Managing Multidistrict Litigation in Products Liability Cases

A Pocket Guide for Transferee Judges

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Introduction

This guide is intended to help judges who receive multidistrict litigation (MDL) products liability assignments.

You, as the judge, will face the many challenges that exist in most MDLs. A highly useful resource is the *Manual for Complex Litigation, Fourth Edition,* which contains a wealth of detailed suggestions. This guide refers to the Manual throughout. You can find other sources of helpful information by clicking the *MDL Judge Resources* button on the J-Net website of the Judicial Panel on Multidistrict Litigation.[1] The site contains sample orders from products liability/mass tort MDLs addressing a broad range of issues.

Fair and efficient resolution of every MDL requires at least that (1) the court exercise early and effective supervision (and, where necessary, control); (2) counsel act cooperatively and professionally; and (3) the judge and counsel cooperate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings.

A products liability MDL presents its own challenges. There may be an evolving and uncertain group of potential claimants and potential defendants. In some cases, the product exposure can occur over years and produce latent injury. Some individuals may not be aware that they have been exposed to a potentially injurious product, and some may not yet have been exposed but will be in the future.

State substantive law usually governs products liability cases, making multistate aggregations of cases even more complex. You will need to distinguish between issues appropriate for aggregate treatment and issues that require individualized determinations before making any decision about whether or how to aggregate claims for pretrial management or final resolution. Some issues (such as the regulatory history of an allegedly defective product) may lend themselves to group litigation and others (such as the circumstances of individual exposure and damages) may require individualized presentation.

This guide is intended to help you successfully manage your MDL and to introduce some of the procedures that transferee judges have developed over the years.[2]

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1. To access the website, go to the J-Net (http://jnet.ao.dcn) and click on *Judicial Panel (JPML)* on the lower right side of the page.

2. The citations to various MDLs in this guide are offered to illustrate various practices that judges may wish to employ.

1. Relationship of Transferee Court and the Panel

a. Transfer

The Panel is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings upon the Panel's determination that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a).

Section 1407 transfer becomes effective when the Panel's transfer order is filed in the office of the clerk of the transferee court. At that point, the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction. During the pendency of a motion (or show cause order) for transfer, however, the court in which the action was filed retains jurisdiction over the case. Once the Panel transfers actions to the transferee judge, the Panel's authority over those actions ceases until remand.

"Tag-along" actions are those that appear to share common facts with the MDL actions already transferred. Tag-along actions, which may have been filed after the Panel's initial hearing on transfer or may have been then pending but not brought to the attention of the Panel, may be transferred during the course of your MDL proceedings. Parties and counsel of potential tag-along actions filed in your district are required to request assignment to you under local rules; no Panel action is required.

b. Communication with the Panel

Your court should keep the Panel informed of certain key events. Your court's MDL docket clerk should email the Panel when the initial Transfer Order is posted and notify the Panel of any party dismissals, counsel changes, and case closings. If you terminate an action, such as by summary judgment, dismissal, stipulation or settlement, your MDL clerk must transmit a copy of that order to the Clerk of the Panel. The terminated action will not be remanded to the transferor court, and the transferee court should retain the original files and records.

Finally, you must notify the Panel when you determine that any remaining cases should be remanded to their transferor courts. You may recommend remand of an action, or certain claims, to the transferor court at any time by filing a suggestion of remand with the Panel.

2. Powers of the Transferee Court

You, as the transferee judge, have responsibility over all pretrial proceedings in the MDL cases until remand occurs. During the pendency of the MDL, you may exercise all the powers available to a federal judge in any other case.

In addition to deciding threshold motions to remand to state court, your initial tasks include coordinating or consolidating the cases previously pending in a number of different districts; identifying differences in applicable law; and seeking information from the parties as to the status of the cases in order to determine how to proceed with pretrial discovery and motions.

Your ultimate responsibility is to resolve pretrial issues in a timely and expeditious manner. The transferee judge supervises discovery; resolves important evidentiary disputes, class certification issues, and dispositive motions; and establishes procedures that will aid the parties in settlement negotiations.

Under certain circumstances, a transferee judge may conduct bellwether trials to give parties a better understanding of the value of the claims. Alternatively, under a more decentralized approach, the transferee judge would suggest that the Panel remand all the cases to their original districts for trial. In some cases, summary judgment or settlements obviate the need for remand to the transferor courts.

Because a transferee court's "jurisdiction" is limited to pretrial matters, litigants may argue—incorrectly—that it is not proper for you to rule on matters that may affect the trial. In fact, your pretrial orders can extend to how the trial will be conducted in the event of remand, such as limiting the number of witnesses to be called. The trial judge may, however, modify these pretrial orders in light of a significant change in circumstances.

a. Consolidation or coordination

Transferred cases are not automatically consolidated in your court. Each case remains a separate action and may be managed separately. One of your first tasks is to determine the appropriate level of consolidation or coordination.

The key factor is the presence of common issues that can be litigated efficiently and fairly, through motions or otherwise, in coordinated or consolidated proceedings. Decisions about whether to aggregate cases, and for what purposes, should be based on the presence of common issues critical to liability determinations. In general, products liability mass torts in which the evidence of exposure and general causation is clear may be candidates for some form of aggregation. When the circumstances of exposure vary widely,

or where specific causation is uncertain or varying, aggregation for trial is inappropriate. In such cases, aggregation for pretrial discovery and motions may provide some efficiencies but will require careful management to protect some parties from unfair rulings.

b. Tag-along cases

Ordinarily, it is advisable to order that (1) tag-along actions are automatically made part of the centralized proceedings upon transfer to, or filing in, the transferee court; (2) rulings on common issues—for example, on the statute of limitations—are deemed to apply to the tag-along action without the need for separate motions and orders; and (3) discovery already taken shall be available and usable in the tag-along cases.

c. Pretrial disposition

You may terminate some or all actions in the MDL docket by ruling on motions to remand to state court, for summary judgment or dismissal, or pursuant to settlement, and may enter consent decrees. An action is closed by appropriate orders entered in the transferee court, without further involvement by the Panel or the transferor court (although both should be notified).

d. Settlement

Experience shows that MDL cases often settle in the transferee court. One of the values of MDL proceedings is that they bring before a single judge all of the federal cases, parties, and counsel making up the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. The parties typically take the initiative in settlement discussions, but you may facilitate the settlement of the federal and any related state cases through prompt ruling on dispositive motions. *See also* § 12 below.

e. Trial—*Lexecon* issues

As you resolve pretrial issues and explore settlement options, the opportunity may arise to schedule a trial in one or more of the transferred cases.

In *Lexecon Inc. v. Milberg Weiss*, 523 U.S. 26 (1998), the Supreme Court ruled that a transferee judge cannot "self-transfer" an MDL action to his or her district under 28 U.S.C. § 1404 for the purpose of conducting a trial after pretrial matters have been resolved. You should anticipate *Lexecon* issues and resolve them, if you can, on the front end. Often, as a transferee judge gains a thorough knowledge of the issues, the parties also develop a trust in

the fairness of that judge. At this point, the parties may find a mutual interest in having the transferee judge conduct the trial of some cases. "*Lexecon* waivers," where parties consent to trial in the transferee court, are increasingly common.

Of course, you have authority to try cases originally filed or refiled in your district. Conducting one or more bellwether trials in those cases can help promote a global settlement or at least expedite settlement of other individual cases.

There is also the possibility of obtaining an intercircuit or intracircuit assignment pursuant to 28 U.S.C. § 292 or 294 to preside over a remanded action in the originating district.[3] Or, after remand to the transferor court, the transferor court could transfer the action back to the transferee court for trial, if criteria under 28 U.S.C. § 1404 or 1406 are met.[4]

Even if you have authority, by consent or otherwise, to try transferred cases, you may decide to use a decentralized approach in which authority to decide individual cases remains with or returns to the transferor judges. If, however, there are common issues that might be tried, either on a test-case basis or otherwise, it may be more efficient to address the merits in a centralized manner. In a number of recent MDLs, transferee judges have exercised their discretion to select test cases for discovery, motions, and trial, and to coordinate their dockets with state courts handling similar cases. *See* § 13 below. Courts have also carved out issue classes to resolve common issues.

3. Establishing Special Procedures for MDL Transferee Cases

a. Coordination with clerk's office

Upon receiving an MDL assignment, you, your courtroom deputy or the case administrator, and those in the clerk's office responsible for handling the MDL should settle upon some practical administrative matters. The number

3. *See* Manual for Complex Litigation, Fourth Edition, § 20.132 [hereinafter MCL 4th]. For example, Judge Kathleen McDonald O'Malley (N.D. Ohio) obtained an intercircuit assignment to try, in the Southern District of Mississippi, one of the bellwether cases in MDL No. 1535, In re: Welding Fume Prods. Liab. Litig.

4. Each of these sections gives a district court discretion to transfer an action to any district in which the action could have been brought, "[f]or the convenience of parties and witnesses, in the interest of justice" under § 1404, or "in the interest of justice" to cure defective venue under § 1406.

of parties and the vast amount of filings will require special attention from your clerk's office. This will go far towards ensuring the smooth processing of this complex litigation.

You should consult *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks*.[5] This publication, which is available on the Panel's J-Net website by clicking on the *MDL Judge Resources* button and on the Federal Judicial Center's intranet website, called FJC Online,[6] under *Class Actions & Complex Litigation*, sets forth the initial actions necessary to properly administer an MDL case. If this is your district's first MDL, you should also encourage your clerk to contact the Panel's clerk's office and other district court clerks' offices that have handled MDLs in the past.

Ensure that the MDL docket clerk sends the following notifications to the Panel, throughout the life of the MDL:

- Send notification of the posting of the initial Transfer Order to the Panel at the following address: PANELMDL@jpml.uscourts.gov.
- Notify the Panel of other important case events: party dismissals; case closings; and MDL termination or reassignment. The clerk can configure CM/ECF to prompt Panel email notification of an order falling within these parameters.

b. Coordination with attorneys

Remember, your new cases may already have experienced some delay while the Panel resolved the issue of centralization under § 1407. It is important to get them moving again. Scheduling a prompt organizational conference sends a message that you are serious about organizing and moving the MDL. Most judges believe that an in-person conference is best, but if attendance is problematic then a telephone conference is an alternative.

Invite counsel to submit proposed agenda items for the initial meeting. Prior to the conference, require counsel to meet and confer with one another and submit a proposed initial case-management order. Counsel should be

5. The Judicial Panel on Multidistrict Litigation & The Federal Judicial Center, Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks (Federal Judicial Center 2008).

6. To access FJC Online from the J-Net, click on *FJC Intranet (FJC Online)* on the lower right side of the page. To go directly to FJC Online within your browser, enter http://cwn.fjc.dcn.

strongly encouraged to agree on all dates. The proposed order may address the following matters:

- deadlines for joinder of parties, amendment of pleadings, filing of motions, and completion of discovery;
- modifications to the time set by Rule 26(a)(1) for initial disclosures and setting dates for its supplementation under Rule 26(e)(1);
- a schedule for amending discovery responses as required by Rule 26(e)(2), which requires parties to amend most discovery responses "seasonably" if they learn that the response is materially "incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing"; to maintain order and clarify counsel's responsibilities, a scheduling order may specify a series of dates on which the parties must provide any amendment required;
- dates for future conferences and, if bellwether trials are planned, the final pretrial conferences and trials;
- suggestions regarding lead/liaison counsel; and
- any other matters appropriate in the circumstances of the case.

