

## LAYERS OF LAWYERS: PARSING THE COMPLEXITIES OF CLAIMANT REPRESENTATION IN MASS TORT MDLS

*by*  
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*The individual plaintiff in an MDL is subject to the efforts and decisions of numerous different attorneys, including many whom the plaintiff did not choose but who stand to share in any fees resulting from the plaintiff's case. Which lawyers effectively represent the MDL plaintiff, at what point(s) in time, for what purpose(s), and with what obligations and potential liability to that plaintiff? What obligations and potential liability do the MDL leadership attorneys have to their own individually retained clients and other litigants in the MDL, and how should these attorneys handle any perceived conflicts in their obligations to the two groups? These important questions have thus far received little systematic attention from courts or scholars but are increasingly the focus of litigation.*

*This Article begins to fill the scholarly void. It explores the guidance provided by existing caselaw, state bar ethics opinions, and state rules of professional responsibility regarding the default obligations and liabilities that attend the receipt of client fees by these different overlapping "layers" of plaintiffs' lawyers and any limitations which may be imposed on them by contract or court order. It then extrapolates from this limited guidance to analyze two contexts of special, recurring importance in mass tort MDLs: (1) the disclosure and consent obligations of lawyers who both "represent" two or more clients covered by, and*

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*“participate in making,” an “aggregate settlement” and (2) conflicts that may arise when a court-appointed leadership attorney negotiates an “inventory” settlement involving only clients who individually retained her. The Article concludes by suggesting some best practices that future MDL courts and their appointed plaintiffs’ leadership attorneys might employ.*

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Multi-District Litigations (MDLs) have accounted for an increasing percentage of all pending federal civil cases over the past 50 years, and now comprise more than half.<sup>1</sup> Of the 141,536 cases pending in MDLs as of July 2019, mass torts, including

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<sup>1</sup> See Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW 360 (Mar. 14, 2019), <https://www.law360.com/articles/1138928/mdl-surge-to-majority-of-entire-federal-civil-caseload> (“MDLs accounted for 52 percent of all pending federal civil cases at the end of the last fiscal year . . . up from 47 percent in the previous fiscal year,” according to a study from Lawyers for Civil Justice); see also *Fact Sheet*, RULES 4 MDLs, <https://www.rules4mdls.com/fact-sheet> (last visited Mar. 8, 2020) (“As of September 30, 2018, there were 301,766 civil cases pending in the federal district court system. Of those, 156,511 cases sat within 248 MDLs and accounted for 51.9 percent of federal civil cases.”); *Report Reveals Products Liability Cases Make Up 90% of All MDL Cases, 42% of Entire Federal Civil Caseload*, RULES 4 MDLs (Oct. 4, 2018), <https://www.rules4mdls.com/calculating-the-case>. This percentage is arguably inflated by the fact that the Lawyers for Civil Justice’s (LCJ) calculation of the total number of civil cases excluded Social Security cases and lawsuits by federal inmates (other than death penalty cases) on the basis that those cases are not typically overseen by U.S. district judges. Alison Frankel, *Defense Group Argues New MDL Stats Prove Need to Change Rules for MDLs*, REUTERS (Oct. 4, 2018), <https://www.reuters.com/article/legal-us-otc-mdl/defense-group-argues-new-mdl-stats-prove-need-to-change-rules-for-mass-torts-idUSKCN1ME2EJ>; see also Patricia W. Hatamyan Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1214 (2015); Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1914–15 (2017) (offering statistics that show cases in MDLs constitute approximately one-third of the caseload of the federal district courts).

product liability claims, comprise more than 95 percent.<sup>2</sup> Consequently, growing numbers of lawyers and their clients (both plaintiffs and defendants) have been participating in MDLs. On the plaintiff side especially, this increase in numbers has resulted in increasing complexity with regard to previously straightforward issues of representation. The individual plaintiff in an MDL is effectively represented by numerous attorneys, including many whom the plaintiff did not choose but who stand to share in any fees resulting from the plaintiff's case. Meanwhile, the plaintiffs' attorneys appointed by the MDL court to leadership positions will effectively represent (and generally hope to receive fees from) two overlapping groups of plaintiffs: those clients who individually retained them via contract and all of the claimants in the MDL for whom the court has appointed them to serve as counsel.

