building a leadership team

Collected Wisdom on Selecting Leaders and Managing MDLs

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In 2020, *nearly one out of every two new suits* filed in federal civil court was part of a multidistrict litigation (MDL).[1] Initially designed to organize antitrust cases against electrical equipment manufacturers, MDL's adaptability and minimal requirements make it the preferred approach for coordinating pretrial process for all manner of cases, from securities, employment, intellectual property, and antitrust to sales practices, common disasters, and products liability. Yet, the simplicity of MDL's technical requirements — that cases are pending in different districts and share a common factual question — belies the complexity of the proceedings themselves.[2] Governed principally by insiders' unwritten but longstanding norms, both newly appointed MDL judges and lawyers with cases suddenly swept up in MDL may find themselves in unfamiliar waters.

For those both old and new to this burgeoning world, we have collected case-management wisdom from interviews with the federal judges who, as of Dec. 15, 2020, were handling the thorniest of MDLs: products-liability proceedings with over 500 cases.[3] Consider this article an insider's guide on how to navigate the critical first step — appointing lead attorneys. Based on our interviews, we also offer best-practice tips on permitting dissent and objections, heading off meritless cases, developing future stars, keeping lawyers fiscally responsible, progressing cases, maintaining transparency, and seeking help from magistrate judges versus special masters.

MDL LEADERSHIP

For newly appointed MDL judges, organizing the lawyers is the first and most pressing task. But outside of the class-action context, no rules exist to guide judges. To fill this gap, we offer some generalized advice while bearing in mind that key differences may necessitate alternative structures. Managing a catastrophic oil spill such as BP's Deepwater Horizon, which demanded hyper-technical maritime knowledge, will differ from MDLs involving common products-liability claims over tractor hydraulic fluid. But both proceedings will have attorneys vying for coveted leadership positions.

Although leadership structures vary and might include defense committees alongside plaintiffs' committees, every proceeding has some hierarchy. Those chosen for lead roles are the ones who fund discovery and tackle the pretrial tasks that individually retained lawyers would ordinarily perform, such as taking depositions, filing and responding to motions, and negotiating settlements. On the plaintiffs' side, attorneys compete to earn sizeable "common-benefit fees," fees deducted from each MDL plaintiffs' attorneys' fee for the work leaders perform on their behalf.

The universal goal in any MDL is to assemble the best team — not to handpick the best individual lawyers. Just think: Drafting the top baseball players would typically yield a hodgepodge of outfielders and shortstops and leave bases unmanned — hardly a recipe ▸

for a winning season. And no person working alone could have put Neil Armstrong on the moon. The more complicated and complex the problem is, the more it calls for divergent skills, tools, and knowledge.

Judges tend to like MDLs for their complexity, the challenges they present, and the talented lawyers they attract. But solving the many problems MDLs offer — from convoluted legal postures to knotty scientific questions — requires a cognitively diverse set of minds. Complex tasks demand contrasting talents, and picking the best leadership team requires judges to assess the particular needs of their MDL, including what expertise, information, and traits will be important for that proceeding.

SELECTION CONSIDERATIONS

Empirical studies suggest that well-functioning decision-making groups tend to have five or six members who think differently and are not afraid to challenge one another on substantive matters.[4] And while the judges we interviewed were quick to note that the "size of leadership depends on the case," some observed that leadership numbers can easily balloon. Oftentimes, the lawyers who land lead counsel roles have promised certain committee positions to others in return for their support during the nomination process. Discerning that some positions may have been doled out to placate attorneys in her MDL, Judge Freda Wolfson (District of New Jersey) was not convinced all the roles were necessary. She whittled the numbers down and made it clear at the outset that duplicative work would not be tolerated and attorneys wishing to share in the common-benefit fee must prove their added value.

Complex tasks demand contrasting talents, and picking the best leadership team requires judges to assess the particular needs of their MDL, including what expertise, information, and traits will be important for that proceeding.

Traditional Factors. *The Manual for Complex Litigation* recommends that judges choose leaders based on attorneys' qualifications, competence, financing abilities (including disclosure of agreements among counsel and third parties), and ability to "fairly represent the various interests in the litigation."[5] Some of our interviewees noted that, in addition to experience, they were looking for leadership qualities, great communication skills, and the ability to be diplomatic and cooperative. Several said that it is "important to have local counsel," and almost all thought that the selected leaders should be personally involved.

Above all, interviewees agreed that attorneys must be competent and able to handle the work. But judges didn't just take applicants at their word; "I read their résumés and did some research online," one judge said. Added another, "I called a couple of judges in other MDLs that had experience with some of these people to make sure that they'd done a good job and were reasonable people who actually showed up personally in the courtroom."

