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A PROPOSAL TO END PAY-TO-PLAY FOR VENDORS IN CLASS ACTION AND MASS TORT LITIGATION

Vendors offer attorneys luxurious perks and are awarded high-dollar litigation contracts, sometimes through a no-bid process. A plaintiff's attorney recommends a new disclosure process.

By Jason S. Rathod

Much has been written about the newly minted Rule 16.1 of the Federal Rules of Civil Procedure, which sets forth guidance to transferee courts in multidistrict litigation (MDL) for the selection of leadership counsel. This rule entrusts transferee judges to "ensure that the lawyers appointed to leadership positions are able to do the work and will responsibly and fairly discharge their leadership obligations."[1] But little has been said about one crucial aspect of this charge to the MDL judges: how to identify and mitigate potential conflicts of interest among the leaders they choose.

Consider, for example, the selection of vendors that assist in the administration of the litigation — electronic data

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storage, deposition transcription, and settlement communications and distributions to class members. At first blush, vendor selection can seem like a pedestrian concern, but vendors play increasingly critical roles and receive vast sums that are often ultimately paid for by the plaintiffs. This is true in all major litigation, but the price tag grows dramatically in MDLs and class actions. These actions combine plaintiffs' claims, and bundle related vendor services, into a single high-dollar enterprise. Too often, vendors are selected on a no-bid basis. And perhaps more troubling, vendors cultivate favor with lead lawyers and their firms through lavish gifts like paid trips to exotic locales and tickets to prized sporting events.[2] Just one sponsored trip for a small group of class action lawyers likely costs settlement administrator vendors tens of thousands of dollars,[3] an eye-opening spend, but one that they earn back, and then some, from the rich administration contracts that follow. These patterns echo the pre-Sunshine Act[4] era of doctors and pharmaceutical representatives: cozy, opaque, and corrosive to public trust — not to mention potentially detrimental to the litigation itself, to the extent that vendors are selected for non-merit-based reasons.

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U.S. Supreme Court Justice Louis Brandeis's observation that "sunlight is . . . the best of disinfectants"[5] can be leveraged to fix these practices. This article proposes adopting a disclosure form to accompany leadership applications in MDLs and similar consolidated proceedings. The form would require disclosure of, among other things, gifts of $100 or more received by the lawyer, the lawyer's firm, or the firm's equity partners from vendors during any of the past five years. The disclosure form will alert the court early to potential conflicts of interest, enabling appropriate prophylactic measures and ensuring legitimacy and public trust in the leadership of the litigation and in the vendors that support it. Moving forward, it will also prompt counsel to think twice before accepting such gifts, which will likely end the present race to the bottom of expensive gift-giving. The resulting incentive structure will encourage the selection of vendors based on merit.

This article first provides a brief overview of the obligations of MDL lead counsel and class counsel with an eye toward loyalty to the plaintiffs and class. Although loyalty to the client is of utmost importance with lead counsel, conflicts of interest are presently rarely screened in the lead counsel selection process.[6] The article then describes the increasing importance of vendors in the litigation process and their salience with the public, noting the rise of vendor work alongside a rise in vendor lobbying of plaintiffs' counsel with exorbitant gifts.[7] From there, it offers research from other industries on the influence of gift-giving on decision-making and the reforms used there before suggesting a reform in the MDL space: adoption by courts of a conflict-of-interest disclosure form in the lead counsel selection process to address potential conflicts at the start of litigation, improve vendor selection, and discourage pay-to-play practices moving forward.

LEAD AND CLASS COUNSEL ARE BOUND BY A DUTY OF LOYALTY

Federal Rule of Civil Procedure 16.1, which took effect December 1, 2025, strongly encourages MDL transferee courts to establish an "initial plan for orderly pretrial activity in the MDL proceedings."[8] The rule and its committee note state that a just, orderly, and efficient MDL can be facilitated by selecting lead counsel[9] and by early identification of factual and legal issues likely to be presented in the case.[10] Regarding lead counsel, the committee note provides that transferee judges "ensure that the lawyers appointed to leadership positions are able to do the work and will responsibly and fairly discharge their leadership obligations."[11]

Similarly, in class actions, Rule 23 states that putative class counsel must "fairly and adequately protect the interests of the class."[12] When overlapping class actions are filed by different counsel, courts may appoint "interim class counsel" before class certification, and often at the start of litigation, to "clarify responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement."[13]

Rule 23 and the committee note to Rule 16.1 identify qualities that courts should look to in evaluating lead counsel and class counsel applicants. These include "benefits of geographical distribution as well as differing experiences, skills, knowledge, and backgrounds."[14] There is no doubt that these enumerated areas provide fertile ground for comparing and

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selecting lead counsel from competing applicants. However, a more fundamental, and easily overlooked, criterion is loyalty to plaintiffs and class members in the form of the absence of conflicts of interest. This should be a gating consideration for evaluating whether counsel "will responsibly and fairly discharge their leadership obligations" and, in class actions, evaluating "counsel's ability to fairly and adequately represent the interests of the class."

