**CALL FOR PUBLIC COMMENT**

**(Comments due no later than July 2, 2018)**

**STANDARDS AND BEST PRACTICES**

**FOR LARGE AND MASS-TORT MDLS**

**BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL**

 **(Updating December 19, 2014, Report)**

Duke Law School

 May 14, 2018

**FOREWORD†**

 The Duke Law Center for Judicial Studies held a series of bench-bar MDL conferences in 2013, 2014, 2015, and 2016. The conferences revealed a growing and large number of cases centralized in a few mass-tort MDLs. These mass-tort MDLs present enormous challenges to transferee judges assigned to manage them. There is little official guidance and no rules explicitly governing the management of mass-tort MDLs, often requiring the transferee judge to develop procedures out of whole cloth. Under the auspices of the Duke Law Judicial Studies Center, which has now become the Bolch Judicial Institute, volunteer judges and practitioners have been examining the various procedures adopted by MDL transferee judges with a view to developing and providing more uniform guidance.

 Following a bench-bar conference on May 2-3, 2013, more than thirty-five practitioners, equally balanced between plaintiff and defense lawyers, and judges drafted a report containing standards and best practices governing large and mass-tort MDLs. The Center issued the report on December 19, 2014. The report has been forwarded to every transferee judge assigned a large or mass-tort MDL.

 On October 27-28, 2016, the Judicial Studies Center held a bench-bar conference on Emerging Issues in Mass-Tort MDLs. Four teams consisting of thirty practitioners, equally balanced between plaintiff and defense lawyers, and seven judges volunteered to update and add new sections to the 2014 MDL Standards and Best Practices.

 Teams were formed, and team leaders selected in early 2017. In February 2017, the teams prepared outlines of new chapters and updates. They submitted drafts in the fall and winter, which were circulated among the team members, who reviewed and revised the drafts in accordance with the comments. The revised drafts were then submitted to seven judges for their comment in early 2018. The teams reviewed the judges’ comments and revised their drafts, which are now being circulated widely for public comment.

This public-comment package revises and updates the 2014 MDL Standards and Best Practices, adding: (1) new sections to Chapter 1 on the information individual plaintiffs should submit on filing a claim; (2) a new Chapter 3 on lead counsel duties, including guidance on the extent of fiduciary duties owed by the plaintiff steering committee and lead counsel to all plaintiffs; (3) a new Chapter 4 on the role of non-leadership counsel; and (4) a new Chapter 6 on settlement review and claims-processing administration. Selected text from the *2014 MDL Standards and Best Practices* is given for context, set off by an elliptical series of three periods indicating omitted text.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**†**Copyright ©2018, All Rights Reserved. This document does not necessarily reflect the views of Duke Law School or its faculty, or any other organization including the Judicial Conference of the United States or any other government unit.

The updated MDL Standards and Best Practices are the culmination of a process that began in October 2016.  Although Duke Law retained editorial control, this iterative drafting process provided multiple opportunities for the volunteers on the four teams to confer, suggest edits, and comment on the draft. Substantial revisions were made during the process.  Many compromises, affecting matters on which the 30 volunteer contributors hold passionate views, were also reached.  But the draft should not be viewed as representing unanimous agreement, and individual volunteer contributors may not necessarily agree with every recommendation.

After the expiration of the public-comment review, the teams will make appropriate revisions and incorporate the additions and revisions into the December 2014 MDL Standards and Best Practices. The single, consolidated document will be posted on the Institute’s web site and made available to the bench and bar and forwarded to every transferee judge of a large or mass-tort MDL. A separate document containing only the MDL Standards and Best Practices will also be posted.

 John K. Rabiej, Deputy Director

 Bolch Judicial Institute, Duke Law School

 Malini Moorthy, Chair, Distinguished Lawyers’ Conferences

 Dena Sharp, Vice-Chair, Distinguished Lawyers’ Conferences

**ACKNOWLEDGEMENTS**

The revision of the 2014 MDL Standards and Best Practices is the work product of more than thirty practitioners and seven federal judges. Eight of the practitioners assumed greater drafting responsibility and served as team leaders, including:

**Team Leaders**

|  |  |  |
| --- | --- | --- |
| James BilsborrowWeitz & Luxenberg | Mark ChalosLieff Cabraser Heimann & Bernstein | Brenda FulmerSearcy Denney Scarola Barnhart & Shipley |
| Michelle MangrumShook Hardy & Bacon | Steven MarshallVenable | Ellen RelkinWeitz & Luxenberg |
| Kaspar StoffelmayrBartlit Beck Herman Palenchar & Scott | Sean WajertShook Hardy & Bacon |

The following practitioners helped draft particular sections of the text:

**Contributors**

|  |  |  |
| --- | --- | --- |
| James BeckReed Smith | Paul BoehmWilliams & Connolly | Maya EatonSidley Austin |
| Gretchen EoffGarden City Group | Yvonne FlahertyLockridge Grindal Nauen | Amy Gernon |
| Mara Cusker GonzalezQuinn Emanuel Urquhart & Sullivan | Steve HermanHerman Herman & Katz | Alyson JonesButler Snow |
| Allan KannerKanner & Whiteley | Altom MaglioMaglio Christopher & Toale | Mary MassaronPlunkett Cooney |
| Debbie MoellerShook Hardy & Bacon | Mark MyhraBoston Scientific | Andrew MyersWheeler Trigg O’Donnell |
| Christopher RitchieThe Huntington National Bank | Alan RothmanArnold & Porter | Susan M. SharkoDrinker Biddle & Reath |
| Rebecca K. Wood, Sidley Austin LLP until June 2017 | Amy ZemanGirard Gibbs | Kenneth ZuckerPepper Hamilton |

We thank Patrick Bradley, Leah Brenner, Matthew Eible, and Calypso Taylor, the four Duke Law, Bolch Judicial Institute Fellows, who edited, proofread, cite checked, and provided valuable comments and criticisms. In particular, we gratefully acknowledge the extensive and superb editing suggestions submitted by James Beck, Reed Smith, which markedly improved the document’s clarity.

The feedback and input of the judiciary have been invaluable in identifying best practices, exploring the challenges faced by judges, and the viability of the proposed standards and best practices. The ways in which these standards and best practices have benefitted from the candid assessment of the judiciary cannot be understated. It is with the greatest of thanks that we recognize the contributions of the thirteen judges, who attended the 2016 MDL conference and the seven judges who reviewed early drafts and provided comments and suggestions.

 Bolch Judicial Institute

 Duke Law School

 May 14, 2018

**STANDARDS AND BEST PRACTICES**

**FOR LARGE AND MASS-TORT MDLS**

**May 2018**

**(Updating and Revising December 2014 MDL**

**Standards and Best Practices)**

**CHAPTER 1**

**MANAGEMENT OF TRANSFERRED CASES**

…. [Material omitted from 2014 MDL Standards and Best Practices.]

**MDL STANDARD 1:** The transferee court, in consultation with the parties, should articulate clear objectives for the MDL proceeding and a plan for pursuing them. The objectives of an MDL proceeding should usually include: (1) the elimination of duplicative discovery; (2) avoiding conflicting rulings and schedules among courts; (3) reducing litigation costs; (4) saving the time and effort of the parties, attorneys, witnesses, and courts; (5) streamlining key issues; and (6) moving cases toward resolution (by trial, motion practice, or settlement).

…. [Material omitted from 2014 MDL Standards and Best Practices.]

Best Practice 1C: At an early juncture, the parties and the transferee judge should collaboratively develop a discovery plan.

…. [Material omitted from 2014 MDL Standards and Best Practices.]

Best Practice 1C(iv): At an early juncture, individual claimants should be required to produce information about their claims.

In non-MDL cases, plaintiffs are required to produce information about their claims from the outset, and that requirement should not change simply because a claim becomes part of an MDL proceeding. Such a balanced approach will ensure that both sides obtain information critical to claims or defenses. Moreover, development of plaintiffs’ individual claims is vital to the establishment of a fair and informative bellwether trial process and is indispensable to any settlement discussions in which the parties may engage. In fact, settlement talks are often delayed because the parties have not anticipated the time needed to assemble information necessary to assess the strengths and weaknesses of the global litigation and examine the potential value of individual claims. Finally, requiring plaintiffs at an early juncture to produce information verifying their basic factual

allegations addresses concerns that MDL proceedings invite unsubstantiated claims.

Until the parties and the transferee court determine the process by which cases might be selected for bellwether trials (if any) in the MDL proceeding (as discussed below) or early remand to transferor courts for trials, there is ordinarily no need for full case development of all cases (e.g., plaintiff depositions, case-specific expert discovery). Rather, each claimant should initially be required to engage in streamlined, cost-effective paper discovery to the maximum extent possible.

Best Practice 1C(v): In large mass-tort MDLs, a court should, on the parties’ request, consider issuing a case management order approving plaintiff and defendant fact sheets, which can provide information useful for case management, relevant to selecting bellwether trials, and valuable for conducting settlement negotiations. Fact sheets also help to uncover cases that should not have been centralized in the first instance.

Fact sheets are one of the most useful and efficient initial mechanisms for obtaining individual discovery in large mass-tort MDLs. These are court-approved, standardized forms that seek basic information about plaintiffs’ claims and defendants’ knowledge about aspects of those claims — for example, what injury a plaintiff claims to have sustained as a result of using the product, or a defendant’s representative’s contacts with providers of allegedly harmful pharmaceuticals. Plaintiff fact sheets spare defendants the expense of tailoring countless interrogatories to individual claimants[[1]](#footnote-1) while allowing plaintiffs’ attorneys to fulfill early discovery obligations with relative ease. It is also common in mass-tort MDL proceedings for the parties to negotiate (and for the court to approve) defendant fact sheets.[[2]](#footnote-2) However, fact sheets will be meaningful only if plaintiffs, defendants, and their counsel devote appropriate time and attention to this project. Fact sheets should be deemed a form of discovery governed by the relevant Federal Rules of Civil Procedure, requiring the same level of completeness and verification.

Fact sheets can serve multiple purposes. The parties and court should give careful consideration to the purpose plaintiff and defense fact sheets are to serve in their MDL, given the needs of the litigation. Fact sheets sharpen assessments of the propriety and focus of a bellwether process. They also can provide an efficient mechanism to assist the parties and the court in assessing whether certain claims may be candidates for expedited resolution through voluntary withdrawal, dispositive motions, or through a settlement process.

Streamlined plaintiff fact sheets (one to two pages) are appropriate in some MDLs to identify quickly some cases that should not have been added to the cases centralized in the MDL in the first instance. In other MDLs, including large mass torts, more extensive plaintiff fact sheets (five to twenty pages) can serve a broader purpose, providing some useful information to the court and parties to inform selection of bellwether trials and settlement negotiations. If only a few core questions are required to be completed, the same fact sheet can serve both purposes.

Targeted plaintiff fact sheets can be particularly useful in the largest mass-tort MDLs, many of which involve personal injury claims allegedly caused by pharmaceuticals or medical devices. In such cases, the plaintiff fact sheet should provide sufficient information to permit the parties and the court to determine: (1) product identity (if not covered in a preliminary product identification disclosure); (2) exposure, alleged injury, and any adverse consequences; (3) date of alleged injury and of notice or discovery of defendant(s)’ alleged wrongful conduct; and (4) authorizations for the release of relevant medical and pharmacy records and other relevant fact sources (such as employers, where wage-related claims are asserted).

Similarly, requiring the collection of plaintiffs’ medical records (in personal injury cases) or employment histories (in employment cases) is another straightforward way that a transferee judge can encourage a robust exchange of key information at a relatively early stage. This information can help defendants verify the answers provided in the fact sheets and can shed light on the potential causes of the plaintiffs’ injuries.

As part of the parties’ preparation and negotiation of proposed fact sheets, they should create protocols or proposed orders governing the form and scope of authorizations and records-collection procedures. Parties should work to reach agreement on, and to obtain court endorsement of, authorization forms, when and how they may be used, the timeframe and subject-matter scope of permissible records collection, how records will be collected and made available, and how collection costs will be divided.[[3]](#footnote-3) Addressing these issues early in an MDL facilitates uniformity and efficiency during this important early information-gathering phase and obviates unnecessary disputes and delay.

Best Practice 1C(vi): When plaintiff fact sheets are used, defendant fact sheets may serve a similarly important purpose.

In MDLs employing a plaintiff fact sheet, the defendant may also be directed to reciprocate by providing the plaintiff with a defendant fact sheet after an agreed upon period of time. Like the content of the plaintiff fact sheet, the content of a defendant fact sheet will vary based on the claims involved in the MDL and should be negotiated by the parties to facilitate the early exchange of information. For example, if streamlined plaintiff fact sheets are agreed upon by the parties, the defendant’s fact sheet should be equally streamlined. Conversely, some large mass-tort MDLs will likely call for more extensive defendant fact sheets. The parties should also discuss the content and timing of defendant fact sheets concurrently with their discussion of plaintiff fact sheets.

The parties thus should consider to what extent the defendant should be required to produce fact sheets for individual plaintiffs, providing basic information the defendant may have about the claimant, her physicians (in product liability injury cases), or her claim. The utility and practicability of individualized information in defendant fact sheets depends upon a number of factors, including the nature of plaintiffs’ allegations, the pre-suit relationship (if any) between plaintiffs and defendant, any contacts or relationship between defendant and plaintiffs’ physicians, the likelihood of defendant possessing plaintiff-specific documents or information, and the accessibility and potential relevance of any such documents or information.

