

MDL STANDARDS AND BEST PRACTICES DUKE

LAW CENTER FOR JUDICIAL STUDIES

(APPENDIX)

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CHAPTER 1: MANAGEMENT OF TRANSFERRED CASES

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

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

Best Practice 1B: The transferee judge should formulate a management plan that advances the purposes of the MDL statute.

Best Practice 1B(i): The transferee judge should schedule regular status conferences.

Best Practice 1B(ii): The court should consider the use of magistrate judges or special masters.

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

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

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

Best Practice 1C(ii): At an early stage, the transferee judge should consider adoption of privilege and confidentiality protocols, including issuance of a Fed. R. Evid. 502(d) order.

Best Practice 1C(iii): The transferee judge should adopt deposition guidelines.

Best Practice 1C(iv): Individual claimants should be required to produce information about their claims.

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

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

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

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

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

Best Practice 1E(iii): The transferee judge should adopt rules that will minimize the risk that parties will attempt to “game” the bellwether trial selection process, resulting in test trials of cases that are not representative of the case pool as a whole.

CHAPTER 2: SELECTION & APPOINTMENT OF LEADERSHIP

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

Best Practice 2A: The transferee judge should assess the needs of the litigation in establishing an appropriate leadership structure.

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

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

Best Practice 2C(i): In cases involving numerous defendants it may be necessary to appoint a leadership team for the defense as well. While the responsibilities of the defendants’ representatives are normally limited to receiving and distributing information and coordinating positions on non-substantive matters, the appointment of a defendants’ liaison counsel or other similar representative is often helpful in simplifying the litigation and expediting motion practice.

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

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

Best Practice 2C(iv): The transferee judge should consider the appointment of liaison counsel to serve an administrative role. If the court appoints a liaison, it should specifically define the roles and duties of the liaison at the outset—including responsibility for communications between the court and other counsel, maintaining records of all orders, filings and discovery, and ensuring that all counsel are apprised of developments in the litigation. An important aspect of the liaison’s role is coordinating with and supporting the clerk of court.

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

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

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

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

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

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

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

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

Best Practice 3C: The judge’s primary responsibility in the selection process is to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will

responsibly and fairly represent all plaintiffs, keeping in mind the benefits of diversity of experience, skills, and backgrounds.

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

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

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

Best Practice 3C(iv): In appropriate cases, the transferee judge should conduct interviews of counsel that have submitted applications for leadership positions, in order to assess the applicants' demeanor and skills. In exceptional cases, the judge should consider having a magistrate judge or special master conduct the interviews and provide assessments of the applicants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Best Practice 4F: Attorneys seeking to serve in leadership positions may have entered into financial arrangements that could raise conflicts of interest and present challenges for the court at settlement. The transferee judge should guard against the possible negative implications of these types of agreements among counsel.

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

Best Practice 4H: In large cases, the transferee judge should encourage the leadership team to provide work for the common benefit of the cases to other attorneys who are qualified and

available to perform the work, unless doing so would create inefficiency in the prosecution of the claims. The transferee judge should inform the leadership team at the outset if it does not want them to assign work to other counsel.

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

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

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

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

CHAPTER 3: ESTABLISHMENT AND USE OF COMMON FUNDS

MDL STANDARD 5: The transferee judge should consider setting aside a portion of the anticipated monetary proceeds from the settlement and establish a common benefit fund (CBF) for the purpose of paying reasonable attorney's fees, costs, and expenses from that fund.

Best Practice 5A: As early as practicable in the litigation, the transferee judge should consider planning and establishing any common funds to be employed in the course of the litigation or in the event of settlement. In doing so, the court should communicate its expectations and provide guidance to the parties with regard to the purpose and operation of these funds, and invite the participation of counsel.

Best Practice 5B: At the outset of the case, the transferee judge should issue a "common benefit order" or "assessment order." The order should establish parameters for how the common benefit fund will be funded, define the compensable functions of counsel, determine the method of compensation, specify what records must be kept, create guidelines for allowable fees and expenses, and set up a common benefit fund that designated parties will contribute to in specified proportions.

Best Practice 5B(i): The transferee judge should assess each case in the MDL a specified percentage of the gross settlement. This global assessment will be deposited with the court or at the direction of the court into an account that is managed by the court. This account is called the "Common Benefit Account" (CBA).

Best Practice 5B(ii): The transferee judge should order the payor/defendant to withhold the specified percentage of the recovery from settlement proceeds and deposit that amount into a Common Benefit Account under the direction of the court.

Best Practice 5B(iii): If a settlement is subject to a common benefit assessment, the assessment should be deducted not from the claimant's portion of the settlement but from the attorneys' fees payable under the individual contingent fee arrangement.