With this increased complexity have come questions and uncertainty for lawyers, clients, and judges. Which lawyers effectively represent the MDL plaintiff, at what point(s) in time, for what purpose(s), and with what obligations and potential liability to that plaintiff? What obligations and potential liability do the MDL leadership attorneys have to each of the two groups of litigants with whom they have a relationship, and how should these attorneys handle any perceived conflicts in their obligations to the two groups? These important questions have thus far received little systematic attention from courts or scholars<sup>3</sup> but are increasingly the focus of

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<sup>2</sup> Calculated from *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (July 16, 2019), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-July-16-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-July-16-2019.pdf) (the most recent available MDL Statistics Report). Approximately 135,095 of the 141,536 pending actions involve product liability and other mass torts. Of the 199 MDLs pending in federal district courts as of July 2019, product liability and other mass torts comprise only about one-third, but include all of the 22 MDLs with at least 1,000 cases pending. The United States Judicial Panel for Multidistrict Litigation (JPML) reported that the 199 pending MDLs involved three categories with 73 total MDLs that could be considered "mass torts": air disaster (1), common disaster (3), and products liability (69). The remaining 130 pending MDLs involved antitrust (48), contract (4), employment practices (2), intellectual property (7), miscellaneous (37), sales practices (21), and securities (7). *MDL Statistics Report - Docket Type Summary*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (July 16, 2019), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Type-July-16-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Type-July-16-2019.pdf). The JPML reported that 42 of the 199 docketed cases included 1,000 or more total "actions" (that is, individual cases that were consolidated in the MDL court). Only 22 of those 42 cases, however, still had 1,000 or more actions as of the date of the Report. The difference is accounted for by actions being resolved while pending in the MDL or having been transferred back to the transferor court. *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, *supra*.

<sup>3</sup> One exception, which touches on a subset of these issues, is Stephen J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 LOY. L. REV. 1 (2018). See also, e.g., Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985 (2011).

litigation. In recent years, for example, one court-appointed MDL leadership plaintiffs' attorney was attacked for an alleged conflict of interest arising from his joint status as primary counsel for a subset of claimants within the MDL.<sup>4</sup> In another matter, multiple plaintiffs alleged that the entire plaintiffs' leadership of the MDL breached purported fiduciary duties to them by, *inter alia*, failing to respond to the defendant's motions to dismiss each of the plaintiffs' individual cases.<sup>5</sup>

This Article begins to fill the scholarly void. It provides a positive and normative assessment of the scope of and basis for the fiduciary obligations, and potential liability, of the different, overlapping "layers" of plaintiffs' lawyers involved in prosecuting claims that proceed through the mass tort MDL process. Part I briefly describes the subset of MDLs that are the focus of this Article and explains how the different layers of lawyers in those cases generally come to represent, and frequently share in the fees from, a given claimant. Included in this examination are: (1) lawyers whom the claimant chooses and retains via contract (e.g., the claimant's originally retained lawyer); (2) lawyers whom the client neither chooses nor controls but who are imposed on the client via the MDL court (e.g., MDL leadership attorneys); and (3) an intermediate group of attorneys whom attorneys in one of the preceding two groups may seek to engage on behalf of the clients who individually retained them or on behalf of other plaintiffs in the MDL (e.g., settlement counsel and bellwether trial counsel). Part II explores the guidance provided by existing caselaw, state bar ethics opinions, and state rules of professional responsibility regarding the default obligations and liabilities that attend the receipt of client fees by these different layers of lawyers and any limitations which may be imposed on them by contract or court order. Part III extrapolates from this limited guidance to analyze two contexts of special, recurring importance (and frequent litigation against plaintiffs' lawyers) in mass tort MDLs: (1) the disclosure and consent obligations of lawyers who both "represent" two or more clients covered by, and "participate in making," an "aggregate settlement"<sup>6</sup> and (2) conflicts that may arise when a court-appointed leadership attorney negotiates an "inventory" settlement involving only clients who individually retained her. The Article concludes by suggesting some best practices that future MDL courts and their appointed plaintiffs' leadership attorneys might employ to reduce some of the confusion and claims of conflicts of interest regarding the overlapping layers of lawyers who speak on behalf of claimants in an MDL.

