

**GUIDELINES AND BEST PRACTICES  
FOR LARGE AND MASS-TORT MDLS  
BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL  
(SECOND EDITION)**

**EXECUTIVE SUMMARY**

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## MANAGEMENT OF TRANSFERRED CASES

**MDL GUIDELINE 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).

**BEST PRACTICE 1A:** Within 30 days after designation by the JPML, the MDL transferee judge should issue an order scheduling an initial conference.

**BEST PRACTICE 1B:** The transferee judge should formulate a management plan that advances the purposes of the MDL statute.

**BEST PRACTICE 1B(i):** The transferee judge should schedule regular status conferences.

**BEST PRACTICE 1B(ii):** The court should consider the use of magistrate judges or special masters.

**BEST PRACTICE 1B(iii):** The transferee judge should give priority to deciding issues broadly applicable to multiple claimants in the MDL.

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

**BEST PRACTICE 1C(i):** The discovery plan should synchronize the production of information with other phases of the litigation and otherwise facilitate the efficient flow of information.

**BEST PRACTICE 1C(ii):** At an early stage, the transferee judge should consider adopting privilege and confidentiality protocols, including issuing a Fed. R. Evid. 502(d) order.

**BEST PRACTICE 1C(iii):** The transferee judge should adopt deposition guidelines.

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

**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.

**BEST PRACTICE 1C(vi):** When plaintiff fact sheets are used, defendant fact sheets may also serve an important purpose.

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.

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

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

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.

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.

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.

BEST PRACTICE 1D(i): Typically, the transferee judge will assess the propriety of class certification in all cases pending in the MDL proceeding and oversee all discovery necessary to carry out that purpose, although alternatives should be considered.

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

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.

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.

BEST PRACTICE 1E(iii): The transferee judge and the parties should establish a process that requires collaborative selection of bellwether trial cases.

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.

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

## SELECTION AND APPOINTMENT OF LEADERSHIP

**GUIDELINE 2:** In an MDL action with many parties with separate counsel, the transferee judge should establish a leadership structure for the plaintiffs, and sometimes for the defendants, to promote the effective management of the litigation.

**BEST PRACTICE 2A:** The transferee judge should assess the needs of the litigation in establishing an appropriate leadership structure.

**BEST PRACTICE 2B:** In determining the appropriate leadership structure, the type of cases included in the MDL is often the most important consideration.

**BEST PRACTICE 2C:** The transferee judge typically should appoint lead counsel and liaison counsel for the plaintiffs, and often a supporting committee when the litigation is especially large or complex or composed of divergent interests.

**BEST PRACTICE 2C(i):** In cases involving numerous defendants it may be necessary to appoint a leadership team for the defense as well.

**BEST PRACTICE 2C(ii):** The transferee judge should designate lead counsel who will act for all parties whom they are appointed to represent and are responsible for the overall management of the litigation. The judge should specify at the outset responsibilities assigned to lead counsel, as well as the structure of the entire leadership team and their respective duties.

**BEST PRACTICE 2C(iii):** Although every case is different, the transferee judge should not appoint more than three attorneys to serve as lead counsel in any matter, in light of the potential for inefficiencies and ineffective decision making.

**BEST PRACTICE 2C(iv):** The transferee judge should consider the appointment of liaison counsel to serve an administrative role. If the court appoints a liaison, it should specifically define the roles and duties of the liaison 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. An important aspect of the liaison's role is coordinating with and supporting the clerk of court.

**BEST PRACTICE 2D:** The transferee judge should consider establishing a steering committee, executive committee, or management committee, if the litigation involves numerous complex issues, if there is a substantial amount of work to be done, or if the plaintiffs have different interests that require separate representation.

**GUIDELINE 3:** The transferee judge should select lead counsel, liaison counsel, and committee members as soon as practicable after the JPML transfers the litigation.