At the conference, take charge and set the tone—consistent with your own style and personality. As with all other litigation, you must establish credibility with the lawyers. Set a clear target date for the conclusion of your MDL, i.e., for all pretrial issues to be resolved and for the cases to be ready for trial. While making it clear that you expect the litigation to be conducted expeditiously, you should also respect the difficulties that counsel may confront in this type of litigation. The important task of selecting lead/liaison counsel can occur at or immediately after this initial organizational conference. You should also use the conference to solicit views as to whether there are key issues that, if decided early or on an expedited basis, would speed settlement or other resolution of the litigation as a whole.

If counsel know that you are serious about maintaining the schedule you establish—and that you will demand at least as much of yourself as you demand of them—they will conform their conduct to your wishes. Brisk progress in the litigation minimizes time-consuming petty disputes among counsel and helps bring the MDL proceedings to a fair and prompt conclusion.

Establishing an electronic mechanism, such as an email distribution list, for ongoing communication among the lawyers and the court during the course of complex mass tort litigation has become essential. Effective management requires constant attention to developments in the MDL. You must

promptly identify and resolve problems, such as difficulties in implementing previously issued orders.

i. Website

You may wish to set up a publicly accessible website devoted to the MDL. A website can be an invaluable tool to keep parties, counsel, and other interested persons informed of the progress of the litigation and to bring tag-along parties and counsel up to speed.[7] The website may be created and maintained by the court, or jointly by lead and liaison counsel for plaintiffs and defendants. A website also helps coordination efforts with parallel state cases.

Consider including pages with the following information:[8]

- basic information about the claims and issues in the MDL,
- current developments,
- FAQ's for counsel of new tag-along cases,
- orders and minute entries,
- reports of liaison counsel,
- contact information for court and counsel,
- transcripts, and
- settlement information (if and when applicable).

Also consider including links to other websites, such as:

- local rules that will govern the MDL,
- PACER,
- an electronic service provider,
- state courts handling related litigation,
- the Panel, http://www.jpml.uscourts.gov/,
- the *Manual for Complex Litigation, Fourth* (the FJC's website provides a free download of the *Manual* and explains how to order print copies).

ii. Scheduled conferences

Many transferee judges schedule regular (often monthly) conferences or telephone conference calls with counsel. Conferences following the initial confer-

7. *See* MCL 4th § 40.3 for a sample order creating a website.

8. Links to sample websites are provided on the Panel's *MDL Judge Resources* web page. MDL websites include:

http://www.wvsd.uscourts.gov/MDL/Avaulta/index.html
http://www.paed.uscourts.gov/md11871.asp
http://vioxx.laed.uscourts.gov/
http://propulsid.laed.uscourts.gov/

ence help you monitor the progress of the case and address problems as they arise. At least in the beginning, it is best to meet in person. Meeting in open court establishes a standard of transparency for the MDL that will set the tone for the duration of the litigation.

Have counsel set an agenda of items to be addressed, submit it for your approval, and distribute it. Scheduling conferences well in advance helps ensure maximum attendance. At a minimum, do not adjourn a conference without setting the date for the next conference or the next report from counsel.

Directing parties to confer and submit written reports before each conference keeps you apprised of the progress of the litigation. When no pressing matters exist, the conference can be canceled. However, unless the conference is regularly scheduled, issues that might seem minor but whose resolution is necessary for the litigation to advance may go unaddressed. Frequent contact allows you to fine-tune scheduling adjustments, set briefing and hearing dates for any anticipated motions, and rule upon discovery and small scheduling disputes.

Most judges have a court reporter present during the conference, to make a record of any scheduling changes or substantive matters discussed and ruled upon. On-the-record conferences will minimize later disagreements, particularly if you anticipate issuing oral directives or rulings. Most judges hold all conferences on the record, particularly when numerous attorneys attend.

Nevertheless, an informal off-the-record conference held in chambers or by telephone with all parties properly represented can sometimes be more productive; a reporter can later be brought in to record the results of the conference.[9]

The best approach may be a combination of the two: before each monthly conference in open court with a court reporter, hold a short off-the-record meeting with lead and liaison counsel in chambers to hash out any particular problems and allow for the free flow of ideas and information that may be too delicate or premature for open court.

9. Rule 16 requires (and sound practice dictates) that all matters decided at pretrial conferences be memorialized on the record or in a written order. Counsel may be directed to submit proposed orders incorporating the court's oral rulings.

c. Coordination with magistrate judges

You may wish to consider referring some issues or tasks to magistrate judges, pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 53(h) and 72, and local rules. You must balance the advantages of obtaining the magistrate judge's assistance against disadvantages such as the risk of delay from requests for review of the magistrate judge's orders, proposed findings, or recommendations. Moreover, becoming familiar with the MDL early helps you manage it effectively and, if necessary, try cases more efficiently. And addressing discovery disputes yourself allows you to keep control over the litigation and prevent discovery abuses.

In some courts, however, magistrate judges help with case management and discovery.[10] For this to work well, the magistrate judge needs the transferee judge's backing.[11] The transferee judge and magistrate judge should reach a general understanding about the management of the case at the outset and coordinate periodically. Lawyers should not get the impression that appealing the magistrate judge's case-management rulings is likely to be advantageous.

4. Designation of Lead/Liaison Counsel and Committees

Early organization of the counsel who have filed the various cases is a critical case-management task. You will likely need to appoint lead and/or liaison counsel for one or both sides.

The types of appointments and assignments of responsibilities will depend on many factors. The most important is achieving efficiency and economy without jeopardizing fairness to the parties. Depending on the number and complexity of interests represented, both lead and liaison counsel may be appointed for one side (typically plaintiffs), with only liaison counsel appointed for the other. One attorney or several may serve as liaison and lead counsel.

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10. Some courts also use magistrate judges to oversee settlement negotiations, as has been done in MDL No. 1836, In re: Mirapex Prods. Liab. Litig. (D. Minn.; Judge Michael James Davis) and MDL No. 1708, In re: Guidant Corp. Implantable Defibrillators Prods. Liab. Litig. (D. Minn.; Judge Donovan W. Frank).

11. In MDL No. 1850, In re: Pet Food Prods. Liab. Litig., Judge Noel L. Hillman (D.N.J.) and the assigned magistrate judge decided to hold all hearings jointly. Similarly, in MDL No. 2187, In re: Avaulta Pelvic Support Systems Prods. Liab. Litig., both the transferee judge (Judge Joseph R. Goodwin (S.D.W. Va.)) and the assigned magistrate judge presided over the initial case-management conference.

The functions of lead counsel may be divided among several attorneys, but the number should not be so large as to defeat the purpose of making such appointments.

Your first appointment is likely to be a local attorney or firm as liaison counsel. Liaison counsel generally play an important coordinating role in products liability MDLs involving numerous parties. Liaison counsel handle essentially administrative matters, such as communications between the court and other counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions. They may also act for the group in managing physical or electronic document depositories and in resolving scheduling conflicts. Liaison counsel usually have offices in the same locality as the court. If their functions are strictly limited to administrative matters, they need not be attorneys (and may be called local administrators).

Lead counsel and committees of counsel for the plaintiffs in products liability MDLs perform a host of functions. They formulate (in consultation with other counsel) substantive and procedural approaches during the litigation. They typically act for the group—either personally or by coordinating the efforts of others—in presenting arguments and suggestions to the court, developing and implementing a litigation plan, and managing discovery. Lead counsel develop proof of liability and anticipate defenses; gather the expertise necessary to prove causation and other elements of plaintiffs' cases; trace patterns of exposure; manage discovery; coordinate the various filings; and communicate with other counsel for plaintiffs, counsel for defendants, and the court.

Committees of counsel, often called steering committees, coordinating committees, management committees, or executive committees, are most commonly needed when group members' interests and positions are sufficiently dissimilar to justify giving them representation in decision making. Particularly in cases where there is related state court litigation, lead counsel must have the self-confidence to include other attorneys in the committee structure and delegate significant responsibilities to them. Including plaintiffs' attorneys with different perspectives and experience as committee members can be helpful. Consider also including counsel handling significant numbers of state cases to facilitate coordination among state and federal cases.

Committees may prepare briefs or conduct portions of the discovery program if one lawyer cannot do so adequately. Committees of counsel can sometimes lead to substantially increased costs, and they should be admonished to avoid unnecessary duplication of efforts and control fees and expenses.

In addition to a steering committee, the most helpful committees are usually a discovery committee and a state liaison committee.[12] A plaintiffs' steering committee may wish to form subcommittees to perform specific common-benefit tasks; encourage them to open these up to non-steering committee members, as that will give more attorneys a stake in the smooth conduct of the MDL.

a. Selecting lead counsel

Take an active role in the decision on the appointment of counsel. The political and economic dynamics among lawyers, unless monitored, can disrupt the MDL and related state court proceedings. Deferring to proposals by counsel without independent examination, even those that seem to have the concurrence of a majority of those affected, may give rise to problems down the road if some designated counsel are unwilling or unable to discharge their responsibilities. Establish and enforce record-keeping requirements to support later attorney fee requests.[13]

There are two basic models for the appointment of counsel. In the competition model, the court invites applications for leadership positions. In the consensus model, the court directs the plaintiffs to file a proposed leadership slate, subject to court approval and an opportunity for objections to be heard. You may wish to use consensus for some positions (such as liaison counsel), and competition for others (such as lead counsel and steering committee membership). Under either approach, there is no magic formula for selecting designated counsel.[14] Your colleagues on the bench can be a valuable source of information. Contact other MDL judges for evaluations of particular lawyers. It is important to assess:

- the attorneys' experience in managing complex litigation, resources, commitment, and qualifications to accomplish the assigned tasks;

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12. In MDL No. 2197, In re: DuPuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig., for example, Judge David A. Katz appointed state liaison counsel, and also established a plaintiffs' discovery committee, science committee, and law and motions committee. *See* Case Management Order No. 3, N.D. Ohio, No. 1:10md2197 (Jan. 26, 2011) (doc. no. 71).

13. *See* MCL 4th §§ 14.213, 40.23 (sample order).

14. In MDL No. 1871, In re: Avandia Marketing, Sales Practices and Prods. Liab. Litig., Judge Rufe (E.D. Pa.) was proactive in considering qualified women and minorities for leadership positions, and specifically directed the Plaintiffs' Steering Committee to do so as well in carrying out its various responsibilities.

- knowledge of the subject matter, and efforts in researching and investigating the claims;
- whether there has been full disclosure of all agreements and understandings among counsel and whether such arrangements are fair, reasonable, and efficient;
- whether designated counsel fairly represent the various interests in the litigation—where diverse interests exist among the parties, consider designating a committee of counsel; and
- the attorneys' ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court.

While prior MDL experience is valuable, each case requires different talent. Consider including attorneys who may bring new perspectives. It is also helpful to appoint steering committee members for one-year terms, and invite them to reapply for appointment along with any new applicants. This practice ensures continued dedication to their duties.

An important factor to consider—especially in cases that do not arise under fee-shifting statutes—is the method or amount of fees that a lawyer will charge. *See* subsection b below. Remember, however, that, while a counsel's proposed fee arrangements are important, this factor should not be dispositive in selecting designated counsel.

