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## Advice to a New MDL Judge on Discovery Management

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## ADVICE TO A NEW MDL JUDGE ON DISCOVERY MANAGEMENT

Judge David G. Campbell\* & Jeffrey A. Kilmark\*\*

So, Judge, you have agreed to preside over a multi-district litigation (MDL) proceeding, and you would like some advice on managing MDL discovery. Congratulations. Your new assignment will be interesting and challenging.

We base our advice on our experience managing a product-liability MDL of about 8,600 cases, where we were aided by some very skilled lawyers.<sup>1</sup> Some MDLs are larger than ours, but most are smaller. While common themes run through all MDLs, there is no single approach to discovery. Your case almost surely will require variations on our suggestions.

Begin with Rule 1 of the Federal Rules of Civil Procedure, which directs you and the parties to achieve the “just, speedy, and inexpensive determination of every action.” There is no MDL exception to Rule 1. Indeed, Congress has directed you “to promote the just and efficient conduct of such actions.”<sup>2</sup>

### I. GETTING THE INFORMATION EXCHANGE STARTED

A number of cases will be included in your MDL when you receive the initial transfer order from the Judicial Panel on Multidistrict Litigation. That number surely will grow, perhaps by hundreds or even thousands. You will need an automatic procedure for the parties to exchange basic information as each new plaintiff arrives. That information may be shared in part by requiring each plaintiff to file a short-form complaint identifying the specific claims she is asserting (selected from a master complaint of all possible claims developed by the Plaintiffs’ Steering Committee you will appoint), and by requiring the defendants to file a short-form answer identifying general information in their possession relevant to the plaintiffs’ claims.<sup>3</sup>

Somewhat more detailed information can be provided by requiring the parties to exchange profile forms. Each new plaintiff can complete and share with the defendants a Plaintiff Profile Form (PPF) that states basic information about the plaintiff and her individual claims – name, date of birth, when and where she used the product, what injuries she has suffered, and whether a spouse asserts a loss of consortium claim. The defendants can be required to provide the new plaintiff with a Defendant Profile Form (DPF) that discloses readily identified information relevant to the plaintiff, such as date and place of manufacture of the

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<sup>1</sup> See *In re Bard IVC Filters Prods. Liab. Litig.*, No. MDL 15-02641-PHX-DGC (D. Ariz. Aug. 17, 2015).

<sup>2</sup> 28 U.S.C. § 1407(a).

<sup>3</sup> Before appointing the leadership lawyers for your case, call judges before whom the candidates have appeared to make sure you are appointing able lawyers who know how to manage complex litigation reasonably and efficiently, with a minimum of unnecessary squabbling. I had such lawyers in my case, and it made my life much easier. And, seek to achieve diversity in your leadership selections. See Elizabeth Chamblee Burch, *Diversity in MDL Leadership: A Field Guide*, 89 UMKC L. REV. 841 (2021).

product, government approvals, and product recalls. You can require that these profile forms be signed under oath as would interrogatory answers, ensuring that the information the parties exchange early in the MDL is as accurate as possible.

Include an enforcement procedure to ensure that profile forms are disclosed promptly, such as specifying the time after complaint filing when the forms must be exchanged; establishing a procedure for the parties to provide notice to each other, followed by a cure period, if a profile form has not been received or is deficient; and setting a procedure for the parties to bring disputes to your attention efficiently, such as providing a chart of deficiencies monthly that you can review and rule on as part of your regular case management.

## II. SETTING THE DISCOVERY SCHEDULE

Your role as an MDL judge is to conduct “coordinated or consolidated pretrial proceedings,”<sup>4</sup> and your primary focus should be on general, MDL-wide issues. You cannot and should not attempt to oversee plaintiff-specific discovery, except for those cases which may be candidates for bellwether trials, as discussed below. The discovery should focus on common-issue discovery: production of relevant documents from the defendants and third parties; depositions of witnesses whose testimony will be relevant to all cases; discovery on issues like preemption that could affect the entire MDL or large portions of it; and the disclosure and depositions of general experts from both sides on litigation-wide issues such as manufacturing and design defects, adequacy of product warnings, regulatory matters, and general medical causation.

