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New Guidance for MDLs

The Judicial Panel on Multidistrict Litigation issued an order on Dec. 12, 2017, centralizing 46 pending actions alleging improper marketing of and inappropriate distribution of various prescription opiate medications into cities, states, and towns across the country in *Nat'l Prescription Opiate Litig.* (MDL No. 2804). As of May 1, 2018, the number of cases ballooned to 600. It will most assuredly rise in the future. Litigation of this type is increasingly commenced and can explode quickly, witness the 2,800 actions initially centralized in *Xarelto Prod. Liab. Litig.* (MDL No. 2592) in December 2015 rising to 21,709 individual actions in 2018. For comparison purposes, as late as 2004, the number of pending non-asbestos cases centralized in all MDLs hovered consistently at 10,000 actions.

In May, the Bolch Judicial Institute published for public comment proposed updates and revisions adding new sections to the *2014 Duke Law Standards and Best Practices for Large and Mass-Tort MDLs*. The original and revised documents, as well as information about the public comment period, are available on the Bolch Judicial Institute website (*see* <http://bit.ly/Bolch-MDLcomment>).

The proposals add: (1) new sections to Chapter 1 on the information individual plaintiffs should submit when filing a claim; (2) a new Chapter 3 on lead counsel duties, including guidance on the extent of fiduciary duties owed by the plaintiff steering committee and lead counsel to all plaintiffs; (3) a new Chapter 4 on the role of nonleadership counsel; and (4) a new Chapter 6 on settlement review and claims-processing administration.

Judges and practitioners are encouraged to review and submit comments, adverse or positive, on the proposals. Following is a streamlined version of the document, containing only the black-letter standards and best practices.

The 2018 revisions to the *2014 MDL Standards and Best Practices* were prepared by four teams consisting of 30 volunteer practitioners, equally balanced between plaintiff and defense lawyers, and seven judges. The proposals arise from a series of bench-bar MDL conferences held by the former Duke Law Judicial Studies Center (now Bolch Judicial Institute) in 2013, 2014, 2015, and 2016. The conferences documented the marked increase in the number of cases centralized in a few mass-tort MDLs. These mass-tort MDLs

present enormous challenges to transferee judges assigned to manage them. There is little official guidance, and no rules explicitly govern the management of mass-tort MDLs, often requiring the transferee judge to develop procedures out of whole cloth.

The revised document is available for public comment from May 14 to July 2, 2018. Then, the drafting teams will make appropriate revisions, incorporating additions and revisions into the *2014 Standards and Best Practices for Large and Mass-Tort MDLs*. A final, consolidated document will be posted on the Bolch Institute's website, made available to the bench and bar, and forwarded to every transferee judge of a large or mass-tort MDL.

The team leaders responsible for drafting the document were **James Bilsborrow** (Weitz & Luxenberg); **Mark Chalos** (Lieff Cabraser Heimann & Bernstein); **Brenda Fulmer** (Searcy Denney Scarola Barnhart & Shipley); **Michelle Mangrum** (Shook Hardy & Bacon); **Steven Marshall** (Venable); **Ellen Relkin** (Weitz & Luxenberg); **Kaspar Stoffelmayr** (Bartlitt Beck Herman Palenchar & Scott); and **Sean Wajert** (Shook Hardy & Bacon).

PROPOSED STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS

Bolch Judicial Institute – May 2018

(Updating and Revising
2014 MDL Standards and Best Practices)

CHAPTER 1: MANAGEMENT OF TRANSFERRED CASES

.... *{Material omitted from 2014 MDL Standards and Best Practices.}*

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

....*{Material omitted from 2014 MDL Standards and Best Practices.}*

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

....*{Material omitted from 2014 MDL Standards and Best Practices.}*

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

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

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

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

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

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

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

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

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

....{Material omitted from 2014 MDL Standards and Best Practices.}

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

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

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

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

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

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

....{Material omitted from 2014 MDL Standards and Best Practices.}

CHAPTER 3: LEAD COUNSEL DUTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 4: ROLE OF NON-LEADERSHIP COUNSEL

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

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

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

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

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

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

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

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

CHAPTER 5: ESTABLISHMENT AND USE OF COMMON FUNDS

....{Material omitted from 2014 MDL Standards and Best Practices.}

CHAPTER 6: SETTLEMENT REVIEW AND CLAIMS-PROCESSING ADMINISTRATION

MDL STANDARD 13: If the parties indicate a willingness to negotiate settlement, the MDL judge should facilitate negotiations, but judges should not impose settlement negotiations on unwilling parties.

Best Practice 13A: If the parties have indicated a willingness to begin settlement

negotiations, a settlement master can play a valuable role at the appropriate stage.

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

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

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

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

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

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

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

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

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

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

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

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

....{Material omitted from 2014 MDL Standards and Best Practices.}

CHAPTER 7: FEDERAL/STATE COORDINATION

....{Material omitted from 2014 MDL Standards and Best Practices.}

Download the revised
Standards and Best Practices at
 <http://bit.ly/Bolch-MDLcomment>

Download the original
Standards and Best Practices at
 <http://bit.ly/Bolch-MDL2014>