You will likely want to hold a hearing to observe and assess counsels' competence and professionalism, particularly if you are unfamiliar with the attorneys seeking appointment. You should inquire as to normal or anticipated billing rates, define record-keeping requirements, and establish guidelines, methods, or limitations to govern the award of fees.

Where several counsel are competing to be lead counsel or to serve on a key liaison committee, you should establish a procedure for attorneys to present their qualifications. Many judges request that lawyers submit their résumés, descriptions of their prior experience in other complex litigation, and their proposed fee arrangements.[15]

The functions of lead and liaison counsel, and of each committee, should be set forth in either a court order or a separate document drafted by counsel

15. The Panel's *MDL Judges Resources* website contains sample orders calling for applications. In MDL No. 2197, the Hip Implant MDL, Judge Katz received more than 100 applications for leadership positions, and then conducted a three-and-a-half hour hearing at which each appearing applicant was allotted two minutes to speak in support of his or her application.

for judicial review and approval.[16] However, it is usually impractical and unwise to spell out these functions in great detail. Designated counsel should seek consensus among the attorneys (and any unrepresented parties) when making decisions that may have a critical impact on the litigation. Communication among the various allied counsel and their respective clients should not be treated as waiving work-product protection or the attorney–client privilege, and a specific court order on this point may be helpful.

The court's responsibilities are heightened in class action litigation, where the judge must approve counsel for the class.[17] In litigation involving both class and individual claims, class and individual counsel will need to coordinate.

b. Attorney fees

Although fees will not be awarded unless and until there is a settlement, early judicial involvement can have a major impact on the fairness and reasonableness of fee requests. Attorney fees should be linked to services provided and a reasonable share of the value of the settlement benefits actually received by plaintiffs. Settlements that call for nonmonetary or deferred payments—such as medical monitoring, the contingent payment of future claims, or coupons for repair or replacement of allegedly defective products—should either be assigned an accurate present value or the payment of attorney fees should be delayed until benefits are in fact distributed to class members and the court knows how much they actually received. An announcement at the outset by the judge of the intention to apply such a rule will motivate attorneys to ensure that settlement benefits have a real value to the parties.

MDL transferee judges generally issue orders directing that a fixed percentage of any settlement be contributed to a general fund to pay national counsel.[18] Courts may direct contributions to be made by defendants, or by plaintiffs' counsel out of individual settlement payments received. Fees may

16. *See* MCL 4th § 40.22 (sample order setting forth responsibilities of lead and liaison counsel).

17. *See* MCL 4th § 21.27; Rothstein & Willging, Managing Class Action Litigation: A Pocket Guide for Judges 3d ed. (Federal Judicial Center 2010).

18. *See, e.g.,* Case Management Order No. 17 (Establishing Plaintiffs' Common Benefit Fund), MDL No. 1789, In re: Fosamax Prods. Liab. Litig., S.D.N.Y., No. 1:06md1789 (Jan. 5, 2010) (doc. no. 857); Order Establishing Common Benefit Fund, MDL No. 1785, In re: Bausch & Lomb Contact Lens Solution Prods. Liab. Litig., D.S.C., No. 2:06mn77777 (July 23, 2008) (doc. no. 128).

not be imposed by a transferee judge on attorneys with no cases in the MDL and who do not use federal discovery material. Consider how you will allocate any unclaimed funds at the conclusion of litigation.

You may wish to determine at the outset the method to be used for calculating fees and the likely range of percentages, if applicable. Most courts use the percentage basis to determine appropriate total fees. In very large settlements, the percentage is commonly between 4% and 18%.[19] Some courts use the more labor-intensive lodestar approach, engaging in a detailed investigation of the reasonable amount of hours worked multiplied by a reasonable hourly rate.

Absent agreement among the attorneys, you will have to allocate fees among the various plaintiffs' attorneys, placing a value on the services provided by class counsel, court-designated lead and liaison counsel, and individual plaintiffs' counsel. In general, all attorneys who provide a common benefit to a group of litigants may also receive compensation from a common fund—even if such "common benefit counsel" are not part of an official committee. You can protect members of a class from excessive fees by limiting the amount of contingent fees awarded for pursuing individual claims in a common-fund settlement. If there is a combination of individual settlements and a class-wide settlement, the judge sometimes orders individual plaintiffs' lawyers to pay a certain percentage of the fees they received into a common fund to contribute to the fees of lead or class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well. In a large MDL, many courts appoint common benefit fee committees, charged either with auditing and recommending common benefit compensation requests, or determining the final allocation of a common benefit fee award among the competing common benefit attorneys.

If lead counsel are to receive attorney fees, set guidelines in an early pretrial order after consultation with counsel.[20] Establishing guidelines and ground rules—even establishing budgets or rates for payment—early in the litigation helps ease the judge's burden and prevent later disputes. In your order, define lead counsel's functions, specify the records to be kept, and es-

19. *See* MCL 4th § 14.121.

20. For example, in MDL No. 2066, In re: Oral Sodium Phosphate Solution-Based Prods. Liab. Litig., Judge Ann Aldrich issued an order setting forth preliminary guidelines and procedures governing the possible future payment of common benefit fees and expenses. *See* Memorandum and Order, N.D. Ohio, No. 1:09-SP-80000 (Sept. 30, 2009) (doc. no. 34).

tablish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions. Matters such as hourly rates, staffing, records, and reimbursement of expenses should be covered. In setting such guidelines, there is a need for some symmetry between the staffing levels of plaintiffs and defendants.

Require counsel to maintain adequate and comprehensible records. You have an independent duty to review fees and specifically determine if they are reasonable, applying traditional legal tests. You may require periodic reports, which encourages lawyers to maintain adequate records and enables you to spot developing problems. To facilitate the hearing and resolution of fee petitions, Rule 54(d)(2)(D) explicitly authorizes district courts to adopt local rules "to resolve fee-related issues without extensive evidentiary hearings" and authorizes judges to refer fee matters to special masters or magistrate judges.

5. Initial Pretrial Orders

a. Case-management plan

Your role is crucial in developing and monitoring an effective plan for pretrial proceedings. Each plan must include an appropriate schedule for bringing the MDL to resolution. As with other cases, an MDL case-management plan prescribes a series of procedural steps with firm dates to give direction and order to the litigation. The plan must be developed and refined in successive stages. It is better to err on the side of over inclusiveness initially, and subsequently modify plan components that prove impractical, than to omit critical elements. Soliciting frequent feedback on the operation of the case-management plan usually yields the information necessary to adjust procedures.

Developing a case-management plan requires setting schedules, establishing ground rules and guidelines, and identifying the critical issues in the litigation.

i. Scheduling

Your initial case-management order should include the usual interim breakpoints, such as:[21]

- filing of a consolidated amended complaint (when appropriate),

21. *See* MCL 4th § 40.21 (sample order).

- responding to motions to remand to state court,
- filing and briefing on motions to dismiss,
- a fact-discovery deadline,
- a deadline for resolution of any class certification motions,
- expert disclosures and discovery deadlines, and
- a summary judgment motions deadline.

For case management to be effective, you must hold parties to agreed-on deadlines absent very good cause, as well as rule promptly on motions. Consider ordering that stipulated continuances must be approved by the court and requiring that all requests contain an account of all prior requests for continuances with reasons given. You should set your own goals (e.g., to rule on nondispositive motions in thirty days) and use electronic calendaring to flag your deadlines.

Many MDLs involve overlapping statewide and national class actions. Sequencing the discovery and briefing necessary to resolve class certification and summary judgment motions is one of your most vital early tasks. Try to avoid unnecessarily delaying some steps until others are completed. For example, when a defendant moves to dismiss some but not all of the plaintiffs' claims, allow other discovery to proceed while you decide the motion. This technique may be particularly useful when the partial motion to dismiss raises difficult issues. On the other hand, limited discovery or even "reverse sequencing" may be appropriate if early settlement is likely. In such a situation, the parties may avoid unnecessary cost and delay by engaging in discovery and preparing expert reports on damages issues before addressing the merits of the underlying claims.

ii. Ground rules

Aside from setting specific dates, initial and follow-up case-management orders typically structure the case by accomplishing the following tasks:[22]

- set the agenda for the initial conference, and notify parties that attendance by each party or attorney is not necessary and that parties with similar interests can be represented at the conference by a single attorney;

22. *See* MCL 4th § 40.52 for a composite of several products liability MDL case-management orders; additional orders can be found on the Panel's J-Net webpage for MDL Judge Resources.

- establish an initial service list of counsel, which can later be modified to include a statement that defendants authorized listed counsel to accept service of process or service of other papers and motions by certified mail or by electronic means;
- urge counsel to familiarize themselves with the *Manual for Complex Litigation, Fourth,* and to be prepared at the conference to suggest procedures to expedite the MDL;
- direct counsel for each side to seek consensus on all agenda items and, specifically, to propose a discovery plan, including methods to obtain expert discovery and a timetable for considering motions;
- call for (1) preliminary reports on the critical factual and legal issues, (2) lists of all affiliated companies and counsel (to assist the court in addressing recusal or disqualification questions), (3) lists of pending motions, and (4) summaries of the nature and status of similar litigation pending in state courts;
- direct attorneys interested in serving as lead, liaison, or coordinating counsel to submit their expected hourly rates and to disclose any agreements or commitments with other attorneys in conducting pretrial proceedings, discovery, and trial;
- consolidate cases for pretrial proceedings, create a master docket and file, and establish a case-caption format;
- bar motions under Rule 11 or 56 without leave of court and order that counsel meet and attempt to resolve other motions (except Rule 12 motions to dismiss);
- order the parties to preserve all documents and records containing relevant information, establish ground rules for any routine purges of computer records, and address other issues relating to electronic data likely to be the subject of discovery;[23]
- stay formal discovery and grant extensions of time for responding to complaints and motions, pending establishment of a schedule; and
- announce whether the judge intends to handle all matters personally and, if applicable, designate a magistrate judge to handle matters requiring immediate judicial attention when the transferee judge is unavailable.

23. *See* MCL 4th §§ 11.432 (protective orders), 40.26 (document depository sample orders); *see also* Rothstein, Hedges & Wiggins, Managing Discovery of Electronic Information: A Pocket Guide for Judges 2d ed. (Federal Judicial Center 2011).

Bear in mind that tag-along cases could be added to your MDL docket, as such cases are filed in other jurisdictions and the Panel transfers them to you. Ask the parties whether additional actions are likely, and, if so, include appropriate provisions in the case-management order for integrating such actions into the ongoing proceedings.[24]

iii. Issues

Effective case management requires identifying the most relevant issues to resolving the parties' dispute and the governing statutory or decisional law. Products liability MDLs frequently involve claims and defenses asserted under various federal and state laws. In early Rule 16 conferences and status conferences, work with counsel to narrow the issues, claims, and defenses. Explore, for example, whether stipulations are feasible to determine what law applies to certain groups of claims or claimants, or which products were distributed during certain periods or in certain geographic areas.