The duty of loyalty demands an attorney's fidelity to client interests and the absence of conflicts that could materially limit dedication to those interests.[15] This duty is found in every U.S. jurisdiction's Rules of Professional Conduct. It has a long lineage in U.S. law, drawing on principles from the law of agency.[16] Important public policy concerns undergird the duty of loyalty. "Attorneys . . . have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process."[17] The functioning of the attorney-client relationship in society hinges on clients trusting that attorneys will zealously advocate for them with undivided allegiance.[18]

MDL lead counsel and class counsel occupy a distinctive position in that they do not have an exclusive bilateral relationship with an individual client. Rather, they are called on to represent a group or groups of plaintiffs on terms set forth by the court's appointment order. For MDL lead counsel, the groups of plaintiffs may even have some divergent interests.[19] Nevertheless, MDL counsel are still bound by a duty of loyalty to maximally serve the interests on their side of the "v" under the authority and direction of the court.[20] Lead counsel has "a duty to perform functions affecting all plaintiffs in an MDL in a fair, honest, competent, reasonable, and responsible way."[21]

For class counsel, the duty of loyalty is heightened compared to lawyers in a traditional client setting "[p]recisely because of the responsibility to absent class members"[22] — a reality reflected in their status as fiduciaries who "owe[] the class an uncompromising duty of the finest loyalty." The phrase "the *finest loyalty*"[23] is an allusion to then-New York Court of Appeals Chief Judge Benjamin Cardozo's well-known articulation of fiduciary duty that holds the trustee "to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[24] The fiduciary duty that class counsel owes class members is policed by the trial court overseeing the class action.[25]

The duty of client loyalty should also be considered heightened in mass torts and class action litigation because these cases affect more people and more often appear in the public eye than traditional litigation. Consider, for example, the substantial media attention and public commentary generated by the *Social Media Addiction* MDL.[26] Given that preservation of "public confidence in the legal profession and the judicial process" is a core rationale for the duty of loyalty, it stands to reason that litigators in cases more likely to have public visibility ought to be held to a high standard.[27] Robin L. Rosenberg, judge for the Southern District of Florida, captured this sentiment well in the *Zantac* MDL:

> The unique nature of an MDL, and particularly one of this potential size, warrants transparency, the highest regard for professional conduct, and confidence in the leadership and in the manner in which the case is handled by all parties. Because leadership often will be called upon to speak on behalf of all other counsel and their respective clients, they must comport their actions at all times to fulfill their leadership duties in a manner that is dignified and trusted.[28]

Indeed, these lawyers often tout themselves as "private attorneys general," which reflects an understanding that they occupy a position of high public trust.[29]

In my experience, despite the critical need for loyalty among lead counsel, conflict screening remains more the exception than the rule in the appointment process. One notable area of scrutiny is the role of litigation funders and the possible conflicts they may introduce — an issue that has received significant attention, including from judges overseeing the appointment of lead counsel.[30] By contrast, screening rarely addresses potential conflicts arising from relationships with vendors.[31]

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THE IMPORTANCE OF LITIGATION AND SETTLEMENT VENDORS

Vendors play an increasingly formative role in plaintiff-side MDL and class action litigation, with their involvement arising in myriad ways.[32] ▸

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For example, vendors can assist plaintiffs with fulfilling their document-preservation obligations by imaging electronic devices such as cell phones and laptops. They can provide counsel with a platform to host, search, and analyze electronically stored information produced by defendants.

Perhaps the most central role vendors occupy in class actions (and MDLs with large numbers of plaintiffs) is with respect to settlement notice and administration. In many class action cases, the vast majority of class members interact with the class action only by receiving a settlement notice. The notice advises class members of their options, which typically involve participating in the settlement, opting out, or objecting. Frequently, those who choose to participate are asked to submit a claim form — a process that was historically handled via U.S. mail, with class members returning the form and receiving a check after final approval. With the rise of digital technology as a means of communication in the 2010s, the process has largely migrated from physical mail to digital channels. This change was explicitly acknowledged in the amendment to Rule 23(c)(2)(B) and its accompanying committee note. The Federal Trade Commission[33] and *Judicature*[34] have issued best practices for digital notice in the wake of the change.

The role of the claims administrator vendor is crucial in these interactions. In recent years, bad actors have abused those settlements in which the identities of class members are not readily known (such as purchasers of low-cost consumables or visitors to a website) by fraudulently posing as class members, and thus diluting the benefits available to actual class members — and, in some cases, creating additional administrative hoops for actual class members.[35] The presence of fraudulent claimants necessitates countermeasures by claim administrators, typically through claim validation. But the validation process takes time and sometimes denies legitimate claimants, especially those who are less digitally savvy or simply not paying close attention.