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<sup>4</sup> See *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL 1441804, at \*11 (S.D.N.Y. Apr. 12, 2016).

<sup>5</sup> See *Casey v. Denton*, No. 3:17-CV-00521, 2018 WL 4205153, at \*2 (S.D. Ill. Sept. 4, 2018).

<sup>6</sup> MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2019). Model Rule 1.8(g) is found in essentially identical form in the rules of professional responsibility in every state. See Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 293 (2015).

## I. LAYERS OF LAWYERS IN MASS TORT MDLS

Today's MDL process, which originated with the Multidistrict Litigation Act of 1968,<sup>7</sup> includes a wide array of case types, only some of which are relevant to our discussion.<sup>8</sup> We are interested primarily in the subset of MDLs which each involve hundreds or thousands of individual cases, typically alleging personal injuries and/or deaths resulting from dangerous products.<sup>9</sup> These MDLs of interest do not proceed as class actions and are not resolved via a class settlement. For convenience, we will refer to this subset as "mass tort MDLs."

Each claimant in a mass tort MDL initially chooses and retains counsel pursuant to an individual attorney-client contract. Virtually all of these contracts will provide the individually retained counsel (IRC) a contingent fee tied to the size of the client's eventual gross monetary recovery. In some instances, the IRC will be a single law firm. In other instances, the IRC might involve a consortium of two or more law firms, each of which will be identified in the retainer agreement and will be sharing in the total contractual fees. In addition, especially if the IRC is an individual law firm, it may "refer" the case to another law firm or consortium.<sup>10</sup> That process will involve the consent of the client, typically in writing, and will not result in any change to the total contractual fees to be paid to the client's attorneys nor any other substantive changes to the original retainer agreement.<sup>11</sup> Thus, all of a client's eventual IRC will have been retained with the client's consent and pursuant to the terms of a written engagement agreement.

An MDL is created through a process that typically begins with attorneys for a plaintiff and/or a defendant filing a motion with the Judicial Panel on Multidistrict Litigation (JPML) to consolidate in a single federal district court all of the cases

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<sup>7</sup> Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2012)).

<sup>8</sup> See *supra* note 2. For recent scholarly discussions of the various types of MDLs, see, for example, Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. (forthcoming 2020) (manuscript at 16); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 465 (2019).

<sup>9</sup> Thus, the MDLs of interest are virtually all included in the JPML "Products Liability" docket. See *supra* note 2.

<sup>10</sup> Different states' rules of professional conduct provide different standards for what constitutes a permissible "referral." Compare, e.g., LA. RULES OF PROF'L CONDUCT r. 1.5(e) (2018) (requiring that each firm sharing in the fee provide "meaningful" legal services to the client), with TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.04 cmt. 12 (2019) (requiring that each lawyer sharing in the fee "ha[s] performed services beyond those involved in initially seeking to acquire and being engaged by the client").

<sup>11</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.5(e) (AM. BAR ASS'N 2019); see also, e.g., TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.04(g) (2019); Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425 (2011) (critiquing the process and claimed policy concerns underlying the adoption of the current Texas Rule).

involving the same product or defendant that are filed in federal district courts across the country.<sup>12</sup> If such motion is granted, hundreds or thousands of individual cases will be transferred to the MDL court and judge designated in the JPML order.<sup>13</sup> On the plaintiffs' side, this means that the hundreds of lawyers retained in those cases are now counsel-of-record in the litigation before the MDL court.

In order to communicate effectively with this large group of counsel, and to ensure that discovery proceeds efficiently, the MDL judge will solicit applications for, and will appoint, "leadership counsel."<sup>14</sup> The court's order appointing the Lead Counsel and the Plaintiffs' Steering Committee (PSC) will typically also detail the responsibilities of the leadership attorneys to the court, the other counsel-of-record, and all of the plaintiffs. Thus, effectively if not explicitly, the order will prohibit a claimant's IRC from engaging in certain aspects of a claimant's representation.<sup>15</sup>

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<sup>12</sup> See, e.g., Brief in Support of Pls.' Mot. for Transfer at 2–5, *In re Bard IVC Filters Prod. Liab. Litig.*, 122 F. Supp. 3d 1375 (J.P.M.L. 2015) (filed by lawyers from six firms, notifying the JPML of 26 lawsuits in 23 different federal districts against C.R. Bard, Inc. and Bard Peripheral Vascular, Inc., involving "virtually identical allegations concerning the manufacture and distribution of a medical device" (IVC Filter) and requesting an order from the JPML "transferring all pending actions against Defendants and any other additional related actions that may be brought to the attention of the Panel, to either the Honorable James E. Kinkeade or the Honorable Robert Jones").