In large mass-tort MDLs involving alleged harmful pharmaceuticals or medical devices, the defendant fact sheet typically would provide sufficient information regarding contacts and communications with the plaintiff’s medical provider(s), including: (1) identification of the representatives who met with or called upon such provider(s); (2) the dates of contact; (3) existence of “call notes” or similar documents that summarize the contacts with the physician(s); and (4) payments, honoraria, reimbursements, or other financial arrangements with such provider(s).

Best Practice 1C(vii): In large mass-tort MDLs, particularly those involving competing brands or versions of a similar pharmaceutical drug, the court should consider issuing a case management order requiring a product identification disclosure sheet that quickly identifies cases that should not have been centralized in the first instance.

Within mature large mass-tort MDLs, a variety of case management techniques have identified individual cases that should not have been centralized in the first instance, sometimes because the plaintiff did not use the product at issue in the litigation. A streamlined “product identification” verification (one to two pages) can be used in large mass-tort MDLs to identify quickly cases that do not belong. The order would require early verification of whether and when plaintiff used the product at issue; this verification should be relatively streamlined and not burdensome. The purpose of such a verification is not to replace a fact sheet or impose any undue burden on the plaintiff but to ensure that the individual case is properly centralized in the MDL. This technique can be especially useful in large prescription product MDLs in which multiple manufacturers may have produced different versions of the drug or medical device. The court should consider dismissing or remanding to the transferor court those cases in which claimants are unable to provide adequate, timely verification of product usage.

Best Practice 1C(viii): Standardized interrogatories may serve as an alternative to fact sheets.

An alternative to fact sheets is standardized interrogatories or document requests, which are less costly and onerous than individually-tailored interrogatories and document requests. Standard document requests can also be included within or annexed to a form fact sheet. In personal injury product liability MDLs, requiring plaintiffs to produce documents that demonstrate proof of product use and injury can help the parties and court focus resources on viable cases.[[4]](#footnote-4)

Especially as a proceeding matures, the transferee judge may consider the entry of *Lone Pine* orders requiring all plaintiffs to submit an affidavit of support from an independent physician.[[5]](#footnote-5) These orders are particularly important in an MDL proceeding involving disparate theories of causation — or where multiple alternative potential causes of the alleged injuries exist. In some MDL proceedings, courts have required defendants to prepare fact sheets for each plaintiff that provide basic information they may have about the claimant or their claim. Typically, this step is required only after a plaintiff has completed a fact sheet.

Best Practice 1C(ix): The court should enforce reasonable deadlines for submitting fact sheets, excusing late submissions only on an appropriate showing.

The transferee judge should articulate clear expectations and impose clear timelines for completing plaintiff and defendant fact sheets, together with clear procedures and timelines for addressing deficiencies.[[6]](#footnote-6) Unless such procedures and deadlines are adhered to and enforced, counsel handling multiple claims may fall far behind in fulfilling that obligation. While the obligation to provide a timely, complete fact sheet falls solely on counsel of record for the individual MDL plaintiff or defendant, the court should expect the PSC and defense counsel to cooperate and share information regarding fact sheet compliance status to enable the PSC to communicate with counsel for individual plaintiffs with the goal of reducing deficiencies and motion practice.

Although deadlines may be extended upon a showing of good cause or agreement of the parties, timely and substantial compliance with fact sheet requirements, including completion of “core criteria,” should be the norm. Case management orders should include procedures for dismissing claims due to substantial noncompliance with fact sheet requirements and deadlines.

Best Practice 1C(x): The transferee judge should consider, in addition to deadlines for the completion of fact sheets, a case management order detailing the process for handling late or incomplete fact sheets.

Anticipating that some fact sheets will not be filed or will be incomplete, the parties should agree ahead of time on the process for addressing deficiencies. Such a process usually should include sending a non-compliance or deficiency notice letter, short (but reasonable) windows for correction of any alleged deficiency (typically ten to thirty days), and a schedule for motion practice for unresolved compliance issues. Several MDL courts have effectively addressed motions to dismiss through a two-tiered process: first, motions to dismiss without prejudice, followed by a short grace period during which the party can re-file; and second, motions to dismiss with prejudice.[[7]](#footnote-7) Other courts, including Judge Fallon in the *Xarelto* MDL, have adopted an order to show cause process for delinquent or deficient fact sheets, which has proven to be a more efficient way of dealing with the issue on large scale rather than individual motions to dismiss. While cases are ideally decided on the merits, efficiency is a primary basis for an MDL, and the fact sheet process is a critical component of the effective management of the litigation. The transferee judge should deal with fact sheet non-compliance directly and promptly, including through a well-defined process culminating in motions to dismiss.

Because one benefit of having court-approved fact sheets is elimination of disputes as to whether certain questions are appropriate in a particular MDL, courts should consider ways in which enforcement of fact sheet obligations might be streamlined, including modifying typical meet-and-confer requirements for discovery motions in favor of a well-defined procedure for addressing fact sheet compliance issues in the order implementing the fact sheets.

Best Practice 1C(xi): Once it is demonstrated that individual fact sheets have been filed with material, inaccurate information, the court should consider requiring that answers be supported with some minimal amount of additional evidence supporting the claim or defense at issue.

Plaintiff fact sheets, including streamlined fact sheets, in many cases provide sufficient information to support the plaintiffs’ claims. However, there have been reported opinions in the largest mass-tort MDLs, usually involving allegedly harmful pharmaceuticals or medical devices, in which large numbers of fact sheets have been submitted with material, inaccurate information.[[8]](#footnote-8) Although the defendant can verify individual claims after receiving medical records authorizations and conducting discovery, doing so takes substantial time in MDLs that consist of thousands of claims. Meanwhile, the cases remain active.

When fact sheets have been submitted with inaccurate information, the court should consider requiring that all individual parties submit some minimum quantum of evidence, for example, pharmacy records, receipts from pharmaceutical purchases, and medical records. If no such evidence is available, the court should provide individuals an opportunity to explain the absence of the evidence.

Best Practice 1D: Class actions may require a different approach to discovery because of the need to resolve class-certification issues as early as practicable.

…. [Material omitted from 2014 MDL Standards and Best Practices.]

Best Practice 1E: The transferee judge should confer with the parties to determine whether holding bellwether trials would advance the litigation.

Concerns continue to be expressed that some MDLs are best managed by focusing on the statutory mandate to conduct pretrial proceedings with an eye toward remand instead of holding bellwether trials and resolving by settlement within the MDL proceedings. Accordingly, the transferee judge should determine as a threshold matter whether bellwether proceedings would be beneficial. But determining whether and which cases should serve as bellwethers can be difficult. Counsel must provide the judge with sufficient information describing the nature of claims, extent of injuries, and other pertinent data so that the judge can make an informed decision.

In some MDL proceedings, the individual cases may be too dissimilar for bellwether trials to provide any useful insight into the larger claims pool. Remand following pre-trial proceedings may well be the most appropriate course in such situations. Otherwise, motion practice, mediation, summary trials, mini-trials, or joint trials of multiple cases may better serve the parties’ goals than a traditional bellwether trial.

 “Bellwether” cases, or test cases focused upon individual claims, have been an important case-management tool in many MDL proceedings involving numerous individual claims. A bellwether is the first sheep that leads the flock — and thus that is the role a court should keep in mind in thinking about bellwether cases. Bellwethers may suggest answers to litigants’ major questions: How well or poorly would these facts play to a jury? How credible and persuasive are the experts? Is the key evidence admissible? These types of questions can have more impact than the amount of the verdict, and will drive the outcomes in motion practice and trial — and it is in the shadow of those expectations that settlement values will be reached, if settlement is to occur. It is important for the parties and the court to know how the cases will fare.

But the bellwether process also means obtaining a sufficient number of outcomes to provide guidance, given the variety of fact patterns, claims, and defenses anticipated. In asbestos litigation, the first ten verdicts were for the defense, but these early results did not foretell the overall litigation trend. The case-management plan should provide for a sufficient number of cases so that early outliers (in either direction) can be identified as such and the true path of litigation discerned to the maximum extent possible.

Bellwethers need not go all the way to trial. Many bellwether cases resolve themselves along the way, whether because of errors in the plaintiff or defendant fact sheet, individualized factors that strengthen or weaken the case during discovery that were not anticipated at the outset, the parties’ decision to settle particular cases, the plaintiff’s decision to voluntarily dismiss, or because of the court’s early rulings. These cases should not be regarded as failures. Instead, they can be important data points that help the lawyers better understand the reality of the cases — which may vary considerably from the hypothetical plaintiff or hypothetical defenses that have been the idealized subject of early negotiations. Indeed, the reasons these cases drop out — gamesmanship, good advocacy, plaintiffs disappearing, defendants settling cases, the outcome of preliminary or dispositive motions — all potentially provide insight into how the broader pool of cases may fare. Yet, recognizing this, it is important that the judge select a larger pool of cases, anticipating that some will resolve at a variety of points in the bellwether litigation process.

Bellwether trials may provide useful information to the parties regarding the likely outcome of other cases at trial, such as: (a) how well or poorly the parties’ fact and expert witnesses perform in a trial setting; and (b) decisions on key legal issues and the admissibility of key evidence. As recognized by the *Manual for Complex Litigation*, the purpose of bellwether trials is to “produce a sufficient number of representative verdicts” to “enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis.”[[9]](#footnote-9) As such, the bellwether process will be valuable only if the cases selected for trial are truly representative of the whole (or of one or more distinct categories of cases that comprise the whole).[[10]](#footnote-10)

Of course, recognizing this purpose opens the door to strategic manipulation by the parties. The transferee judge must carefully consider how the bellwether selection process will work, and how to address cases that drop out of the pool, to minimize the influence of strategic behavior and enhance the value of the bellwether process. Later in the process, counsel may strategically settle cases as they are proved to be particularly strong or weak compared to the expected baseline.

The judge will also need to consider whether to broaden the pool of potential bellwether cases. For example, through *Lexecon*[[11]](#footnote-11)waivers or trying cases in their originating district (unless barred by the Ninth Circuit ruling,[[12]](#footnote-12) which prevents inter-circuit assignment solely for these purposes), the transferee judge may be able to obtain authority to try cases not filed in the transferee district.

In addition, the judge should be alert to the origin of the bellwether cases — is the case one in which the plaintiff is represented by counsel not active in the MDL; or does the case include someone from the Plaintiff Executive Committee, a PSC member, or another attorney active in the MDL? If the PSC is unable to control the litigation of a bellwether case, it may not treat the result as being indicative. Some cases are outliers with unique causation issues, damages, or defenses — particularly in pharmaceutical cases — and thus careful attention must be paid to selecting cases that will advance the goals of the MDL as a whole. Conversely, it may well be that some of the best cases were not filed by the MDL leadership. As discussed in this section, there are many ways of selecting the bellwether cases to balance the competing needs of the bellwether MDL process.

Case selection should be attuned to the goals of the parties and court in pursuing a bellwether process. For example, are counsel trying to determine the distribution and range of claims, or how particular types of claims will fare through the litigation process (and, the damages that will be awarded, if any)? Given these goals, the judge should create a selection process that will identify cases conducive to those aims and should communicate selection criteria to counsel. For example, does the judge want the parties to propose their strongest cases, or does the judge want to see cases that explore certain contested issues?

Usually, a judge should be skeptical of the value provided by trying one side’s “strong” cases that may not be representative of the broader claims; for example, cases with a particularly sympathetic plaintiff or a case with a strong non-merits defense, such as the statute of limitations. While both approaches may be appropriate, they simply serve different goals. If a bellwether process of some type will be used, plaintiffs’ counsel may urge the use of a case-selection committee on the plaintiffs’ side. The committee members will inform themselves about the particular cases on file to find the cases they believe are representative. This information, in turn, helps guide the settlement negotiations, which can otherwise be untethered from the reality of the filed cases.

In designing a selection process, the judge should bear in mind its likely consequence. For example, allowing the parties to nominate and then strike each other’s picks yields different results from a judge ordering, “here are the types of claimants and categories I do or do not want to see; bring me your nominees and I will make the final selection.” Random selection results in yet another type of sample set. Some parties caution that random selection does not necessarily lead to representative cases. One judge solved this problem by randomly selecting ten cases to go first, then allowing the lawyers to challenge the cases’ representativeness — obtaining the benefit of random selection while minimizing the risk of outliers.

One approach that has garnered substantial support is employing a grid or categorization of the cases based upon the earlier litigation process. This technique involves placing claims in different buckets based on certain characteristics –– for example, plaintiff age, injury type, injury severity, date of alleged injury in relation to evolving science, and so on. Then, the parties select twenty cases that fall within each of those categories. That pool of cases can then be developed such that one-off anomalies do not skew the results, but the size of the pool is small enough to allow counsel to focus on those cases. As MDL settlements have moved toward global grid settlements or smaller settlements by claims type, the grid bellwether approach also supports the development and testing of potential settlement categories.[[13]](#footnote-13) If the MDL does not end in a settlement, the grid approach can help clarify the remand packet with materials specific to each claim type.

Counsel strongly support judges taking an active role in articulating the criteria by which cases would be selected, recognizing that attorneys might otherwise act strategically in their nominations and strikes of cases. Judges likewise agree that “parties sometimes don’t want what they ask for,” so a strong hand from the judge may often be necessary to maximize the value of early cases.

Before developing a bellwether protocol for moving forward with an initial set of cases, transferee judges recommend resolving pending motions to remand, acting on outstanding motions, and allowing early science hearings to help clarify what types of cases and claims are at issue. The judge may also ask the parties to provide an early science tutorial, which some transferee judges reported finding more instructive than *Daubert* hearings. Judges suggest that this was very helpful to do before the creation of the bellwether-selection process to help the judge know enough about the cases and science to control the jockeying among attorneys and select the right process and parameters for the cases.