If a claim administrator cuts corners and does a poor job with this process, it can undo the purpose of the litigation itself, redistributing its benefits to the wrong people. It can also engender resentment among class members who may already be in a vulnerable state, having suffered from a wrong that gave rise to the settlement in the first instance. Similar problems can arise in the mass tort context as vendors help facilitate the allocation of funds based on complex formulae and assist with third-party lien resolution.

In the previous era, the simple regime of direct-mail notice and payment could be achieved cost-effectively, partly because postage costs were comparatively low. The now-ubiquitous digital notice programs and robust claim-validation processes, among other things, can drive costs up. The mechanisms and costs of reaching class members with publication notice and validating claims are also not natively understood by lawyers and judges.

This state of affairs means that there is appreciable room for administrators to do more and charge more for some services than is optimal. Claims administration contracts in big cases easily rise into the millions of dollars.[36] The cost of claims administration often comes out of a defined amount — a common fund — from which class member payments are also drawn.

There have been some high-profile examples of claimant frustration at settlement administration. The MDL involving the Norfolk Southern freight-train derailment in East Palestine, Ohio, resulted in a $600 million class action settlement designed to cover personal injury, property damage, and business loss claims.[37] The administrator was selected by class counsel with no reference to a competitive bidding process in the settlement preliminary approval papers.[38] After the administrator had already billed millions of dollars in costs, class counsel documented widespread errors and miscalculations in the class member settlement allocations and early disbursements the administrator had made. A messy dispute resulted in which class counsel recommended replacement of the administrator, which the court ultimately ordered.[39] The original administrator also generated outrage among class members for its claim-denial letters, including those for personal-injury claims of first responders.[40]

Situations like this impact both the plaintiffs in the instant case and the perceived legitimacy of the system. In fact, the settlement administration industry itself is now the subject of an MDL — *In re Class Action Settlement Administration Litigation*, MDL No. 3162, which consolidates lawsuits alleging that major administrators conspired with banks and fintech companies in kickback schemes that

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reduced payouts to class members. Although those allegations concern different conduct from pay-to-play practices discussed here, the litigation underscores the broader risks created by opacity in high-dollar settlement administration.

With lucrative contracts that can materially impact payouts to class members on the line, the selection of claim administrators is surprisingly casual. In my experience, having been appointed to MDL leadership teams and/or as settlement class counsel in dozens of cases, fewer than 10 claims administrators routinely perform this work.[41] Many times, class counsel do not even require a competitive bidding process to choose among them.

My firm has long insisted on competitive bids, a practice that has occasionally met resistance from co-counsel. In my experience in cases in which I am not lead counsel and based on conversations with claim administrator representatives, in the absence of a competitive bidding process, a claim administrator is presumptively selected based on a prior relationship with counsel, and a quote is elicited and often accepted with modest revision.

Even with competitive bidding, a favored administrator can submit a low initial bid that balloons later if a hard cap is not imposed, which is often the case. (My firm insists on a hard cap.) Courts often approve the selection of the administrator by class counsel as part of the preliminary settlement approval process without much scrutiny.

A casual selection process that hinges on relationships would be particularly troubling on its own. But it is doubly so in the class and MDL contexts because of the way that administrators curry favor with those lawyers, often providing costly gifts for free.

To illustrate, in just the past few years, administrators have invited me on all-expense-paid trips to Costa Rica at a five-star resort, the PGA Championship, the Rocky Mountains for multi-day skiing, Wyoming for an exclusive ranch excursion, and a wellness retreat at a ranch in the Hudson Valley. (I turned down each offer.[42]) Others have received World Series tickets[43] and red-carpet access with movie stars at a film festival.

From what I have seen, these expensive perks began to be offered by one administrator in the 2010s, which eventually spawned a gift arms race that continues to intensify. One can only imagine the outrage that claimants would feel if they knew that, in a settlement for which they had difficulty filing a claim or receiving payment, the claim administrator was selected on a no-bid basis and had previously bestowed luxurious gifts on lead counsel.

LESSONS LEARNED FROM GIFT-GIVING INTERMEDIARIES IN OTHER INDUSTRIES

The presence of intermediaries who stand to benefit from influence is, of course, not unique to legal practice. Other industries have grappled with this concern, and an examination of their experiences demonstrates both that gift-giving influences decision-making and that transparency reforms can mitigate the problem. Two examples come to mind: (1) doctors and pharmaceutical representatives and (2) pension funds and placement agents.