Issues to be taken up early in the litigation may include the following:

- whether the facts and expert evidence support a finding that the products in question have the capacity to cause the type of injuries alleged;
- whether claims of causation are generally applicable and susceptible to proof across large groups of individuals and over time;
- what law applies and whether there are material differences among the applicable laws;
- whether claims are barred by statutes of limitations or other legal bars;
- whether plaintiffs can pursue punitive damages;
- whether one or more classes should be certified and, if so, how to define the class and whether it should be limited to particular claims or issues; and
- whether to consolidate groups of cases under Rule 42(a) for pretrial management.

b. Remand motions and other pending motions

As you receive MDL cases, you may find many pending motions. Some of these motions may require more attention than others. Rulings should be prompt and disciplined; scholarly perfection is not required on all issues. Consider issuing short rulings, which assume that the reader has knowledge

24. *See* MCL 4th §§ 20.132, 22.631.

of the underlying facts and legal issues and which merely state your holdings and the reasons for them.

In some of the cases you receive, there may be pending motions for remand to state court under 28 U.S.C. § 1447. Given their threshold nature, you should generally resolve such motions as promptly as possible. The Panel does not review your decisions on these or any other motions.

Where several motions appear to present an identical or substantially similar issue (for example, the alleged fraudulent joinder of the same defendant), you may find it useful to decide one of them, and then order the remaining movants and/or respondents to show cause why that ruling should not be made generally applicable to the other motions.[25]

c. Tag-along actions

Transfer of tag-along actions has no automatic effect on MDL proceedings in your court. You are solely responsible for determining the extent of coordination or consolidation of the newly transferred cases' pretrial proceedings.

Transfer of tag-along actions may present practical problems if they are in a radically different procedural posture than the actions previously transferred. Use your best efforts to bring tag-along actions up to speed with the rest of the cases. Where previous rulings in the MDL apply to tag-along cases, counsel may be permitted to file a motion on why the ruling should be different in the tag-along case.

Another potential complication is that introduction of new parties or claims may disrupt the course of the MDL. Consider setting a deadline for joining additional parties and for amending to add new issues to the case.

It is always appropriate to consider at what point in the MDL proceedings it is counterproductive to receive additional tag-along actions. If you conclude that the continued transfer of tag-alongs significantly impairs your ability to manage the litigation or is otherwise inadvisable, you should feel free to notify the Panel, either formally or informally.

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25. Judge Rufe has employed this technique in MDL No. 1871, the Avandia MDL. *See, e.g.,* Order, E.D. Pa., No. 2:07md1871 (Apr. 22, 2009) (doc. no. 399). Similarly, in MDL No. 2100, In re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Prods. Liab. Litig., Judge Herndon reported that he had categorized remand motions by issue(s), made a ruling on a representative motion in each category, and then directed the parties to reassess their positions and decide whether to continue to pursue or withdraw the remaining motions.

d. Pretrial discovery/disclosure

Resolving discovery disputes expeditiously is vital, particularly in an MDL. Some transferee judges assign a magistrate judge to handle all discovery issues. Others have found it beneficial to handle discovery disputes themselves, concluding that the more contact they have with counsel, the more they can control the pace of the litigation.

Some judges use telephonic conference calls to resolve discovery disputes, dispensing with briefing when unnecessary. Regardless, the availability of a judge or magistrate judge to resolve a discovery dispute may enable counsel to resolve it themselves.

In managing disputes, your challenge is to permit the common discovery to proceed and also provide for the individual needs of the various litigants. You can establish separate discovery and motion tracks to deal with individual issues, and can excuse parties from discovery in which they have no interest. Discovery on any issues unique to a single action may be scheduled to proceed in a separate discovery schedule concurrently with discovery on common issues.

To increase efficiency, you may order bifurcation of litigation, and may defer discovery on some issues until after the trial of a threshold issue. You should also allow previously taken discovery to be used by all parties. A document depository may facilitate efficiency. Electronic documents should be in a format accessible to all parties.

e. Status of transferor court rulings

The entry of a transfer order essentially divests the transferor court of jurisdiction and transfers the case to the transferee court in its procedural posture on the transfer date. Although the transferor court orders and rulings continue to bind the parties, you may, of course, modify those orders, if warranted by a significant change of circumstances. In coordinating or consolidating MDL cases, you may make orders in one of the transferred cases applicable to other parties and actions.

6. Coordination with Related State Cases

There are often pending state court cases related to your MDL. Reach out to your state court colleagues from the outset and forge constructive working relationships with them. Coordination may take many forms, and may vary in scope and degree depending on the needs of the cases and the interests of the

state court judges. Begin by assessing what issues presented in the related state and federal court cases might be suited for coordinated efforts.

Coordination methods include arrangements made by counsel, communications between judges, joint pretrial conferences and hearings at which all involved judges preside, and parallel orders.

a. Coordination through attorneys

The nature and number of related state court cases should be clarified, so as to minimize conflicts. Direct counsel to identify all similar cases in other courts, their stage of pretrial preparation, and the assigned judges. This should be part of the initial case-management order in any MDL with related litigation pending in other courts.

Direct counsel to coordinate with the attorneys in the other cases to reduce duplication. In appointing lead or liaison counsel or committees, consider including attorneys from jurisdictions with cases that may need to be coordinated with the MDL. Also consider appointing attorneys from states with significant numbers of cases to an advisory committee, to facilitate communication with the state judges and MDL counsel.

Coordination of expert depositions presents a particular challenge in MDLs with concurrent state actions. The PPA MDL[26] transferee judge allowed the parties in any state proceedings to cross-notice the deposition of an expert noticed in the MDL where the expert had been designated in both proceedings. Similarly, the parties could cross-notice in the MDL the deposition of any expert designated in a state court case where the same expert had been designated in both proceedings. The court's order specifically stated: "Nothing in this provision shall be construed as an injunctive or equitable order affecting state court proceedings. Rather, this provision is intended to reflect this Court's desire for voluntary state–federal coordination."[27]

To avoid repetitive state and federal depositions, the PPA transferee judge invited state attorneys to share in taking expert depositions, and allowed those attorneys additional examination time on case-specific issues if the expert was also named in their cases. With regard to general causation issues,

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26. MDL No. 1407, In re: Phenylpropanolamine (PPA) Prods. Liab. Litig., W.D. Wash., No. 2:01md1407 (now closed).

27. Case Management Order #12 Regarding Expert Deposition Discovery, at 2, MDL No. 1407, In re: Phenylpropanolamine (PPA) Prods. Liab. Litig., W.D. Wash., No. 01-md-01407 (Dec. 23, 2002) (doc. no. 1298) (emphasis omitted).

state attorneys usually preferred to turn their questions over to the attorneys handling the MDL.[28]

Ensure that common benefit fund provisions allow compensation of state attorneys who cooperate with MDL counsel or otherwise advance the national litigation. Otherwise, the MDL fee structure may become an obstacle to cooperation. In the Diet Drug MDL, discovery proceedings were coordinated between the MDL court and the judge presiding over California's statewide consolidated litigation. The federal and state judges entered orders establishing rates of contribution for lawyers who settled cases using coordinated state–federal discovery.[29] The state judge controlled the fund, eliminating concerns about federal dominance and providing a direct financial link between the state and federal common-benefit activities. In other mass tort litigation, judges have permitted state attorneys who were not part of the MDL plaintiffs' steering committee to make claims for MDL-managed funds.

b. Coordination with state judges

MDL judges have developed various practices, with various levels of formality, for coordinating their efforts with their state judge counterparts.[30] Informal practices include personal meetings, telephone calls, and email communications to exchange information about scheduling and to coordinate discovery, timing of class certification rulings, and other procedural matters. One step to fostering cooperation is to establish an MDL website so that your orders and rulings are readily available.

If you appoint a state liaison committee as part of the attorney organizational structure, seek state judges' input on its membership. This early opportunity to work with state judges can set a tone of cooperation for the duration of the litigation.

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28. *See* Rothstein, *Perspectives on Asbestos Litigation: Keynote Address,* 37 Sw. U. L. Rev. 733, 738 (2008).

29. *See In re Diet Drugs*, 582 F.3d 524, 532 & n.10 (3d Cir. 2009). *See also* First Am. Pretrial Order No. 6 Common Benefit Order (Establishing Common Benefit Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Otherwise for Plaintiffs' General Benefit with Provisions for State Court Coordination), N.D. Ohio, No. 1:08hc60000 (Nov. 6, 2008) (doc. no. 45).

30. For example, early on in MDL No. 1953, In re: Heparin Prods. Liab. Litig., Judge James G. Carr (N.D. Ohio) established a good working relationship with the Illinois state court judge to whom all the related Illinois state court actions had been assigned.

Where applicable, discussions between state and federal judges about the timing of class certification hearings and decisions may enhance cooperation generally. Unilateral action by any judge to certify a class or assert nationwide jurisdiction can fatally undermine future coordination efforts. Joint deferral of decisions on certification and perhaps joint hearings on motions to certify enhance the chances that both sets of courts will find appropriate roles in managing the litigation.

In more formal contexts, MDL judges may share a special master with state judges, as in the Celebrex MDL, sit jointly and hear evidence and argument on motions, or even hold a national conference or a set of meetings about the litigation.

Generally, state judges have responded to requests for coordination in a spirit of cooperation. The more transparent and even-handed the proposed cooperative venture is, the more acceptable it will be to other judges and to attorneys.

Be aware of potential disadvantages of some forms of cooperation. Coordination can delay or otherwise affect pending litigation, conferring an advantage to one side in contentious, high-stakes cases. Watch out for strategic maneuvering by both parties. For example, plaintiffs may seek early trial dates in jurisdictions with favorable discovery rules.

Coordination approaches differ depending on the nature of the litigation. Coordination is relatively straightforward if all of the cases are pending in a single state. States increasingly have adopted procedures for assigning complex multiparty litigation to a single judge or judicial panel, or have created courts to deal with complex business cases. Federal judges should learn about their own state or local courts' practices and procedures for consolidating cases.

Coordination becomes much more complex when cases are dispersed across many states. Dispersed litigation makes essential an information network, perhaps formalized as a judicial advisory committee, which can serve as a catalyst for some degree of state–federal coordination. If warranted by the litigation, a judicial advisory committee can foster relationships among the judges and ease coordination efforts. An Internet website or listserv is another economical way to foster communications among geographically dispersed attorneys and judges.

c. Specific forms of coordination

At a minimum, judges should exchange case-management orders, master pleadings, questionnaires, and discovery protocols. This simple step can promote the use of the same or similar approaches to discovery and pretrial management. Having some overlapping membership among counsel in state and federal cases also facilitates communication and cooperation.

i. Discovery

Discovery is quite amenable to coordination. Depending on the progress of the state litigation, some aspects of discovery in state cases may in some instances serve as the basis for national discovery or vice versa.[31]

Specific elements of discovery coordination could include

- creating joint federal–state, plaintiff–defendant document depositories, accessible to attorneys in all states;
- inviting state judges to participate in a coordinated national discovery program, while retaining control of local discovery;
- ordering coordinated document production and arrangements for electronic discovery;
- ordering discovery materials from prior state and federal cases to be included in the document depository;
- scheduling and cross-noticing joint federal–state depositions;
- designating state-conducted depositions as official MDL depositions; and
- coordinating rulings on discovery disputes, such as the assertion of privilege, and using parallel or joint orders (e.g., concerning the preservation of evidence or the examination of evidence by experts) to promote uniformity to the extent possible.[32]

The use of common experts, along with consolidated expert disclosures and expert discovery, is also sometimes worthwhile. In sophisticated litiga-

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31. In MDL No. 1760, In re: Aredia and Zometa Prods. Liab. Litig., for example, the parties agreed to the use of discovery previously produced in related New Jersey state court litigation.

