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COMMENT OF ALAN B. MORRISON & ROGER TRANGSRUD
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RE
DRAFT MDL RULE 16.1

The draft proposed by the MDL subcommittee and its accompanying notes raise many questions. This comment will address only the threshold issue of what should take place at the preliminary meeting prior to the initial MDL management conference. Until that is determined, none of the other issues can be resolved. Therefore, this comment takes no position on these other issues at this time.

My first question is why is it necessary or at least desirable to have a meeting of some kind before the management conference? The answer requires an understanding of what will happen at the management conference. Although written for the preliminary conference, Alternative A, section (c), suggests the main areas that the MDL court should address at the management conference. They can be summarized as follows: (a) all matters relating to appointment of lead counsel and their relation to other counsel for MDL plaintiffs [items 1-5]; (b) identification of the principal legal and factual issues in these cases [item 6]; (c) preliminary discovery matters [items 7 & 10]; (d) pleadings and motions [items 8, 9 & 12]; and (e) scheduling of future conferences and other issues [items 11, 13, & 14].

There seem to be two main reasons why a preliminary conference should be held. The first is to help organize the information for the MDL judge. By definition, in complex MDL

proceedings there will be many attorneys for the plaintiffs and sometimes for the defendants. Cases will be at various stages of discovery and motion practice, with some subject to Rule 16 and Rule 26 orders and others just filed. Thus, one function will be to help sort through the cases and to prepare an organized summary of what is then known for the MDL transferee judge.

The second function of a preliminary meeting is to assist the transferee judge with the appointment process for lead counsel and for related functions. The work at the preliminary meeting would include presenting options for the appointment of counsel and might include gathering resumes and other information about counsel who are seeking appointment to various positions. Ideally, this information would be presented in writing to the transferee judge and made available to all counsel well in advance of the initial management conference.

Lawyers, like nature, abhor a vacuum, and so if there is no formal preliminary meeting, lawyers will get together and gather some or all of the information suggested above and have it available for the judge at the initial management conference. The most likely area in which this will occur is the appointment of lead and other counsel because lawyers in MDLs care more about that than anything else. And when that occurs, it is most likely that lawyers with prior MDL experience will band together and present the MDL judge with their preferred slate. At one time, that approach may have been appropriate, but today MDL judges are using many other options for deciding whom to appoint to various positions, and so one function of a formal preliminary conference would be to take those issues out of the hands of groups of lawyers alone, and assure that all lawyers have input into what is presented to the MDL judge.

It is for this reason that it would be advisable for the transferee judge to designate a magistrate judge or a special master (or perhaps even another district judge) to manage the preliminary conference and to oversee the production of a report that would include the relevant

information about the issues noted in Alternative A and present various options for appointing counsel. Designating coordinating counsel for the preliminary conference creates too great a risk that those lawyers would have a substantial advantage in becoming lead counsel, a problem that can be avoided by designating a magistrate judge to run the preliminary conference. The transferee judge would include in the designation order a statement as to whether the report should include specific information regarding proposed lead counsel etc, or whether that information will be submitted after the initial management conference.