**BEST PRACTICE 3A:** Holding the initial conference at the earliest practicable time after the order transferring cases is issued allows the transferee court to promptly set in motion the procedure for appointment of counsel.

BEST PRACTICE 3A(i): The initial case-management order should inform counsel that the leadership structure will be discussed at the initial case-management conference and direct them to be prepared to identify case-specific issues that may inform the appropriate structure. Counsel who intend to seek a leadership position should be required to attend.

BEST PRACTICE 3A(ii): The transferee judge should take steps to ensure a smooth process for administration of the MDL by confirming that the clerk of court is prepared for and capable of handling the possible (indeed likely) influx of filings that follow transfer of the cases by the JPML, and issuing initial orders that address the filing procedures for counsel to follow before the leadership team is appointed.

BEST PRACTICE 3A(iii): At this stage, the transferee judge should consider appointing an interim liaison counsel or encourage counsel to select a proposed liaison counsel prior to the conference, although the formal appointment will be subject to court approval.

BEST PRACTICE 3B: Following the conference, the transferee judge should issue an order describing the leadership structure, the procedures for counsel to follow if they intend to seek appointment to any of the roles identified in the order, and the criteria that the transferee judge intends to use in selecting counsel to fill the roles.

BEST PRACTICE 3B(i): The transferee judge should set a schedule that will ensure that leadership is in place within three to four months after the creation of the MDL, or even sooner, to avoid unnecessary delay in proceeding with litigation of the case.

BEST PRACTICE 3C: The judge's primary responsibility in the selection process is to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent all plaintiffs, keeping in mind the benefits of diversity of experience, skills, and backgrounds.

BEST PRACTICE 3C(i): The transferee judge should develop a straightforward and efficient process for counsel to apply for appointment. The process should reflect the need to avoid unnecessary divisiveness, while encouraging professionalism and honesty. The description of the application and selection process should be filed in the public docket in a manner that provides timely notice to all who may be interested in applying.

BEST PRACTICE 3C(ii): Counsel should submit written applications that describe their qualifications to serve in the positions they seek to fill.

BEST PRACTICE 3C(iii): The transferee judge should direct counsel to identify cases in which they have served in a similar leadership capacity, describe their experience in managing complex litigation and their knowledge of the subject matter, and provide information about the resources they have available to contribute to the litigation.

BEST PRACTICE 3C(iv): In appropriate cases, the transferee judge should conduct interviews of counsel (on the record during an in-court hearing) that have submitted applications for leadership positions, in order to assess the applicants' demeanor and skills.

BEST PRACTICE 3C(v): The transferee judge should ensure that the selection process is as transparent as possible by providing a general statement of the goals and considerations that guided the selection.

BEST PRACTICE 3C(vi): Even if counsel are able to agree upon a leadership structure themselves, the transferee judge should establish a procedure for the selected lawyers to submit written applications to ensure that they are qualified to lead the litigation.

**GUIDELINE 4:** As a general rule, the transferee judge should ensure that the lawyers appointed to the leadership team are effective managers in addition to being conscientious advocates.

BEST PRACTICE 4A: In the order appointing counsel, the transferee judge should clearly define the role and responsibilities of each appointed individual within the leadership structure.

BEST PRACTICE 4B: The transferee judge should appoint lead counsel who have excellent management skills.

BEST PRACTICE 4C: The transferee judge should appoint committee members who have some demonstrated leadership ability because they too must communicate and establish effective working relationships with numerous other lawyers.

BEST PRACTICE 4C(i): It is essential that the transferee judge appoint a leadership team that is composed of lawyers with a demonstrated track record of successfully working with others, building consensus, and amicably managing disagreements. The transferee judge should be mindful of the importance of harmony among the leadership team, and between the leadership team and both the court and opposing counsel.

BEST PRACTICE 4C(ii): The transferee judge should appoint lead counsel who are sufficiently experienced and respected to manage multidistrict litigation.