If the parties do not settle in the shadow of the bellwether trials, the bellwether materials — such as deposition cuts and key rulings — will be helpful to the judge in preparing a trial package for remand. These materials, in many instances, add significant value for the parties and the judiciary.

Best Practice 1E(i): The transferee court should adopt a strategy for facilitating the availability of the broadest possible pool of candidates from which to select bellwether cases.

If the decision is made to conduct bellwether trials, the transferee judge should take steps to ensure that an appropriate pool of cases is available for selection as bellwether trial candidates. Under the U.S. Supreme Court’s decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[[14]](#footnote-14) a transferee judge may only conduct trials of cases originally filed in that court. Often, some subset of the cases pending in a MDL proceeding will qualify, but that subset may not be representative of the entire MDL case pool. Thus, trials of cases selected from that pool may be of limited value.

For that reason, the transferee court should consider adopting one of three commonly-used options for facilitating the broadest possible pool of candidates to select as bellwether cases.[[15]](#footnote-15) The first is to request that parties sign “*Lexecon* waivers” — that is, waivers of the right to object to venue before the MDL court. This option is attractive to many judges because it allows selection for bellwether trial of any case in which the parties have executed such a waiver.[[16]](#footnote-16) Claimants are often willing to give such waivers because they (and their counsel) want the opportunity for an early trial. These waivers are sometimes resisted by parties — particularly by claimants who wish to maintain their right to try their cases in the venue where they were originally filed, and defendants who may want to try the cases in a venue other than the MDL.[[17]](#footnote-17) If this approach is selected, the request for waivers should be made early to ensure that a clearly defined pool of cases are available for trial in the MDL court’s district.

Because *Lexecon* waivers require parties to divest themselves of fundamental protections of personal jurisdiction and venue, a transferee judge should carefully ensure that the waivers are voluntary and the scope “clear and unambiguous” before trying out-of-district bellwethers.[[18]](#footnote-18) As illustrated by *In re DePuy Orthopaedics, Inc.*,[[19]](#footnote-19) proceeding to try bellwethers founded on ambiguous *Lexecon* waivers may invite scrutiny that risks invalidating tried cases, when parties challenge venue and personal jurisdiction. The source of the dispute in that case — an alleged “blanket” *Lexecon* waiver — reinforces the care with which these waivers must be negotiated and drafted at the outset.

A second option is for the MDL court to enter an order allowing for direct filing of cases in the MDL court with a later determination of venue issues.[[20]](#footnote-20) Such orders allow the court to select any case for a potential bellwether trial and then at that point ask the parties to waive any jurisdictional or venue objections to conducting a trial in the MDL proceeding. This option has the benefit of not requiring the judge to urge all parties in all cases to execute a waiver, which can be a daunting undertaking. Once the bellwether trial process is complete, the transferee judge may either keep the non-bellwether cases in the MDL district or transfer them to another federal venue based on the parties’ views.

The third option is for the MDL judge to conduct bellwether trials in the districts in which the selected cases were originally filed, thereby avoiding the *Lexecon* problem. This option may be the least convenient for the transferee court because it requires the judge to apply to sit by designation in another jurisdiction and requires the court to shift the base of operations from the MDL venue. In addition, the U.S. Court of Appeals for the Ninth Circuit has held that an MDL judge can only use this procedure upon a showing of need for additional judges in the transferor district, which might not be satisfied in the typical MDL setting.[[21]](#footnote-21) To date, no other circuit has considered the question.

Best Practice 1E(ii): One strategy for facilitating the broadest pool of candidates from which to select bellwether cases is to consider remanding select cases back to the transferor districts for trial.

 Instead of the transferee judge handling all bellwether trials dependent upon obtaining appropriate *Lexecon* waivers, the judge should consider remanding representative cases back to the transferor districts for trial. Not only would this practice mitigate the risk of a single transferee judge exerting outsized influence on the proceedings, but it also would provide a wider range of information on the strength and weaknesses of individual cases adjudicated by juries and judges in different jurisdictions. Moreover, these bellwether trials would better reflect the jurisdictional variations in underlying substantive law. The downsides, of course, include the loss of efficiency germane to the transferee judge’s central administration of the MDL and the possibility for conflicting legal rulings, though the latter might provide useful information for settlement purposes. To make this approach workable, the transferee judge should ensure that the transferor judges receive information sufficient to acquaint them with the pretrial developments that had unfolded in the transferee court. In this context, the transferee judge should consider handling the first bellwether proceedings. Rulings on substantive motions by the transferee judge would provide added information for subsequent proceedings remanded to transferor districts.

The transferee judge would need to coordinate carefully with the transferor districts reasonable timetables so that prompt trials could be held.[[22]](#footnote-22) Persuading other districts to coordinate trial schedules can be difficult, but the alternative of wholesale remand of all MDL cases, absent settlement, may encourage transferor judges to agree to resolve their bellwether trials promptly.

Best Practice 1E(iii): The transferee judge and the parties should establish a process that requires collaborative selection of bellwether trial cases.[[23]](#footnote-23)

In designing a trial-selection protocol, the transferee judge should be mindful that bellwether trials are most beneficial if they: (a) produce decisions on key issues applicable to other cases in the proceeding (including on *Daubert* issues, cross-cutting summary-judgment arguments, and the admissibility of key evidence); and (b) help the parties assess the strengths and weaknesses of various types of claims pending in the MDL proceeding. To that end, the key is to select cases that are representative of the entire claimant pool (or of specified categories in that pool). The most popular methods are: (1) random selection of cases from the entire case pool; and (2) selection of cases by the parties (usually with strikes).

The *Manual for Complex Litigation* endorses random selection as the preferred means of identifying representative cases: “To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly from the entire pool or from a limited group of cases that the parties agree are typical of the entire mix.”[[24]](#footnote-24) Some MDL judges have embraced this approach and adopted random selection methods for identifying test-trial candidates. For example, in *In re Baycol Products Litigation*, the court’s selection program included all cases filed in the District of Minnesota involving Minnesota residents plus a minimum of 200 additional cases selected at random from all MDL filed cases.[[25]](#footnote-25) And in *In re Prempro Products Liability Litigation*, 15 cases were randomly drawn from a hat.[[26]](#footnote-26) However, some commentators have expressed the view that random selection will rarely result in the selection of representative cases.[[27]](#footnote-27)

Another approach is to give the parties input into the bellwether trial selection process. For example, in *In re Vioxx Products Liability Litigation*,[[28]](#footnote-28) the PSC and Defendant’s Steering Committee were each permitted to designate for trial five bellwether cases involving the most serious condition allegedly caused by Vioxx. Each side was given two strikes with the remaining cases set for trial on a rotating basis, starting with one of the plaintiff’s selections.[[29]](#footnote-29) As Judge Eldon Fallon noted in an article published after the *Vioxx* settlement, the alternate-selection approach used in *In re Vioxx* is preferable to allowing “only one side” to select bellwether trial cases, which “opens the door for the inequitable stacking of overtly unfavorable and possibly unrepresentative cases, as well as creating an atmosphere of antagonism.”[[30]](#footnote-30) Further, allowing “both sides of coordinating attorneys [to] make selections by exercising alternating picks” is “the most useful approach” to bellwether trial selection because it “institutes fairness and attorney participation, while maintaining efficiency and placing the burden of ensuring representative cases on those with the most stake in the trial selection process.”[[31]](#footnote-31) Such collaborative approaches give the parties “better control over the representative characteristics of the cases selected” and are therefore more likely to result in bellwether cases that are typical of the litigation pool.[[32]](#footnote-32)

Judge Fallon took a different approach, however, more recently in the *Xarelto*® MDL, creating a bellwether pool consisting of cases selected by the plaintiffs, the defense and randomly, and then randomly picking the bellwether trial cases from a pool which was created through a strike process by the parties.

Another approach is to give the parties input but vest the ultimate selection with the court. In *In re: DePuy Orthopaedics, Inc.*, the parties initially selected four cases each as bellwether trial candidates and certain case specific discovery ensued. The parties then filed submissions setting forth which cases each party thought should be designated as a case to be tried in a bellwether trial. The parties were encouraged to agree upon cases to be designated, but if they could not, the court, after reviewing the submissions, would pick a primary and a backup bellwether trial case for two back-to-back bellwether trials.

Some judges are critical of allowing the parties too much freedom to select cases because advocates may be inclined to pick cases they are most likely to win, without regard to their cases’ representativeness.[[33]](#footnote-33) To address this concern, the transferee judge may consider selecting bellwether trials only if both sides consent to the final selection. Under this approach, outlier cases favoring one side would be unlikely to be selected. This option places the responsibility on the parties, who have better knowledge about the cases than the transferee judge, to select useful, representative bellwether trials. If an agreement cannot be reached, the transferee judge may consider interviewing each side to identify the key issues presented and the critical evidence to be presented. The interview process, coupled with the judge’s final decision-making authority (over which cases she selects for trial and the order in which they will be tried), encourages parties to put forward representative cases. And because the interview would be focused on a case’s representativeness, it should uncover valuable information to enhance the bellwether process.

Bellwether trials selected randomly or by the litigants may not provide a truly representative cross-section of all cases. But a hybrid approach could combine random selection, litigant input, and the judge’s selection to arrive at a representative sample of cases for bellwether trial. In *In re Testosterone Replacement Therapy Products Liability Litigation*, Judge Kenelly began by randomly choosing 100 cases. Each side then picked 16 cases. After some preliminary discovery, the court selected the eight cases that would proceed to trial. (Alternatively, eight cases could be selected by the parties’ mutual consent.) This hybrid approach allows parties to participate in the selection process, provides some assurance that claims are representative, and avoids concerns with other approaches while yielding what could be a representative stable of cases.

A judge should carefully view any proposal for consolidated multi-plaintiff bellwether trials. At the bellwether stage, the goal should be to achieve valid tests, not to resolve large numbers of claims. Consolidation can tilt the playing field, undermining the goal of producing representative verdicts. As one transferee judge recognized in rejecting a proposal to hold a three-plaintiff bellwether trial, “[u]ntil enough trials have occurred so that the contours of various types of claims within the . . . litigation are known, courts should proceed with extreme caution in consolidating claims.”[[34]](#footnote-34) Consolidated bellwether trials may confuse juries, who are charged with wading through large quantities of complicated evidence to determine claims that may present different issues. Not only do some defense attorneys argue that consolidated bellwethers are unfair for their clients,[[35]](#footnote-35) but these trials may not further settlement when attorneys for one side question verdict accuracy. For example, this can occur when a jury awards each plaintiff a similar verdict despite grave differences between claims. On the other hand, a court should consider whether consolidated trials may provide useful information in certain cases, consistent with due process concerns, when the differences among the plaintiffs do not lead to ambiguous results.[[36]](#footnote-36)

As discussed previously, to enhance the selection process, the transferee judge should require plaintiffs to: (1) provide court-approved fact sheets; and (2) submit medical and employment record authorizations to collect basic information about plaintiffs’ claims.[[37]](#footnote-37) Defendants should likewise provide basic information regarding individual plaintiffs’ cases (e.g. detailer information or other relevant basic factual information about the individual plaintiff or her claims). The availability of such information should facilitate selection of more representative cases for trial. Indeed, sampling information from these sources may aid the court and the parties in defining what constitutes a representative case and in drawing distinct categories of cases within the pool pending in the proceeding. Irrespective of the chosen bellwether selection method, the parties should have a reasonable amount of and time for discovery in the selected cases to ensure that no party is subjected to unfair surprise or otherwise disadvantaged.

Best Practice 1E(iv): The transferee judge should adopt rules that will minimize the risk that parties will attempt to “game” the bellwether trial-selection process to result in test trials of cases that are not representative of the entire case pool.

Although there may be good-faith reasons for settling or for voluntarily dismissing a test case, there are also instances in which the parties do so to manipulate the takeaways from the bellwether process.[[38]](#footnote-38) For example, defendants could offer to settle what they view as a strong bellwether case for the plaintiffs. Conversely, plaintiffs could dismiss what they view as weak bellwether cases. If the transferee judge has elected a random selection of cases, there is little that can be done about such tactics, beyond mandating dismissal with prejudice, unless the judge adopts a different procedure to select replacement cases.[[39]](#footnote-39) Such strategic behavior can be mitigated by, for example, allowing plaintiffs to choose the replacement for any bellwether case that defendants choose to settle rather than take to trial, or allowing defendants to select the replacement for any bellwether case that plaintiffs choose to dismiss.

A court can more effectively adopt rules and procedures to address gaming the system in an MDL proceeding in which the parties participate in the selection of bellwether cases. For example, if the transferee judge allows each side to select a bellwether case from among four nominees by the other side (i.e., plaintiffs would pick the bellwether case from among four nominees by defendants, and vice versa), and one party chooses to dismiss or settle the case selected by the other party, the acting party could either lose their right to pick their own case, or the other party could be invited to choose the replacement case from among the entire case pool.

Even if a bellwether case is voluntarily dismissed before trial, the dismissal itself can be of significant predictive value, particularly ifthe court has made pretrial rulings. The rulings themselves, regardless of the fate of the particular case, place parties in a better position to gauge the direction of the litigation. While bellwether verdicts can be explained away, and a negotiating spin placed on them by either side, a court’s ruling (e.g., on a *Daubert* or summary judgment issue) remains. Moreover, repeated voluntary dismissals or eve-of-trial settlements may be an important signal that the acting side lacks confidence in certain types of cases, or that those cases may be candidates for dispositive motions.