Gifts from the pharmaceutical industry to physicians were ubiquitous through the early 2000s. Surveys showed that well over a majority of clinicians had "received meals, tickets to entertainment events, or free travel" from the pharmaceutical industry.[44] Troubling anecdotal accounts abounded of industry officials making gifts to physicians with the expectation that they would write reciprocal prescriptions. Jamie Reidy, author of the memoir *Hard Sell: The Evolution of a Viagra Salesman* (2005), fittingly characterized his experiences while working for Pfizer in the 1990s as "the Wild West": "They cashed the check, and that was it. And hopefully they remembered you every time they turned on the TV, or bought a drink on the cruise. . . ."[45]

The nature of affairs changed in the 2010s with the Physician Payments Sunshine Act (PPSA). The Sunshine Act required the Centers for Medicare & Medicaid Services to create what is now the Open Payments program, under which every drug and device manufacturer that participates in federal healthcare programs must annually report any payment or gift worth more than $10 (indexed to inflation) made to physicians. Patients and journalists can search the Open Payments database for physicians and note any potential conflicts of interest.[46]

While not a cure-all, studies suggest that the law has had appreciable impacts. In its wake, one study found a 7% drop in name-brand statin prescriptions, with a higher drop among heavier prescribers, while generic prescriptions remained constant.[47] The upshot is that physicians appeared less likely to steer patients to the more expensive, branded product also associated with greater lobbying prowess.[48] Another study found that an earlier sunshine law in Massachusetts resulted in similar effects across three major drug classes when prescription trends were compared to those of neighboring states without sunshine laws.[49]

Public pension funds have experienced similar scrutiny of their relationships with placement agents, who contract with investment funds (such as hedge funds or private equity) to assist with execution and administration. In the ▸

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early 2000s, CalPERS — the largest public pension fund in the United States — became embroiled in controversy when a massive pay-to-play scandal came to light.[50] Alfred Villalobos, a CalPERS board member in the 1990s, left the pension fund and became a placement agent. He showered CalPERS board members and other decision-makers with luxury travel and hospitality. The gifts were intended to steer work to Apollo Global Management, which, in turn, would give placement work to Villalobos. Most egregiously, after millions of dollars had been funneled in this manner to Villalobos, CalPERS CEO Fred Buenrostro left CalPERS, joined Villalobos's company, and had Villalobos transfer a condo to Buenrostro and pay most of the cost of his $300,000 Lake Tahoe wedding. The brazen quid pro quo eventually resulted in federal indictments for both figures. Buenrostro was convicted and sentenced to four and a half years in federal prison. Villalobos died by suicide weeks before his trial.

While the CalPERS misconduct was perhaps the most high-profile and egregious, a similar pay-to-play scandal engulfed the New York state pension fund, resulting in the conviction of its director of fixed-income investing.[51] And, across other states, a culture of gratuity — including prized sports tickets and high-end travel in exchange for placement work — proliferated, even if it did not result in criminal convictions.[52]

When the scope of the scandals began to crystallize, regulators moved quickly to implement fixes. In California, the CalPERS board adopted a Placement-Agent Disclosure Policy that mandated public reporting by every external investment manager of all such fees, the identity of each agent, and any prior connection to CalPERS officials.[53] Each quarter, CalPERS posted the filings in its board packets. The board also adopted a rule prohibiting members from accepting more than $50 (in aggregate) per calendar year from anyone who does business with the system.[54] The state government instituted additional reforms.[55] The data collected as part of these transparency reforms showed that funds using placement agents (traditionally selected through pay-to-play arrangements) underperformed other funds.[56] CalPERS's negotiated management fees dropped by approximately $300 million across investment portfolios in the wake of the reforms as well.[57]

A PROPOSAL: DISCLOSURE FORMS FOR LEAD COUNSEL APPLICANTS

The status quo in which vendors are awarded well-paid, no-bid contracts after providing counsel with valuable gifts raises serious ethical concerns and may result in plaintiffs receiving suboptimal representation, or worse. To address this state of affairs, this article proposes introducing much greater transparency into the process, borrowing from successful approaches in other industries with similar intermediaries. Specifically, a disclosure form should be required of applicants for MDL lead counsel and class counsel. The form would require responses to each item below:

1. Do you, your firm, or any holder of equity in your firm have any financial relationship (direct or indirect) with any vendor, financial institution, or similar entity that could have a role in this litigation? Examples of such vendors or financial institutions include, but are not limited to, settlement claims administrators, lien resolution specialists, litigation support vendors (such as specialists in electronically stored information), and/or banks that offer escrow account services. If yes, please describe the nature of such relationship.

2. Have you, your firm, or any holder of equity in your firm accepted anything of value of $100 or more (single gift) or $250 or more (in aggregate in any calendar year) during any of the past five calendar years from any vendor, financial institution, or similar entity that could have a role in this litigation? Examples of such vendors or financial institutions include, but are not limited to, litigation support vendors (such as specialists in the storage of electronically stored information) or settlement support vendors (such as settlement claims administrators, lien resolution specialists, and/or banks that offer escrow account services)? If yes, please list and describe each gift-giver, the gift, the date received, the estimated fair market value of the gift, and any context.

3. Describe any personal, familial, or professional relationship, or any other circumstance, that could create an actual conflict of interest or the appearance thereof, if not disclosed above.

4. If appointed to leadership, would you be willing to recuse yourself from the final decision regarding selection and retention of any of the entities that you have disclosed herein as either having a relationship with or having received a gift from? If not, how do you propose addressing conflicts of interest, or the appearance thereof, that could arise from your relations with any of the entities that you have disclosed herein?