Best Practice 5C: Early in the case, the transferee judge should establish a transparent procedure for the allocation of common benefit funds to reduce the potential for disputes among counsel and to encourage counsel to cooperate and avoid duplication of effort.

Best Practice 5C(i): The transferee judge should inform counsel early in the litigation that if they wish to be paid attorney's fees from the common benefit fund they must keep detailed and contemporaneous records of their work, and periodically submit reports to the court or a designee such as a special master or accountant.

Best Practice 5C(ii): The transferee judge should request all interested parties to make submissions concerning what steps and procedures the judge should implement, as well as a suggested timetable, in determining any final or other awards of attorney's fees.

Best Practice 5D: The court should give careful thought to what method for calculating the CBF is most appropriate for the particular settlement.

Best Practice 5D(i): The transferee judge should consider applying a blended method (percentage method, with the lodestar method used as a cross-check) in calculating the common benefit fund.

Best Practice 5D(ii): In determining fees to be paid to individual attorneys from the common benefit fund, the transferee judge will need to determine the customary hourly rate. In large MDL's the judge may find it helpful to use a national rate for certain purposes.

Best Practice 5D(iii): The transferee court may also decide to use its discretion in awarding fees at current rates, rather than historical rates, if litigation occurs over a particularly extended period of time; however, this practice is disfavored in limited-fund cases.

Best Practice 5E: To avoid duplication and ensure equitable allocation of the resulting fund, the transferee court should appoint a common-fund fee committee, comprised of plaintiffs' leadership attorneys, or designate a special master or magistrate judge, to make fair and impartial allocation recommendations to the court; however, the court retains ultimate control over the allocation and distribution of funds.

Best Practice 5F: Courts should explain their reasoning for the allocation to further the goal of transparency, to provide feedback to interested parties, and to ensure that any reviewing court has a sufficient record.

Best Practice 5G: In imposing fee assessments, the transferee judge should promote fairness among counsel, compensate counsel who made the recovery possible, and suppress perverse incentives among non-performing counsel. This may include imposing fees on attorneys representing individual clients who opt out, yet use MDL discovery materials or otherwise enjoy the fruits of common benefit counsels' efforts. It may also include extending the fee structure to non-MDL participants, if the corporation agrees to a global settlement.

CHAPTER 4: FEDERAL/STATE COORDINATION

MDL STANDARD 6: Effective coordination between the federal and state courts in an MDL action promotes cooperation in scheduling hearings, conducting and completing discovery, facilitates efficient distribution of and access to discovery work product, avoids inconsistent federal and state rulings on discovery and privilege issues, if possible, and fosters communication and cooperation among litigants and courts that may facilitate just and inexpensive determination.

Best Practice 6A: The transferee judge should set the tone early in the litigation, by engaging in outreach and communications with state court judges, by specifying the time and manner in which counsel are to report on the existence, status, and progress of related actions in other jurisdictions, and by encouraging and facilitating ongoing coordination.

Best Practice 6B: In issuing the initial scheduling order, the newly appointed transferee judge should consider including provisions tailored to facilitate effective federal-state coordination.

Best Practice 6B(i): The transferee judge should direct liaison counsel for plaintiffs and defendants to provide a report on the existence and status of related state court litigation, either in writing in advance of the initial conference, or orally at the conference itself, to inform this discussion. Counsel should be requested to provide contact information for the state court judges before whom related proceedings are pending.

Best Practice 6B(ii): Similar reports by liaison counsel should be made a feature of every subsequent status conference, so that the transferee judge is apprised, on an ongoing and current basis, of hearing schedules, discovery activities, trial dates, and other important events and rulings, in the state courts.

Best Practice 6B(iii): Counsel should be advised at the initial conference that such communications between the MDL judge and state court judges will take place. While counsel should be given the opportunity to object, there will rarely be a well-founded objection to such communications, which have become a familiar feature of multi-jurisdictional proceedings.

Best Practice 6C: In an MDL action with parallel court actions, state and federal judges should communicate informally as needed to correct perceived duplication, and should explore whether formal measures may, or may not be efficient or justified.

Best Practice 6D: If multiple jurisdictions are involved, the transferee judge should consider procedures or mechanisms to facilitate state/federal court coordination, to provide periodic reports to each of the courts, to assist in coordinating discovery and hearing schedules, and to schedule joint federal-state court status conferences and hearings.

Best Practice 6E: The MDL judge should direct designated counsel (typically, lead or liaison counsel for each side) to provide information on the status of related state court actions in the written status conference report submitted several days before each regularly scheduled status conference.

Best Practice 6F: The transferee judge should provide accessible, up-to-date information on the status and progress of the MDL proceedings, including the status and progress of coordination with the state courts, and specific pages for each MDL on the district court's website. The MDL-specific site should provide a calendar, access to important orders, hearing transcripts, and a list of key events.

