

CALL FOR PUBLIC COMMENT

**STANDARDS AND BEST PRACTICES
FOR LARGE AND MASS-TORT MDLS
BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL
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CHAPTER 4

ROLE OF NON-LEADERSHIP COUNSEL

In a mass-tort MDL, lead counsel makes up a fraction of the lawyers representing plaintiffs. Non-leadership counsel have a limited role in key decisions affecting overall strategy and settlement. Because lead counsel effectively controls the litigation, non-leadership counsel, who continue to be bound by canons of ethics to act in the best interests of their clients, face difficult problems when they disagree with lead counsel's actions and decisions. It is true that if a global settlement negotiated by lead counsel is proposed, non-leadership counsel and their clients make the final decision regarding whether to participate. But, as a practical matter, rejecting the offer at that time with the expectation that lead counsel will no longer be involved with the litigation in a substantive capacity may not seem feasible.

To the extent that lead counsel can set up a process that takes into consideration the input of non-leadership counsel without undermining the efficiency of MDL management by countless second-guessing, decision-making for the MDL benefits. Lead counsel should engage in candid discussions with non-leadership counsel early in the litigation about the case's strengths and weaknesses, especially any issues regarding critical science findings and *Daubert* questions. Lead counsel has a role to educate all non-leadership counsel from the start of the litigation about the MDL's parameters and the general strategy that will be followed, as well as updating counsel throughout the course of the litigation as circumstances change.

MDL STANDARD 10: Lead counsel should strive to make the key decisions that lead to settlement with as much consensus among non-leadership counsel as possible.

Lawyers representing individually-retained clients have a duty to advocate for their clients' best interests. Although they have the power to accept or reject a proposed settlement, their bargaining position may be significantly weakened. At a minimum, they should be informed of all significant actions taken in the MDL consistent with BEST PRACTICE 4I. Ideally, non-leadership counsel should have an opportunity to provide input on key decisions consistent with BEST PRACTICE 10B.

BEST PRACTICE 10A: Lead counsel should ensure that all willing and able counsel have an equal opportunity to participate in discovery and other MDL tasks.

Providing non-leadership counsel an equal opportunity to perform discovery tasks enhances consensus-building consistent with BEST PRACTICE 4H. It is

important that the compensation for such work is commensurate with the compensation provided to leadership counsel for the same type of work consistent with BEST PRACTICES 12G(ii) and 12H.

BEST PRACTICE 10B: The court should consider permitting non-leadership counsel to provide input on certain issues that are known to create potential conflicts among counsel.

There are certain, discrete decision points in an MDL that are among those most likely to cause disagreements among lead and non-leadership counsel, including: (1) selection of trial counsel for early cases; (2) decisions about which claims or theories to pursue or abandon in early trials and during discovery; and (3) resources made available to lawyers preparing individual cases for trial outside of a bellwether process, e.g., for discovery, trial packages, experts, etc. In consultation with lead counsel, the court may consider developing a process under which non-leadership counsel can report issues or concerns to the court on a regular basis (perhaps quarterly). The court may seek explanation from lead counsel as to how these matters are being handled.

In some instances, concern about the resources being made available to non-leadership lawyers may not be apparent until the coordinated proceedings are near their conclusion, when non-bellwether cases are more likely to move forward on an individual basis. The court should, therefore, consider making specific inquiries at earlier stages in the litigation as to what steps lead counsel are taking to comply with the court's instructions on this subject.

Settlement strategy is another area in which conflicts may arise, but due to the nature of most mass-tort negotiations, this is unlikely a topic that should be openly vetted. Settlement negotiations are typically confidential, and disclosure of ongoing discussions would likely jeopardize their success. Rather, the court might consider appointment of a settlement master or engage in private discussions with the MDL co-leads or others specifically tasked with responsibilities relating to settlement discussions. Alternatively, the court could consider directing the liaison counsel to act as an intermediary, communicating concerns of non-leadership counsel.

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

The court appointment order authorizes lead counsel to manage the MDL on behalf of all plaintiffs and their retained counsel. Ideally, lead counsel performs its functions to maximize the common and collective good of all plaintiffs. But disagreements over strategy, selection of bellwether trials, allocation of common

benefit funds, etc., can cause conflicts. This raises a tension between two important concerns of the court: on the one hand, it must make sure to address real problems with the performance of lead counsel; on the other hand, it must make sure that complaints about lead counsel are not being used to jockey for position or for other improper purposes. The court should consider requests to remove leadership counsel only for very serious and acute problems.

Consistent with BEST PRACTICE 2C(iv), the court may appoint a liaison counsel who could alert the judge to potential conflicts and disagreements. The roles and duties of the liaison should be specified 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.

BEST PRACTICE 11A: The court should consider delineating in a case-management order the roles and obligations of lead counsel and plaintiffs' counsel in individual cases.

Potential conflicts and misunderstandings between lead and non-leadership counsel may be avoided if their respective roles and responsibilities are clearly delineated in a case-management order. The court should remind non-leadership lawyers that they continue to have all of their normal obligations to protect their clients' interests and to comply with all court orders that have application to individual plaintiffs.