32. In the Yaz MDL, No. 2100, Judge Herndon coordinated with state-court judges in California, New Jersey, and Pennsylvania in implementing a detailed deposition protocol covering the use and admissibility of depositions, and specifying that Judge Herndon would coordinate among the involved courts regarding the resolution of any deposition-related dispute. *See* Case Management Order No. 28 Regarding Deposition Protocol, S.D. Illinois, No. 3:09md2100 (Feb. 28, 2011) (doc. no. 1580).

tion, only a limited number of persons may be available to provide certain kinds of opinions. Moreover, high expert fees can provide an incentive for parties to join together in selecting their experts on common issues and to establish reasonable parameters on expert discovery.

The PPA MDL court developed a system allowing plaintiffs in the individual federal actions, as well as state court plaintiffs, to either adopt scientific experts selected by the steering committee or decline to do so.[33] Following the plaintiffs steering committee's Rule 26 disclosures of general causation experts, the court gave individual plaintiffs a two-week opt-in period to decide whether to adopt those experts for use in their respective cases. A plaintiff in an individual case adopting the steering committee's experts with respect to any issues of widespread applicability could nevertheless designate different experts to testify at trial on the same issues, provided that: (1) the later-designated experts relied upon the same or substantially the same evidence, opinions, or theories relied upon by the adopted experts; and (2) such opinions, evidence, and/or theories had not been previously determined by the court to be scientifically unreliable or otherwise inadmissible. Similarly, the court ruled that a defendant in an individual action could later designate experts different from the generic experts disclosed by defendants to testify at trial on the same issues, provided the same conditions were met. Later-added tag-along parties were given until three months prior to the close of fact discovery in their cases to adopt or decline to adopt experts.

Coordination in discovery should take into account the pressure a state judge might experience from state lawyers eager to present their cases at trial or, at a minimum, to share in any common fund that their efforts help create. In the Diet Drug litigation, the MDL transferee judge took the lead in implementing a comprehensive state–federal discovery plan while state judges presided over individual trials and settlements. The parties achieved the economies of consolidated discovery and developed information about the value of individual cases, providing a basis for aggregated settlements and judgments.

ii. Pretrial motions and hearings

Pretrial hearings, such as *Daubert* hearings, can also be effectively coordinated. State and federal judges have jointly presided over hearings on pretrial

33. *See* Rothstein, McGovern & Dion, *A Model Mass Tort: The PPA Experience,* 54 Drake L. Rev. 621, 625–32 (2006).

motions, based on a joint motions schedule. Joint hearings have used coordinated briefs so that one set of briefs can be used in both state and federal courts, with supplements for variations in the applicable laws and choice-of-law questions.

In scheduling *Daubert* proceedings, explore opportunities to coordinate scheduling with state courts handling parallel cases.[34] In the PPA litigation, because the *Daubert* hearings would address the admissibility of the plaintiffs' experts' opinions on general causation and include the examination of experts taking part in numerous state court actions, the MDL judge invited state court judges with PPA cases to preside over the hearings alongside the MDL judge. The hearings were videotaped to allow state judges unable to participate to use them. Eleven judges from seven states participated, and the attorneys' presentations addressed the different standards of admissibility of different states.[35]

State court judges' attendance at these hearings had two positive effects on the litigation nationwide. First, it diffused some of the natural tension that can exist between the state and federal courts, as well as between different state courts, where there are concurrent proceedings. Second, it was vastly more efficient than having substantially similar hearings in multiple jurisdictions.[36]

iii. Settlement

Coordination of mediation or settlement efforts is particularly important when there are pending state court cases related to the MDL cases. State and federal judges should encourage joint comprehensive settlement negotiations and alternative dispute resolution procedures.[37] Insurance coverage disputes may

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34. For example, in MDL No. 1629, In re: Neurontin Marketing, Sales Practices and Prods. Liab. Litig., Judge Patti B. Saris (D. Mass.) conducted a joint *Daubert/Frye* hearing with Judge Marcy Friedman, a New York state judge, and found that doing so was efficient and effective both for the parties and the two courts. Judge David C. Norton conducted a similar joint hearing in MDL No. 1785, In re: Bausch & Lomb Inc. Contact Lens Solution Prods. Liab. Litig.

35. *See* Rothstein et al., *supra* note 33, at 632–33.

36. *Id.* at 634.

37. In MDL No. 1985, In re: Total Body Formula Prods. Liab. Litig., Judge R. David Proctor (N.D. Ala.) oversaw the settlement of all actions in the MDL. In connection therewith, he and a Georgia state court judge conducted a settlement "summit" that resulted in the settlement of many related Georgia state court actions.

require special attention and coordination because resolution of the primary litigation may depend on resolution of the coverage dispute. MDL judges may direct settlement masters to work toward obtaining global settlements.

7. Coordination with Criminal Proceedings and Grand Juries

Major management problems arise in concurrent criminal and civil cases involving the same persons. Witnesses may claim a Fifth Amendment privilege in the civil actions, especially if examined prior to final resolution of the criminal proceedings. Serious questions may arise as to requiring an accused, during the pendency of criminal charges, to produce in civil proceedings either adverse (although nonprivileged) evidence or exculpatory evidence to which the prosecution would not be entitled under Fed. Rule Crim. P. 16. The criminal proceeding ordinarily has first priority because of the short pretrial period allowed under the Speedy Trial Act and because of the potential impact of a conviction.

Even if conviction will not preclude relitigation of issues in a subsequent civil proceeding, it may be admissible in the civil case as substantive evidence of the essential elements of the offense under Fed. R. Evid. 803(22) or as impeachment evidence under Fed. R. Evid. 609. Suspending all pretrial activities in civil litigation until the end of the criminal proceeding may be inadvisable, however, since it may be possible to conduct major portions of the civil case's discovery program without prejudice before completion of the criminal proceedings.

To facilitate coordination, related criminal and civil cases are often assigned to the same judge. If the cases are assigned to different judges, the judges should at least communicate and coordinate informally. If grand jury materials from another court are sought, the standard set in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), must be met. The disclosure must be necessary to avoid a possible injustice in another judicial proceeding, the need for disclosure must be greater than the need for continued secrecy, and the disclosure request must be structured to cover only material so needed.

8. Resolving Multi-Jurisdictional Conflicts and Choice of Law Issues

a. Jurisdictional conflicts

The pendency of related state and federal actions can cause jurisdictional complexities and conflicts, leading to requests that the federal court either stay its proceeding or enjoin state court proceedings. Federal courts have a duty to exercise their jurisdiction, notwithstanding the pendency of parallel or related litigation in state court.

A federal court's power to interfere with parallel or related proceedings in state court is limited by the Anti-Injunction Act, which prohibits a federal court from enjoining or staying state court proceedings except as expressly authorized by an act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. The exceptions under the Act are narrowly construed.[38] The fact that persons who fall within the scope of a class certified in a federal court action have filed parallel actions in state court does not afford a basis for interfering with the state court actions during the pendency of the federal action. Accordingly, when defining a proposed class, a federal court should consider whether a class can be defined so as to avoid unnecessary conflict with state court actions. In a narrow exception, where a class has been certified under Fed. R. Civ. P. 23(b)(3), and where class members have failed to avail themselves of their right to opt out and litigate their claims independently in state or federal court, a district judge may enjoin those members from initiating or proceeding with civil actions in other state or federal courts.

An injunction against pending state proceedings, even if authorized by federal statutes and case law, can have a detrimental effect on future efforts to work cooperatively and should be used only as a last resort.

b. Choice of law issues

In making pretrial rulings, the law of the transferor district usually applies. For example, in diversity cases, the law of the transferor district determines

38. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (holding that transferee court exceeded its authority under the "relitigation exception" to the Anti-Injunction Act enjoining a state court from considering a plaintiff's request to approve a class action, where the issue presented was not identical to that decided by the transferee court, and the state court plaintiff did not have the requisite connection to the federal suit to be bound by the transferee court's judgment).

what state substantive law to apply. For federal question cases, you should apply your own circuit's interpretation of substantive federal law. Where federal law borrows state statutes of limitations, the law of the transferor court applies. Procedural matters are governed by your circuit's law.

Differences in the substantive law governing liability and damages may substantially affect discovery, trial, and settlement. In dispersed, multistate defective products litigation, choice of law issues may be especially problematic because a wide range of state laws may apply, and the state in which the action is pending may not have a significant relationship with many of the plaintiffs, with the defendants, or with the activities that are subject to the litigation. If the choice of law and subsequent analysis show little relevant difference in the governing law, or that the law of only a few jurisdictions applies, you might address these differences by creating subclasses or by other appropriate grouping of claims.[39]

When different state laws apply, you might ask the parties to research the feasibility of organizing cases based on the similarity of the applicable laws. If the cases are consolidated for pretrial purposes, lead counsel can file "core" briefs on dispositive motions based on the most widely applicable or otherwise most significant state substantive law. Variations in state laws can be addressed separately through supplemental briefs, which can be prepared by lawyers whose clients assert that a different law applies to some or all of their cases. Alternatively, you may rule on a motion in cases under one state's law and issue an order to show cause why the ruling should not apply to the other cases.

c. Direct filing

Where the defendant waives venue and personal jurisdiction objections for pretrial proceedings, plaintiffs may file directly in the transferee court, thus eliminating the involvement of the Panel. If you enter a direct filing order, you may wish to order plaintiffs to designate "home" districts for direct filed cases, to facilitate determination of choice of law issues, as well as possible future transfer under 28 U.S.C. § 1404(a).

39. *See* MCL 4th §§ 22.72, 22.75.

9. Discovery

Discovery in products liability cases generally has two distinct dimensions: one involving the conduct of the defendants, and another relating to the individual plaintiffs' conduct, causation, and injuries. Sometimes—particularly in an MDL— judges focus initial discovery toward matters bearing on the defendants' liability to all plaintiffs, perhaps initially only requiring plaintiffs to provide basic information on exposure and damages. This approach may be appropriate when liability is seriously disputed.

In other cases, however, particularly those involving "mature" mass torts, the judge and parties prefer at the outset to discover plaintiff-specific information or to conduct discovery from plaintiffs concurrently with discovery from the defendants.

Interrogatories inquiring into the extent of the plaintiffs' damages may be useful early in the litigation even if depositions of the plaintiffs are to be delayed. Answers to such interrogatories may provide a valuable starting point for settlement discussions. Alternatively, or in addition to such interrogatories, many transferee judges use "plaintiff fact sheets," standard forms disclosing information that would be relevant to both settlement and trial.[40]

The volume and complexity of discovery in a products liability MDL might warrant appointing a special master to assist the court with discovery issues or to facilitate coordination with related state court litigation.[41] Other organizational steps include conducting discovery in waves, as in the Diet Drug litigation, or dividing it into national, regional, and case-specific categories, as was done in the breast implant MDL.

a. Privilege claims and protective orders

At an early conference, preferably before discovery begins, assess any need for procedures to accommodate claims of privilege or for protection of materials

40. For examples of fact sheets, see Pretrial Order #9 (Plaintiffs' Fact Sheets and Defendants' Fact Sheets), MDL No. 2187, In re: Avaulta Pelvic Support Systems Prods. Liab. Litig., S.D. W. Va, No. 2:10md2187 (June 7, 2011) (doc. no. 56); and Case Management Order No. 4 Regarding Plaintiff Fact Sheet and Related Authorizations, MDL No. 2051, In re: Denture Cream Prods. Liab. Litig., S.D. Fla., No. 1:09md2051 (Sept. 23, 2009) (doc. no. 107).