Adequate Representation and Conflicts of Interest. Because MDLs require only a common factual question — not that the common questions predominate as in Rule 23(b)(3) classes — plaintiffs' interests are likely to align on some issues and differ substantially on others. Balancing the competing interests that can arise presents a unique set of challenges. One judge said, "I think the judge has some responsibility to guide this and to make sure that the plaintiffs have some representation in the MDL."

Yet we heard little about how judges ensure that diverse plaintiffs are adequately represented when selecting leaders. As Judge Alvin Hellerstein (Southern District of New York) previously recognized in the mass-tort context, some lawyers represent huge inventories of clients who "may have differing interests and expectations" and, with large financial outlays that urge lawyers toward settlement, "representing a mass of litigants may interfere with a lawyer's ability to represent particular litigants."[6] He suggests that judges take a strong managerial approach "because the court is the only participant to the proceedings that is truly neutral, and only the court can ensure that conflicts arising in the representation do not unfairly harm plaintiffs."[7]

As Judge Hellerstein acknowledges, "[h]ow to ensure conflict-free representation, without intruding unduly on the lawyer-client relationship, is a difficult, but necessary, judicial task."[8] Still, helpful examples exist. The late Judge Jack Weinstein (Eastern District of New York) appointed a new plaintiffs' steering committee for non-settling plaintiffs in *Zyprexa* after the original committee negotiated a proposed deal with the defendant.[9] Similarly, Judge Eldon Fallon (Eastern District of Louisiana) appointed additional counsel to the plaintiffs' steering committee to represent ineligible or unenrolled claimants post-settlement in *Vioxx*.[10] Of course, conflicts can arise sooner and it is extraordinarily important to identify potential divisions early when choosing leaders to ensure that if structural conflicts of interest exist among plaintiffs, each subgroup has its own representative at the table.[11]

Repeat Players. Past judicial focus on experience, cooperation, and financing abilities has led to a relatively small group of insiders spearheading most MDLs. As one judge put it, "you were kind of stepping into a fraternity of players who already knew each other." Another saw this as a positive — knowing lawyers from previous proceedings means "there is some built-in trust." There are certainly benefits to having repeat players in leadership roles, such as capitalizing on economies of scale, leveraging experienced attorneys' familiarity with MDL norms, and signaling the proceeding's importance to others. Nevertheless, there are downsides, too.[12]

Judge Freda Wolfson cautioned that repeat players' comfort level with one another can translate into the lawyers thinking that they hold a certain sway with the court. But that presumptive boldness, whether intentional or not, does not sit well with judges. Moreover, when the same group of lawyers from the same group of law firms is tapped repeatedly — most of whom are still white and male[13] — there is not only decreased diversity, but also a cost to the legal profession as a whole: New lawyers cannot gain valuable experience in this increasingly important area of law.[14]

Third-Party Funding. Given the expense of litigating MDLs, financing concerns factored in heavily for judges. "It's a very expensive game to get into," one judge said. "You need a lot of money — a win is a long time out," which means that you're "going to get the big guys over and over because they have capital." As Judge Dan Polster (Northern District of Ohio) observed, "the biggest challenge with diversity in plaintiff leadership appointments is the financing issue." Without the ability to secure external financing, the inevitable cycle of repeat players continues. Large, up-front investments limit the number of firms that can commit capital and, consequently, the firms that do qualify are better positioned to secure future leadership positions because of the experience and resources gained from prior appointments.

Alternative litigation funding may provide a pathway to leadership for plaintiffs' attorneys without deep war chests. Although grave ethical concerns arise if a third party controls decision-making or settlement, third-party financing does not automatically cede that power to unauthorized entities. Judge Polster required any party using third-party financing to provide documents *in camera* and discuss the potential for the third party to influence settlement discussions, a practice that Judge Carl Barbier (Eastern District of Louisiana) plans to follow in the future.[15] Judicial *in camera* disclosure can help alleviate ethical concerns (some courts even require such disclosures routinely)[16] while keeping defendants from accessing the information, which judges largely agreed was not within defendants' rights to know. Judge David Campbell (District of Arizona) commented, "Defense counsel has strategic reasons for wanting to know about plaintiffs' financial capabilities, and there is no real reason why they should have a full-blown look into the source of funding."

When asking our interviewees about third-party funding, responses ranged from "the topic never came up" to "the first time I heard of it, I recoiled in horror." Those who did encounter it addressed it in various ways. For example, Judge Campbell meets with counsel, and if he is persuaded that they can finance the case, they need not prove the funding's source. And while Judge Richard Young (Southern District of Indiana) never broached the topic with counsel, it was well-known that the attorneys' immensely successful advertising campaign likely cost tens of millions of dollars, making him acutely aware that the money had to come from somewhere.