In planning case management, it must be remembered that every MDL proceeding is different —what is a best practice in one MDL may be irrelevant, or even counterproductive, in another. Ultimately, collaboration among counsel and the court is the most essential ingredient in a successful MDL proceeding. Effective MDL management depends on cooperation among counsel to a greater degree than in other civil litigation matters due to the magnitude and complexity of what is ordinarily at stake in MDL cases. Proper case management is a shared responsibility among the court and counsel, and the court should hold counsel accountable for fulfilling their duties in that regard.[[40]](#footnote-40)

Best Practice 1E(v): The transferee judge should consider using bellwether alternatives, including mini-trials and mediation.

The ultimate goal of bellwether trials is to inform the parties of the value of claims. While a full-blown merits trial on an individual case offers one data point of claim value, methods short of bellwether trials can furnish useful information for lawyers, often at less cost. *Daubert* rulings, for example, give litigants a strong sense for what types of claims will make it to the jury. Pretrial rulings on motions *in* *limine* indicate whether critical evidence will be admissible at trial. In addition to developing information for litigants through pretrial procedures, courts can employ bellwether alternatives specifically designed to uncover the value of claims.

 One such approach is to encourage parties to agree to “summary trials.” Summary trials involve impaneling a jury from the federal jury pool to hear an abbreviated presentation of evidence. Summary trials often last no more than a day and end with a nonbinding verdict. Summary trials may be limited to the lawyers’ presentation of only the key evidence that would be heard at trial, or they may involve live testimony by the most critical witnesses. Although this option may be unpalatable to litigants who demand the “real thing,” summary trials are a less expensive alternative to bellwethers that can quickly generate helpful information. Because “real juries” are involved, parties may walk away with an accurate sense for how their claims will be received.

Mini-trials, a similar tool, are nonbinding trials on single issues — most often liability, causation, or damages. Mini-trials present another opportunity to efficiently generate information about a spectrum of claims, as they typically include groups of cases consolidated under Rule 42. Although this type of adjudication is quick and inexpensive, mini-trials may be of limited value to the parties. Some defense lawyers point to the fact that a finding on liability based on a presentation entirely divorced from assessing causation may be unpersuasive. There is also no opportunity to appeal adverse rulings, which may diminish the rulings’ predictive value.

In addition to bellwether alternatives, the transferee judge can consider appointing a special master or settlement judge to oversee settlement negotiations. This judicial initiative can help both sides, removing the fear that the party suggesting settlement first will relinquish negotiating power. Further, it brings both sides to the negotiating table, over the reluctance of some of the individual plaintiffs or defendants. Judicial involvement will not always be necessary; but it may prove essential after a significant breakdown in trust between the parties. One example of a judicially-supervised settlement resulted in a global agreement after the parties worked with a settlement master to construct a grid that provided the values of different types of claims.

Settlement talks will only prove fruitful if they occur after both sides have enough information to accurately assess claim values. But the transferee judge should exercise great caution not to appoint a special master or settlement judge too early in the proceedings, when sufficient information has not yet been gathered on the strength and weaknesses of the claims. A premature appointment may inappropriately signal a judicial predilection towards settlement.[[41]](#footnote-41)

**CHAPTER 3**

 **LEAD COUNSEL DUTIES**

A court should appoint lead counsel, liaison counsel, and plaintiffs’ executive or steering committees to perform certain functions on behalf of all plaintiffs in an MDL or other similar complex, coordinated, or consolidated proceeding consistent with *Best Practice* 2D. The court must specify the existence, nature, and scope of duties that may be owed by such appointed counsel to plaintiffs in the litigation, including plaintiffs who are counsel’s retained clients.

**MDL Standard 5:** Plaintiffs’ lead counsel in an MDL does not have a fiduciary relationship with all plaintiffs in the case, notwithstanding a perception sometimes expressed to the contrary.

 Despite contrary statements, the better view is that the authority of lead counsel, including liaison counsel and plaintiffs’ executive or steering committees’ members in an MDL, emanates solely from the court. MDL leadership appointments are distinguished from the typical attorney-client situation, in which the lawyer’s authority arises from a formal retainer agreement between the attorney and the plaintiff. Although reasonable attorney/client agreements may limit the scope of the lawyer’s responsibility, it is ordinarily the case that the lawyer will undertake any and all actions reasonably necessary to achieve the desired results and objectives of the litigation.

By contrast, in an MDL court-appointed counsel situation, lead counsel’s authority––and concomitant responsibility––is often defined not in terms of the ultimate goals sought by plaintiffs, or by the law governing attorney-client relationships but only in terms of the procedural responsibilities conferred by the MDL court. These steps are generally set forth in an appointment order, which describes the services that lead counsel are asked and directed to perform.

**MDL Standard 6:** Lead counsel owes an obligation to the court to comply with all directions set out in the court’s appointment order and must resolve any conflicts with obligations owed to counsel’s retained clients that might otherwise interfere with lead counsel’s ability to carry out the court’s directions.

Ultimately, appointment of lead counsel protects the interests of the MDL plaintiffs as a whole. The primary purpose of counsels’ role is to further the interests of judicial efficiency and economy for the collective benefit of those involved in the MDL. To the extent that each plaintiff has particular facts creating divergent interests, such plaintiffs are being simultaneously represented by

privately-retained counsel, who remain obligated to protect their own clients’ interests, diverse or not, as in any other case.[[42]](#footnote-42)

Therefore, to the extent that lead counsel owes a duty or other obligation to plaintiffs whom they do not formally represent, such duties are: (1) limited to the specific actions that lead counsel is court appointed and authorized to undertake; and (2) owed, not to any one individual plaintiff, but to the common and collective interests of the plaintiffs as a whole.

Best Practice 6A: The court should delineate in its appointment order the responsibilities of lead counsel in sufficient detail for counsel to advise individually-retained clients of the duty owed to the court, which is superior to any duty owed to the individually-retained client.

Appointed counsel can play various roles, including “lead counsel,” “liaison counsel,” “plaintiff steering committee member,” and “plaintiff’s executive committee member.” Each position has different responsibilities, which may impact the rights of individual plaintiff clients of the lead counsel in the MDL.

In accepting appointment, lead counsel assumes the responsibility to address and resolve any potential conflicts with their individually-retained clients. Lead counsel must meaningfully disclose to their clients how their appointment as lead counsel will impact the clients’ interests. Because decisions of lead counsel take priority over the interests of an individual client, it is essential that the court’s appointment order fully inform counsel of what the court expects of counsel so that counsel can advise their clients of potential issues consistent with Best Practice 2C(ii).

A lawyer’s appointment as lead counsel does not excuse any conflict of interest as to his or her own clients that would otherwise be impermissible or noncompliant with the relevant rules of professional conduct and legal obligations of attorneys to their clients. Lead counsel is responsible for ensuring that obligations to the court under the appointment order can be simultaneously discharged with obligations to individually-retained clients.

Best Practice 6B: Lead counsel has a duty to perform functions affecting all plaintiffs in an MDL in a fair, honest, competent, reasonable, and responsible way.

Lead counsel has a duty to perform appointed functions in a fair, honest, competent, reasonable, and responsible way, but there is no “fiduciary” relationship with all plaintiffs in the traditional sense. The origin and nature of the relationship between lead counsel and MDL plaintiffs is judicially created, and thus differs in significant respects from common-law fiduciary relationships of agency or trust. Imposition of strict fiduciary standards to an entire MDL would be extremely burdensome for lead counsel and the court to adhere to and enforce.

Under the common law, an agency relationship is generally consensual, whereby the principal retains the right to direct and control the agent’s actions, as well as power to terminate the agency. An MDL does not possess these hallmarks of traditional agency. Except for lead counsel’s individually-retained clients, no underlying offer and acceptance of power of attorney or agency exists between such appointed counsel and other MDL plaintiffs. Such a relationship is unnecessary, and would likely conflict with, that between each litigant and his or her own privately-retained attorney.)

Lead counsel is ordinarily left to their good judgment and discretion in carrying out assigned tasks, and is not subject to the instruction or control of one or more of the MDL plaintiffs or their counsel. Nor does any single plaintiff, or the plaintiffs collectively, have the power to terminate lead counsel’s authority to act. Only the court can alter or rescind the appointment.

Unlike privately-retained counsel, who assume as to their own clients a fiduciary relationship of trust concerning deposits, advances, and settlement proceeds, lead counsel in the typical MDL will rarely be in possession or control of plaintiff funds or other property. This remains true relative to lead counsel’s litigation costs and expenses. When appointed counsel advances or incurs expenses for the common benefit of plaintiffs, appointed counsel are, at that point, simply spending their own money. Only when lead counsel seeks reimbursement is a claim made against any plaintiff funds — and such claim are almost invariably subject to court approval. MDL settlement funds are generally placed into a Qualified Settlement Fund, with an independent escrow agent, whereas most judgment or settlement proceeds are deposited into the attorney’s trust account for subsequent accounting and distribution.

Finally, a strict traditional common-law duty of loyalty could not practically be imposed upon lead counsel. A fiduciary duty to hundreds or thousands (or more) of MDL plaintiffs – all with their own counsel − would create an endless series of inquiries and disputes over the extent to which potential or actual “conflicts” might exist between lead counsel, his or her retained clients and, on the other hand, every other plaintiff in the MDL. Such disputes would undermine, if not eliminate entirely, the MDL-related efficiencies and economies that justified creating the lead counsel position in the first place. A strong lead counsel role is also necessary to avoid depriving plaintiffs as a whole of the most knowledgeable, skilled, and experienced counsel and by “balkanizing” the plaintiffs into so many sub-groups that effective organization would be impossible.

**MDL Standard 7:** Lead counsel should not disclose information provided under a condition of confidentiality, including settlement discussions subject to confidentiality conditions, to plaintiffs or their retained counsel.

As with the duty of loyalty, it would be impractical and unwise to require lead counsel to reveal sensitive strategic concerns, confidential settlement negotiations, and other information provided under a condition of confidentiality to all plaintiffs in the litigation (or their counsel).The *Manual for Complex Litigation* explicitly recommends that lead counsel “use their judgment” in advising MDL plaintiffs and their attorneys of progress of the litigation, as “too much communication [of confidential information] may defeat the objectives of efficiency and economy.” Nevertheless, lead counsel has an obligation to regularly communicate with non-lead counsel as to developments in the MDL so that non-lead counsel are properly informed and can effectively represent their respective clients.

Informational needs in complex multi-plaintiff litigation differ from single-party litigation, in at least two respects. First, in ordinary litigation, the attorney is retained to act as the plaintiff’s agent, and whatever information acquired in the course of the representation “belongs” to the client. In an MDL, by contrast, lead counsel acquires information not as any particular plaintiff’s agent, but because the court has directed or authorized the attorney to undertake a certain function.

Second, in a typical case, almost always the client has no interest or incentive to reveal attorney-client privileged information. An individual plaintiff divulging such confidences also does not hurt others. In an MDL, by contrast, individual litigants — and their privately-retained counsel — often, regardless of good or bad faith, perceive some advantage to themselves or a particular sub-group of plaintiffs in disseminating information more broadly. Such information, if learned by MDL defendants, can easily prejudice plaintiffs’ overall position.

Individual MDL plaintiffs, or their privately-retained counsel, frequently ask lead counsel for periodic status reports, especially disclosure of settlement negotiations. Defendants, however, typically demand confidentiality for such discussions, and will discontinue the negotiations in the event of a breach. Until a settlement is actually reached, the value of such information to individual plaintiffs is of limited utility, whereas the risks and consequences of compromise are considerable and potentially severe. All settlements ultimately negotiated by lead counsel require consent of the settling plaintiffs to be binding, and such consent will require full and transparent notice and other disclosure – but only after the negotiators have reached a deal.

When settlement confidences are compromised, for whatever reason, the consequences extend beyond the plaintiff or lawyer who divulged the information to other plaintiffs with cases pending in the litigation. While different circumstances warrant different levels of disclosure to plaintiffs and their privately-retained counsel so that they can determine whether to participate, pre-agreement disclosure should not be unlimited or ongoing, given the prejudicial nature of unauthorized disclosure to the very plaintiffs whose collective interests lead counsel was appointed by the court to advance.

Deliberate withholding litigation information from plaintiffs and their retained counsel, including plaintiffs who are lead counsel’s clients, must be carefully circumscribed. Court orders should specify such circumstances. Lead counsel cannot unfairly exploit their interests under a cloak of confidentiality. Thus, all plaintiffs should receive equal notice of cut-off date for cases for settlement inclusion, and lead counsel may not advantage their personal clients.

**MDL Standard 8:** Absent a compelling reason, lead counsel should not disclose confidential information, including confidential settlement discussions, to their own individually-retained clients.

Both traditional fiduciary standards and professional rules of conduct recognize exceptions to the general duties of disclosure if such revelations would violate a “superior duty” owed to another. Lead counsel is generally not obligated to share — and, for the reasons outlined above, generally should refrain from sharing — confidential and sensitive information gained by virtue of their court-appointed position with even privately-retained clients, absent some compelling reason to do so.

Lead counsel is not privy information received in their court-appointed role as the representative of their own clients. Instead, the court has placed lead counsel in that role; a role that is not intended to advance the interests of lead counsel’s clients. Lead counsel serves the collective interests of all plaintiffs, and must prosecute and protect the common and collective interests of plaintiffs as a whole.

**MDL Standard 9:** Lead counsel must disclose to individually-retained clients their role as lead counsel.

A lawyer is barred not only from representing interests that are adverse to a client’s interests but also, under some state ethical rules, from representing a client if the lawyer’s professional judgment on the client’s behalf might be adversely affected by the lawyer’s own personal interests. Both traditional fiduciary responsibility and the professional rules of conduct impose affirmative obligations to inform clients about significant developments or decisions affecting their interests, as well as a general duty of full disclosure regarding anything related to the representation, when asked.

