\)

The adequacy of counsel provision is exceptionally salient in the class action context because of concerns over the attenuated agent-fiduciary relationship.\(^8\) Lawyer fidelity needs to be particularly strong where clients are bound in absentia, rather than engaging in the regular informative colloquy expected in an attorney-client relationship.\(^9\) The potential for abuse of the interests of the class is exacerbated because attorneys often initiate class actions and may even select class representatives.\(^10\) Given the specific role class counsel plays, the Federal Rules grant judges broad discretion to “consider any other matter pertinent to counsel’s
ability to fairly and adequately represent the interests of the class . . . .”\(^{11}\) Given this broad language—and the fact that class certification is subject to a deferential abuse of discretion review standard—it would seem that challenges to a trial court’s determinations pursuant to Rule 23(g) would be doomed to fail.

II. \textit{Martin v. Blessing}

Enter \textit{Martin v. Blessing}, a case petitioning for certiorari challenging a district court judge’s consideration of race and gender in determining adequacy of counsel.\(^{12}\) \textit{Martin} originated as a relatively straightforward class action case: Two digital radio companies merged and then faced a slew of class action suits where subscribers alleged antitrust violations.\(^{13}\) The plaintiffs sought to certify the class pursuant to Rule 23 in order to proceed with litigation.\(^{14}\) Here the process took an unusual turn: The judge spoke openly about the importance of aligning the racial and gender identities of lawyers with their clients; in his certification order, Judge Baer used this discretion to “ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics.”\(^{15}\)

When a settlement offer was made which included injunctive but not monetary relief, class member Nicholas Martin objected to its terms.\(^{16}\) Martin argued on appeal that the settlement should be set aside in part because Judge Baer relied on race and gender in evaluating the adequacy of counsel during certification.\(^{17}\) The Second Circuit denied the petition for review and refused to address the question of what were relevant or permissible facts to consider in the context of certifying class counsel on standing grounds.\(^{18}\) The petition for certiorari was similarly denied on grounds other than the class counsel certification issue.\(^{19}\)

\begin{itemize}
  \item \textit{FED. R. CIV. P. 23(g)(1)(B)}.
  \item \textit{Martin}, 134 S. Ct. at 402.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id. at 403.}
  \item \textit{Id.; Blessing, 507 F. App’x at 5.}
  \item \textit{Blessing, 507 F. App’x at 5.}
  \item \textit{Martin}, 134 S. Ct. at 404–05 (dismissing on standing grounds).
\end{itemize}
III. A RESPONSE TO JUSTICE ALITO

Unlike the Second Circuit, the Supreme Court took the opportunity to discuss in some detail Judge Baer’s appointment of class counsel.20 In denying the petition for certiorari, Justice Alito issued a relatively rare written opinion (made rarer still by the subject matter at issue and the passion of its rhetoric) stating that judges can and should evaluate lawyering as distinct from racial or gender identity—reaffirming a commitment to the idea of neutral partisanship.21 Arguing that race and gender are irrelevant in determining the fairness and adequacy of class counsel, the opinion stated that the court was “hard pressed to see any ground on which Judge Baer’s practice can be defended.”22

Yet Judge Baer’s viewpoint on fairness and adequacy is straightforward: Lawyers are more likely to serve clients fairly and adequately when there is some overlap between the race and gender of the class and of the representative legal team. Why? As an initial matter, clients may trust their lawyers more and therefore be more forthcoming and candid about relevant facts and concerns.23 Moreover, such lawyers have cultural knowledge that allows them to communicate effectively with clients and anticipate concerns and roadblocks.24 Lawyers that share demographic qualities with their clients are also more likely to have empathy for their clients and substantive loyalty to their interests.25 They may be in a