Although some judges expressed wariness of alternative financing in the legal profession generally, most did not think it was an issue in their MDLs. Moreover, they seemed to agree it would be difficult to craft an all-encompassing rule that would adequately cover the unique needs of individual proceedings. Plus, as Judge Campbell acknowledged, external financing is not limited to plaintiff firms; some defense firms have embraced it as well.

Cultivating Diversity. Judge Robert Kugler (District of New Jersey) noted that MDL leadership has typically been composed of white men — but to the bar's credit, this is changing, and ▸

counsel now understand that leadership should be diverse. Importantly, his message was *not* that white males are bad lawyers, but that they aren't the *only* lawyers qualified to run complex MDLs. Still, white men generally make up the overwhelming majority of leadership appointments. As awareness of the repeat-player issue grows and society recognizes the moral, business, and democratic arguments favoring diversity, many judges are attempting to diversify lead counsel. Some focus on traditional identity diversity, aiming to include more women and minorities in leadership positions, while others consider cognitive diversity and seek out lawyers with varied life experiences, geographic placements, skills and abilities, and, antithetically, those who have not served as lead counsel before.

These efforts have not been without opposition. In *Martin v. Blessing*, a class member objected to Judge Harold Baer's (Southern District of New York) requirement that "class counsel ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics."[17] Weighing in on the Supreme Court's denial of certiorari, Justice Samuel A. Alito commented that he was "hard-pressed to see any ground on which Judge Baer's practice can be defended" and "doubtful that the practice in question could survive a constitutional challenge."[18]

Setting aside quotas and metrics, MDL judges have nevertheless found practical, creative ways to increase both identity and cognitive diversity — and with good reason. Research has shown that identity diversity (visible differences such as race, ethnicity, age, gender, physical limitations, and demographic dissimilarities) can be critically important where a particular demographic trait is at issue.[19] For example, in MDLs involving birth control like Yaz and NuvaRing, in which gender itself is at the crux of the proceeding, normative claims about representation, fairness, and social legitimacy should dictate a leadership roster broadly inclusive of women. In proceedings like these, one of our interviewees saw "many women attorneys because claimants felt they were better represented by woman lawyers." But studies are mixed when it comes to the business case for identity diversity outside these instances, with some suggesting that when team members perceive themselves as belonging to different groups, they may tune each other out and be less open to sharing privately held information for fear of being ridiculed or ostracized.[20]

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The arguments and evidence are far more straightforward when it comes to cognitive diversity — meaning diverse knowledge and expertise stemming from training, experiences, and, yes, identity.[21] Cognitively diverse teams consistently see "bonuses" when members perform disjunctive, nonroutine, thought-provoking tasks like brainstorming legal strategies or identifying which issues to appeal.[22] By employing different tricks, reframing the problem in a new way, or offering varied perspectives, cognitively diverse teams can avoid getting stuck on thorny problems.[23]

Judges, too, are seeking cognitively diverse leaders. For instance, Judge William Orrick (Northern District of California) tells counsel up front that he is looking for diversity in *all* of its forms, not just gender and race, but in varied backgrounds and experiences. Another judge considers geography and law firm size, aiming for a mix of "big firms plus a single shingle." In her order seeking leadership applicants, Judge Robin Rosenberg (Southern District of Florida) said she wanted a plaintiff steering committee (PSC) that is "diverse and experienced, but also has a diversity of experiences — the leadership team should represent different skill sets, expertise, life experiences, and prior MDLs, so that together they can bring together a multiplicity of approaches to select the best ideas."[24] Interviewing applicants also gave Judge Rosenberg an opportunity to learn about those life experiences and question candidates about how they planned to foster diversity and mentorship within the team, if appointed.

Searching for relevant expertise can likewise lead to cognitive diversity. In presiding over the NCAA Concussion MDL, Judge John Lee (Northern District of Illinois) sought up-and-coming

leaders who shared experiences with the putative class members, not simply those who had prior MDL or trial expertise. Including attorneys who had played intercollegiate sports at NCAA-affiliated schools, he said, would "provide a unique insight on what putative class members might want."

Some judges likewise raised the need for identity diversity, at times implicitly linking it with the cognitive diversity that different demographics can produce. In his case management order, Judge Brian Martinotti (District of New Jersey) wrote, "Leadership and the committees are expected to be diverse in gender, ethnicity, geography, and experience."[25] He explained that the overall litigation benefits when different lawyers with varying backgrounds, experiences, and skillsets perform the required tasks. Furthermore, he has seen positive results after "opening the door that has been closed to young lawyers for so many years." He described these less experienced lawyers as "new blood," providing a fresh perspective that strengthens the legal profession.