 Professional ethical rules may also limit defendants and defense counsel from making certain types of settlement offers that, by their nature, create a conflict that did not previously exist.

Best Practice 9A: As soon as possible after appointment, lead counsel should advise individually-retained clients how the appointment may implicate the clients’ interests, including participation in decision-making dealing with selection of bellwether trials, allocation of common-benefit funds, litigation management strategy, and settlement negotiations.

Lead counsel’s involvement in selecting bellwether trials, allocating common-benefit funds, and making general strategic-litigation management and settlement decisions, may implicate the interests of lead counsel’s individually-retained clients. Lead counsel must advise their own clients that in making these decisions, their duty to the court to act for the common and collective interest of all plaintiffs will come first.

Lead counsel must fully and meaningfully inform individually-retained clients of the implications of each of these decisions as soon as possible, so that the client can make an informed decision whether to continue the representation. For example, if expenses incurred in presenting a bellwether trial are treated as shared expenses to be paid from the common benefit fund, lead counsel should inform clients of the possible allocation.

Lead counsel should explain if the value of individual cases can be maximized in an MDL, to reduce expenses, including expenses of the individually-retained client, that would otherwise lower a net recovery in any settlement. Disclosure should also explain that neither lead counsel, nor any individual plaintiff’s counsel, can compel the defendant to negotiate “globally” with all similarly-situated, or all, plaintiffs on a uniform or transparent basis. Individually-retained clients should also be told that lead counsel cannot prevent a defendant from offering favorable “inventory” settlements to some but not all parties, from making offers to bellwether or test plaintiffs whose cases are set for trial, or from otherwise making offers or refusing to make offers to any one or more individual plaintiffs or plaintiff’s counsel.

Best Practice 9B: When considering an inventory or global settlement, lead counsel should fully inform individually-retained clients of the implications of the lead counsel appointment.

When lead counsel negotiate an individual settlement for their own clients, or a multi-plaintiff proposed settlement on behalf of their own clients and other plaintiffs in the MDL, lead counsel’s duties to their privately-retained clients can conflict with the requirements of their lead counsel role.

A proposed settlement negotiated by lead counsel must, like any other settlement, be structured to bind no plaintiff unless: (1)each participating plaintiff receives affirmative and fully informed consent; or (2) a class action proceeding involving public review of the settlement agreement with absent parties protected by court approval, notice, and the right to opt out. In MDLs questions frequently arise with respect to:

* Lead counsel’s negotiation of a settlement on behalf of their own clients (whether on an “inventory” basis or for some subset of individual clients) in the absence of similar settlements offered to all, or virtually all, other plaintiffs’ counsel or plaintiffs;
* Lead counsel’s negotiation of a settlement on behalf of their own clients simultaneously with a “global” settlement they are negotiating as lead counsel on behalf of other plaintiffs;
* Lead counsel’s negotiation of a “global” settlement that arguably favors lead counsel’s own clients; or
* Lead counsel’s negotiation of a “global”-type settlement that excludes some of lead counsel’s own clients or affords them less compensation than they arguably otherwise could have been attained.[[43]](#footnote-43)

Best Practice 9C: Lead counsel must remain faithful to their obligations to the court as delineated in the appointment order when engaging in confidential settlement discussions for individually-retained clients.

 If lead counsel opens settlement negotiations for only lead counsel’s own individually-retained clients, a potential conflict arises between retained clients’ interests and interests of the rest of the plaintiffs. The concern exists that lead counsel will be influenced by generous settlement terms for lead counsel’s individually-retained clients when making settlement demands for the MDL plaintiffs as a whole. Resignation from the lead counsel position is the surest way to avoid any appearance of impropriety, but resignation is not typical nor necessary in most instances.

 So long as lead counsel faithfully carries out their functions and responsibilities on behalf of all plaintiffs, as delineated in the appointment order, lead counsel can continue to serve effectively in both roles, even though lead counsel may also be able to secure an advantage for their own clients.

Best Practice 9D: Should the court ever have a concern that a settlement negotiated on behalf of lead counsel’s individually-retained clients might violate the terms of the court’s order appointing lead counsel, the court should order lead counsel to disclose the settlement terms in camera to a Special Master appointed for this purpose or, if desired, to the court itself.

Should lead counsel succumb to conscious — or even only “structural” — collusion, in considering disqualification, the court must consider the loss to the plaintiffs of the knowledge, skill, experience, and insight possessed by lead counsel, both generally and as uniquely gained in the particular litigation. There is a potential risk that automatic disqualification of lead counsel who enters into client-favorable settlement agreements could encourage a defendant to enter into an early settlement with lead counsel, perhaps at a premium, in order to deprive the MDL plaintiffs of the most highly skilled representation. Such issues must be carefully weighed in considering disqualification of lead counsel.

Judicial review of “side agreement” settlements by lead counsel may be provided for in the court’s appointment order as a safeguard and means to eliminate the appearance of collusion while retaining the services of the lead counsel. Such review should be conducted *in camera*, maintaining any confidentiality provisions, ideally by a Special Master so that the judge charged with deciding the merits of subsequent cases is not “tainted” with knowledge of the parties confidential settlement posture.

Best Practice 9E: Lead counsel should maximize the common and collective interests of all plaintiffs in negotiating a global settlement consistent with appointment.

 Even though lead counsel is negotiating a “global”-type settlement for all or a large majority of the plaintiffs, continues to owe an undivided duty of loyalty to their own clients and must, within that framework, seek to maximize the recoveries of their own clients even if that might arguably work to the prejudice of other plaintiffs. Lead counsel’s obligation to their own clients ordinarily will not preclude them from simultaneously attempting to achieve the best possible settlement for MDL plaintiffs generally,

Lead counsel participates in global settlement negotiations not by virtue of their own clients’ cases but because the court appointed lead counsel to participate in such discussions on behalf of all plaintiffs. Although in such negotiations lead counsel would be drawing upon the knowledge and perspectives gained from the representation of their own clients, the appointment order should specify lead counsel’s obligation, in that capacity, to maximize the common and collective interests of the plaintiffs as a whole.

The policy of such provisions is to allow lead counsel’s clients to obtain the full benefit of their representation by particularly knowledgeable and skillful counsel without conferring an undue advantage solely attributable to their attorney’s appointment as “lead counsel.” Such an appointment premium would come at the expense of other plaintiffs in the litigation represented by other counsel.

Best Practice 9F: Consistent with existing attorney-client relationships, the court should consider entering an order authorizing confidential settlement negotiations.

Lead counsel in settlement negotiations acts in accordance with the court’s appointment order for the common and collective good of the plaintiffs. Disclosing the substance of the negotiations to lead counsel’s individually-retained clients could adversely affect the settlement. Provided that such individually-retained clients consent after prior notice, a court order that expressly authorizes confidentiality obviates any disclosure concern of lead counsel and provides lead counsel an effective response to clients’ or other lawyers’ requests to disclose confidential information.

**CHAPTER 4**

**ROLE OF NON-LEADERSHIP COUNSEL**

In a mass-tort MDL, lead counsel make up a fraction of the lawyers representing plaintiffs. Non-leadership counsel have a limited role in key decisions affecting overall strategy and settlement. Because lead counsel effectively controls the litigation, non-leadership counsel, who continue to be bound by canons of ethics to act in the best interests of their clients, face difficult problems when they disagree with lead counsel’s actions and decisions. If lead counsel negotiate a global settlement, non-leadership counsel and their clients make the final decision regarding whether to participate. But, as a practical matter, rejecting the offer at that time may not seem feasible.

MDL decision-making benefits whenever lead counsel can create a process for considering input from non-leadership counsel without being subject to inefficient second-guessing. Lead counsel should engage non-leadership counsel in candid discussions early in the litigation about the case’s strengths and weaknesses, including *Daubert* issues critical to acceptance of the plaintiffs’ scientific position.. Part of lead counsel’s role is to educate non-leadership counsel about the MDL’s parameters, its risks, and the general strategy being adopted, and to update counsel throughout the course of the litigation as circumstances change.

**MDL Standard 10:** Lead counsel should establish processes that build consensus among non-leadership counsel as to key decisions that lead to settlement.

Lawyers representing individually-retained clients keep their duty to advocate for their clients’ best interests. Although having the power to accept or reject a proposed settlement, as a practical matter their bargaining position weakens the longer lead counsel are in command of the MDL. At minimum, they should be informed of all significant actions taken in the MDL consistent with Best Practice 4I. Ideally, non-leadership counsel should be able to provide input on key decisions consistent with Best Practice 10B.

Best Practice 10A: Lead counsel should provide equal opportunity to all willing and able counsel to participate in discovery and other MDL tasks.

Equal opportunity for non-leadership counsel to perform discovery tasks enhances consensus-building consistent with Best Practice4H. Compensation for such work should be commensurate with the compensation leadership counsel receive for the same type of work consistent with Best Practices 12G(ii) and 12H.

Best Practice 10B: Where the court is advised of issues that create potential conflicts among counsel, it should institute measures that permit non-leadership counsel to provide input.

Disagreements among lead and non-leadership counsel commonly arise at certain, discrete decision points in an MDL , including: (1) selection of bellwether trial counsel; (2) decisions to pursue or abandon claims/theories in discovery and bellwether trials; and (3) resources (discovery, trial packages, experts) provided to lawyers preparing individual cases outside the. In consultation with lead counsel, the court should develop a process whereby non-leadership counsel can report issues or concerns to the court on a regular basis (perhaps quarterly). The court may seek explanation from lead counsel as to how these matters are being handled.

In some instances, concern about resources being made available to non-leadership lawyers may not arise until the coordinated proceedings near conclusion, when remand is imminent for non-bellwether cases moving forward on an individual basis. The court should provide an avenue at an earlier stage in the litigation to address the steps lead counsel are taking to provide the necessary resources for post-remand litigation.

Settlement strategy also has a high conflict potential, but due to the nature of most mass-tort negotiations, open vetting is difficult. Settlement negotiations are typically confidential, and disclosure of ongoing discussions would likely jeopardize their success. If significant acrimony arises, the court could consider appointing a settlement master, or conduct private discussions with lead counsel or others specifically tasked with carrying out settlement discussions. Alternatively, the court could designate a liaison counsel to act as an intermediary, communicating concerns of non-leadership counsel.

**MDL Standard 11:** The court and lead counsel should develop practices to identify potential conflicts and disagreements early on between non-leadership counsel and lead counsel.

Court appointment authorizes lead counsel to manage the MDL on behalf of all plaintiffs and their retained counsel. Ideally, lead counsel performs these functions to maximize the common and collective good of all plaintiffs. Inevitably, disagreements over strategy, selection of bellwether trials, allocation of common benefit funds, etc., will cause conflicts, which must be kept under control. In so doing, the court must balance two important concerns: ensuring that real problems with lead counsel performance are addressed; while at the same time preventing complaints about lead counsel from being used to jockey for position or for other improper purposes. Requests to remove leadership counsel should be entertained only for very serious and acute problems.

Consistent with Best Practice 2C(iv), the court may appoint special liaison counsel to be alert for potential conflicts and disagreements. The roles and duties of such liaison should be specified at the outset — including responsibility for communications between the court and other counsel, maintaining records of all orders, filings, and discovery, and ensuring that all counsel are apprised of developments in the litigation.

Best Practice 11A: The court should issue case-management order delineating the roles and obligations of lead counsel, any liaison counsel, and plaintiffs’ counsel in individual cases.

Potential conflicts and misunderstandings between lead and non-leadership counsel can best be avoided if their respective roles and responsibilities are clearly delineated in an early case-management order. The order should provide that non-leadership lawyers continue to have all of their normal obligations to their clients’ interests must comply with all court orders applicable to those clients.

The roles and duties of appointed leadership may also be specified in the initial solicitation of applications and in the resultant appointment orders. Lawyers seeking leadership appointments should be required to provide the court and other counsel with specifics on how they will fulfill their obligations to work with others during the litigation and how they will provide timely and adequate communication and support to non-leadership counsel.

Best Practice 11B: A transferee judge should be alert throughout the MDL proceedings for potential and emerging disagreements and conflicts between lead and non-lead counsel.

 Many problems arising from disagreements between lead and non-leadership counsel can be avoided, or at least addressed, by active case management. Regularly scheduled status conferences, frequent conferences with liaison counsel, and attention to status reports can timely identify most potential conflicts and disagreements between lead counsel and non-leadership counsel.

Consistent with Best Practice 1B(i), the court should schedule regular status conferences. At the start of the MDL, or if the court anticipates conflicts between lead and non-leadership counsel, a monthly conference schedule is advisable. Key rulings and discussion should be on the record, and conference transcripts should be posted on the court’s website or made available by plaintiffs’ counsel to non-leadership counsel.

The court should require leadership counsel to prepare and distribute detailed status reports to all non-leadership counsel in advance of each conference, to confer with the court in preparing an agenda, and to distribute detailed reports to all non-leadership counsel afterward. Such documents should keep all participants in the MDL proceeding well-informed, consistent with Best Practice 4I. The court and lead counsel should also consider regular reports to non-leadership counsel about key expert opinions on causation, periodically updating lists of all counsel’s inventory, and providing on the status of company witness depositions and document production. Lead counsel should also provide *pro se* plaintiffs with a point of contact on the Plaintiff Steering Committee to whom they can direct questions.

Many MDLs have benefitted from the court creating an official website for the proceeding on which these documents (as well as status conference reports and significant orders) can be viewed consistent with Best Practice 12F. Similarly, lead counsel should consider developing a file-sharing option for non-leadership counsel to obtain MDL materials, key orders, and transcripts. Timely and adequate information about the MDL proceedings provides the means for non-leadership counsel to fulfil their responsibilities and obligations to their respective clients.