<sup>13</sup> See, e.g., *In re Bard IVC Filters Prods. Liab. Litig.*, 122 F. Supp. 3d at 1377 (ordering consolidation and transfer of cases involving the Bard IVC Filters to Judge David G. Campbell in the District of Arizona).

<sup>14</sup> In the Bard IVC Filters MDL, for example, Judge Campbell's first Case Management Order (CMO) detailed the appointment of the Plaintiffs' Leadership Counsel, which included two "Plaintiffs' Co-Lead/Liaison Counsel and State/Federal Liaison Counsel" as well as a Plaintiffs' Steering Committee (PSC) of 22 attorneys from different firms across the nation. Case Mgmt. Order No. 1 at 1, *In re Bard IVC Filters Prod. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz., Oct. 30, 2015). As Resnik, Curtis, and Hensler noted two decades ago, there is little positive law to guide the MDL judges in the process of selecting the leadership attorneys. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 321–26 (1996). In recent years, academics have raised and debated various issues with regard to the process by which MDL judges select the leadership attorneys. See, e.g., Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

<sup>15</sup> For example, Judge Campbell's order stated that "Lead/Liaison will be (a) the only attorneys permitted to file in the Master Docket as to all actions, and (b) the only attorneys receiving Notices of Electronic Filing for pleadings and orders filed in the Master Docket for all actions." *In re Bard IVC Filters*, Order No. 1, at 3. In addition, the order stated that the PSC was responsible, *inter alia*, to: "[c]onduct all discovery in a coordinated and consolidated matter on behalf and for the benefit of all plaintiffs," "[e]xamine witnesses and introduce evidence on behalf

Through this order of the MDL court, claimants acquire additional lawyers responsible for the prosecution of their claims. Neither the individual claimants nor their chosen IRC will have selected or voluntarily consented to the addition of these counsel, however.<sup>16</sup> And notwithstanding that lack of consent, these court-appointed MDL leadership attorneys will generally share in the attorneys' fees that the claimant contracted to pay his or her IRC.<sup>17</sup>

Additional lawyers—who might be considered “intermediate counsel”—may ultimately come to effectively represent a claimant, typically following one of two routes. In some instances, the claimant’s IRC may seek to bring another attorney or

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of plaintiffs at hearings,” “[s]ubmit and argue all verbal and written motions presented to the Court on behalf of Plaintiffs’ Leadership Counsel as well as oppose when necessary any motion submitted by defendants or other parties which involve matters within the sphere of the responsibilities of Plaintiffs’ Leadership Counsel,” “[n]egotiate and enter into stipulations with defendants regarding this litigation” pursuant to court approval, “[e]xplore, develop, and pursue all settlement options pertaining to any claim or portion thereof of any case filed in this litigation,” and “perform any task necessary and proper for Plaintiffs’ Leadership Counsel to accomplish its responsibilities as defined by the Court’s orders, including organizing subcommittees comprised of plaintiffs’ lawyers not on Plaintiffs’ Leadership Counsel.” *Id.* at 5–7.

<sup>16</sup> While the claimant will have no opportunity or ability to consent to the addition of these counsel, the claimant’s IRC will sometimes be offered (via an order of the MDL Court) a choice to become “Participating Counsel” in the MDL and pay the court-ordered common benefit attorneys’ fee assessment from their contractual attorneys’ fees in exchange for access to common benefit work product (e.g., a “trial package”). An IRC who declines this option and chooses instead to be “Non-Participating Counsel” may be deprived of access to common benefit work product and generally assumes the risk of a potentially larger fee assessment. *See, e.g.*, Case Mgmt. Order No. 6 at 10, *In re Bard IVC Filters Prod. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz., Dec. 18, 2015) (“[I]f any counsel fails to timely execute the Participation Agreement and Joint Prosecution and Confidentiality Agreement, such counsel and members of his/her firm may be subject to an increased assessment. Moreover, if a Non-Participating Counsel receives common benefit work product or otherwise benefits from the common benefit work product, such counsel and the cases in which she/he has a fee interest may be subject to an increased assessment.”).