In addition, the transferee judge can reaffirm the roles and duties of appointed leadership in the solicitation of applications and issuance of appointment orders. Lawyers seeking leadership appointments should provide the court and counsel for all parties with details as to how they intend to fulfill their obligations to work with others during the course of the litigation as well as ensure that they are providing timely and adequate communication and support to non-leadership counsel so that those attorneys can fulfill their obligations to their respective clients.

BEST PRACTICE 11B: A transferee judge should be alert throughout the course of the MDL proceedings to potential and emerging disagreements and conflicts between lead and non-lead counsel.

Many of the problems arising from disagreements between lead and non-leadership counsel can be addressed, and perhaps avoided, by an active case manager. A transferee judge who holds regularly scheduled status conferences, confers with liaison counsel, and reviews status reports can identify early on potential conflicts and disagreements between lead counsel and non-leadership counsel.

Consistent with BEST PRACTICE 1B(i), the court should schedule regular status conferences. At the start of the MDL, or if the court anticipates conflicts between lead and non-leadership counsel, the court should consider holding the conferences monthly. Key rulings and discussion should be on the record, and transcripts of the conferences should be made available on the court website or by plaintiffs' counsel to non-leadership counsel.

The court should require leadership counsel to prepare and distribute detailed status reports to all plaintiffs in advance of a conference, to confer with the court in preparing an agenda, and to distribute detailed reports to all plaintiffs afterward. The purpose of these documents is to keep all participants in the MDL proceeding well-informed consistent with BEST PRACTICE 4I. The court and lead counsel should also consider regularly reporting to non-leadership counsel key expert opinions on causation, encouraging periodic inventory analysis, and providing updates on company witness depositions and document production. Lead counsel may also consider providing *pro se* plaintiffs a point of contact on the Plaintiff Steering Committee to whom they can direct questions.

The court should consider creating an official website for the proceeding on which these documents (as well as status conference reports and significant orders) can be viewed consistent with BEST PRACTICE 12F. Similarly, lead counsel should consider developing a file-sharing option for non-leadership counsel to obtain MDL materials, key orders, and transcripts. Timely and adequate information about the MDL proceedings provides necessary support to non-leadership counsel, who have responsibilities and obligations to their respective clients.

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

A formal reappointment process can provide a regular opportunity for non-leadership lawyers to comment (positively as well as negatively) on the performance of leadership. Even if the court retains leadership counsel, the reappointment process provides a good opportunity for the court and non-leadership lawyers to receive a formal report from lead counsel on how they have performed their duties and for the court to address any concerns based on the comments it receives from non-leadership counsel. The court can also reiterate its expectations for lead counsel, which sends an important message to all parties.

The court can use the reappointment process as a means to facilitate the airing of grievances with lead counsel by non-leadership counsel, who are often reluctant to criticize the management of the MDL. At the same time, the court can use the reappointment process as an opportunity to remind non-leadership counsel that their obligations to their clients may require them to raise issues that, they

believe, may prejudice their clients' interests.

The court should consider when to initiate the reappointment process. BEST PRACTICES 3A(iii) and 4(K) suggest that in some cases a reappointment after the first twelve months may be too soon to evaluate the performance of lead counsel. In other cases, the timing may be right.

Many mass-tort MDLs take years for complete resolution. Leadership does not remain static and circumstances beyond the control of individual lead counsel may have significant impacts. The MDL workload burden may grow or shrink to an extent that lead counsel cannot continue to devote the time and financial resources necessary to allow them to continue in a leadership role. And some lawyers simply may not have the continuing ability or interest to fulfill true leadership roles; this may not become apparent to the court until the litigation has been underway for some time.

Under other circumstances, non-leadership counsel may become heavily involved in the work of the MDL or develop a particular expertise that is valuable to the MDL such that a lead-counsel appointment during the course of the MDL might be appropriate even though such an appointment may not have been appropriate at the outset of litigation. A reappointment process establishes a set framework that the court can use to make necessary adjustments to accommodate changed circumstances. The court may consider replacing lead counsel with insufficient personal involvement or replace senior lead counsel with more junior lawyers doing the actual work. Advancing more junior attorneys benefits those lawyers by bolstering their resumes, which can facilitate future appointments, and these appointments also lead to greater diversity in MDL representations.

BEST PRACTICE 11D: As part of the reappointment process, the court should consider requiring lead counsel to report on how they have exercised their MDL obligations, including communication with non-leadership lawyers.

The court can require lead counsel seeking reappointment to provide information not only on how effective they have been but also on actions taken to account for the concerns of non-leadership counsel. As part of the reappointment process, the court should consider inviting comment from lawyers not personally seeking leadership positions to comment on the performance of lead counsel. These steps provide the court an opportunity to address issues before they become acute. It also makes it more difficult for non-leadership lawyers to raise major concerns for the first time at very late stages, which is disruptive, can undermine the court's management of litigation in reliance on work with lead counsel, and generally diminishes confidence on all sides in the MDL process.