BEST PRACTICE 4C(iii): The transferee judge may take into account whether counsel applying for leadership roles have worked together in other cases, their ability to collaborate in the past, divide work, avoid duplication, and manage costs.

BEST PRACTICE 4D: The transferee judge should appoint counsel who have the commitment and resources to effectively serve in the leadership role for which they are selected. The judge should confirm that the leadership team as a whole will be able to effectively handle the demands of the litigation.

BEST PRACTICE 4D(i): The transferee judge should recognize the practical reality that the leadership team may need to finance the litigation but should not allow it to overshadow the need to appoint a functional and diverse team.

BEST PRACTICE 4D(ii): In making its selection decision, the transferee judge should consider the other demands on the applicants' time, including the number of other MDLs in which they are serving in leadership positions.

BEST PRACTICE 4D(iii): The transferee judge should consider the number, type, and nature of the applicant's cases in mass tort and common disaster litigation.

BEST PRACTICE 4D(iv): The transferee judge should inquire as to whether an applicant has a significant number of cases pending in related state litigation and the applicant's views about the effective coordination of those cases with the MDL proceedings.

BEST PRACTICE 4E: The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case.

BEST PRACTICE 4F: Attorneys seeking to serve in leadership positions may have entered into financial arrangements that could raise conflicts of interest. The transferee judge should guard against the possible negative implications of these types of agreements among counsel.

BEST PRACTICE 4G: The transferee judge should create a process at the outset of the case for the contemporaneous submission and review of all counsels' time and expenses.

BEST PRACTICE 4H: In large and mass-tort MDLs, the transferee judge should encourage the leadership team to provide work for the common benefit of the cases to other attorneys who are qualified and available to perform the work, unless doing so would create inefficiency in the prosecution of the claims. The transferee judge should inform the leadership team at the outset if it does not want them to assign work to other counsel.

*Best Practice 4H(i):* The transferee judge should inform the leadership team that the roles and primary responsibilities of lead counsel, liaison counsel, and committee members should not be delegated to other attorneys without prior permission of the court.

BEST PRACTICE 4I: The transferee judge should direct the leadership team to implement a process for communicating key events, deadlines, and other important information to all plaintiffs' counsel.

BEST PRACTICE 4J: The transferee judge should create a process for receiving regular input from the leadership team and ensuring that the litigation is progressing in an effective and efficient manner.

BEST PRACTICE 4K: The transferee judge should not hesitate to reconstitute the leadership team if it becomes necessary.

## LEAD COUNSEL DUTIES

**GUIDELINE 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.

**GUIDELINE 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.

**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.

**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.

**GUIDELINE 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.

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

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

**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.

**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.

**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.

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

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



## **ROLE OF NON-LEADERSHIP COUNSEL**

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

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

**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.

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

**BEST PRACTICE 11A:** The court should issue a case-management order delineating the roles and obligations of lead counsel, any liaison counsel, and plaintiffs' counsel in individual cases.

**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.

**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.

**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.

## **ESTABLISHMENT AND USE OF COMMON FUNDS**

**GUIDELINE 12:** The transferee judge should consider setting aside a portion of the anticipated monetary proceeds from a settlement to establish a common benefit fund (CBF) for the purpose of paying reasonable attorneys' fees, costs, and expenses from that fund.

**BEST PRACTICE 12A:** As early as practicable in the litigation, the transferee judge should consider planning and establishing any common benefit funds to be employed in the course of the litigation or in the event of settlement. In doing so, the court should communicate its expectations and provide guidance to the parties with regard to the purpose and operation of these funds and invite the participation of counsel.

**BEST PRACTICE 12B:** At the outset of the case, the transferee judge should issue a "common benefit fund order" or "assessment order." The order should establish parameters for how the common benefit fund will be funded, define the compensable functions of counsel, determine the method of compensation, specify what records must be kept, and create guidelines for allowable fees and expenses.

BEST PRACTICE 12C: The transferee judge should consider what actions should be taken to address common benefit work that benefits parties in parallel state litigation.