Newcomers with relevant expertise "may be a rich source of ideas for improving group performance," explain psychologists, because they "lack strong personal ties to other members that inhibit their willingness to challenge group orthodoxy," are not already "committed to the group's task strategy," and "bring fresh perspectives gained in other groups."[26] Judge Freda Wolfson echoed psychologists, sharing that "the benefit of newcomers is that they bring new ideas. Additionally, it is important to this profession that new lawyers don't think all of the big cases are tied up by a small group of repeat players." Without intentionally allowing new players to develop in this technical area, she worried that those attorneys may remove themselves from consideration, a disservice to complex litigation in the long term.

Lawyers seem to be getting the message. "Plaintiffs' counsel was well aware that to make themselves look presentable they needed to give me a diverse group in terms of age and experience in the MDLs, certainly in terms of gender, to some degree ethnicity and race," one judge said. But as the larger MDLs still tend to be run by lawyers who are "mostly 55 and older" and who "tend to be white males," judicial nudges remain important. "Everyone can't keep looking like us; it's pretty darn white," one judge quipped. "It's our responsibility — we've benefited from the privilege."

Developing Future Stars. While thinking about diversity, Judge Richard Gergel (District of South Carolina) reflected: "I have noticed that many of the members of the leadership bring younger partners along, many of them women, who seemed to be doing much of the work. I have tried to push this younger generation of lawyers into leadership positions." Other judges are doing the same. Judges Robin Rosenberg and John Lee each created internal programs and mentorship opportunities to foster less experienced attorneys' professional growth. Creating a leadership development committee allowed Judge Rosenberg "to get less experienced and diverse attorneys included in leadership" without sacrificing experience. She makes it clear to the leaders that the less experienced lawyers must be given real substantive work and constructive supervision; she also requires that one of these developing leaders speak or present at each monthly status meeting. Judge Lee requests "résumés from the future stars" of the law firms participating in leadership — a group that tends to be more diverse. Keen to incorporate more junior attorneys, he anticipates that these up-and-coming lawyers will be given substantive assignments and argue motions.

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Both judges reported successful results: Up-and-comers brought novel ideas to the table which, when combined with experienced counsels' wealth of knowledge, added value to the proceedings. And the programs provided a structured avenue for less experienced but more diverse attorneys to break into a club historically reserved for a much smaller, tight-knit demographic.

METHODOLOGY: CONSENSUS VS. APPLICATIONS

Given the many selection considerations already discussed, it is not surprising that judges vary in their methodology. Roughly two-thirds of our interviewees deferred to plaintiffs' ▸

attorneys' "consensus" slates, where lawyers work out the organizational structure themselves and present the judge with an agreed-upon roster. One-third opted for an open application process, which allows judges to formally select leaders. Keeping in mind that one size does not fit all, we provide their perspectives and offer some advice.

Consensus Method. While undoubtedly more efficient — many plaintiffs' lawyers develop these cases before the Judicial Panel on Multidistrict Litigation centralizes them and already know which peers would make great leaders — the consensus method also tends to reinforce the repeat-player problem.[27] Judges who accepted proposed slates provided various rationales. One said, "Basically a handful of plaintiffs' firms figured out a way to make everyone happy." Another lamented, "I took the lazy man's way out and accepted the proposed slate. Next time, I would work harder to promote diversity."

Judge Brian Martinotti explained that as soon as an MDL judge is assigned, lawyers are already jockeying for a lead counsel position. Rather than take over *their* case, he viewed his role as shepherding counsel through the process, but not intervening where unnecessary. Plaintiffs' counsel know each other well, he observed, and, ultimately, as the people working closely with one another for the next few years, they are sufficiently incentivized to pick qualified leaders who will promote harmony and fairly distribute assignments.

One judge was prepared to consider applicants but, without instruction, plaintiffs' counsel had already organized themselves and suggested a diverse and geographically balanced leadership team. The judge explained, "It would take a lot for me to turn down what looked like a reasonable proposal that everyone agreed to." Finally, although attorneys presented Judge Richard Story (Northern District of Georgia) with a slate, he permitted additional applications "to assure no one was excluded from the process."

In one of his orders, Judge Eldon Fallon remarked that allowing attorneys to select one another "would involve intrigue and side agreements which would make Macbeth appear to be a juvenile manipulator." Another judge told us simply, "I wasn't going to use the slate provided."

Application Method. Other judges advocate for open applications. In one of his orders, for example, Judge Eldon Fallon remarked that allowing attorneys to select one another "would involve intrigue and side agreements which would make Macbeth appear to be a juvenile manipulator."[28] Another judge told us simply, "I wasn't going to use the slate provided." Judge Casey Rodgers (Northern District of Florida) likewise declined parties' suggestions. She observed that accepting a proposed slate, usually composed of MDL veterans, risked reducing newcomers' energy and innovative ideas. Judge Dan Polster agreed: "Without proactive lawyers and judges constantly trying to change the status quo, diversity will remain on autopilot and nothing will change." In his opinion, although a judge cannot manufacture lawyers and is, for all practical purposes, stuck with the pool of applicants who are interested in MDL positions, judges retain wide discretion and can set a positive, inclusive tone moving forward.

