

**ADVISORY COMMITTEE  
ON  
CIVIL RULES**

**Philadelphia, PA  
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Some urge that MDL transferee judges focusing on the "central" issues in their combined litigation may decline to address these issues that affect only a few of the cases. In a sense, this could be viewed as similar to the "bystander" party issues mentioned above. These are "bystander" issues in that they are not central to the centralized cases. They bear on the state-federal mix because remand can return cases to the state courts.

The consensus was that this topic should remain on the list. It was also noted that topic (9) can have links to topic (7) on bellwether trials. Creative collaboration with state courts can produce advantages for all.

(10) PSC formation and common fund issues: This topic includes a variety of somewhat distinct issues. One has to do with the selection of individual attorneys to serve on the PSC or similar entity. Some urge that standards like the ones in Rule 23(g) be applied. There is no rule that currently so requires. But it was noted that most MDLs involving "mass" claims include class actions, so Rule 23(g) will apply. And the reality seems to be that judges are actually employing standards like Rule 23(g) in evaluating potential PSC members without any rule requiring them to do so.

A different problem might be called the "old boy" problem. Too often, according to some, judges go with prominent well-established lead counsel. Pressure has built to increase the diversity of lawyers appointed. The idea here is not that incompetent people are getting appointed, but that many highly talented people are not getting the call. As one participant put it, "People work hard to become lead counsel." It does not seem that the incompetent are getting the call, but it may be that outreach would produce benefits. At least some judges mention diversity in making decisions on lead counsel.

Another pressure point is the growing importance of common fund arrangements. From the perspective of some lawyers not designated to serve on committees, this results in taking money out of their fees to pay the lawyers favored by the judge. As some of them might say, they are the ones who have the actual clients, but their fees are often capped (sometimes on the "quasi class action" notion) and also taxed for the common benefit fund.

A reaction was that, among the things discussed during the call, this seems least likely to be addressed effectively through a rule. The Manual for Complex Litigation already has provisions about appointment of counsel, and it is not likely we will be able to improve on that. Almost inevitably, tensions among lawyers will arise in some cases.

The consensus was that this topic should remain on the agenda but that, along with topic (4) it presently seems less promising as a topic for rulemaking.