

Memorandum

To: Judge Robert Dow and Members of the MDL Subcommittee

From: AAJ's MDL Working Group

Re: Preliminary Provisional MDL Suggestions

Date: February 22, 2018

Introduction

AAJ has only begun preliminary discussion on this topic, so the suggestions herein do not reflect the plaintiff's bar as a whole, or even the perspective and variety of AAJ practice areas. Gathering such broad-based opinion would take a significant amount of time. AAJ understands that the MDL Subcommittee welcomes initial thoughts from the plaintiff's bar, and we provide some here with the caveat that this is not a complete or fully-vetted set of MDL issues.

Plaintiff lawyers have deep reservations that amendments to the civil rules are not the appropriate mechanism for improving the operation of MDLs. Thus, AAJ cautions that MDLs may not be a good fit for rule-making, as MDLs are so case-specific¹ that "one size fits all" rules do not make sense. Judges need to remain empowered to exercise broad discretion in any particular case rather than be constrained by formalistic preconceptions of what a vocal minority consider to be "best practices." AAJ believes that it would be more practical to focus on a specific set of topics that could improve the operation of MDLs. To have a productive discussion about what works and what does not work, AAJ, in drafting this preliminary memorandum, was not focused solely on the rules amendment process, but rather on identifying *issues* that commonly arise in MDLs where improvements may be warranted or useful. Therefore, AAJ suggests some topics that could potentially be explored, but that the appropriate vehicle for solutions to these topics – for example via rules, statutory changes, or recommendations in the Manual for Complex Litigation, etc. – could be determined later.

¹ A review of the MDL pending docket confirms an array of practice areas including air disasters and other common disasters, antitrust, data and security breaches, pharmaceutical and other product liability claims, consumer claims, intellectual property, employment practices, securities, and other torts.
http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Type-February-15-2018.pdf

AAJ's position is that the Federal Rules of Civil Procedure are not the appropriate vehicle for addressing MDL practice issues. However, recognizing that there has been a call for revisions pertaining to MDLs, AAJ suggests that the following areas may be worth exploring.

1. **Examine motions to remand; opt-out provisions; transferee court authorization.** Regarding these subjects, problems from the plaintiff's perspective are that: 1) some cases are inappropriately transferred to the MDL transferee court, and it takes a long time to get the claims remanded; and 2) some cases are included in the MDL that initially seem like they belong, but then the court and/or the PSC focus on other types of claims or theories of liability. There should be a later mechanism for claims to be remanded if the litigation will not address the claims or theories premised on the initial transfer order or complaints.
 - a. *When a potential tag-along is filed in state court and then removed to federal court, a pre-existing motion to remand the case back to state court should be decided by the would-be transferor court before a conditional transfer order may issue.* To facilitate this practice, the MDL transfer should be delayed until the time period permitted for filing a motion to remand has expired.
 - b. *Assuming that there is no "global resolution" in the MDL, cases should be rapidly transferred back to transferor courts, assuming the transferee court has engaged in some resolution process or engaged in some trial practice.* While the varying facts and dynamics unique to each MDL defy the establishment of an across-the-board "rule" regarding such remands, any discussion about remand should include a discussion about when cases should be sent back to the transferor courts for individualized resolution or trial.
2. **Scope of Duties; Appointments.** *The transferee judge should spell out in the Appointment Order the scope of duties and responsibilities that are delegated to leadership positions.* The court could be encouraged to specifically enumerate responsibilities for Lead, Liaison, Executive Committee and Plaintiff Steering Committee rather than simply appointing the positions without in any way defining what that means and the duties it entails. This enumeration should also outline the outer limits of responsibilities, such as the limitation on the PSC's ability to enter into binding substantive stipulations without hearing, opportunity to object, and court approval. It might be useful to provide a list of duties and responsibilities appropriate for delegation to MDL leadership/committees. Also, enumeration of responsibilities should be expressed in broad, flexible terms so that litigation strategy and efficient prosecution of the case is not impeded.
3. **Restrictions on Protective Orders.** For the protection of the public at large, it is imperative that branded drug manufacturers or other defendants maintain transparency throughout the litigation process. When requests for, and issues regarding, protective orders are not addressed early in litigation, these matters disrupt the discovery schedule and cause significant delay. Thus, to ensure that transparency is maintained, to assist defendants in rapidly responding to

document requests, and to eliminate delays in discovery, manufacturers should be precluded from obtaining protective orders for any documents other than highly sensitive trade materials. AAJ contemplates that Federal Rule of Civil Procedure 26(c) would need to be modified to reflect this change. A specific exception could be carved out in Rule 26(c) stating in detail that manufacturers be precluded from obtaining protective orders in MDLs, except in the case of trade materials, which could be defined further in the rule's Note. When broad claims of confidentiality are permitted, courts are tasked with substantial administrative burdens dealing with filings under seal and concomitant procedures and tasks.

4. **MDL trials.** Where trials that are non-binding on the rest of the MDL group are utilized to give parties a sense of the merits of the case and potential size of verdicts, the case selection process should begin with a detailed categorization of cases, where cases are grouped by similarity of allegations, damages claims, and types of evidence that may be presented to a jury. It is important that selection of bellwether cases is not premature, so that selected cases represent categories of filed cases.
 - a. From the categories established, a pool of cases amendable to trial in the MDL – and close to being trial ready – would be selected to be considered for bellwether trials based on proposals to the transferee court from both plaintiff and defense counsel. The cases selected would be set on a fast track for case-specific discovery.
 - b. At the conclusion of discovery², a predetermined number of cases that have completed case-specific discovery would be selected for trial. The pool of cases eligible for this process should be larger than the predetermined number so that those cases that have not yet developed into a representative sample of its category could be dropped from the bellwether list, without prejudice so that a selected client that is not representative may be removed without effecting the other cases selected for bellwether treatment. In addition, priority should be accorded to cases most likely to inform trends within the litigation and support an ultimate disposition of the litigation.
 - c. Lawyers for Civil Justice previously suggested adding a subparagraph (c) in Federal Rule of Civil Procedure 42. The proposed addition seeks, in part, to eliminate any requirement that parties be required to waive jurisdiction in order to participate in bellwether trials, and to allow the transferee judge assigned to the MDL to remand select cases for trial in the transferor courts. While a majority of this proposal would be viewed unfavorably by AAJ members, consideration should be given to allowing an

² The scope of discovery appropriate for a PSC's request would be substantially greater than the same request propounded in a single event case. Frequently, transferee courts into which the cases are consolidated do not consciously look beyond a hypothetical single event case when disputes arise concerning the scope of discovery. This failure compromises the underlying public policy served by consolidation, and prejudices Plaintiffs by applying the lowest common denominator to the scope of discovery applicable to their claims.

MDL transferee judge to preside over bellwether trials outside the court's vicinage without need for prior authority of his or her Circuit's presiding judge. This would eliminate the roadblocks of *Lexecon*, the 1998 U.S. Supreme Court case that held that MDL transferee judges cannot try cases that were filed in courts other than the transferee district.

Ongoing Discussions

AAJ reiterates that these suggestions are based on preliminary discussions only and do not reflect the views of the entire plaintiffs' bar. MDLs include a cross-section of practice areas represented by the plaintiff's bar, and it would take a significant amount of time to have meaningful dialogue and consensus about areas where improvements may be warranted or useful. AAJ generally does not agree that "one size fits all" rule-making is the appropriate way to change MDL proceedings. We will continue to discuss MDL issues with our members and provide additional information to the Subcommittee.