Judge Rodgers' approach pushes lawyers further: First, she made the process as transparent as possible by creating a panel that included herself, the magistrate judge, and a special master. Second, the panel then sorted through 190 applications. Third, from those, the panel selected 65 attorneys to present orally. Once selected, she prohibited leaders from changing the subcommittee structure. This allowed lead counsel to focus on running important day-to-day operations rather than spin their wheels managing lawyers who might maneuver for committee seats. Accordingly, leaders had to propose leadership changes directly to her.

Judge Robin Rosenberg required candidates to submit a three-page application that included relevant experience as well as an appendix with a list of all the lawyer's participating MDL cases, a list of other lawyers the applicant would recommend, a disclosure about use of third-party

funding, and an *ex parte* affidavit concerning conflicts of interest. She used those applications and the candidate's requested position to schedule 15- to 20-minute interviews with all 66 applicants, a process that took two days to complete.

In Judge William Orrick's MDL, although the lawyers proposed a slate, he required anyone interested in a position to apply, and then conducted interviews, explaining that everyone should get an opportunity to present their oral pitch. Finally, Judge Vince Chhabria (Northern District of California) has experimented with multiple methods; in the *Roundup* MDL, attorneys presented him with a slate, but in his *Facebook* MDL, he created an application process, identified a diverse group of ten finalists to present, then ultimately selected leaders based on the finalists' credentials. Short interviews, even just a few minutes in length, gave him a sense of who he was dealing with.

Not all judges held in-person hearings. Judge Carl Barbier, for instance, relied entirely on attorneys' paper submissions and was wary of applicants using podium time to simply regurgitate their own qualifications or disparage others. Realizing that the lawyers were privy to certain information regarding their peers, however, he allowed applicants to object to specific appointments in writing.

Balancing the Pros and Cons. Applications give judges more control over who serves in key positions, but at the cost of time-intensive interviewing and vetting. For those interested in this method, one of us has created sample forms and an application scoring sheet to simplify matters.[29] On the other hand, permitting counsel to propose a slate practically ensures that leadership will cooperate — after all, they handpicked each other — but this process tends to concentrate experience and power in the hands of a few repeat players and firms.

Such cooperation can thus come at a cost: Repeat players may be getting along just to ensure they are on the slate of the next big MDL, which means the best person for the task may not necessarily be getting the job. Some judges have found demanding up front that cognitive, geographic, and experiential diversity be included in any proposed slate has been relatively successful in producing a diverse and capable leadership team. Yet getting one's name on the roster could mean the lawyer already has a seat at the table.

INTERIM, ANNUAL, OR PERMANENT APPOINTMENTS

Our interviewees differed on whether to appoint interim lead counsel before selecting permanent positions as well as whether to reappoint them annually. From a conflict-of-interest and diversity perspective, selecting interim counsel and giving the litigation a few months to develop before choosing more permanent leaders may give judges a better idea as to the potential fault lines among plaintiffs. Waiting can also expand the pool of available leaders beyond the usual suspects. Empirical data from the Federal Judicial Center demonstrates that repeat players appear much earlier in MDLs than do other attorneys.[30] Interim appointments can likewise give judges a sense as to whether the pick will be a good fit long-term; as one of our judges shared, "[Interim counsel] turned out to be a total buffoon, and I was in a little bit of a pickle because this guy can't be lead counsel." Another observed, "Lawyers who had been instrumental as interim counsel felt entitled to more permanent roles once they became available, but I wanted to move in another direction." A third added, "I never should have appointed these [interim] folks. I dumped them."

Judges who appoint permanent counsel largely agreed that unless there was an issue with leadership, no reason existed for interruptions and turnover. For example, Judge Catherine Blake (District of Maryland) believes "if a judge gets the right people in charge initially, this additional reappointment work is unnecessary." Similarly, Judge Freda Wolfson observed that not only does lead counsel expect and prefer permanency, but that the purpose of the initial time-consuming selection process is to find qualified people who are willing to work hard for the MDL's duration.