Best Practice 11C: The court should consider a reappointment process for lead counsel as a means of discovering serious conflicts, if any, between lead and non-leadership counsel.

A formal reappointment process at specified intervals, corresponding to logical points in the development of the MDL can provide opportunities for non-leadership lawyers to comment (positively as well as negatively) on the performance of leadership. Regardless of outcome, the reappointment process provides a good opportunity for the court and non-leadership counsel to receive a formal report from lead counsel on how leadership has performed its duties and for the court to address any concerns raised by comments received from non-leadership counsel. The court can also reiterate its expectations for lead counsel, which sends an important message to all parties.

The court can use the reappointment process to facilitate airing of non-leadership counsel’s grievances (if any) with lead counsel. Overcoming any reluctance to criticize the management of the MDL. At the same time, the reappointment process serves as an opportunity to remind non-leadership counsel that their obligations to their clients may require them to raise issues that, they believe, may prejudice their clients’ interests.

The reappointment process should not occur so frequently as to impede leadership’s management of the litigation, but often enough to be meaningful. Under Best Practices 3A(iii) and 4(K), reappointment after the first twelve months is usually too soon to evaluate lead counsel’s performance, particularly in larger MDLs. In smaller litigation, that timing can be about right.

Many mass-tort MDLs take years to resolve. Leadership does not remain static, and circumstances beyond the control of individual lead counsel may have significant impacts. The MDL workload burden may grow to the point that lead counsel cannot continue to devote the time and financial resources necessary to allow them to continue in a leadership role, or it may shrink to the point that leadership imposes significant opportunity costs. Some lawyers may not have the continuing ability or interest to fulfill true leadership roles. All of these issuesmay not become apparent to the court until the litigation has been underway for some time. A reappointment process ensures timely airing of these sorts of problems.

Further, non-leadership counsel may become heavily involved in the work of the MDL, or from related litigation develop a particular expertise valuable to the MDL. Such circumstances justify appointing additional lead counsel during the course of the MDL, although the appointment may not have been appropriate at the outset of litigation. A reappointment process establishes a set framework that the court can use to make necessary adjustments to accommodate changed circumstances. Lead counsel with insufficient ongoing personal involvement may have to be replaced, as may senior lead counsel where more junior lawyers are doing the actual work. Advancing more junior attorneys not only benefits those lawyers by bolstering their resumes, which can facilitate future appointments, but also is a vehicle to foster greater diversity in MDL representations.

Best Practice 11D: As part of the reappointment process, the court should require lead counsel to report on their exercise of MDL obligations, including communication with non-leadership lawyers.

Lead counsel seeking reappointment should provide information not only on how effective they have been but also on their interaction with non-leadership counsel. The reappointment process is a convenient point for inviting comment from lawyers not personally seeking leadership positions to comment on the performance of lead counsel. These steps provide the court an opportunity to address issues before they become acute. These opportunities can also estop non-leadership lawyers from raising last-minute, disruptive complaints at very late stages. Such belated complaints undermine judicial management of litigation in reliance on lead counsel’s work, and generally diminishes the confidence of all parties to the MDL process. Requiring airing of grievances during the reappointment process can be a valuable tool to ward off such disruptive tactics.

**....** [Material omitted from 2014 MDL Standards and Best Practices.]

**CHAPTER 5**

**ESTABLISHMENT AND USE OF COMMON FUNDS**

**….**[Material omitted from 2014 MDL Standards and Best Practices.]

**CHAPTER 6**

**SETTLEMENT REVIEW AND CLAIMS-PROCESSING ADMINISTRATION**

**MDL Standard 13:** If the parties indicate a willingness to negotiate settlement, the MDL judge should facilitate negotiations, but judges should not impose settlement negotiations on unwilling parties.[[44]](#footnote-44)

The transferee judge “must guard against the temptation to become an advocate — either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not party to it.”[[45]](#footnote-45) A transferee judge should facilitate settlement negotiations as soon as the parties indicate a willingness to settle unless the judge determines the request is frivolous or intended for dilatory purposes.

Best Practice 13A: If the parties have indicated a willingness to begin settlement negotiations, a settlement master can play a valuable role at the appropriate stage.

A settlement master can serve as an effective liaison between the parties and the court in helping the court to understand the full complexion of the plaintiffs’ claims, how they may break down among injury categories, and other key factors that differentiate them; what issues in litigation may need to be addressed and rulings entered, such as preemption or the statute of limitations issues, which will impact a defendant’s settlement posture; and whether a *Lone Pine* order is needed for the parties to have meaningful settlement discussions.

A settlement master can facilitate communication between the parties and reduce barriers that could impede unsupervised discussions. A settlement master may ultimately guide both the court and the parties along a path leading toward settlement.

Best Practice 13B: The parties should consider appointment of a settlement master as soon as they are willing to begin settlement negotiations.

Once the parties are willing to begin settlement negotiations, they should consider recommending one or more settlement masters to the court. Timing will depend on the circumstances, but as a general matter, prior to a settlement master’s appointment, major preliminary legal challenges (preemption, *Daubert*, and the like) will have been addressed, and liability discovery of the defendant, general causation, and expert discovery will have largely been completed. Defendants cannot be expected to consider settlement seriously without meaningful case-specific discovery from plaintiffs, such as from PFSs, production of medical records, and other methods of exploring plaintiffs’ individual claims. Often, defendants will require an opportunity to raise individual dispositive motions based on such evidence.

Prompt appointment of a settlement master when parties are willing to negotiate should be the norm. In appropriate circumstances, settlement masters can be appointed from an MDL’s outset, such as when the MDL is dealing with an ongoing violation and injunctive relief is sought. Early appointment can result in the parties agreeing on the settlement master, rather than taking up time later.

Appointment of a settlement master should be a collaborative process between the court and the parties, where each may suggest an individual to be considered by the others. Ultimately, however, the court selects the settlement master. The court should afford the parties an opportunity to request rescission of a settlement master’s appointment on an appropriate showing.

**MDL Standard 14:** The parties must advise the MDL court upon reaching a settlement agreement and must provide the court with information concerning the settlement, which information will differ based on whether the settlement is a global or inventory settlement.

The MDL court must be advised when a settlement will dispose any claims before it. A settlement’s structure dictates the amount of information the court will require, because different types of settlement warrant different levels of court involvement. The two main types of MDL settlements are “global” and “inventory” settlements. The former describes a settlement designed to resolve all cases within the scope of the MDL; the latter describes the settlement of only cases brought by certain plaintiffs’ counsel.

In a global settlement, agreement is reached with plaintiffs’ leadership, and commonly extends to state actions and unfiled claims. Examples of global settlements include the *Vioxx*, *Pradaxa*, and *Guidant* *Implantable Defribulators* MDLs. Key features of a global settlement are: (1) use of a settlement matrix to achieve horizontal and vertical equity (i.e., similarly situated claimants are treated the same and those with greater proof of signature injuries receive greater compensation); (2) plaintiff participation percentages to go into effect; and (3) designated plaintiffs’ counsel selected to manage the settlement program.

An inventory settlement is one in which one or more plaintiffs’ firms negotiates a settlement with the defendant involving only clients represented by the settling firm(s). Examples of recent inventory settlements include the *TVM*, *Avandia*, and *Yaz* (VTE injury) litigations. The terms and values of inventory settlements vary depending on the number of plaintiffs and quality of claims in a particular inventory.

**MDL Standard 15:** For global settlements, which will resolve an entire MDL, the court should ensure the integrity and transparency of the process that led to the settlement agreement, including the claims process.

More than ninety percent of cases centralized in mass-tort MDLs are finally resolved, either on motion or by settlement. Judicial approval is required for settlements that dispose of class actions and certain antitrust actions. Global MDL settlements, which effectively terminate the MDL and thus affect the rights of the remaining non-parties to the settlement, should be examined by the MDL court pursuant to its oversight authority to facilitate and ensure the fairness of the overall settlement process. For inventory settlements, the court may rely on the parties to execute their settlement agreement unless the court’s assistance is sought.

Best Practice 15A: Upon reaching a global settlement, the parties should provide the transferee judge with information concerning the allocation model specified by the settlement (including eligibility criteria), distribution system, minimum participation rate, and provisions accounting for any distributions for extraordinary circumstances.

A transferee judge overseeing a global settlement does not need to know all the details of a settlement, but must have information sufficient to determine that the agreement and claims process are not unfair.[[46]](#footnote-46)

Global settlements (and inventory settlements, with which the court is not generally involved) establish eligibility criteria to determine whether a plaintiff is entitled to settlement compensation. Usually, additional medical information is then used to determine the amount of compensation available to each individual. For example, medical risk factors for the injury at issue independent of the defendant’s product may preclude or reduce a plaintiff’s recovery from a settlement fund.

In many large MDLs, the parties employ a matrix grid to develop a “point system” that allocates an aggregate settlement amount among eligible plaintiffs according to objective criteria. A points system typically begins by categorizing relevant injuries by severity, often after plaintiffs are evaluated by medical experts. Base points are assigned to specific injuries, and adjusted for objective criteria, including age and health history, that are relevant to the injuries at issue in the litigation.

The completed matrix provides an easy-to-comprehend grid, which informs claimants of the basis for their settlement amount. The more detailed and sophisticated the matrix, the greater the likelihood of eligibility disputes. The less detailed the matrix, the greater the likelihood that the relative size of claimants’ awards will not reflect relevant differences in their circumstances.

Best Practice 15B: The parties should advise the transferee judge of any minimum percentage or number of cases disposed of by a global settlement.

Typical settlements of large MDLs enable the defendant to abandon the settlement if the percentage or number of cases settled does not reach a minimum “participation threshold,” which may be as high as ninety-five percent of the eligible population. Often, a settlement also sets minimum numbers or percentages concerning sub-categories of cases, typically the most serious.[[47]](#footnote-47)

Best Practice 15C: The parties should advise the transferee judge of any reserve allocated in the settlement to pay for extraordinary injuries.

A certain percentage of the settlement amounts is often placed in an Extraordinary Injury Fund (“EIF”) to compensate plaintiffs who can demonstrate unique circumstances justifying a higher settlement distribution. This reserve, often equal to ten percent of the aggregate settlement amount, can be either part of the total settlement or a bonus. If the reserve is part of the settlement, it should be exhausted. A bonus need not be, with the excess usually reverting to the settling defendant.

Special masters are routinely engaged to assist with the allocation process or hear appeals from plaintiffs who are unhappy with their allocation amounts. Special master involvement ensures an independent review of claims.

**MDL Standard 16:** The transferee judge should review the claims process to help facilitate claims processing and settlement distribution.

Distribution of settlement proceeds to a large number of eligible claimants in an MDL can take several years. Two factors are the principal causes of delay: (1) time necessary to review submitted claims, to verify that criteria are met, to resolve eligibility disputes, and to make proper allocations; and (2) time consumed in resolving liens against the individual settlement payouts, typically health care liens (including Medicare).

Best Practice 16A: In a large MDL involving many claimants, a Qualified Settlement Fund (“QSF”) provides significant administrative convenience for the court and parties and offers favorable tax advantages to the parties.

After the parties agree to a settlement, a defendant typically deposits settlement monies in an escrow account, making funds available for disbursement to settlement-eligible plaintiffs who have accepted their settlement allocations and executed the required settlement documents.

A QSF is a fund, account, or trust established under Treasury Regulations.[[48]](#footnote-48) The funds deposited into the QSF are the sole property of the QSF. The QSF is responsible for investing and for paying income taxes on fund earnings. Distributions to claimants can be made only in accordance with the settlement agreement. This arrangement prevents claimants for whose benefit the fund is created from taking constructive receipt of settlement monies before they are disbursed. This option is particularly attractive to claimants who would otherwise lose eligibility for Medicaid and other needs-based government benefits.

The QSF option affords claimants the ability to address complications that can arise from receipt of settlement monies, such as on public assistance and other income-dependent benefits, and to decide in what form to accept payments (i.e., lump sum payments or periodic payments over time). The settling defendant receives immediate tax deductions and benefits associated with making settlement payments.

Best Practice 16B: The parties should file a joint or unopposed motion or stipulation asking the court to establish a QSF and appoint a QSF Administrator to manage funds, handle ongoing claims resolution, and work with the plaintiffs and their counsel to determine the QSF’s payout structure.

The QSF Administrator can be the plaintiffs’ counsel, but frequently it is more appropriate to appoint an independent, qualified professional. The QSF Administrator manages the funds, handles ongoing claim resolution, and works with the parties to determine the trust’s payout structure. The QSF administrator is typically paid based on a pre-established agreement with plaintiffs’ counsel from principal in the QSF, interest earned on the QSF, or as a portion of the MDL common-benefit fund (or a combination thereof).

Occasionally, a QSF can be created by other means, such as a court order approving a settlement agreement that requires a QSF. And because a QSF is subject to the continuing supervision of a court, the documents creating the QSF often provide for the court’s review of the process, which is flexible enough to permit the court as much supervision as is deemed appropriate and desired depending on the mechanics of a particular settlement.

**MDL Standard 17:** The transferee judge and parties should collaborate in addressing lien resolution (including Medicare and Medicaid) and instituting methods to minimize delays caused by such resolution, especially health care liens.

MDLs that involve personal injury claims require parties and courts to address healthcare liens, a challenging and not well-understood aspect of MDL settlement administration. Attention to healthcare liens early in the settlement process can streamline the settlement timeline, allow claimants to receive payment more quickly, reduce settlement-related disputes, conserve judicial resources, and reduce the parties’ expenses.