41. In the Avandia MDL, No. 1871, Judge Rufe appointed a special discovery master to handle scheduling issues with respect to depositions and document production and to mediate discovery-related disputes. Pretrial Order No. 8 (Appointment of Special Discovery Master), E.D. Pa., No. 2:07md1871 (June 10, 2008) (doc. no. 136).

from discovery as trial preparation materials, as trade secrets, or on privacy grounds. If not addressed early, these matters may later disrupt the discovery schedule. Consider not only the rights and needs of the parties but also the existing or potential interests of those not involved in the litigation.

Certain materials may qualify for full protection against disclosure or discovery as privileged, as trial preparation material, or as incriminating under the Fifth Amendment. To minimize their potentially disruptive effects on discovery, establish a procedure for resolving such claims or for avoiding them through appropriate sequencing of discovery.[42]

In complex litigation involving voluminous documents, privileged materials are occasionally produced inadvertently. Electronically stored information (ESI) carries a greater risk of inadvertent disclosure. The volume of ESI searched and produced in response to a discovery request can be enormous, and characteristics of certain types of ESI (e.g., embedded data, threads of email communications and email attachments) make it difficult to review for privilege and work-product protection. Thus, the risk of inadvertent disclosure of privileged or protected material during production persists even if great care is taken to identify and segregate it.[43]

The parties can agree to limit the effect of waiver by disclosure among themselves, but if the parties want greater protection, any agreement must be made part of a court order. Once the court has incorporated the parties' agreement in an order, the litigants are protected against assertions by third parties in parallel or subsequent litigation that privilege or work product protection has been waived through inadvertent disclosure in this litigation.[44]

Parties may also seek limited disclosure or protective orders for other sensitive material. The parties usually seek "umbrella" protective orders by stipulation, making designated material confidential unless challenged.[45] Protective orders are, of course, always subject to modification.

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42. *See* MCL 4th § 11.431. In MDL No. 2100, Judge Herndon dealt with approximately 18,000 privilege claims by directing the parties to present a representative sampling (250) of those claims, on which the judge then ruled. He then ordered the parties to attempt to resolve the balance of the 18,000 claims based on those representative rulings.

43. *See* Rothstein, Hedges & Wiggins, Managing Discovery of Electronic Information: A Pocket Guide for Judges 2d ed. (Federal Judicial Center 2011).

44. *See* Fed. R. Evid. 502(d), (e).

45. *See* MCL 4th § 11.432.

b. Document production and physical evidence

The volume of discovery in a products liability MDL often warrants creation of physical and/or electronic document depositories, a website or sites, and other means of making discovery materials available to all parties.[46] The goal is to have as much discovery material as possible readily accessible to litigants in federal and state courts. Generally, documents relating to scientific studies, public records, and public reports would be included at such a site, as well as responses to written discovery requests, copies of deposition transcripts, and documents discovered by the parties. Requests for documents can be coordinated and handled through a document depository. The court reporters and parties should provide depositions and discoverable documents in an electronic format so that the court and the parties can use electronic search tools to locate relevant information. If the parties can agree in advance on a file format for electronic documents, consider including that in a pretrial order. Procedures should permit a party easily and quickly to request the return of inadvertently disclosed privileged or confidential information or documents without waiving attorney–client or work-product privilege or protection against discovery.[47]

Products liability cases may also require steps to ensure the retention and preservation of physical evidence. For example, in the Chinese-manufactured drywall MDL, the transferee court ordered preservation of drywall samples if repairs were undertaken. In cases alleging product design or manufacturing defects in models, makes, or lots that may have changed over time, such orders should be entered early in the case. For example, in the Bridgestone/Firestone MDL, the judge ordered a detailed system for the parties to identify, inspect, retain, and store—and, in the case of new salable models, share the cost of obtaining—the extensive range of recalled and new tires that were at issue. If the case involves a number of product makes, models, or lots, the parties should work toward a joint proposed order setting procedures to collect, store, and inspect or test a sampling of such products. Although the need for joint testing might be less critical than in single-

46. In the Total Body Formula MDL, No. 1985, Judge Proctor worked with counsel to develop a court-operated searchable electronic document depository for use not only in the MDL but also in concurrent related state litigation being handled by some of the same counsel.

47. *See* Rothstein et al., *supra* note 43.

incident torts where there may be only a single product or remnant to be tested, joint testing may still be advisable to minimize unnecessary disputes.

c. Depositions

Consider instituting procedures to facilitate the use of depositions against similarly situated parties later added to the litigation and to provide counsel in related cases in other courts with access to relevant confidential materials covered by protective orders. Courts routinely establish preliminary guidelines for conducting depositions and create a system for resolving disputes that arise during depositions.

Limiting repetitive depositions of significant decision makers, defendants, or experts promotes efficiency, as does using videotaped depositions for witnesses likely to testify more than once. Parties with different interests must be allowed fair discovery, but discovery that has already been competently conducted need not be reopened for later-added parties, absent a showing of a specific need. *See Manual for Complex Litigation, Fourth,* § 11.452 for a discussion of technology to enable broad remote participation in depositions conducted by a few lawyers physically present and other lawyers participating by electronic access, perhaps having you "on call" for handling objections or using a magistrate judge or special master for that purpose.

d. Interrogatories

Encouraging or requiring parties with similar interests to confer and fashion joint interrogatories supplemented as necessary can help prevent multiple requests for the same information. This task usually falls to lead counsel or a discovery committee. In lieu of interrogatories, plaintiff fact sheets have been used successfully in many MDLs.

Standard discovery requests can be deemed filed automatically as new parties are joined or new actions filed. Answers to interrogatories or plaintiff fact sheets should generally be made available to other litigants, who in turn might then be permitted to add only supplemental questions.

e. Expert discovery

Products liability cases often involve critical scientific testimony about the causal relationship between exposure to an allegedly harmful product and a wide range of injuries. In high stakes litigation, each side retains numerous experts who proffer detailed, complex opinions in support of the parties' wide-ranging allegations and defenses.

Because expert opinions play a vital role in many products liability MDLs, both during the discovery process and at trial, you should establish at an early pretrial conference a schedule for disclosing expert opinions in written reports, for deposing the experts, and for resolving *Daubert* motions. The PPA MDL court split expert discovery into two distinct phases, with general causation discovery to occur in the MDL and case-specific expert discovery to wait until after remand. In deciding the timing of expert disclosures, depositions, and *Daubert* hearings, consider whether and to what extent:

- scientific or technical issues are novel, developing, or settled;
- scientific or technical issues are central to the claims and defenses and whether resolution of the admissibility of such evidence will as a practical matter be dispositive of the litigation;
- parties and their experts disagree about crucial scientific evidence;
- underlying scientific issues are complex and require extensive time for discovery and for experts to prepare the reports required by Rule 26(a)(2)(B); and
- scientific issues need to be sequenced or staged in a particular order to promote economy and efficiency in the litigation.

Generally, the more novel, complex, and central the scientific or technical issues, the more time the parties will need to conduct discovery, prepare expert reports, and brief the issues for a *Daubert* hearing. Although an evidentiary hearing is not always required to resolve *Daubert* issues, having the witnesses testify may allow you to test the underlying assumptions and reasoning employed by the experts and to compare various approaches to the same subject.

You should be aware of the possibility that not only the parties' testifying experts, but also the published research on which the experts rely, may be subject to charges of bias. For example, where parties directly or indirectly fund authors of research articles and studies that are relied upon by testifying experts, such funding may be discoverable as relevant to the issue of bias.[48]

In cases involving disputed evidence on causation, there will often be ongoing scientific studies addressing the disputed issue. You may need to establish procedures for discovery regarding such studies. Generally, courts protect researchers from disclosure of data or opinions relating to an ongoing

48. *See In re Welding Fume Prods. Liab. Litig.*, 534 F. Supp. 2d 761 (N.D. Ohio 2008) (denying protective order for chart listing party's payments to authors of articles relied on by expert witnesses).

unpublished study. By contrast, courts generally allow discovery into party-sponsored studies.[49]

f. Sampling

In some cases that involve a massive number of claims for damages for similar injuries, sampling techniques—while not a substitute for discovery relating to individual plaintiffs' conduct and injuries—can provide preliminary information to facilitate case management and resolution.[50] Sampling and surveying by questionnaires can provide information for settlement discussions, facilitate test case selection for bellwether trials, or identify plaintiffs who might require special consideration due to the severity of their injuries. For example, in a case involving thousands of claimants seeking damages for injuries allegedly caused by eating fish contaminated with DDT, the parties agreed to limit formal discovery to a sample of the claimants randomly selected by a special master. Responses to questionnaires provided information about the remaining claimants and served as the basis for screening out a substantial number of claims. In the absence of consent or a settlement, however, litigants are entitled to full discovery and to adjudication consistent with the Constitution. Whether the aim is discovery, settlement, or a bellwether trial, any sample should be representative of the claims and claimants, taking into account relevant factors such as the severity of the injuries, the circumstances of exposure to the product, the mechanisms of causation, the products and defendants alleged to be responsible, any affirmative defenses, and the applicable state law. If sampling does not lead to a global settlement, individual discovery of all plaintiffs will be needed.

10. Preliminary Hearings

a. *Daubert*

A transferee judge should go beyond mere pretrial discovery and should encourage the resolution of scientific disputes. Judges must grapple with scientific issues in their roles as gatekeepers.

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49. *See* MCL 4th § 22.87.

50. Be careful not to treat information gathered by sampling techniques as if it provided probative evidence regarding individuals not sampled. *See Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2554–57 (June 20, 2011) (in employment discrimination class action, plaintiffs' statistical and anecdotal evidence did not show a company-wide discriminatory policy).

If causation issues dominate the MDL proceeding, it may be appropriate for you to conduct a *Daubert* hearing on general causation issues, leaving specific causation issues for the transferor courts on remand. Such a division in the appropriate case efficiently separates the role of the MDL court from that of the trial courts after remand.

Use *Daubert* hearings to assess the validity of the general scientific principles at issue, as well as the testimony of the proffered experts, and enter summary judgment if the underlying scientific principles are not properly established.

The PPA MDL court took an aggressive role in determining the admissibility of scientific evidence. The practical result was to set clear parameters for summary judgment motions.[51] When the plaintiffs' experts' testimony is ruled inadmissible, the plaintiffs' cases are usually subject to dismissal. Thus, once the *Daubert* issues are decided, the court can rule on motions for summary judgment—a major vehicle for reducing meritless claims in a large litigation.

b. Class certification

Putative class actions may be among the cases transferred to you. Mass tort personal injury cases are rarely appropriate for class certification for trial, particularly on a nationwide or multistate basis, because individual issues of causation and individual damages often predominate and state law often varies. Property damage claims may be different—if the amounts at issue in each individual claim are too small, individual litigation may not be a superior, or even feasible, alternative for resolution, especially when the proposed mass tort rests on a novel or untested scientific or legal claim. Some courts have addressed these difficulties by certifying some, but not all, issues for class treatment, and by structuring subclasses under Fed. R. Civ. P. 23(c)(5) to reflect state law differences.

In a settlement context, the proposed class must meet Rule 23 requirements, with the exception of trial manageability, and the court must carefully review the proposed settlement terms to ensure that they are fair, reasonable, and adequate.[52]

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51. *See* Rothstein et al., *supra* note 33, at 638.