Finally, some praised annual reappointments. They found that renewals set the tone that the position must be continuously earned and forced judges to have contact with lower-level committee members. During these check-ins, judges were able to determine which lawyers were contributing meaningfully and which, if any, were not pulling their weight. According to Judge Richard Gergel, "MDLs pose significant management challenges, and it is important that the judge have the tools to maintain control and to keep the litigation progressing forward. The ability to appoint and remove leadership in the MDL is simply one of those tools." While revisiting leadership annually does incentivize lead lawyers to continue working hard, it has the danger of making them principally beholden to the judge when judicial preferences might drive a wedge between lawyers and zealous client advocacy. ▸

The better alternative might be to allow lead and nonlead attorneys to request leadership substitutions or additions if a chosen attorney neglects cases or if new information on conflicts comes to light. Even without making appointments annually, judges felt free to make changes if issues arose. Judge Brian Martinotti remarked, "Counsel knows it's within my discretion to change the leads at any time."

PERMITTING DISSENT AND OBJECTIONS

Selecting leadership isn't an exact science. And even when judges aim to reap the benefits of a cognitively diverse team, when group members work together for years they may start to think alike and lose their edge. Like newcomers, outsiders — nonlead lawyers — can be a powerful source of fresh thinking and new information. Providing them with mechanisms to object to leaders' decisions when necessary doesn't just ensure due process, it can unravel the power of majority conformity, subject leaders' decisions to scrutiny, kindle divergent thinking (even when they are wrong!), and reveal new information.[31]

Whether the rationale is protecting due process or preventing a rush to judgment, judges would do well to pave a path for objections. Chief Judge Landya McCafferty (District of New Hampshire), for instance, allows any attorney to object, "provided that in doing so they do not repeat arguments, questions, or actions of lead counsel."[32] And although Judge Casey Rodgers does not have a formal structure for objections, she does have an open-door policy and a hands-on management style that allows her to talk with leaders and subcommittee members regularly. Yet, she, along with many others with whom we spoke, expects dissenters to attempt to resolve any issues with leaders before approaching her.

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CASE MANAGEMENT PEARLS OF WISDOM

Magistrate Judges vs. Special Masters. To help manage high-volume MDLs, some judges rely on special masters, and others depend on magistrate judges. While both can ease the burden, empirical studies suggest that judges would do well to prioritize public resources by using magistrate judges, and that magistrate judges want MDL work.[33] Even controlling for factors like the number of cases, MDLs with special masters lasted 66 percent longer than those without.[34] Plus, MDL attorneys have raised concerns about special masters that range from sky-high costs, self-dealing, and bias to capture and cronyism between repeat players and repeat special masters.[35]

Progressing Cases and Maintaining Transparency. "The defendant wanted to try two cases a year — they'd be trying cases until 3200 at that rate!" lamented one judge. Most judges agreed that trial dates and status conferences keep cases progressing, and Judge Richard Young added that monthly conferences kept both him and the parties focused on key issues.

To combat contentiousness and promote collegiality pre-pandemic, Judge Richard Gergel suggested cocktail parties the evening before each monthly status conference, with firms alternating sponsorship and the court promising to attend so long as no one discussed the case. This led to the lawyers developing personal relationships that made disputes easier to resolve and gave Judge Gergel an opportunity to get to know the out-of-town attorneys.

One of our other interviewees has been meeting monthly with attorneys via Zoom during the pandemic, issu-

ing orders orally from the bench, and posting transcripts on the court's dedicated MDL website "so members of the MDL have the benefit of knowing why I ruled the way I did." This approach "keeps the case moving, and the litigants don't have to wait for 20 written orders." Others also mentioned the benefit of posting court documents on websites: "It's good for transparency," said one. Another related, "When I have periodic conference calls or have people in court, other lawyers are welcome to listen in, and I try to send out the case management orders broadly so others know what's happening in the litigation."

Continuing to hold virtual MDL status conferences with geographically dispersed attorneys post-pandemic can save costs, enable nonlead attorneys and litigants to listen in, and promote transparency for the lawyers — and even the plaintiffs themselves. Conversely, because many MDL lawyers travel from out of state, counsel needs to know up front if the court expects in-person attendance.

"Meritless" Claims. Complaints about "meritless" claims and the so-called "Field-of-Dreams" problem in MDLs abound, but there is little data on the issue or its extent. *Vioxx* is often cited as an illustrative example. In 2010, Judge Eldon Fallon reported that only two out of 50,000 claims were fraudulent[36]; in 2015, the claims administrator asked for additional information on 256 allegedly fraudulent claims and did not receive a response on 194.[37] Of the 62 who responded, 39 (or 46 percent) overcame the initial suspicion.

"Meritless" is not synonymous with "fraudulent." Non-colorable claims could fall under that umbrella for different reasons — some plaintiffs may have received a misdiagnosis from their doctors, while others may not be able to link their injuries to the defendant's drug or product. Some may receive little communication from their attorneys (and vice versa), and still others may simply fall outside of the scope of the claims that the plaintiffs' steering committee decides to develop.