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20. Id. at 402–04.
21. Id. at 403 (“It seems quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class.”).
22. Id.
23. Bill Ong Hing, Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses, 45 STAN. L. REV. 1807, 1809–10 (1993) (noting gender and racial differences between an attorney and client can impede building client rapport and the willingness of clients to “open up”); Roland Acevedo, Edward Hosp & Rachel Pomerantz, Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race, 18 BUFF. PUB. INT. L.J. 40 (2000) (noting that nearly 60 percent of people of color surveyed agreed that “[c]lients are more open with attorneys of the same race as them); Timothy L. Dupree, Race and the Attorney-Client Relationship, 80 JUN. J. KAN. B. ASSN 9 (2011) (noting that client distrust is exacerbated when the attorney and the client are of different races . . . [and that the client] was further concerned that differences in our backgrounds might impede his ability to express his opinions and beliefs”).
24. See Acevedo et al., supra note 23, at 19 (noting that clients and attorneys of the same race share cultural assumptions and constructs that support communication and better understanding of the client’s perspective); Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyers, 8 CLINICAL L. REV. 33, 41 (2001) (“[S]haring a common cultural heritage with a client tends to improve our predictions and interpretations and to reduce the likelihood of misunderstandings.”).
25. Shani M. King, Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys, 18 CORNELL J. L. & PUB. POL’Y 15–16 (2008) (noting that African Americans would prefer to have “their case in the hands of someone who sees the world
better position to assess nonmaterial trade-offs implicated by legal action. In assessing fairness, a demographically representative legal team is more likely to weigh the interests of different class members fairly against one another, making better judgments for the overall class.26

Setting aside administrative concerns regarding how the appointments process would work if it did consider race and gender,27 the primary concern the Court raised regarding the consideration of race and gender is that it would “lead to truly bizarre results.”28 Some of the examples the court gives of “truly bizarre” results include (1) favoring law firms with high percentages of male attorneys in a case involving prostate cancer treatment; (2) favoring firms with high percentages of female attorneys in class actions regarding breast cancer treatments; and (3) favoring firms with low minority attorney populations when the class is wealthy, based on a perceived correlation between wealth and white/Caucasian ethnicity (or poverty and minority status).29

Yet these fact patterns—designed as straw men to unsettle the idea of considering race and gender—actually fail to undermine the idea that these factors are valid when determining adequacy or fairness. The first and second fact patterns are straightforwardly fair: It is absolutely valid in cases when the product at issue impacts a specific demographic of people to favor law firms that employ at least some members of the affected demographic over another law firm that does not. The Court’s treatment of the final fact pattern is misguided—for a law firm representing a class of wealthy clients, the real representative issue is whether or

as they do, someone who can personally identify with their historical and current struggle in this country as black Americans,” or in other words, “in the hands of an African American attorney”); Alexis Anderson, Lynn Barenberg & Carwina Weng, Challenges of “Sameness”: Pitfalls and Benefits to Assumed Connections in Lawyering, 18 CLINICAL L. REV. 339, 388 (2012) (observing that “[s]hared personal characteristics and shared life experiences can . . . help [lawyers] to understand and appreciate more fully a particular client’s legal problem and to be more effective advocates”).

26. Not all class members will have identical interests. See Deborah L. Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183, 1183 (1982) (“[B]y presupposing an individual client with clearly identifiable views, [the American Bar Association’s ethical codes] elide a frequent and fundamental difficulty in class action proceedings. In many such cases, the lawyer represents an aggregation of litigants with unstable, inchoate, or conflicting preferences. The more diffuse and divided the class, the greater the problems in defining its objectives.”) (footnote omitted).

27. The opinion also argues that Judge Baer’s actions are systemically untenable: “There are more than 600 district [court] judges, and it would be intolerable if each judge adopted a personalized version of the criteria set out in Rule 23(g).” Martin v. Blessing, 134 S. Ct. 402, 403 (2013). However, the language of the rule is deliberately broad and allows judges to “consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class . . . .” FED. R. CIV. P. 23(g)(1)(B). As such, multiple interpretations are not only allowable, but facilitated.


29. Id. at 404–05.
not there is anyone on the legal team that falls into the clients’ socioeconomic demographic, since financial status is what defines that class. Such cases are likely to be staffed by high-powered lawyers who are, by any objective standard, also wealthy. Therefore, with regard to that group, favoring a heavily white firm does not make as much sense, since affluence does not correlate to race in the context of law firm attorneys, as suggested by Justice Alito. That said, even if one engages with the Justice’s analysis, the correct framing of the question would be: Is it appropriate for a judge in such a case to require a law firm with no white attorneys to staff the case with some white lawyers? The answer to this may well be yes.

If adequacy and fairness is validated by technical competence in legal research, filings, and support services, then Rule 23(g) is easily met. Yet, as the Rules contemplate, a lawyer’s duties extend beyond standard competence and diligence. Perhaps the most important of the traditional lawyerly duties, the bedrock drawn from agency and fiduciary common law, is a duty of loyalty. Loyalty is not purely technocratic; it requires trust, a relationship, and candor. Loyalty allows the lawyer to fulfill his or her role as an advisor. A plausible reading of the adequacy requirement could (and perhaps should) include an emotional intelligence component to fulfill this role—a degree of empathy—in order to adequately represent a client as a counselor and as an advocate.