The parties’ and the court’s involvement in an MDL does not end when a settlement is reached. Typically, bringing all settlement administration processes to final conclusion -- the settlement “tail” -- can be quite lengthy, although no specific data on settlement tails is readily available. MDLs involving consumer claims generally have shorter settlement tails. Time spent administering settlements can be reduced with up-front planning of settlement mechanics that anticipates lien issues and payment complications.

A lien is a legal claim possessed by a healthcare insurer that paid for a plaintiff’s treatment for the alleged injury that is the subject of a settlement. The lien holder is entitled to reimbursement of the cost of such treatment from a plaintiff’s recovery. The healthcare insurer may be the federal or a state government that provided coverage under Medicare, Medicaid, or some other program. The insurer also may be a private insurance carrier that provided coverage. The lien may be rooted in federal law, state law, contractual agreement between a plaintiff and insurer, or a combination of these sources.

The Medicare Secondary Payer Act, enacted in 1980, attempts to reduce Medicare costs by designating Medicare as a “secondary” payer when a third-party payer or other form of “primary” insurance is available.[[49]](#footnote-49) Medicare has what is frequently referred to as a “super lien,” that is both a subrogation right and an independent priority right of reimbursement. The government has reimbursement rights against virtually everyone involved in a personal injury claim, including the beneficiary, the defendant, and attorneys representing the beneficiary.

Medicare is not required to notify anyone of its right to reimbursement, nor need it make a request for reimbursement to enforce its right to recovery. Instead, the controlling statute[[50]](#footnote-50) requires that providers of liability insurance (including self-insurance and thus litigation defendants), no fault insurance, and workers’ compensation insurance affirmatively determine the enrollment status of each claimant with whom a settlement or other award in resolution of a claim is made. They must also report certain information about those claims to Medicare to ensure that Medicare’s interest is protected.[[51]](#footnote-51)

The Medicare Program is made up of Parts A through Part D. Medicare Parts A & B are often referred to as “federal” or “traditional” Medicare. Medicare Part C Plans (referred to as “Medicare Advantage Plans”) allow Medicare beneficiaries to enroll in a private plan as an alternative to traditional Medicare. Such plans provide the same benefits as Medicare Part A and Part B and may also include prescription drug coverage. Part C plans are provided by private insurers. These plans must offer at least the same benefits as traditional Medicare but can do so with different rules, costs, and coverage restrictions.

Circuit court case law from the Third and Eleventh Circuits accord Part C private providers (“Medicare Advantage Organizations”) the same secondary payer rights as Medicare under Part A and B, notably not having to notify anyone of a right to reimbursement or to make a request for reimbursement in order to enforce a right to recovery.[[52]](#footnote-52) Medicare Part D is delivered through private companies that contract with the Centers for Medicare & Medicaid Services (“CMS”) to provide prescription drug benefits.

Medicaid is a government-sponsored health insurance program providing coverage to qualifying low-income individuals, including parents, children, and the disabled.[[53]](#footnote-53) The program is funded by federal and state governments but is administered by individual state agencies. States have discretion to determine Medicaid eligibility criteria, so Medicaid beneficiary demographics can vary significantly from state to state. There are currently 52 Medicaid agencies administering 52 separate Medicaid lien recovery programs. Resolution of Medicaid liens is required by state and federal law.

Other governmental providers also assert healthcare liens. The lien rights of military and other federal government entities providing health insurance coverage to potential plaintiffs stem from the Federal Medical Care Recovery Act (“FMCRA”).[[54]](#footnote-54) These federal entities are typically granted an independent right of recovery against a third party responsible for a member’s medical care along with a right of subrogation, assignment, and ability to intervene or join the plan member plaintiff’s claim.[[55]](#footnote-55)

Private health insurance companies may also assert healthcare liens. Private health insurance is provided primarily by employers and individually purchased policies. Lien and subrogation rights are a mixture of contract, state law, federal law (including the Employment Retirement Income Security Act (“ERISA”)), judicial decisions, and other considerations (such as whether a private health plan is fully self-insured). The process for resolving private lien interests has been evolving significantly and can benefit from court supervision and oversight.

Best Practice 17A: The transferee judge overseeing a global settlement should designate representatives from both sides to create a healthcare lien resolution process. The responsibilities and respective duties of these representatives (and subcommittees, as needed) should be specified at the outset and assigned at the earliest possible time.

All parties benefit from addressing healthcare liens early on in the settlement process, because the risks of non-compliance[[56]](#footnote-56) are magnified by large numbers of plaintiffs and claims.

Usually, the first step toward lien resolution is for all plaintiffs to submit their personal indemnifying information, dates of injury, healthcare plans, and medical treatment to identify possible liens. The second step is verification of entitlement (“VOE”), to determine the extent that particular plaintiffs received healthcare benefits from particular plans during relevant time periods. The claims and medical records of identified plaintiffs are reviewed to ensure that lienholder are repaid only for expenses actually incurred and directly related to alleged injuries for which settlement compensation is being paid. The final lien amount is determined using various strategies, depending on the type of lien at issue.

Because resolving healthcare liens can take months, even years, the court-designated representatives should design a lien resolution plan as expeditiously as possible. The parties should consider engaging a Lien Resolution Administrator to facilitate the entire lien resolution process. Professional Lien Resolution Administrators reduce the workload for firms looking to conserve resources, and ensure efficient healthcare lien handling by persons with knowledge, experience and well-established connections for dealing with the various lienholders’ recovery agents, such as the 52 separate state Medicaid lien recovery programs. A Lien Resolution Administrator also ensures a transparent, uniform lien resolution process, so that similarly-situated participating plaintiffs achieve similar outcomes.

Medicare liens are often resolved under a “global model,” which avoids the time delays and costs associated with resolving thousands of claims on a traditional case-by-case basis. Construction of a global model requires analysis of the routine costs associated with the medically-accepted standard of care for the treatment and care of the injuries at issue in a particular MDL. This data is then used to determine a uniform reimbursement value for all claims in any injury category.

There are 52 separate state Medicaid lien recovery programs, which complicates the resolution of Medicaid liens. One advantage of using an experienced Lien Resolution Administrator is that they should already have well established connections with these recovery programs.

Resolving Medicare Part C and other private liens in mass litigations, presents additional difficulties because, unlike federal Medicare and state Medicaid programs, there is no centralized system through which a Lien Resolution Administrator or the parties can affirmatively identify whether liens exist in favor of one of the thousands of potential private health plans. Many private insurers hire private recovery contractors to manage lien claims. The court-designated representatives should consider establishing a Private Resolution Program (“PLRP”) to verify and resolve the complexities of private lien payment. An experienced Lien Resolution Administrator can assist in untangling these complexities and help identify the necessary recovery contractors needed in order to have an effective PLRP.

Best Practice 17B: The transferee judge should assist the parties in the healthcare lien process by issuing orders, as needed, requiring periodic reporting.

The transferee judge can shorten the healthcare lien resolution timeline by requiring periodic reporting from the parties and lien administrator and by assisting, when needed, in advancing the process.

If the parties choose to use a Lien Resolution Administrator, they should seek a court order naming that administrator, thereby permitting the administrator to communicate directly with Medicare and other lienholders. Such an order should also authorize disclosure and exchange of settling plaintiffs’ protected health information.

**….**[Material omitted from 2014 MDL Standards and Best Practices.]

**CHAPTER 7**

**FEDERAL/STATE COORDINATION**

**….**[Material omitted from 2014 MDL Standards and Best Practices.]

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

**Thank you to our Sponsors!**

 The Bolch Judicial Institute gratefully acknowledges the financial support of its sponsors. The Institute’s law-reform conferences and other related programs rely on the generosity of sponsors’ donations.

**Gold Sponsors**

Western Alliance Bank

Huntington Bank

**Silver Sponsors**

|  |  |
| --- | --- |
| Altec, Inc.Bayer CorporationDechert LLPEndo International PLCExxon MobilGE's Power & WaterGirard Gibbs LLPGlaxoSmithKlineDiCello Levitt & CaseyHome DepotHuntington BankImpact FundKessler Topaz Meltzer & Check LLPKing & SpaldingKirkland & Ellis LLPLieff Cabraser Heimann & Bernstein LLP | Lincoln Financial GroupMedtronicMerckThe Moskowitz Law FirmMotley Rice LLCNastLaw LLCPfizer, Inc.Podhurst Orseck PAQuinn Emanuel Urquhart & Sullivan LLPSeeger Weiss LLPSkadden Arps Slate Meagher & Flom LLPState Farm InsuranceStone Pigman Walther & Wittmann LLCToyota Motor North America, Inc. |