After conferring with the parties, set a reasonable but firm schedule for completing common fact and then expert discovery. This schedule will be longer than the discovery period in a single case, even a complex case, but make it as short as reasonably possible. As attorneys Ryan Hudson, Rex Sharp, and Dean Nancy Levit aptly note in their Introduction, “the most time-consuming part [of an MDL] is the production of documents . . . and the taking of depositions[;]” it is common to see “millions of pages of documents produced” and scores or even hundreds of witnesses deposed.<sup>5</sup>

Even though your MDL is complex, remember that your discovery schedule should be modified only upon a showing of “good cause.”<sup>6</sup> “Good cause” exists only when a deadline “cannot reasonably be met despite the diligence of the party seeking the extension.”<sup>7</sup> Tell the parties in your case management conference and state in your case management order that the discovery deadlines are real and

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<sup>4</sup> 28 U.S.C. § 1407(b).

<sup>5</sup> Ryan C. Hudson, Rex Sharp & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801, 811 (2021).

<sup>6</sup> FED. R. CIV. P. 16(b)(4).

<sup>7</sup> FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment; see *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (“[T]he focus of the inquiry is upon the moving party’s reasons for seeking modification. If that party was not diligent, the inquiry should end.”) (internal citation omitted).

will be extended only on a showing of good cause. This warning will avoid later surprises and will encourage the parties to pursue their discovery diligently.

### III. EIGHT DISCOVERY TIPS

First, hold regular status conferences, perhaps every month at the start. Require the parties to file a joint memorandum shortly before each conference reporting on the status of discovery, their progress in meeting deadlines, discovery issues, and other obstacles they have encountered. View each status conference as a problem-solving session to keep the discovery schedule on track.

Second, establish a procedure for handling already-completed common discovery. Prior to the establishment of your MDL, the parties may have conducted discovery in individual cases, including the production of documents and electronically stored information (ESI) and the deposition of defense witnesses. Require the parties to make pre-MDL general fact discovery available to all plaintiffs in the MDL, and encourage the parties to agree on the binding effect of such discovery, resolving disputes as necessary.

Third, manage ESI discovery closely. If the parties plan to use word searches for locating relevant ESI, require them to agree on search terms and custodians by a deadline early in the discovery period and to come to you if they cannot agree. If the parties intend to use some form of machine learning for their searches, require them to agree upon protocols by an early deadline and come to you if they cannot. Delaying agreement on these matters invites serious complications down the road when ESI discovery has not been completed and the deposition clock is running.

Fourth, set reasonable limits on the number and length of depositions. Consider placing an overall time limit on each side's number of deposition hours, such as 300 hours per side to be allocated among all general-discovery depositions in the case. Such time limits create a powerful incentive for efficiency in each deposition and largely eliminate time-wasting. Where a witness has been deposed on MDL-related issues before the MDL was formed, consider setting a shorter period for her MDL deposition to cover matters not addressed in the previous questioning.

Fifth, forbid written discovery motions. They waste time and money and likely will interfere with your discovery schedule. Instead, require the parties to call you when they have a discovery dispute they cannot resolve through their own good faith discussions. Take their call immediately if you are available or set a time to talk with them in the next day or two. Hold the discovery conference call on the record. Have each side explain the dispute. You usually will be able to make a decision on the spot. If issues arise during a deposition and you are not available to take the parties' call, require them to complete the deposition and make a record of the issues they wish to have you resolve when you are available.

If you find during a discovery call that certain issues require briefing, order it to occur within a week, focused on issues identified in the conference call and with page limits. Then rule on the issues within a week of receiving the briefs.

Enter your ruling in clear and direct text-only orders in your court's electronic docket – orders the lawyers will receive immediately by email.

If interrogatory answers or requests for production of documents (RFPs) are at issue, give the parties seven days to jointly prepare and submit a matrix summarizing the disputes. Allow one row of the matrix for each interrogatory or RFP at issue, and require the parties to complete four columns in each row: (1) quoting the interrogatory or RFP verbatim; (2) quoting the opposing party's response verbatim; (3) stating the propounding party's arguments on why the request is proper and the response deficient; and (4) stating the responding party's argument on why the request is improper or the response is sufficient. Rule on the issues within a week of receiving the matrix.