BEST PRACTICE 12C(i): Early in the case and to the extent practicable, the transferee judge should establish a transparent procedure for the later allocation of common benefit funds to reduce the potential for disputes among counsel and to encourage counsel to cooperate and avoid duplication of effort.

BEST PRACTICE 12C(ii): The transferee judge should inform counsel early in the litigation that if they wish to be paid attorney's fees from the common benefit fund they must keep detailed and contemporaneous records of their work and periodically submit reports to the court or a designee, such as a special master or accountant.

BEST PRACTICE 12D: When individual cases in the MDL begin to settle, or when a global settlement or other final resolution is reached, the transferee judge should determine an appropriate assessment to be made from the gross recovery in each case. The transferee judge should order the defendant to withhold the specified percentage of the recovery from settlement proceeds and deposit that amount into the CBF under the court's direction.

BEST PRACTICE 12D(i): If a settlement is subject to a common benefit assessment, the assessment should parallel the regular fees and costs allocation.

BEST PRACTICE 12E: The transferee judge should request all interested parties to make submissions concerning the procedures the judge should use to award interim or final attorney's fees.

BEST PRACTICE 12F: When determining the CBF amount, the court should decide what method for calculating the amount is most appropriate for the particular settlement.

BEST PRACTICE 12F(i): Although the percentage method is appropriate in many cases, the transferee judge should consider using a blended method to ensure that the fee award is reasonable.

BEST PRACTICE 12G: In determining the amount of fees to be paid to individual attorneys from the CBF, the transferee judge will need to determine the customary hourly rate. In large and mass-tort MDLs, the judge may find it appropriate to use a national rate for certain purposes.

BEST PRACTICE 12G(i): The transferee court may also award fees at current rates, rather than historical rates, if the litigation has spanned many years, although the practice is disfavored in limited-fund cases.

BEST PRACTICE 12G(ii): The transferee court should appoint a common-fund fee committee, comprised of members of the plaintiffs' leadership team, or designate a special master or magistrate judge, to make fair and impartial allocation recommendations to the court, although the court retains ultimate control over the allocation and distribution of funds.

**BEST PRACTICE 12H:** Courts should explain their reasoning for the allocation to further the goal of transparency, to provide feedback to interested parties, and to ensure that any reviewing court has a sufficient record.

**BEST PRACTICE 12H(i):** In imposing fee assessments, the transferee judge should promote fairness among counsel, compensate counsel who made the recovery possible, and suppress perverse incentives among non-performing counsel. This may include imposing fees on attorneys representing individual clients who opt out, yet use MDL discovery materials or otherwise enjoy the fruits of common benefit counsels' efforts. It may also include extending the fee structure to non-MDL participants, if the defendant agrees to a global settlement.

### **FEDERAL/STATE COORDINATION**

**GUIDELINE 13:** Effective coordination between the federal and state courts in an MDL action promotes cooperation in scheduling hearings, conducting and completing discovery, facilitates efficient distribution of and access to discovery work product, avoids inconsistent federal and state rulings on discovery and privilege issues, if possible, and fosters communication and cooperation among litigants and courts that may facilitate just and inexpensive determination.

**BEST PRACTICE 13A:** The transferee judge should set a cooperative tone early in the litigation by engaging in outreach and communications with state court judges, by specifying the time and manner in which counsel are to report on the existence, status, and progress of related actions in other jurisdictions, and by encouraging and facilitating ongoing coordination.

**BEST PRACTICE 13B:** In issuing the initial scheduling order, the newly appointed transferee judge should consider including provisions tailored to facilitate effective federal-state coordination.

**BEST PRACTICE 13B(i):** The transferee judge should direct liaison counsel for plaintiffs and defendants to provide a report on the existence and status of related state court litigation, either in writing in advance of the initial conference or orally at the conference itself to inform this discussion. Counsel should be requested to provide contact information for the state court judges before whom related proceedings are pending.