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5. If appointed to leadership, do you agree to conduct a competitive bidding process pursuant to best practices for the selection of vendors?

A downloadable, editable version of the Model Case Management Order is available in the online version of this article.

Use of this conflict screening form with leadership applications yields three key benefits in that it surfaces potential conflicts at the start of litigation, promotes more transparent and effective vendor selection and services, and deters pay-to-play practices moving forward.

First, the form compels disclosure of potential conflicts of interest at the outset of litigation, helping ensure that the court is apprised of such conflicts and can tailor appropriate measures as necessary.[58] This approach is consistent with Rule 16.1 and its accompanying committee note, which emphasize the importance of early issue-spotting and planning.[59] Equipped with information about potential conflicts, judges can manage the matter in several ways. For example, they could exclude conflicted counsel from making final vendor decisions, while still permitting input during deliberations, assign vendor selection and oversight to an unconflicted member or members of the leadership team, or find the disclosed relationship too minor to rise to the level of an actual conflict and permit counsel to participate fully.

Failure to disclose upfront, by contrast, carries downstream risks. If a hidden relationship surfaces later, it could undermine the integrity of the proceedings. At the settlement approval stage, objectors or intervenors — whether other plaintiffs, class members, or non-lead counsel — could conceivably challenge the cost award as padded by a relationship-based markup. Considerable judicial resources would be expended trying to untangle the problem. Put simply, an ounce of early disclosure is worth a pound of 11th-hour motion practice.

Second, the disclosure will improve vendor selection and services. It stands to reason that vendors only pay for lavish gifts to counsel to recoup that spend, and then some, in litigation contracts they are awarded. Such an arrangement necessarily comes at the expense of plaintiffs and class members who ought to have counsel negotiating the best services at the best price. Moreover, the preceding section examined experiences with other industries — namely, medicine and public pension funds — that have similar intermediary service providers and demonstrated that a culture of opacity and gift-giving leads to subpar outcomes at best. And, as detailed above, public disclosure reforms in those arenas resulted in improved outcomes.[60] In the medical context, sunshine reforms resulted in fewer patients being steered to branded prescriptions associated with larger lobbying budgets. In the public pension context, transparency reforms resulted in significant savings on management fees. Adoption of comparable measures here — mandatory disclosure of vendor gifts and relationships, coupled with a pledge to use competitive bidding — should likewise curb the practice of awarding work based on gratuity as opposed to merit and deliver cost savings to plaintiffs, the class, and counsel by subjecting vendor pricing to genuine competition and scrutiny.

Third, disclosure will discourage pay-to-play practices moving forward. With counsel having to disclose vendors' gifts, they will be much less likely to accept them, knowing that doing so could invite attention from a court and possible recusal from vendor selection in important litigation. Vendors, too, will be discouraged from making such gifts for similar reasons.[61] These would be positive developments that drive vendor selection in a more professionalized direction, prioritizing performance and cost savings for plaintiffs.

Some may question whether a disclosure form could be incorporated into a case management order after leadership selection, for example, as part of a time-and-expense protocol. The comparative benefit of the disclosure approach presented here, however, is precisely that it occurs in conjunction with leadership selection, which is often a charged, visible, and important case milestone. Fundamental change of the current pay-to-play dynamic likely requires a high level of deterrence, one more likely to be achieved if attorneys know that judges and other counsel will review their disclosures as part of a competitive leadership-selection process. By contrast, if the disclosures are tucked into a post-appointment time-and-expense protocol, scrutiny is lower and the professional stakes have largely already passed; counsel who have secured their coveted appointment are more likely to treat the exercise as a box-checking formality and keep accepting vendor perks with little hesitation. Aside from deterrence, if conflicts surface later, the judge may have fewer options. If all appointed lead counsel have problematic entanglements with the same vendor, for example, mandatory recusal is not workable, and the judge may be loath to change leadership midstream.

All of that said, vendor selection and services should also receive greater attention from counsel and the court at different stages of the case, including in the time-and-expense protocol and in the petition for fee and cost awards, where counsel should incorporate provisions that memorialize that ▸

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vendor selection is based on merit following a competitive bidding process.

Of course, the disclosure form could also include screening of other types of possible conflicts of interest, including stakes in the litigation held by litigation funders, financial investments from lawyers in businesses associated with the defendant, and concurrent retention by lawyers of clients with competing interests, such as putative class representatives on the one hand and mass arbitration claimants on the other. Each of these issues warrants its own careful treatment. But the frequency and quantity of financial exchange between vendors and counsel in some of the nation's most public and high-stakes litigation — and the threat it poses both for plaintiffs and our trust in the system itself — demands immediate attention.

CONCLUSION

Lead counsel in MDLs and class counsel owe plaintiffs a heightened duty of loyalty in no small part because of the public salience of MDLs and class actions. In such cases, vendors can play an important role for which they are awarded lucrative contracts. Too often these contracts are given by counsel on a no-bid basis and with the ability for the vendor to exceed quoted prices. More troubling, vendors lobby plaintiffs' MDL and class action lawyers with lavish gifts, raising serious questions about whether counsel's vendor selections best serve plaintiff interests or are compromised by conflicts of interest and divided loyalties.