Best Practice 6G: In MDL and state court proceedings, the judges should consider holding joint pretrial hearings, including joint status conferences in a variety of jurisdictions, co-presiding over each conference with the state court judge in that jurisdiction.

Best Practice 6H: The transferee judge should ensure that the parties establish a common discovery-product depository (now most frequently a password-protected online collection rather than a physical depository).

Best Practice 6I: If no party requests the court to issue a Rule 502(d) order, the transferee judge should consider issuing the order on its own.

Best Practice 6J: When feasible without causing discovery delays, the transferee judge should coordinate with state court colleagues to set uniform schedules in related federal and state proceedings for document production, production of privilege logs, and resolution of privilege disputes and other objections.

Best Practice 6K: Discovery decisions should be made available to all courts.

Best Practice 6L: In an MDL involving multiple jurisdictions, the transferee judge should consider the *joint* appointment of a special master among multiple courts to review disputed documents *in camera* and issue a report and recommendation to all courts.

Best Practice 6M: The transferee judge may appoint a "state court liaison" or "state/federal liaison" from among plaintiffs' (or defendants') counsel who are active in the MDL, in order to provide transparency by submitting periodic reports on the status and progress of state court proceedings, and to assist in assuring that discovery work product is made appropriately available to those who are litigating in state courts.

Best Practice 6N: The transferee judge should consider issuing a deposition protocol order that assigns a specific percentage of deposition time to state counsel.

CHAPTER 5: SETTLEMENTS AND REMANDS TO TRANSFEROR COURTS

MDL STANDARD 7: The transferee judge should endeavor to use the MDL forum to resolve or streamline the litigation before remand to the district courts.

Best Practice 7A: Remand of cases to transferor courts should not begin until the court has taken steps: (1) to preside over discovery, decide on motions and conduct such trials that are needed to position the cases for potential resolution, (2) to explore and consider all possibilities for resolution of the cases; and (3) to prepare cases that do not resolve for trial in the transferor courts.

Best Practice 7B: In most situations, the time to raise settlement will be after sufficient time has passed to close the door on substantial new litigation being filed.

Best Practice 7B(i): The court is usually uniquely situated to play a role in facilitating settlement discussions, and should be prepared to take advantage of this fact.

Best Practice 7B(ii): At the appropriate time, the court may consult with counsel on whether the appointment of a settlement master or mediator would be helpful to the settlement process.

Best Practice 7B(iii): Once a settlement discussion process is under way, the court should be prepared to step back and let the discussions proceed. However, the court should require sufficient reporting from the parties to confirm progress is in fact occurring and whether the court can assist the process.

Best Practice 7B(iv): Courts generally should not stay discovery or other pretrial proceedings while the settlement process is under way. However, if all parties agree that a stay would be in the interest of the process, courts may consider staying proceedings during the pendency of settlement discussions.

Best Practice 7B(v): If significant parallel state court litigation exists, after consultation with counsel, the transferee court should consider reaching out to state courts with significant case volumes to discuss coordination of settlement efforts.

Best Practice 7B(vi): If the parties reach an agreement to resolve all or a substantial portion of the cases, and the parties so request, the court should be prepared to take an ongoing role in implementing and enforcing the settlement agreement.

Best Practice 7B(vii): In the MDLs that include class actions, the court should ensure that counsel consider from the outset of any settlement proceedings the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Best Practice 7C: In appropriate cases, courts should consider utilizing the Intercircuit Assignment procedure to facilitate MDL proceedings.

Best Practice 7D: For remands of more than a handful of cases, the transferee judge should put in place a well-considered and organized procedure for remanding and transferring cases rather than simply remanding all cases at once.

Best Practice 7D(i): In preparation for remand, the court should consider using *Lone Pine* proceedings or other methods to cull meritless cases and ensure that only the viable cases may ultimately be eligible for remand.

Best Practice 7E: The transferee court can greatly assist transferor courts when suggesting remand to the JPML by providing a remand packet that summarizes the key activities and rulings that have taken place since the cases were coordinated.

Best Practice 7E(i): The court should be prepared to answer questions of the transferor courts to which cases are remanded.

Best Practice 7E(ii): The transferee judge should consider how, in the context of the specific litigation, remand procedures may minimize the burdens on the transferor courts and litigants after cases are transferred and remanded.

Best Practice 7E(iii): MDL courts should issue rulings with the expectation that transferor courts will follow their rulings upon remand, but should clarify any potential conflicts their rulings may have with state law in the transferor courts.

Best Practice 7F: The transferee judge should be prepared to see that every MDL has an “end-game” such that it may be ended when no additional activity in the transferee court will be required.