**BEST PRACTICE 13B(ii):** Similar reports by liaison counsel should be made a feature of every subsequent status conference, so that the transferee judge is apprised, on an ongoing and current basis, of hearing schedules, discovery activities, trial dates, and other important events and rulings in the state courts. These recommendations can be scaled based upon the needs of the particular litigation.

**BEST PRACTICE 13B(iii):** Counsel should be advised at the initial conference that such communications between the MDL judge and state court judges will take place. While counsel should be given the opportunity to object, there will rarely be a well-founded objection to such communications, which have become a familiar feature of multi-jurisdictional proceedings.

BEST PRACTICE 13C: In an MDL action with parallel court actions, state and federal judges should communicate informally as needed to correct perceived duplication and should explore whether formal measures may, or may not, be efficient or justified.

BEST PRACTICE 13D: If multiple jurisdictions are involved, the transferee judge should consider procedures or mechanisms to facilitate state/federal court coordination, to provide periodic reports to each of the courts, to assist in coordinating discovery and hearing schedules, and to schedule joint federal-state court status conferences and hearings.

BEST PRACTICE 13E: The MDL judge should direct designated counsel (typically, lead or liaison counsel for each side) to provide information on the status of related state court actions in the written status conference report submitted several days before each regularly scheduled status conference.

BEST PRACTICE 13F: The transferee judge should provide accessible, up-to-date information on the status and progress of the MDL proceedings, including the status and progress of coordination with the state courts, and specific pages for each MDL on the district court's website. The MDL-specific site should provide a calendar, access to important orders, hearing transcripts, and a list of key events.

BEST PRACTICE 13G: In MDL and state court proceedings, the judges should consider holding joint pretrial hearings, including joint status conferences in a variety of jurisdictions, co-presiding over each conference with the state court judge in that jurisdiction.

BEST PRACTICE 13H: The transferee judge can also promote coordination through its supervision of the litigation process; for example, the court may encourage the parties to establish a common discovery-product depository (now most frequently a password-protected online collection rather than a physical depository) to avoid duplicative efforts.

BEST PRACTICE 13I: If no party requests the court to issue a Rule 502(d) order, the transferee judge should consider raising the matter on its own.

BEST PRACTICE 13J: When feasible without causing discovery delays, the transferee judge should coordinate with state court colleagues to set uniform schedules in related federal and state proceedings for document production, production of privilege logs, and resolution of privilege disputes and other objections.

BEST PRACTICE 13K: Discovery decisions should be made available to all courts.

BEST PRACTICE 13L: In an MDL involving multiple jurisdictions, the transferee judge should consider the *joint* appointment of a special master among multiple courts to review disputed documents *in camera* and issue a report and recommendation to all courts.

BEST PRACTICE 13M: The transferee judge may appoint a “state court liaison” or “state/federal liaison” from among plaintiffs’ (or defendants’) counsel who are active in the MDL, in order to provide transparency by submitting periodic reports on the status and progress of state court proceedings and to assist in assuring that discovery work product is made appropriately available to those who are litigating in state courts.

BEST PRACTICE 13N: The transferee judge should consider issuing a deposition protocol order that assigns a specific percentage of deposition time to state counsel.

## **RESOLUTION AND REMAND**

**GUIDELINE 14:** The transferee judge should endeavor to use the MDL forum to resolve or streamline the litigation before remand to the district courts.

BEST PRACTICE 14A: Remand of remaining cases to transferor courts should not begin until the court has taken steps: (1) to preside over discovery, decide on motions, and conduct such trials that are needed to position the cases for potential resolution; (2) to explore and consider all possibilities for resolution of the cases; and (3) to prepare cases that do not resolve for trial in the transferor courts.

BEST PRACTICE 14B: In most situations, the time to raise settlement will be after sufficient time has passed to ensure a degree of certainty about both the nature and scope of the claims at issue.

BEST PRACTICE 14B(i): The court is usually uniquely situated to play a role in facilitating settlement discussion.