The risks of impaired judgment and subpar outcomes are illuminated by examining other industries that have reformed their practices regarding gift-giving by intermediaries. Taking a page from successful reforms, this article proposes the implementation of a conflict disclosure form during the selection process for MDL lead counsel and/or class counsel. Experience strongly suggests that adoption of the form will address potential conflicts at the start of litigation, improve vendor selection and services, and stymie pay-to-play practices moving forward.

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1 Fed. R. Civ. P. 16.1(b)(2)(A) advisory committee's note to 2025 amendment.

2 *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67 (2017).

3 Klara Glowczewska, *The Extravagant Rise of the Corporate Incentive Trip*, Condé Nast Traveler (June 13, 2024), https://duke.is/corporate-incentive-trip (citing sources that place the cost of analogously lavish "incentive travel" at typically $4,000-$6,000 per participant, but that could rise to as much as $25,000).

4 Physician Payments Sunshine Act, 42 U.S.C. § 1320a-7h (2023).

5 Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914).

6 *See* Burch, *supra* note 2, at 125 (noting that "judges pay little attention to adequate representation on the front end — often appointing leaders before conflicts are known.").

7 *See infra* section titled, "The Importance of Litigation and Settlement Vendors."

8 Fed. R. Civ. P. 16.1(a).

9 28 U.S.C. § 1407 (authorizing transfers to "promote the just and efficient conduct"); Fed. R. Civ. P. 16(b)(2)(A) advisory committee's note to 2025 amendment.

10 Fed. R. Civ. P. 16.1(b)(3)(G).

11 Fed. R. Civ. P. 16.1(b)(2)(A) advisory committee's note to 2025 amendment.

12 *See* Fed. R. Civ. P. 23(a)(4).

13 Fed. Jud. Ctr., Manual for Complex Litigation § 21.11, 246 (4th ed. 2004).

14 Fed. R. Civ. P. 16.1(b)(2)(A) advisory committee's note to 2025 amendment. Rule 23 identifies similar criteria: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23.

15 See Model Rules of Prof. Conduct r. 1.7(a)(2) (stating that "a concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer").

16 *See*, *e.g.*, *Stockton v. Ford*, 52 U.S. 232, 247 (1851) ("There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.").

17 *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys. Inc.*, 980 P.2d 371, 379 (Cal. 1999).

18 *See id.*

19 *See* Fed. R. Civ. P. 16.1(b)(2)(A) advisory committee's note to 2025 amendment ("For example, in some MDL proceedings there may be claims by individuals who suffered injuries and also claims by third-party payors who paid for medical treatment.").

20 Bolch Judicial Institute, Guidelines and Best Practices for Large and Mass-Tort MDLs 51 (2d ed.), https://duke.is/MDL-guidelines ("[L]ead counsel owes an obligation to the court . . . and must resolve any conflicts . . . that might otherwise interfere with lead counsel's ability to carry out the court's directions.").

21 *Id.* at 52.

22 *See Palumbo v. Tele-Communications*, 157 F.R.D. 129, 133 (D.D.C. 1994); *see also Huston v. Imperial Credit Com. Mortg. Inv. Corp.*, 179 F. Supp. 2d 1157, 1167 (C.D. Cal. 2001) ("[D]isqualification is more likely because putative class counsel are subject to a heightened standard which they must meet if they are to be allowed by the Court to represent absent class members." (internal quotations omitted)).

23 *Wells v. McDonough*, 1998 U.S. Dist. LEXIS 4441, at *12 (N.D. Ill. Mar. 23, 1998) (emphasis added).

24 *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928).

25 *See*, *e.g.*, *Reynolds v. Ben. Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (describing the district court's duty to "protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class."); *Mendoza v. United States*, 623 F.2d 1338, 1346 (9th Cir. 1980) ("The fact that the action before the Court is a class suit imposes special responsibilities upon the trial judge. As noted above, representative suits carry with them inherent dangers of conflict and compromise of absentee interests. Accordingly, a Court overseeing a class suit must constantly be sensitive to conflicts. . . . The Court must . . . serve as a guardian of absentee interests.").

26 *See In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 816-17 (N.D. Cal. 2023); Cal. v. Meta Platforms, Inc., No. 4:23-cv-05448-YGR, 2026 LEXIS 135067, at *22 (N.D. Cal. June 11, 2026) (noting that the issues on trial "impact the daily lives of the public across the states involved").

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27 *See supra* note 17 and accompanying text.

28 *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 2924, 2020 U.S. Dist. LEXIS 62805, at *39 (S.D. Fla. Apr. 3, 2020).

29 *See*, *e.g.*, William B. Rubenstein, *On What a "Private Attorney General" Is — And Why It Matters*, 57 Vand. L. Rev. 2129 (2004) (engaging with the widespread professional self-identification of lawyers as "private attorneys general").