Nevertheless, a preemptive warning to counsel at the outset can be helpful. In larger MDLs, the cases can grow exponentially through TV and internet advertising. Judge Richard Young found that he was spending a lot of time reviewing and then dismissing cases that were clearly outside the statute of limitations or statute of repose and that "lawyers really don't talk to their clients." When he asked counsel about including cases that were clearly unfit for trial, the response was less than adequate — usually a quick excuse by the attorney that "my legal assistant did the intake and must have missed that." Similarly, Judge Clay Land (Middle District of Georgia), who was not in our study, dealt with frivolous claims by putting plaintiffs' lawyers on notice that if their cases lacked a good-faith basis for continuing through summary judgment, he would require them to show cause as to why he should not impose sanctions.[38]

Monthly Billable Hour Reports. Judge Freda Wolfson warned that at the end of the proceeding, "too many people can come in and try to share the attorneys' fee," but "the [common-benefit fee] is for the people really doing the work." To head this off, several judges required all plaintiffs' attorneys to prepare and submit monthly time records so they could monitor who is working and who is not. Some, like Judge Stephen Bough (Western District of Missouri and an author of this article), further break down these reports by gender. And others, like Judge Carl Barbier, not only require monthly time reports, but also use a CPA to review them, monitor expenses, and point out anomalies. Hypothetically, if a lawyer claimed to read MDL emails for more than 24 hours in a single day, the issue could be promptly addressed.

Knowing that both the court and appointed leadership are monitoring their work promotes good participation and contributions by all. It also has the benefit of ensuring that another lawyer does not come in at the last moment and seek fees for unauthorized work.

CONCLUSION

One judge said it all for us: "I love MDLs. I wish I had done more of them; they allow judges to be creative with lawyers." Although each MDL comes with its own set of challenges and some require unique solutions, we hope the bits of advice shared here will demystify MDLs for lawyers and judges alike. There is no one "right" way to run complex litigation, but learning from those who have traveled the path before can make the way easier. ▸

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1 *U.S. District Courts — Judicial Business 2020*, U.S. Cts., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020 (last visited Mar. 20, 2021) (listing 470,581 total filed cases in 2020); *Judicial Panel on Multidistrict Litigation — Judicial Business 2020*, U.S. Cts., https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2020 (last visited Mar. 20, 2021) (listing 4,210 cases transferred and 227,285 initiated in the transferee districts for 231,495 cases filed in 2020). Most cases are from *In re 3M Combat Arms Earplug Products Liability Litigation*.

2 28 U.S.C. § 1407.

3 We selected proceedings with 500 or more cases pending on the MDL docket as of Dec. 15, 2020, and reached out to each MDL judge. Using a semi-structured interview process, we asked each the following five questions: (1) How do you approach the process of selecting lawyers to lead a proceeding; (2) Do you make interim or permanent leadership appointments? When in the proceeding do those selections occur; (3) How do you go about choosing leaders (e.g., consensus among lawyers, an open process, or have you developed a hybrid approach); (4) What criteria do you consider in making those appointments (e.g., experience, financing including third-party litigation financing, cooperation, diversity, etc.); and (5) Are nonsteering committee lawyers able to object to decisions made by steering committees during the MDL? We spoke by phone with 17 and by email with one, for a total of 18 MDL judges, some of whom requested anonymity. We likewise examined their case-management orders.

4 While financing the suit may require leaders and steering committees to get buy-in from additional attorneys, empirical research suggests that "[g]roups containing 3 to 8 members [are] significantly more productive and more developmentally advanced than groups with 9 members or more," and productivity further increases in groups with 5 to 6 members. Susan A. Wheelan, *Group Size, Group Development, and Group Productivity*, 40 Small Grp. Rsch. 247, 247, 257–58 (2009).

5 Fed. Jud. Ctr., Manual for Complex Litigation (Fourth) § 10.221 (2004).

6 Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding Over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 Colum. J.L. & Soc. Probs. 473, 474 (2012).

7 *Id.* at 477.

8 *Id.* at 475, 478.

9 *E.g.*, *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 261–62 (E.D.N.Y. 2006).

10 *In re Vioxx Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Jan. 8, 2010) (Pretrial Order No. 45A).

11 Structural conflicts arise when there is a danger that counsel "might skew [the litigation] systematically" to favor some plaintiffs over others "on grounds aside from reasoned evaluation of their respective claims or . . . disfavor claimants generally vis-à-vis the lawyers themselves." A.L.I., Principles of the Law of Aggregate Litigation § 2.07(a)(1)(B); *see also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 627 (1997).

12 Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell L. Rev. 1445, 1467–68 (2017).