1. *See* John H. Beisner & Jessica D. Miller, Eliminate the Tort, Not the Mass: A Modest Proposal for Reforming How Mass Torts Are Adjudicated 4 (Wash. Legal Found. 2009), http://www.wlf.org/upload/beisner09.pdf (expressing concern about the quality of mass-tort claims filed in MDL proceedings, noting that “[t]his problem is compounded by the fact that many of the claims are not developed by the filing counsel — they effectively were purchased from other attorneys who advertised to attract claimants in their home markets with no intention of ever litigating the claims themselves”); MCL § 22.83; *see also* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 8 n.40 (2011) (“The use of ‘fact sheets’ to streamline discovery by replacing formal interrogatories with supposedly less onerous, more fact-oriented formats is now a common practice in mass tort multidistrict litigation.”). [↑](#footnote-ref-1)
2. *See, e.g.*, Pretrial Order No. 6: Plaintiff Fact Sheets and Defendant Fact Sheets at ¶ 12, *Bextra & Celebrex Marketing Sales Practices & Prods. Liab. Litig*.,MDL No. 1699 (N.D. Cal. Feb. 13, 2006). [↑](#footnote-ref-2)
3. *See, e.g.*, Pretrial Order No. 22, Service of Plaintiff Fact Sheets and Defendant Fact Sheets at ¶¶ 6–7, *In re* *Taxotere (Docetaxel) Prods. Liab. Litig.*, MDL No. 2740 (E.D. La. Mar. 10, 2017). [↑](#footnote-ref-3)
4. *See, e.g.*, Pretrial Order No. 18, Plaintiff Fact Sheet and Defendant Fact Sheet & Ex. A (Plaintiff Fact Sheet) at 6, *In re* *Taxotere (Docetaxel) Prods. Liab. Litig*., MDL No. 2740 (E.D. La. Feb. 14, 2017); MDL Order No. 10 [Dkt. 251], Order Concerning Early Disclosure of Product Identification Information, *In re Zofran (Ondansetron) Prods. Liab. Litig*., MDL No. 2657 (D. Mass. May 26, 2016) (“The Court has concluded that production of [product identification] information at a relatively early stage in the litigation may assist in the preservation and collection of additional evidence; is not likely to be unduly burdensome; is not likely to result in unfairness to any party; and may help resolve certain issues in this litigation in a timely manner.”); Pre-Trial Order No. 27, Plaintiff Fact Sheets and Defendant Fact Sheets at ¶ 2, *In re* Xarelto *(Rivaroxaban) Prods. Liab. Litig*., MDL No. 2592 (E.D. La. Apr. 22, 2016) (requiring “records of proof of use and proof of injury within 90 days from the date Plaintiff’s complaint was filed”). [↑](#footnote-ref-4)
5. Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 927–28; *see* McGovern, *supra* note xxii, at 1888–89 (“[In the Fen/Phen litigation, the parties] cooperated extensively with each other in the discovery process in order to reduce their transaction costs. Innovative processes, including the MDL-standardized fact sheets . . . provided models for discovery . . . .”); *see also* Order # 12, Case Management (PFS) at ¶ A.2, *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, 2016 WL 3281032 (N.D. Ill. June 10, 2016) (*Lone* Pine order imposed after difficulties arose in managing bellwether process); In *re* Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., MDL No. 2100 (S.D. Ill. Mar. 3, 2010) (“A completed PFS, which requires that each Plaintiff sign the Declaration in Section XIII, shall be considered to be interrogatory answers and responses to requests for production under the Federal Rules of Civil Procedure, and will be governed by the standards applicable to written discovery under the Federal Rules of Civil Procedure.”). [↑](#footnote-ref-5)
6. *See generally, e.g.*, Case Management Order 12 (PFS), *supra* note 6; Case Management Order 18 (DFS), *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices & Prods. Liab*. Lit., MDL 2100 (S.D. Ill. Mar. 3, 2010). [↑](#footnote-ref-6)
7. *See In re* *Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig*., No. 2:14-cv-20042, 2015 WL 5786776, at \*2 (S.D. W. Va. Sept. 30, 2015); *In re* *Cook Medical Inc. Pelvic Repair Sys. Prods. Liab. Litig*., No. 2:14-cv-30296, MDL No. 2440, 2015 WL 4458971, at \*2 (S.D. W. Va. July 17, 2015); Order No. 7, *In re* *Mirena IUD Prods. Liab. Litig*., No. 13-MD-2434 (CS) (S.D.N.Y. Aug. 15, 2013); Order No. 7A, *In re* *Mirena IUD Prods. Liab. Litig*., No. 13-MD-2434 (CS) (S.D.N.Y. Apr. 24, 2014). [↑](#footnote-ref-7)
8. *See* *e.g.*, *In re Orthopedic Bone Screw Prods. Liab. Litig*., No. MDL 1014, 1997 WL 704719 (E.D. Pa. July 24, 1997). [↑](#footnote-ref-8)
9. MCL § 22.315; *see also In re* *Hydroxycut Mktg. & Sales Practices Litig*., No. 09-md-2087 BTM(KSC), 2012 U.S. Dist. LEXIS 118980, at \*56 (S.D. Cal. Aug. 21, 2012) (“The bellwether cases should be representative cases that will best produce information regarding value ascertainment for settlement purposes or to answer causation or liability issues common to the universe of plaintiffs.”). [↑](#footnote-ref-9)
10. Only when a “representative . . . range of cases” is selected may “individual trials . . . produce reliable information about other mass tort cases.” MCL§ 22.315; *see also* *In re* *Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig*., MDL No. 2100, 2010 U.S. Dist. LEXIS 108107, at \*4, \*6–7 (S.D. Ill. Oct. 8, 2010) (it is “critical to a successful bellwether plan that an honest representative sampling of cases be achieved” because “[l]ittle credibility will be attached to this process, and it will be a waste of everyone’s time and resources, if cases are selected which do not accurately reflect the run-of-the-mill case”); Eldon E. Fallon et al., *Bellwether Trials In Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2343 (2008) (“the trial selection process should . . . illustrate the likelihood of success and measure of damages” of all cases in the litigation and “[a]ny trial-selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact”). [↑](#footnote-ref-10)
11. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). [↑](#footnote-ref-11)
12. *See In re* *Motor Fuel Temperature Sales Practices Litig*., 711 F.3d 1050, 1053 (9th Cir. 2013) (“Only severe or unexpected over-burdening, as happens when a judge dies or retires, when the district is experiencing a judicial emergency or when all judges are recused because of a conflict, will warrant bringing in a visiting judge.”). [↑](#footnote-ref-12)
13. Settlements are discussed in more detail in Chapter 5. As discussed there, most settlements are global grid settlements. However, defense counsel have increasingly urged settlement on other bases, whether by firm-inventory settlements or by claim settlements (effectively global settlements of a particular type of claim). [↑](#footnote-ref-13)
14. 523 U.S. 26 (1998). [↑](#footnote-ref-14)
15. MCL§ 20.132. [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. Accordingly, parties should consider whether they wish to attach conditions to such waivers, such as choice of law, permitting or prohibiting consolidation, or agreeing only to try compensatory damages or certain claims. [↑](#footnote-ref-17)
18. Such waivers may also address topics such as choice of law, consolidated trials, and bifurcation of damages or issues. [↑](#footnote-ref-18)
19. 870 F.3d 345 (5th Cir. 2017). [↑](#footnote-ref-19)
20. MCL§ 20.132. Such an order should not alter filing-fee requirements. [↑](#footnote-ref-20)
21. *See supra* note 12. Direct filing must be consistent with constitutional limits on personal jurisdiction. [↑](#footnote-ref-21)
22. *See infra* Best Practices 18E–18E(iii), 18F. [↑](#footnote-ref-22)
23. *See, e.g.*, Joint Bellwether Plan, *In re Hydroxycut Mktg. & Sales Practices Litig*., (S.D. Cal. Mar. 19, 2012) (providing that each party will pick an equal number of trial candidates, subject to veto from the other side, that will then be tried alternately); Pretrial Order #10 at 2, *In re* *Levaquin Prods. Liab. Litig*., (D. Minn. Mar. 8, 2011) (the “[c]ourt, upon recommendation by the parties, designated six individual plaintiffs . . . as possible bellwether” candidates and then allowed parties to take turns choosing cases to be tried); Case Management Order No. 9 at 2–3, *In re Fosamax Prods. Liab. Litig*., (S.D.N.Y Jan. 31, 2007) (providing that each party will pick 12 cases to fill the bellwether trial pool, with the Court picking an additional case; from that pool, plaintiffs, defendants and the court will each pick a trial case and the court “will randomly select the order in which each of the three cases will be tried”); Order Re: Bellwether Trial Selection at 2, *In re Prempro Prods. Liab. Litig*., (E.D. Ark. June 20, 2005) (selecting fifteen cases at random for the bellwether trial pool and then the directing the “parties must ‘meet and confer’” to “together select” five cases that involve representative plaintiffs for trial). [↑](#footnote-ref-23)
24. MCL§ 22.315. [↑](#footnote-ref-24)
25. *See* Pretrial Order No. 89, *In re Baycol Prods. Litig*., (D. Minn. July 18, 2003); *see also In re Norplant Contraceptive Prods. Liab. Litig*., No. 4:03-cv-1507-WRW, 1996 WL 571536, at \*1 (E.D. Tex. Aug 13, 1996) (“[f]ollowing random selection of the twenty-five bellwether trial plaintiffs”). [↑](#footnote-ref-25)
26. *See* Order re: Bellwether Trial Selection at 2, *In re Prempro Prods. Liab. Litig*., MDL No. 1507 (E.D. Ark. June 20, 2005). [↑](#footnote-ref-26)
27. Fed. Judicial Ctr., Nat’l Ctr. for State Courts, U.S. Judicial Panel on Multidistrict Litig., Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges12 (2013), https://www.fjc.gov/sites/default/files/2014/Coordinating-Multijurisdiction-Litigation-FJC-2013.pdf [hereinafter Coordinating Multijurisdiction Litigation] (“Selecting cases randomly . . . is unlikely to produce a representative set of verdicts that will assist the parties in reaching a global settlement.”). [↑](#footnote-ref-27)
28. 501 F. Supp. 2d 789, 791 (E.D. La. 2007). [↑](#footnote-ref-28)
29. *Id.* [↑](#footnote-ref-29)
30. Fallon et al., *supra* note 10, at 2350. [↑](#footnote-ref-30)
31. *Id*. at 2364. [↑](#footnote-ref-31)
32. *In re Yasmin & Yaz*, 2010 U.S. Dist. LEXIS 108107, at \*7 (S.D. Ill. Oct. 1, 2010). [↑](#footnote-ref-32)
33. Coordinating Multijurisdiction Litigation, *supra* note 27, at 12 (“Allowing attorneys complete freedom to choose bellwethers is unlikely to produce a representative set of verdicts that will assist the parties in reaching global settlement.”). [↑](#footnote-ref-33)
34. *See In re Levaquin Prods. Liab. Litig*., No. 08-1943, 2009 U.S. Dist. LEXIS 116344, at \*9–11 (D. Minn. Dec. 14, 2009) (internal quotation marks and citations omitted); *see also* Pretrial Order # 71 at 2, *In re C.R. Bard Inc., Pelvic Repair Sys. Prods. Liab. Litig*., MDL No. 2187 (S.D. W. Va. Mar. 7, 2013) (denying plaintiffs’ motion to consolidate three plaintiffs’ cases or, in the alternative, “seat three juries in a single trial but deliberate separately and render separate verdicts” as the first bellwether trial in product-liability litigation involving pelvic implant surgery); *In re Hydroxycut Mktg. & Sales Practices Litig*., No. 3:09-md-2087-BTM(KSC), 2012 U.S. Dist. LEXIS 93282, at \*50–52 (S.D. Cal. June 28, 2012) (“The selection of ***individual*** plaintiffs by the parties with oversight from the court is similar to approaches taken by other courts in designating representative bellwether cases for trial.”) (emphasis added); *In re* Yasmin & Yaz, 2010 U.S. Dist. LEXIS 108107, at \*9 n.3 (providing that plaintiffs for inclusion in the bellwether pool “must be selected . . . ***individually***”) (emphasis added); *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 644 (E.D. La. 2010) (noting that six bellwether trials of individual plaintiffs were conducted during the course of litigation). [↑](#footnote-ref-34)
35. Attorneys holding this view should consider conditioning *Lexecon* waivers to preclude consolidation. [↑](#footnote-ref-35)
36. *See*, e.g., Order Consolidating Bellwether Cases For Trial, *In re:* *DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Lit., MDL 2244*, (N.D. Tex., January 18, 2016) (consolidating five cases for bellwether trial); see also *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004, 2010 WL 797273 (M.D. Ga. Mar. 3, 2010) (finding consolidation appropriate with the significant common issues of the manufacturer’s knowledge of risks and proper curative treatment versus what was disclosed to physicians, along with other common evidence including expert testimony on “research, development, design, testing, manufacturing, quality control, and product evaluation-as well as general evidence on anatomy, biostatistics, bioengineering, the Food and Drug Administration’s 510(k) process, and [Defendant’s] corporate knowledge.”). *But see, In re Repetitive* *Stress Injury Litigation*, 11 F.3d 368, 373-74 (2d Cir. 1993) (granting mandamus to reverse consolidation); *Guenther v. Novartis Pharmaceutical Corp.*, 2012 WL 5398219, at \*2 (Mag. M.D. Fla. Oct. 12, 2012) (“[The MDL] Panel has repeatedly rejected attempts to consolidate cases for trial and has ordered multi-plaintiff case complaints be severed because the claims of individual plaintiffs were not suited for consolidation”), adopted, 2012 WL 5305995 (M.D. Fla. Oct. 29, 2012); *In re Levaquin Prods. Liab. Lit.*, 2009 WL 5030772, at \*3-4 (D. Minn. Dec. 14, 2009) (three-plaintiff consolidation improper due to different prescribing physicians notwithstanding plaintiff’s promise to call “nearly twenty generic witnesses”); *In re Baycol Prods. Liab. Lit.*, 2002 WL 32155269, at \*2 (D. Minn. July 5, 2002) (the “same basic set of facts” is absent where plaintiffs “went to different doctors or teams of doctors and medical facilities and providers”); *In re Consolidated Parlodel Litigation*, 182 F.R.D. 441, 447 (D.N.J. 1998) (“predominance of individual . . .causation and marketing evidence” precludes consolidation); *In re Diet Drugs*, 1999 WL 554584, at \* 4 (E.D. Pa. July 16, 1999) (joinder of plaintiffs improper where “plaintiffs [had] not purchased or received diet drugs from an identical source, such as a physician, hospital or diet center”). [↑](#footnote-ref-36)
37. MCL§ 22.83. [↑](#footnote-ref-37)
38. Coordinating Multijurisdiction Litigation, *supra* note 27, at 12 (“Permitting plaintiffs to dismiss cases on the eve of trial also can distort the information provided by bellwether trials.”); In re *FEMA Trailer Formaldahyde Prods. Liab. Litig*., 628 F.3d 157, 163-64 (5th Cir. 2010) (discussing a party’s “manipulate[ing] the integrity of the court's bellwether process” through voluntary dismissal of selected cases). [↑](#footnote-ref-38)
39. *See* *FEMA Trailers*, 628 F.3d at 164 (affirming with prejudice dismissals). [↑](#footnote-ref-39)
40. *See* Pretrial Order No. 1 at 1–2, *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on Apr. 20, 2010*,* MDL No. 2179, (E.D. La. Aug. 10, 2010) (“The Court expects, indeed insists, that professionalism and courteous cooperation permeate this proceeding from now until this litigation is concluded.”). [↑](#footnote-ref-40)
41. *See infra* Best Practices 18B–18B(iii). [↑](#footnote-ref-41)
42. Retention of separate counsel by individual plaintiffs is an important distinction between a class action and an MDL coordinated or consolidated proceeding. The class action device generally presumes that the absent class members will not have their own independent economically viable claims and are therefore made parties to the litigation only by virtue of the class certification order, without individual representation. In class actions, the only attorneys representing absent plaintiffs’ interests are Class Counsel. [↑](#footnote-ref-42)
43. In all cases, lead counsel’s settlement-related obligations to their own clients is subject to the usual ethical rules concerning joint settlements, including the aggregate settlement rule. *See* Principles of the Law of Aggregate Litigation §§ 3.15-17 (ALI 2010). [↑](#footnote-ref-43)
44. Committee Note, Fed. R .Civ. P. 16(c) (1983). [↑](#footnote-ref-44)
45. MCL § 13.14. [↑](#footnote-ref-45)
46. Principles of the Law, Aggregate Litigation § 3.17 (2010). [↑](#footnote-ref-46)
47. Calculation of thresholds should account for deceased claimants, whose estates may not be closed for many years, by accepting releases from heirs or other family members, even if not technically binding. [↑](#footnote-ref-47)
48. Under I.R.S. § 468B and Treasury Regulation 1.468B-1(c), each QSF must: (1) be created by a court or other governmental authority and be subject to continuing court supervision; (2) resolve claims related to the subject of the lawsuit; and (3) qualify as a trust under state law or have its assets otherwise segregated from other assets of the transferor. [↑](#footnote-ref-48)
49. *See* 42 U.S.C. § 1395(y)(b) (2012). [↑](#footnote-ref-49)
50. Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (“MMSEA”), 42 U.S.C. § 1395y(b) & (b)(8). [↑](#footnote-ref-50)
51. *See id.* § 1395(y)(b)(8). [↑](#footnote-ref-51)
52. *See* Humana Medical Plans, Inc. v. Western Heritage Ins. Co., 832 F.3d 1229 (11th Cir. 2016); *In re Avandia*, 685 F.3d 353 (3d Cir. 2012). [↑](#footnote-ref-52)
53. 42 U.S.C. §§ 1396(a), (k) (2012). [↑](#footnote-ref-53)
54. *See* 42 U.S.C. §§ 2651-2653 (2012). [↑](#footnote-ref-54)
55. Such providers include the U.S. Department of Veterans Affairs (“VA”), TRICARE, and Indian Health Service (“IHS”). [↑](#footnote-ref-55)
56. Both parties and attorneys can be liable for failure to report. *See e.g.,* 42 U.S.C. § 1395y(b)(2)(B)(iii); 42 C.F.R. § 411.24(c)(2) (allowing for a penalty of $1,000 per day for failure to report a settlement involving a Medicare beneficiary and allowing Medicare to bring an action for double damages against any responsible entity for repayment). [↑](#footnote-ref-56)