BEST PRACTICE 14B(ii): At the appropriate time, the court may consult with counsel on whether the appointment of a settlement master or mediator would be helpful to the settlement process.

BEST PRACTICE 14B(iii): Once a settlement discussion process is underway, the court should be prepared to step back and let the discussions proceed. However, the court should require sufficient reporting from the parties to confirm progress is in fact occurring and whether the court can assist the process.

BEST PRACTICE 14B(iv): Courts generally should not stay discovery or other pretrial proceedings while the settlement process is under way. However, if all parties agree that a stay would be in the interest of the process, courts may consider staying proceedings during the pendency of settlement discussions.

BEST PRACTICE 14B(v): If significant parallel state court litigation exists, the transferee court should consider, after consultation with counsel, reaching out to state courts with significant case volumes to discuss coordination of settlement efforts.

BEST PRACTICE 14B(vi): If the parties reach an agreement to resolve all or a substantial portion of the cases, and the parties so request, the court should be prepared to take an ongoing role in implementing and enforcing the settlement agreement.

BEST PRACTICE 14B(vii): In the MDLs that include class actions, the court should ensure that counsel consider from the outset of any settlement proceedings the requirements of Rule 23 of the Federal Rules of Civil Procedure.

BEST PRACTICE 14C: In appropriate cases, courts should consider utilizing the Intercircuit Assignment Procedure to facilitate MDL proceedings.

BEST PRACTICE 14D: For remands of more than a handful of cases, the transferee judge should put in place a well-considered and organized procedure for remanding and transferring cases rather than simply remanding all cases at once.

BEST PRACTICE 14D(i): In preparation for remand, the court should consider using *Lone Pine* proceedings or other methods to cull meritless cases and ensure that only the viable cases may ultimately be eligible for remand.

BEST PRACTICE 14E: The transferee court can greatly assist transferor courts when suggesting remand to the JPML by providing a remand packet that summarizes the key activities and rulings that have taken place since the cases were coordinated.

BEST PRACTICE 14E(i): The transferee court should be prepared to answer questions from the transferor courts to which cases are remanded.

BEST PRACTICE 14E(ii): The transferee judge should consider how, in the context of the specific litigation, remand procedures may minimize the burdens on the transferor courts and litigants after cases are transferred and remanded.

BEST PRACTICE 14E(iii): MDL courts should issue rulings with the expectation that transferor courts will follow their rulings upon remand, but should clarify any potential conflicts their rulings may have with state law in the transferor courts.

BEST PRACTICE 14F: The transferee judge should be prepared to see that every MDL has an “end-game” such that it may be ended when no additional activity in the transferee court will be required.

#### **SETTLEMENT REVIEW AND CLAIMS-PROCESSING ADMINISTRATION**

**GUIDELINE 15:** 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.

BEST PRACTICE 15A: If the parties have indicated a willingness to begin settlement negotiations, a settlement master can play a valuable role at the appropriate stage.

BEST PRACTICE 15B: The parties should consider appointment of a settlement master as soon as they are willing to begin settlement negotiations.

**GUIDELINE 16:** 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.

**GUIDELINE 17:** 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.

**BEST PRACTICE 17A:** 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.

**BEST PRACTICE 17B:** The parties should advise the transferee judge of any minimum percentage or number of cases disposed of by a global settlement.

**BEST PRACTICE 17C:** The parties should advise the transferee judge of any reserve allocated in the settlement to pay for extraordinary injuries.

**GUIDELINE 18:** The transferee judge should review the claims process to help facilitate claims processing and settlement distribution.

**BEST PRACTICE 18A:** 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.

**BEST PRACTICE 18B:** 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.

**GUIDELINE 19:** 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.

**BEST PRACTICE 19A:** 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.

**BEST PRACTICE 19B:** The transferee judge should assist the parties in the healthcare lien process by issuing orders, as needed, requiring periodic reporting.