Judge Baer’s use of discretion to consider the race or gender of an individual is not per se inappropriate as a matter of ethics—it is how and why race or gender is considered that may be questionable. Judges are already charged with making this distinction between warranted differentiation and impermissible bias in the courtroom. If judges use race or gender when it does not correlate to the needs of the class, it would be inappropriate. But if a judge considers race and gender to serve the integrity of the legal system and safeguard the interests of predominately absent clients by providing a representative who is more likely to adequately and

30. Rule 23(g)(1)(A) deals specifically with examining competency. FED. R. CIV. P. 23(g)(1)(A). Accordingly, the basic canon of statutory construction—the rule against surplusage—requires that the inclusion of Rule 23(g)(1)(B) must therefore serve a different purpose.

31. Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships: An Exploratory Analysis, 1 GEO J. LEGAL ETHICS 15, 21 (1987) (“In the relationship with a client, the lawyer is required above all to demonstrate loyalty.”).

32. Michael K. McChrystal, Lawyers and Loyalty, 33 WM. & MARY L. REV. 367, 370 (1992) (“Loyalty is a term of relation; it must know an object. It also describes the relation, implying at least a preference for the object and, perhaps, even a devotion to it. Finally, loyalty requires action; the preference (or devotion) must be expressed through conduct. Most loyalties are essentially social . . . .”).

33. See MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2007) (prohibiting bias, harassment, and prejudice, while allowing discussion and consideration of issues of race and gender in relation to substantive legal requirements).
fairly consider their interests, that seems to be a valid exercise. Such fact specific inquiries are valid especially in the class action context, where there has been a clear congressional mandate for broad discretion, where lawyer loyalty is vulnerable, and where that loyalty cannot be monitored in the day-to-day interactions between lawyer and client. The class action lawyer must act in the clients’ interests without regular input or guidance from the bulk of the class members. As such, rules governing class action were specifically devised as a watchdog to consider and evaluate if a lawyer fairly and adequately represents the (absent) client’s interests. The adherence to the neutral partisan norm must yield to concerns that a lawyer’s identity may be relevant to a just outcome.

Justice Alito states in Martin that “[i]t seems quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of the counsel mirror the demographics of the class.” Is it not equally farfetched to think that class counsel possibly could represent the interests of clients with whom they have no demographic overlap? Here, the deeply entrenched legal fiction of the lawyer as a neutral advocate colors the Court’s assessment of what constitutes adequate and fair legal services when it should seem clear that determining adequacy and fairness necessarily includes examining qualities associated with the identity of the attorney. To serve the clients as such requires judgment, discretion, and loyalty without threat of oversight.

CONCLUSION

Particularly in relation to class actions, considering the race and gender of proposed class counsel is not only a valid exercise of judicial discretion; ignoring such considerations may undermine fair and adequate representation. Omitting the identity of the lawyers fails to interrogate and challenge existing norms as they play out in this specific case before the Court: norms that routinely leave classes of people represented by lawyers who have little connection to or knowledge of their clients. This also undermines the class counsel certification requirement, which is predicated on a fact intensive review. Here, courts must assess the conviction with which the lawyers on a given case will pursue the legal rights of those they

34. Martin H. Redish, Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalist Socialism in the Litigation Process, 64 EMORY L.J. 460 (2014) (noting the tensions in loyalty that arise since “class attorneys stand to gain more financially than any one of their clients”). Regarding the lack of regular interactions between lawyers and clients, see id., at 472 (“[T]hey lack whatever bonds develop between client and attorney based on the traditional one-on-one relationship for the simple reason that the overwhelming portion of the absent class remains faceless to class attorneys.”).

represent, absent client oversight. If these lawyers lack the ability to comprehend the totality of their clients’ circumstances and place litigation choices in a context that comports with the needs of their broad client base, the clients are ultimately disadvantaged. Accordingly, in determining whether counsel may adequately represent a class, the race of lawyers may matter; the gender of lawyers may matter; and both should be considered in determining the adequacy of a legal representative on a case-by-case basis. Perhaps what is most surprising about *Martin* is how long it has taken for a federal judge to openly come out and say so.