13 Amanda Bronstad, *There Are New Faces Leading MDLs. And They Aren't All Men*, Law.com (July 6, 2020, 10:53 PM), https://www.law.com/2020/07/06/there-are-new-faces-leading-mdls-and-they-arent-all-men/.

14 *See* Stanwood R. Duval Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. 391, 392–93 (2014) ("My colleagues and I often see the same attorneys appointed to all such committees. This repetition is not necessarily a good thing.").

15 *See In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio May 7, 2018) (ECF No. 383).

16 *E.g.*, N.D. Cal. Civ. R. 3-15, https://www.cand.uscourts.gov/filelibrary/3/Local_Rules-Civil-eff-5-1-2018.pdf; N.D. Cal. Standing Order for All Judges, ¶ 19, https://cand.uscourts.gov/wp-content/uploads/judges/Standing_Order_All_Judges_11.1.2018.pdf.

17 571 U.S. 1040, 1041 (2013).

18 *Id.* at 1042.

19 *See* Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am. J. Pol. Sci. 389, 390 (2010).

20 Marie-Élène Roberge & Rolf van Dick, *Recognizing the Benefits of Diversity: When and How Does Diversity Increase Group Performance?*, 20 Hum. Res. Mgmt. Rev. 295, 297 (2010) (citing studies).

21 Scott E. Page, the Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies 7–8, 302–12, 324–27 (paperback ed., 2007); Eden B. King et al., *Conflict and Cooperation in Diverse Workgroups*, 65 J. Soc. Issues 261, 267–68 (2009); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 Psychol. Sci. Pub. Int. 31, 41–42 (2005); Abby L. Mello & Lisa A. Delise, *Cognitive Diversity to Team Outcomes: The Roles of Cohesion and Conflict Management*, 46 Small Grp. Rsch. 204, 205–07 (2015).

22 *See* Page, *supra* note 21, at xiv–xv, 325–27.

23 Scott E. Page, Diversity and Complexity 157 (2011).

24 Pretrial Order 1, at 11–12, *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 20-md-2924 (S.D. Fla. Feb. 14, 2020) (ECF No. 13).

25 Case Management Order 1, *In re* Elmiron (Pentosan Polysulfate Sodium) Prods. Liab. Litig., No 20-md-2973 (D. N.J. Dec. 18, 2020) (ECF No. 2), https://static.reuters.com/resources/media/editorial/20210125/elmiron--pretrialorder1.pdf.

26 John M. Levine & Hoon-Seok Choi, *Minority Influence in Interacting Groups: The Impact of Newcomers*, *in* Rebels in Groups 73, 78 (Jolanda Jetten & Matthew J. Hornsey eds., 2011).

27 *See* Michael Baylson & Cecily Harris, *Equal Opportunity? Increasing Diversity in Complex Litigation Leadership*, 101 Judicature 65 (2017) (suggesting that applications and interviews that place more power in the judge's hands can lessen "the power of the 'old boys' club'").

28 *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 643 n.4 (E.D. La. 2010).

29 Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 162–65 (2017).

30 Elite insiders appear an average of 73 days after transfer. Repeat players with fewer appearances arrive after 333 days, and others appear 419 days post-transfer. Margaret S. Williams, Emery G. Lee, III & Catherine R. Borden, *Repeat Players in Multidistrict Litigation*, 5 J. Tort L. 141, 166 (2014).

31 *See* Charlan J. Nemeth & Jack A. Goncalo, *Rogues and Heroes: Finding Value in Dissent*, *in* Rebels in Groups: Dissent, Deviance, Difference, and Defiance 17, 22 (Jolanda Jetten & Matthew J. Hornsey eds., 2011); Stefan Schulz-Hardt et al., *Dissent as a Facilitator: Individual- and Group-Level Effects on Creativity and Performance*, *in* The Psychology of Conflict Management in Organizations 149, 150–54, 162–63 (Carsten K.W. De Dreu & Michele J. Gelfand eds., 2008).

32 Case Management Order 3A, *In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig.*, No. 16-md-2753 (D.N.H. Mar. 13, 2017) (ECF. No. 40).

33 Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129 (2020); Judge George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 Fed. Cts. L. Rev. 35, 37 (2015).

34 Burch & Williams, *supra* note 33, at 2182–85, 2205–14.

35 *Id.*

36 Status Conference at 59, *In re Vioxx*, No. 05-md-1657 (E.D. La. Sept. 3, 2010) (ECF No. 50843).

37 Report by the Claims Administrator on Potentially Fraudulent Claims Filed in the Nationwide Vioxx Consumer Settlement Program, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-01657 (E.D. La. Feb. 25, 2015) (ECF No. 65169).

38 Order, *In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, MDL No. 08-md-2004 (M.D. Ga. Sept. 7, 2016) (ECF No. 1039).