52. *See, e.g., In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010).

11. Special Referrals

a. Special masters

Fed. R. Civ. P. 53 authorizes judges to appoint special masters to aid in handling pretrial matters "that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[53] Reference to a special master must be the exception and not the rule.

Rule 53(a)(2) requires that a master "not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification." It is generally preferable to appoint special masters with the parties' consent, and either to permit the parties to agree on the selection or to make the appointment from a list submitted by the parties. Appointment of a magistrate judge as a special master makes it unnecessary to worry about imposing extra expense on parties or about the question of neutrality. In a products liability MDL, it may be particularly difficult to appoint a completely disinterested special master with no prior relationship to any of the parties, since special masters are often practicing attorneys and tend to have substantial experience with similar disputes.

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53. In MDL No. 1769, In re: Seroquel Prods. Liab. Litig., Judge Anne C. Conway appointed special masters to coordinate case-specific discovery (including the depositions of doctors and other fact witnesses). *See* Order Appointing Special Master and Directing Discovery, M.D. Fla., No. 6:06md1769 (Aug. 3, 2007) (doc. no. 348) and related order (Sept. 19, 2007) (doc, no. 483). She also appointed a special master to assist and, when necessary, direct the parties in completing required discovery of electronically stored information. *See* Order (Sept. 27, 2007) (doc. no. 511) and related order (Oct. 5, 2007) (doc. no. 546). Judge Conway found that the discovery-coordinating special master, the cost of which was shared by the parties, resolved many potential problems and kept the litigation moving forward, and that the e-discovery special master cut through many technical issues and greatly simplified the issues needing judicial resolution.

Transferee judges have also frequently appointed special masters to oversee administration of settlements, as was done in MDL No. 2004, In re: Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., M.D. Ga., No. 4:08md2004 (Apr. 13, 2011) (doc. no. 403), MDL No. 1968, In re: Digitek Prods. Liab. Litig., S.D.W. Va, No. 2:08md1968 (Sept. 1, 2010) (doc. no. 383); and MDL No. 1873, In re: FEMA Trailer Formaldehyde Prods. Liab. Litig. E.D. La., No. 2:07md1873 (June 11, 2010) (doc. no. 14400).

The special master's tasks must be narrowly and expressly defined. Ultimate management authority must remain with the judge. An order of reference to a special master should specify:

- the scope of the reference,
- the issues to be investigated,
- the circumstances under which ex parte communication with the court or a party will be appropriate,
- the time and format for delivering the master's record of activities,
- the master's compensation, and
- the delegated powers.

b. Court-appointed experts

Early consideration of expert disclosure and discovery enables you to determine whether to appoint an independent expert or panel of experts to assist you with technical issues. Testifying expert witnesses may be appointed under Fed. R. Evid. 706. Non-testifying technical advisors may be appointed under the court's broader inherent authority to invite expert assistance in duties necessary to decide a case. It is, of course, crucial to ensure that the experts understand that their role is to address the science, and not to offer an opinion on the ultimate legal questions.

Many judges prefer to appoint a technical advisor as a "teaching expert" to give them a tutorial or training session explaining the background scientific techniques and findings at issue. In the PPA MDL, the transferee judge held a two-day training session and invited state judges with related cases to attend.[54] Generally counsel should be present during a tutorial but, if counsel consent, the judge may then confer with the teaching expert as needed.

In some cases, the parties can provide the necessary background information. In the Welding Rod products liability MDL, the court invited counsel

54. Similarly, in MDL No. 1742, In re: Ortho Evra Prods. Liab. Litig., Judge David A. Katz scheduled a "Science Day" at the Newark federal courthouse and invited state court judges handling similar cases. Approximately 125 attorneys attended, as did the New Jersey state court judge overseeing the related New Jersey state court litigation. *See* Case Management Order No. 19, N.D. Ohio, No. 1:06cv40000 (June 12, 2007) (doc. no. 124); *see also* Stipulated Order Granting Defendants' Motion for a NuvaRing® "Science Day," MDL No. 1964, In re: NuvaRing Prods. Liab. Litig., E.D. Mo., No. 4:08md1964 (July 22, 2009) (doc. no. 226).

to provide a one-hour audio–video background tutorial on the technical and science issues presented by the litigation.[55]

Appointing an expert without unduly delaying the litigation requires establishing procedures for previewing proposed expert testimony at an early stage. *See* § 9(e), *supra*. Typically each party pays half of the expense of appointing an expert, and the prevailing party is reimbursed by the losing party at the conclusion of the litigation.

You will most likely have to initiate the appointment process with an order to show cause why an expert witness should not be appointed, as the parties frequently will not raise this possibility on their own. Parties should be asked to nominate candidates for the appointment and give guidance concerning characteristics of suitable candidates. No person should be nominated who has not previously consented to it and undergone a preliminary screening for conflicts of interest. Candidates for appointment should make full disclosure of all engagements (formal or informal), publications, statements, or associations that could create an appearance of partiality. Encouraging both parties to create a list of candidates and permitting the parties to strike nominees from each other's list will increase party involvement and expand the list of acceptable candidates. You may also turn to academic departments and professional organizations as sources of expertise.

12. Mediation/Settlement Negotiation

Settlement efforts are an important part of pretrial proceedings in the transferee court. Many MDL cases settle during the course of pretrial proceedings, obviating the need for remand to their transferor courts. Motions to enforce settlement may be brought in the transferee court.

a. Encourage an early mediation process

As soon as you are satisfied that plaintiffs' claims arguably have at least some merit, suggest to counsel that they establish a mediation structure, select a mediator, and begin a process of settlement negotiations to occur simultaneously with the conduct of preliminary motions practice and the taking of discovery.[56] A separate set of attorneys may be needed so that the litigation is not delayed. Although such early negotiations may not bear immediate fruit,

55. *See* Case Management Order at 31, MDL No. 1535, In re: Welding Fumes Prods. Liab. Litig., N.D. Ohio, No. 1:03-CV-17000 (Dec. 9, 2003) (doc. no. 63).

56. *See* MCL 4th § 13.1.

they do require all parties to keep the goal of resolution in mind even in the initial phases of the litigation.

Sometimes the accumulation of costs and fees can be an obstacle to settlement. It is important at the outset to advise all parties about the importance of controlling costs. Particularly in cases arising under fee-shifting statutes, it may be helpful to set some ground rules, such as no first-class travel and a limitation on the number of lawyers at depositions or hearings.[57]

b. Judicial role and settlement

In mass torts, as in other types of complex litigation, questions regarding the appropriate extent of judicial involvement in settlement negotiations are important because the costs associated with recusal of a judge familiar with the litigation are high. Although some judges participate actively in settlement negotiations, others insulate themselves from the negotiations, leaving this activity to a magistrate judge, a special master, or a settlement judge.[58] Judges who have been involved in unsuccessful settlement negotiations sometimes turn over to another judge the responsibility for trying the case because they have been privy to information on the merits of the case or on issues that would otherwise not have been revealed.

Judges who have been involved in successful settlement negotiations may transfer to another judge judicial review of the settlement to avoid having to rule on the fairness, reasonableness, and adequacy of a settlement they helped to craft.

You may be able to facilitate settlement negotiations by establishing a system to collect information about past, pending, and likely future claims. In many MDL mass torts, courts have ordered claimants to complete plaintiff fact sheets, disclosing critical information such as the circumstances of their exposures and the severity of their injuries, to facilitate settlement negotiations or improve claim administration following settlement. Judges have occasionally appointed special masters to assemble databases documenting essential information concerning the thousands of personal injury claims that may be pend-

57. *See* MCL 4th § 14.21.

58. For example, in MDL No. 1953, In re: Heparin Prods. Liab. Litig., Judge Carr has enlisted his colleague, Judge Katz, to mediate settlement negotiations. At defendants' request, Judge Carr has erected an "ethical wall" to insulate himself from those negotiations. Similarly, in MDL No. 2172, In re: Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices and Prods. Liab. Litig., a retired federal district judge (Dickran M. Tevrizian, Jr.) has been appointed to oversee settlement negotiations.

ing. Comparing individual pending cases against similar closed cases should produce a range of settlement values.

You may be able to assist the parties to achieve a "global" settlement resolving not only the defendants' potential liability to the plaintiffs, but also their liability to one another for indemnification or contribution. Efforts to achieve global settlements through class certification, however, may not pass muster under Rule 23 or the due process clause.[59]

Settlements affecting the rights of "future claimants" who have no present injury present special concerns. The Supreme Court in *Amchem* and *Ortiz* cautioned against improper settlement classes.[60] However, judges have approved such settlements after determining claimants could be identified and given notice, and after scrutiny to ensure that Rule 23 was satisfied, including the requirement of adequate representation both to those presently injured and to those exposed but not presently injured. Separate counsel is generally necessary for different subclasses. Courts have approved settlements that included protections for those who knew that they had been exposed to a potentially injurious substance but did not know if injury would result or whether it would be disabling or much less severe. Such protections have included the opportunity to opt out if and when injury is manifested or its extent is apparent.[61]

Parties that are unable to agree on a global settlement may be able to resolve discrete sets of claims that significantly reduce or limit the scope of the litigation through a series of case-by-case, party-by-party settlements, or may be able to agree on a process for resolving the litigation. For example, the parties may agree to resolve a representative sample of claims through bellwether trials or mediation, arbitration, or another form of alternative dispute resolution. Information generated through trials or ADR processes might enable the parties to arrive at a reasonable estimate of the value of the aggregate claims from which they drew the sample. Yet another approach is to appoint a special master to facilitate settlement by reviewing information on

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59. *See* MCL 4th, §§ 22.72, 22.73, 22.922.

60. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (rules blocking "unwarranted or overbroad class definitions . . . demand undiluted, even heightened, attention in the settlement context "); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–53 (1999) (because limited-fund classes do not permit opt-outs, certification for settlement imposes particularly stringent standards).

61. See discussion of back-end opt outs in MCL 4th § 22.922 and of future claimants in § 21.612.

liability and damages and placing an estimated value on each claim. Judges have used this approach with considerable success in mass tort litigation.

c. Objections

If a settlement is reached, in many instances it will require judicial review and approval. Court approval is needed for class action settlements or where the settlement requires court action, particularly if it affects the rights of non-parties or non-settling parties.[62] Although the standards and procedures vary, in general you must ensure that any settlement is fair to the persons whose interests the court is to protect. Those affected may be entitled to notice and an opportunity to be heard. This usually involves a two-stage procedure. First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing. Be open to the views of those who may be affected by the settlement, whether or not they have legal standing to be heard. This may include providing notice to absent parties even if not required by governing law, and appointing an expert under Fed. R. Evid. 706 to provide a neutral assessment, or special counsel to represent the interests of persons who are absent or under a legal disability. You may not rewrite a settlement agreement; if it is unacceptable you must disapprove it, but you may suggest changes.

Objectors to a class settlement may play a beneficial role in improving the settlement. Some objections, however, are made for improper purposes, and benefit only the objectors and their attorneys (e.g., by seeking additional compensation to withdraw even ill-founded objections). Your challenge is to distinguish between meritorious objections and those advanced for improper purposes.[63] Watch out for ill-intentioned objectors holding the settlement hostage to extract unwarranted payments or other concessions from the parties. Objections may be individual or class-based. While the important role some objectors play might justify additional discovery, access to information obtained by class counsel and class representatives, and the opportunity to participate in the fairness hearing, discovery should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel. An objector who wins changes in the settlement

62. *See* MCL 4th § 13.14.