30 *See* Jayme J. Herschkopf, Third-Party Litigation Finance (2017), https://duke.is/third-party-litigation-finance (noting that judges overseeing lead plaintiff and lead counsel appointment in securities class actions have reported that litigation funders may condition funding on the selection of their preferred counsel, raising conflicts of interest in the appointment process).

31 Some notable exceptions include the *Zantac* MDL, *supra* note 28; *In re MOVEit Customer Data Sec. Breach Litig.*, MDL No. 1:23-md-03083-ADB, MDL Order No. 4, at 1–4 (D. Mass. Dec. 1, 2023), ECF No. 259; and *Zakarian v. Rawlings Co.*, No. 24-cv-00229-SRB, at 1–4 (W.D. Mo. Aug. 15, 2025), ECF No. 124.

32 In many ways the heightened involvement of vendors in litigation stems from technological advancements. In the past, a plaintiff's document production could be made by simply photocopying and Bates-stamping hard copies from the plaintiff. Today, many documents are electronically stored and their preservation, retrieval, and production in native form often require the involvement of a vendor or vendor's software. *See*, *e.g.*, *Madrigal v. Live Nation Entm't, Inc.*, No. 2:25-cv-02375 GW (KSx), 2026 U.S. Dist. LEXIS 97158, at *13 (C.D. Cal. Apr. 24, 2026) (ordering the forensic examination of a class representative's personal cell phone by a vendor. While the defendant bore the cost of the vendor in that case, plaintiffs' counsel in high-stakes cases often undertake this task, and bear the cost, on their own). The storage, review, and analysis of voluminous productions from company defendants is often assisted by a vendor and/or vendor's software as well.

33 *See* Fed. Trade Comm'n, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns (Sept. 2019), https://duke.is/class-action-fairness-report.

34 *See* Bernard Chao, Christopher Robertson & David Yokum, *Crowdsourcing and Data Analytics: The New Settlement Tools*, 102 Judicature 62 (2018).

35 Mike Scarcella, *U.S. Class Action Settlements Flooded with Fraudulent Claims by Scammers*, Reuters (May 2, 2024), https://duke.is/addressing-fraudulent-class-action-claims.

36 *See*, *e.g.*, *Lopez v. Apple, Inc.*, No. 4:19-cv-04577-JSW (Dkt. No. 398) (noting that declaration from claim administrator estimated administration costs of nearly $3.5 million in $95 million class action settlement arising from alleged disclosure of private communications on Siri devices); *Sapozhnikov v. N.Y. Cmty. Bank*, No. 23-cv-01609-KAM-SIL, 2026 U.S. Dist. LEXIS 80109, at *23 (E.D.N.Y. Feb. 20, 2026) (suggesting that claim administration case invoices that amount to 5% of the total settlement fund are presumptively reasonable).

37 *See* Becky Sullivan, *Norfolk Southern Will Pay $600 Million to Settle East Palestine Derailment Lawsuit*, NPR (Apr. 9, 2024), https://duke.is/norfolk-southern-settlement.

38 *See* Memorandum in Support of Motion for Preliminary Approval of Settlement, Appointment of Lead Class Counsel, and Approval of Notice 9, *In re East Palestine Train Derailment*, No. 4:23-CV-00242-BYP (N.D. Ohio Apr. 26, 2024), ECF No. 452-1, https://duke.is/train-derailment-memo (noting that selection of claim administrator with a dearth of details on the criteria including whether a competitive bidding process was used).

39 *See In re East Palestine Train Derailment*, No. 4:23-CV-00242-BYP (N.D. Ohio June 11, 2025), ECF No. 979.

40 Stephanie Elverd, *First Responders Among Many Denied Personal Injury Claims in East Palestine Settlement*, Marietta Times (June 19, 2025), https://duke.is/east-palestine-settlement.

41 Joshua P. Davis & Rose Clark, *2024 Antitrust Annual Report: Class Actions in Federal Court*, UC Law San Francisco Research Paper Forthcoming, tbl. 17 (2025), available for download at https://duke.is/class-actions-in-federal-court (last visited May 25, 2026) (showing, in antitrust class action settlements, that administration is concentrated among a small set of companies).

42 In the interest of full disclosure, my firm and I have, in the past, benefited from (more modest) claim administrator outreach. Specifically, claim administrators have sponsored lunches and events for a group of plaintiff-side class action lawyers based in Washington, D.C., that I have assisted in planning. These events have been primarily in a roundtable format in a conference room with counsel and claim administrators discussing recent issues that have arisen in class action litigation and settlements. As of the start of this year, however, my firm has instituted a policy to not accept gifts of even nominal value from vendors who could perform work in class action litigation and settlements.

43 *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129, 2208 (2020).