These practices resolve discovery disputes quickly and efficiently, and prevent disputes from interrupting the schedule you have established. They also reduce game-playing because the lawyers know you are readily available to resolve issues and keep the case moving. One more thing: require in your case management order that discovery disputes be raised before the end of the discovery period. This will avoid the months-later disputes that can interfere with motions and trial.

Sixth, require parties to notify the opposing side whenever they serve subpoenas. This already is required in Rule 45(a)(4),<sup>8</sup> but often is overlooked. Advance notice avoids surprises and discovery disputes that could have been resolved earlier.

Seventh, enter necessary protective orders promptly – their delay slows down discovery. Set a deadline by which an agreed-upon order will be submitted by the parties. Tell them that if they cannot agree on some provisions, they must submit an order containing everything they agree on and setting forth their respective proposed language for each paragraph or section on which they disagree. You can then enter the order promptly by selecting the most appropriate of the disputed provisions. No motions needed.

Eighth, tell the parties that if privilege disputes arise, the party seeking discovery will be permitted to select ten or fifteen entries from the opposing party's privilege log, and the opposing party will be required to submit the documents covered by the selected entries to the Court for *in camera* review and a ruling on the privilege assertion. This approach motivates parties to be reasonable in their privilege assertions. Provide rulings on those ten to fifteen entries promptly, and then require the parties to meet and confer to see if they can work out additional disagreements. Usually they can. If not, repeat the process; if a large number of privilege assertions must be resolved, appoint a special master (at the parties'

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<sup>8</sup> FED. R. CIV. P. 45(a)(4).

expense) to complete the privilege review on an expedited basis so as not to interfere with the discovery schedule.

#### IV. EXPERT DISCOVERY

Require full and complete expert disclosures under Rule 26(a)(2)(B)<sup>9</sup> by specific dates. Tell the parties that their experts will be permitted at trial to say only what appears in their report or what has been elicited by the opposing party in the expert's deposition (a rule which makes wise lawyers more cautious and effective in their expert depositions).<sup>10</sup> Stand by this rule in the bellwether trials. Rule 26(a)(2)(B) is designed to present a complete picture of what the expert will say at trial; the advisory committee note states that the report should provide "the testimony the witness is expected to present during direct examination, together with the reasons therefor."<sup>11</sup> Advise the parties that supplemental reports will be allowed only in exceptional circumstances, thereby avoiding the piecemeal disclosures that can greatly complicate expert discovery and trial.

Consider limiting the number of experts in the case, such as one expert per issue per side, or a total number of experts per side. And tell the parties that you will entertain expert discovery disputes only during the expert discovery period, again avoiding months-later disputes that only complicate matters.

#### V. BELLWETHER DISCOVERY

If the parties ask you to conduct bellwether trials, as they usually do in large MDLs, you will need to establish a schedule and procedures for some plaintiff-specific discovery.<sup>12</sup> Courts often establish a procedure for creating an initial pool of bellwether trial candidates, such as having each side propose twenty-five plaintiffs for the initial pool.<sup>13</sup> You can then require the fifty identified plaintiffs to provide additional case-specific information in the form of more detailed plaintiff fact sheets, to be answered under oath, setting forth information

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<sup>9</sup> FED. R. CIV. P. 26(a)(2)(B).

<sup>10</sup> *See id.*

<sup>11</sup> FED. R. CIV. P. 26 advisory committee's note to 1993 amendment; *see id.*

<sup>12</sup> Bellwether trials or "test cases" are trials in individual cases that "can help facilitate resolution of the MDL by testing essential elements of each side's litigation strategy and establishing representative settlement values." Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG., 44 (2011).

<sup>13</sup> *See* Melissa J. Whitney, *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG., 19-32 (2019), <https://www.fjc.gov/sites/default/files/materials/19/Bellwether%20Trials%20in%20MDL%20Proceedings.pdf> (providing examples of bellwether pool selection strategies employed in MDLs); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Prac. & Prods. Liab. Litig.*, No. 3:09-MD-02100-DRH, 2011 WL 3035087, at \*1 (S.D. Ill. July 25, 2011) (deciding that the initial "pool of cases, with which core discovery would be pursued and from which the bellwether trials would be drawn, would consist of fifty (50) cases").

such as when and where the plaintiff obtained the product, how it was used, what injuries resulted, the plaintiff's medical history, the identities of doctors who treated the plaintiff, relevant fact witnesses for the plaintiff's individual claims, and the amount of claimed damages. You also can require the defendants to provide similar fact sheets of plaintiff-specific information, such as when the product was placed in commerce, what warnings accompanied it, which sales representatives promoted the product, which contacts the defendants had with the plaintiff or her treating physicians, and what plaintiff-specific defenses will be asserted. Some additional, limited discovery may be warranted before the bellwether pool is narrowed, such as brief depositions of the plaintiffs and a key defendant salesperson.