63. *See* MCL 4th § 21.643.

that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory.

13. Bellwether Trials

Conducting individual trials, sometimes referred to as bellwether trials or test cases, can help facilitate resolution of the MDL by testing essential elements of each side's litigation strategy and establishing representative settlement values. If bellwether trials are to produce reliable information about the other cases in the MDL, the specific plaintiffs and their claims should be representative of the range of cases.

Advantages of bellwether trials might include litigating and trying all of the claims in those cases, which would allow the litigation to mature through trials. If the MDL cases include class allegations, the bellwether trial approach resolves the claims as to the named parties, ends the tolling of the statute of limitations, and requires potential litigants to file lawsuits if they wish to pursue claims. Potential disadvantages of bellwether trials include the lack of any clear preclusive effect of a judgment for defendants, possible limits on the preclusive effects of judgments for the plaintiffs, and the possibility of creating chaos among lead counsel jockeying for position (and attorney fees).

For cases transferred by the Panel, the initial question is whether *Lexecon* concerns have been addressed so that the transferee court has authority to conduct trials of the cases at all. Depending on the number and representativeness of cases amenable to trial in the transferee court, the best course may be to remand all cases to their transferor courts for trial once all issues appropriate for pretrial consolidation or coordination have been resolved.

a. Selection of cases

First, with the attorneys' assistance, catalogue the cases in the MDL and divide them into categories based on easily identified, substantively important variables that provide clear lines of demarcation.[64] Plaintiff fact sheets are a useful way to obtain the necessary information. For example, in litigation involving allegedly harmful products or substances, the variables might be (1) the circumstances of exposure to the toxic product (e.g., the place, time span, and amount of exposure), (2) the types of diseases or injuries attributable to

64. Fallon, Grabill & Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2345 (2008).

the exposure (e.g., in the Diet Drug litigation, heart-valve disease and primary pulmonary hypertension), (3) relevant and distinguishing characteristics of multiple products, including manufacturing and distribution information (e.g., prescription from a doctor or over-the-counter distribution through specific retailers), and (4) the types of occupations or other roles of the plaintiffs (e.g., asbestos factory worker, installer, consumer, bystander, exposed spouse).

Second, select a manageable-sized pool of potential bellwether trial cases. The pool must reflect the various categories and contain cases that are both amenable to trial in the MDL and close to being trial-ready. In this context, trial-ready means that the attorneys have adequate proof of the important, basic information.[65] The best method of selection is to require the attorneys to agree on all cases.[66] Only if this method fails because the parties cannot agree should you consider using random selection to fill the pool. Allowing each side to choose half the cases risks giving you a pool full of extreme cases that are not representative. All the cases in the pool should be set on a fast track for case-specific discovery.[67]

Third, near the conclusion of the case-specific discovery, the transferee court and the attorneys should select a predetermined number of individual cases within the sample and set these cases for trial.[68] These test cases should produce a sufficient number of representative verdicts and settlements 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.

The more representative the bellwether cases, the more reliable the information about similar cases will be. If possible, require counsel to agree on all bellwether cases. If the attorneys fail to agree, you may permit the plaintiffs and defendants to each choose some of the cases to try. This could skew the information that is produced, but by permitting each side a certain number of

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65. *Id.* at 2343, 2352.

66. *Id.* at 2348–51.

67. *Id.* at 2360. For example, in MDL No. 1943, In re: Levaquin Prods. Liab. Litig., Judge John R. Tunheim selected, with the parties' agreement, fifteen cases for case-specific fact discovery, after which a subset of those cases would be designated for bellwether trials. *See* Pretrial Order #4 on Bellwether Trials and Discovery, D. Minn., No. 0:08md1943 (Feb. 20, 2009) (doc. no. 132).

68. 82 Tul. L. Rev. at 2360–61.

vetoes, you can minimize the chances of an unrepresentative case serving as a bellwether trial.[69]

Bellwether trials of mass torts can draw on many of the standard practices for managing complex trials.[70] Similarities among the cases tried and cases pending trial may allow use of a standard pretrial order and application of rulings on evidentiary and trial issues. Videotaped expert testimony and use of a standard set of exhibits can streamline presentation of evidence.[71]

b. Structure of trial

The structure of the bellwether trial should be addressed as early in the pretrial process as is feasible. Require the parties to submit detailed trial plans as soon as you settle on a plan to hold bellwether trials or consolidated trials. Plans can be modified as the case develops. Such plans assist the court and the parties in determining what issues, claims, and defenses may apply across groups and how to present the proof to a jury. If the MDL is to proceed by first adjudicating individual bellwether cases, identification of those plaintiffs and discovery into their exposure and injury should occur at the earliest opportunity. If the trial is to be of consolidated groups of claimants with comparable exposure or injuries, the composition of those groups should be defined during discovery and pretrial motions stages.

In pursuing traditional or bellwether trials, you may conduct a unitary trial, bifurcate liability and damages, or create other helpful trial structures. A joint trial of common issues may be feasible, followed by separate trials of remaining issues. In general, a consolidated or aggregated trial must take into account defenses and the measure of damages. To avoid inconsistent adjudications and duplicative presentation of evidence, punitive damage claims should ordinarily be tried to the same jury that determines liability and overall compensatory damages, although in most cases the issue of punitive damages is tried only if liability is established.

You must identify and minimize any risk of unfairness in requiring litigants to present claims or defenses in a piecemeal fashion. For example, the judge in the Bendectin litigation found the use of a trifurcated trial plan (causation, liability, damages) to be troubling yet concluded that, on balance, the

69. *Id.* at 2365.

70. *See* MCL 4th § 12.

71. *See* MCL 4th §§ 12.13, 23.345.

procedure served overriding purposes of efficiency and fairness.[72] In litigation concerning HIV contamination of the blood supply, one court held that a bifurcated trial plan calling for more than one jury interfered with the right of a defendant to present comparative negligence defenses against individual plaintiffs.[73] In general, the Seventh Amendment entitles parties to have facts decided by one jury and prohibits a second jury from reexamining those facts. The test is whether the issues can be presented separately to different juries without generating confusion and uncertainty. Courts have found some approaches inappropriate. For example, one court rejected nonconsensual sampling and extrapolation of causation and damages in personal injury cases because these procedures contravened litigants' right to a jury trial under the Seventh Amendment and violated due process.

Courts and litigants have experimented with various trial structures to achieve greater efficiency and expedition in resolving mass tort cases. The most common approaches are described below:

- A series of individual trials against one or more defendants on all issues. The verdicts in representative cases inform the parties as to a likely range of verdicts in other similar cases.
- A consolidated trial on common issues followed by a stipulated binding procedure (such as arbitration or mediation) agreed to by the parties to resolve individual issues. This type of approach to the individual issues encompasses possible test-case trials or special master adjudications. Such an approach is generally more feasible in a single incident mass tort than in a dispersed mass tort, however.
- A stipulated resolution of all elements of individual claims according to a formula or by a hearing before an arbitrator, special master, or magistrate judge. The court should ensure that the parties' waiver of the right to a jury trial is knowing and intelligent.

14. Interlocutory Appeals

Interlocutory appeals are disfavored and can interfere with efficient case management, but in rare cases you may wish to use the interlocutory appeal procedure afforded by 28 U.S.C. § 1292(b) to provide an opportunity for appellate review of critical rulings, while other aspects of the case move forward.

72. *See In re Bendectin Litig.*, 857 F.2d 290, 306–20 (6th Cir. 1988) (holding that transferee judge did not abuse his discretion in determining to try causation as a separate issue).

73. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302–03 (7th Cir. 1995).

Some circuits are more amenable to permitting such appeals than others. Whatever the case, the pendency of an interlocutory appeal should generally not be allowed to delay or halt other aspects of the MDL. Such delay is usually counterproductive.

Some legal issues may be susceptible to resolution and review on interlocutory appeal relatively early in the litigation. Examples include whether claims are cognizable under federal common law, barred by the statute of limitations, subject to issue or claim preclusion, or covered by insurance. Interlocutory certification of controlling but unresolved questions of state law to state courts may also be feasible. Because you may lose control of the pace of litigation, such certification should only be done if absolutely necessary.

15. Remand to Transferor Court

In a products liability MDL, considering when to suggest remand of one or more of the subject actions, if warranted, is vital to ensuring fairness to all the involved parties. Remember that in any products liability MDL, it is often the individual plaintiff who may be inconvenienced the most by the inclusion of his or her action in the centralized proceedings.

Remand is required when centralized proceedings have concluded, but one or more transferred cases remain unresolved. When discovery has been completed, pretrial motions have been ruled upon, and reasonable attempts to try or settle the actions have not borne fruit, your final responsibility is to recommend that the Panel remand those unresolved cases to their transferor districts. When coordinated or consolidated pretrial proceedings no longer serve a valid purpose, do not hesitate in making this recommendation.

You should consider when remand will best serve the expeditious disposition of the litigation. Remand is not appropriate if there is more to be done on the cases as a group. But remand may be appropriate if the remaining proceedings relate to individual cases and issues rather than to the entire docket or to groups of cases.

As a technical matter, the transferee judge issues a suggestion of remand to the Panel.[74] Upon receipt of that suggestion, the Panel issues a conditional order of remand but does not forward that order to the transferee court for seven days.[75] Usually, no party will object, the order becomes effective, and

74. *See* MCL 4th § 20.133.

75. Panel Rule 10.1(b)(i), 10.2.

the case or cases are remanded to the transferor court. Occasionally, where a party does object, the Panel schedules a briefing and then renders a decision. However, as a practical matter, the Panel gives great deference to the view of the transferee judge with respect to remand.

The Panel does not order any substantive relief as part of the remand order. The Panel has also ruled that remand is not affected by an automatic stay under the bankruptcy law, and has ordered remand despite the stay.

After remand, the transferor court has exclusive jurisdiction, and further proceedings in the transferee court with respect to a remanded case are not authorized absent a new transfer order by the Panel. The transferor court conducts further pretrial proceedings, as needed.

A final recommendation: When suggesting the Panel remand to the transferor court, you can greatly assist the transferor court by providing a summary of developments in the case since transfer. In your suggestion of remand, chronicle the proceedings, summarize the key evidentiary and legal rulings that will affect further proceedings, identify any remaining discovery or other pretrial issues, and estimate the time needed to resolve such issues and make the case ready for trial.[76] Transferee courts typically do not provide transferor courts with status reports during the pretrial proceedings, so this summary will provide invaluable assistance to the transferor courts in planning further proceedings and trial. Ensure that the MDL docket clerk sends the complete pretrial record to the transferor court upon remand of the case.

76. A particularly comprehensive order was prepared by Judge Conway in MDL No. 1769, In re: Seroquel Prods. Liab. Litig. *See* Final Pretrial Order and Suggestion of Remand, M.D. Fla., No. 6:06md1769 (May 13, 2010) (doc. no. 1640). Another recent example was issued in MDL No. 1507, In re: Prempro Prods. Liab. Litig.. *See* MDL Pretrial Order for Remanded Cases and Second Suggestion of Remand, E.D. Ark., No. 4:03cv1507 (Dec. 6, 2010) (doc. no. 2501).