44 Kaiser Family Found., *National Survey of Physicians Part II: Doctors and Prescription Drugs* (2002), cited in Inst. of Med. (U.S.) Comm. on Conflict of Interest in Med. Research, Educ. & Practice, *Conflicts of Interest and Medical Practice*, in Conflict of Interest in Medical Research, Education, and Practice 123 (Bernard Lo & Marilyn J. Field eds. 2009).

45 Carl Elliott, *The Drug Pushers*, The Atlantic (Apr. 2006), https://duke.is/carl-elliott.

46 Ctrs. For Medicare & Medicaid Servs., *Open Payments Data*, https://duke.is/open-payments-data.

47 *See* Jing Li, Bingxiao Wu, James Flory & Jeah Jung, *Impact of the Affordable Care Act's Physician Payments Sunshine Act on Branded Statin Prescribing*, 57 Health Servs. Res. 1145 (2022), https://duke.is/branded-statin-prescribing (finding that the PPSA led to a 7% "reduction in monthly new prescriptions of brand-name statin over the study period, with little change in generic prescribing").

48 *See id.* (concluding that the PPSA "may have achieved its intended effect of reducing branded prescriptions at least in the short run, particularly among physicians most likely to have engaged in excessive or low-value prescribing of branded drugs").

49 Tong Guo, S. Sriram & Puneet Manchanda, *"Let the Sun Shine In": The Impact of Industry Payment Disclosure on Physician Prescription Behavior* (Feb. 25, 2019), https://duke.is/sun-shine-in.

50 Ed Mendel, *CalPERS Ex-CEO Sentenced, but Probe Continues*, Calpensions (June 6, 2016), https://duke.is/calpers-ex-ceo.

51 Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the S. Dist. of N.Y., *Former Director of Fixed Income and Head of Portfolio Strategy at the New York State Common Retirement Fund Pleads Guilty in "Pay-For-Play" Bribery Scheme* (Nov. 8, 2017), https://duke.is/pay-for-play-plea.

52 *See*, *e.g.*, *Kentucky Pension Investigated Over Placement Agent, 'Troubling Aspects' Found*, Chief Investment Officer (June 29, 2011), https://duke.is/kentucky-pension-investigated.

53 *See* Cal. Code Regs. tit. 2, § 559 (2011); CalPERS Adds Placement Agent Disclosure Policy, PLANSPONSOR (May 11, 2009), https://duke.is/placement-agent-disclosure-policy.

54 CalPERS Bd. of Admin., Gift Policy (effective Apr. 18, 2012), https://duke.is/calpers-gift-policy.

55 *See*, *e.g.,* Assembly Bill 1743, which became effective January 1, 2011, required lobbyist registration for individuals acting as a placement agent when soliciting business from CalPERS. Cal. Gov't Code § 82047.3 (West 2011) (enacted by A.B. 1743, ch. 668, 2010 Cal. Stat., effective Jan. 1, 2011).

56 *See* Matthew D. Cain, Stephen B. McKeon & Steven Davidoff Solomon, *Intermediation in Private Equity: The Role of Placement Agents*, 55 J. Fin. & Quantitative Analysis 1095, 1106–07 (2020) (finding that, across the top 20 most active limited partners, funds using placement agents underperformed by 350 basis points annually, with CalPERS's placement-agent funds lagging non-agent funds by 1.4%).

57 *See* Ed Mendel, *CalPERS Will Reveal Private Equity Share of Profits*, Calpensions (July 6, 2015), https://duke.is/private-equity-share-of-profits (reporting, based on an April 2015 CalPERS board presentation, that one-time savings from post-scandal fee negotiations with private equity managers totaled $429 million over four years and that ongoing annual savings from those negotiations had grown to $293 million per year).

58 Frontloading the form should not be an overly onerous task for either counsel or the court. It is telling that federal judges already must complete the AO 10 Financial Disclosure Report (Judicial Conference of the United States, *Guide to Judiciary Policy, Vol. 2D: Financial Disclosure* (last rev. Mar. 10, 2026), https://duke.is/financial-disclosure-guide) and Seminar-Attendance Disclosure form (Judicial Conference of the United States, *Policy on Judges' Attendance at Privately Funded Educational Programs*, https://duke.is/privately-funded-seminars-disclosure-system) to prevent conflicts of interest for receipt of items of monetary value. There is no reason why counsel seeking to represent large groups of plaintiffs should not similarly have to disclose items of value they have received.

59 *See*, *e.g.*, Fed. R. Civ. P. 16.1 (b)(3)(G) advisory committe's note to 2025 amendment ("Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented.").

60 *See supra* section entitled "Lessons Learned from Gift-Giving Intermediaries in Other Industries."

61 Examples from other industries suggest this is true. For instance, as Georgia moved toward adoption of a $75 cap on lobbyist gifts in 2013, lobbyist spending on food, drink, and entertainment fell more than 30 percent during the legislative session compared with the prior year. *See Lobbyist Spending Down Significantly This Legislative Session*, WABE (Apr. 15, 2013), https://duke.is/lobbyist-spending-down.