On the basis of the information exchanged for these fifty bellwether candidates, the parties can narrow the pool of candidates to, say, twenty-four, by each side striking thirteen from the list. The parties will then engage in more detailed discovery with respect to the twenty-four remaining plaintiffs' cases, such as production of medical records (consider allowing the parties to use a medical records collection service), depositions of key doctors and family members, and depositions of individuals who sold the product to the plaintiff or her doctor.

With this more detailed information in hand, the bellwether trials can be selected. Require the parties to agree on (or to propose if there is disagreement) six plaintiffs for the bellwether trials (or more or less, if you decide).<sup>14</sup> Additional discovery will then be needed to prepare these six cases for trial, such as completing plaintiff-specific fact discovery and the disclosure and deposition of plaintiff-specific experts. Limited discovery for punitive damages claims, such as production of documents and a Rule 30(b)(6) deposition<sup>15</sup> concerning the defendants' net worth, may also be necessary.

When you set your initial general discovery schedule, keep in mind that this plaintiff-specific discovery will be needed for bellwether selection and trials, and that it likely will take several months to complete.

## VI. DISCOVERY AFTER REMAND AND TRANSFER OF CASES FROM THE MDL

Because all common fact and expert discovery likely will have been completed in your MDL, the courts receiving cases via remand or transfer after the MDL has closed should not be concerned with facilitating general expert, corporate, and third-party discovery.<sup>16</sup> But you should consider allowing trial

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<sup>14</sup> See *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, MDL No. 15-2666 (JNE/DTS), 2019 WL 4394812, at \*2 n.1 (D. Minn. July 31, 2019) (noting the court chose eight of the parties' proposed cases and then the parties each struck one case to finalize the bellwether pool's six cases); *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, No. 2:18-CV-01509, 2020 WL 1158734, at \*2 (S.D. Ohio Mar. 10, 2020) (discussing the expert discovery needed for "the six bellwether trial pool cases").

<sup>15</sup> FED R. CIV. P. 30(b)(6).

<sup>16</sup> See *Bartilet v. C. R. Bard, Inc.*, No. CV-19-9153-SAB (PJWx), 2020 WL 3467657, at \*5 (C.D. Cal. Feb. 12, 2020) ("The Court finds that reopening general discovery would be inconsistent with

testimony depositions for certain witnesses who will not be able to testify live at the trials in remanded and transferred cases.

## VII. CONCLUSION

In short, be an active case manager. Control the scope and pace of discovery. Resolve discovery disputes quickly and efficiently. Take advantage of the talent and experience of the lawyers in your MDL and the valuable resources made available by the Judicial Panel on Multidistrict Litigation and the Federal Judicial Center.<sup>17</sup> You will enjoy this experience and do some good along the way.

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Rule 1's mandate for the just, speedy, and inexpensive resolution of this case. To begin with, while these cases were being litigated in the MDL court, the parties reached an agreement regarding the scope of general issue/generic discovery. . . . Second, expanding discovery at this date would extend the case and result in additional expense, further defeating the aims of Rule 1.”)

<sup>17</sup> See Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2011); *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2d ed. 2014); Melissa J. Whitney, *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2019); Margaret S. Williams, Jason A. Cantone, & Emery G. Lee, *Plaintiff Fact Sheets in Multidistrict Litigation Proceedings: A Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2019); Fed. Jud. Ctr., <https://www.fjc.gov/subject/multidistrict-litigation-mdl> (last visited Jan. 28, 2021); U.S. Jud. Panel on Multidistrict Litig., <https://www.jpml.uscourts.gov/> (last visited Jan. 28, 2021).