<sup>17</sup> Judge Campbell’s CMO in the Bard IVC Filters MDL, for example, began by noting that “[t]his Order is entered to provide for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation.” *Id.* at 1. The order went on to state that “[t]he governing principles are derived from the United States Supreme Court’s common benefit doctrine,” and that “[c]ommon benefit work product includes all work performed for the benefit of all plaintiffs, including pre-trial matters, discovery, trial preparation, a potential settlement process, and all other work that advances this litigation to conclusion.” *Id.* at 1–2. The order further states that “plaintiffs and their attorneys . . . who agree to settle, compromise, dismiss, or reduce the amount of a claim or . . . recover a judgment for monetary damages . . . are subject to an assessment of the gross monetary recovery.” *Id.* at 9–10. “The assessment amount is 8%, which includes 6% for attorneys’ fees and 2% for expenses. The assessment represents a holdback . . . and shall not be altered.” *Id.* at 10 (citation omitted).

firm into the representation in exchange for a share of the IRC's contractual attorneys' fees in order, for example, to assist with settlement negotiations.<sup>18</sup> In this case, the claimant (and his or her IRC) will explicitly consent to the representation pursuant to the procedures set out in the applicable state(s)' Rules of Professional Responsibility for the sharing of contractual attorneys' fees.<sup>19</sup> In some instances, a claimant's IRC may need to retain "local counsel" to assist with a claimant's representation in exchange for a specified hourly or flat-rate fee rather than a share of the contingent attorneys' fees. In this case, too, the claimant (and his or her IRC) will consent to the representation.

A second route by which "intermediate counsel" may come to effectively represent a claimant is through the court-appointed leadership attorneys. The court's order appointing the PSC and Lead/Liaison Counsel typically authorizes them to "[p]erform any task necessary and proper for Plaintiffs Leadership Counsel to accomplish its responsibilities as defined by the Court's orders, *including organizing subcommittees comprised of plaintiffs' lawyers not on Plaintiffs' Leadership Counsel.*"<sup>20</sup> These additional counsel whom the court-appointed leadership authorizes to perform common benefit work will be paid from the common benefit fee assessments pursuant to the procedures set out in the relevant court order.<sup>21</sup>

## II. OBLIGATIONS AND LIABILITIES OF THE LAWYERS IN EACH LAYER

As detailed in Part I above, by the time a mass tort claimant's case settles, there will typically be two groups of attorneys sharing in the contingent attorneys' fees associated with the case: (a) those who are representing the claimant with the express

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<sup>18</sup> This may take the form of either the retaining of "settlement counsel," who will negotiate a potential settlement, or joining with another firm or consortium of firms that is already in settlement talks with the defendant.

<sup>19</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.5(e) (AM. BAR ASS'N 2019); LA. RULES OF PROF'L CONDUCT r. 1.5(e) (2018); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.04(g) (2019); see also Baker, *supra* note 11, at 426–31.

<sup>20</sup> *In re Bard IVC Filters*, Order No. 1, at 7 (emphasis added); see also *In re Bard IVC Filters*, Order No. 6, at 8 ("Plaintiffs' Co-Lead Counsel may assign Participating Counsel common benefit work.").

<sup>21</sup> See, e.g., *In re Bard IVC Filters*, Order No. 6, at 8 ("Participating Counsel shall be eligible for reimbursement for time and efforts expended for common benefit work if said time and efforts are: (a) for the common benefit; (b) appropriately authorized . . . ."); *id.* at 12 ("The amounts deposited into the Bard IVC Filters Fee Fund and the Bard IVC Filters Expense Fund shall be available for distribution to Participating Counsel who have performed professional services or incurred expenses for the common benefit in accordance with this Order . . . . Each Participating Counsel who does common benefit work has the right to present their claim(s) for compensation and/or reimbursement prior to any distribution [from the Bard IVC Filters Fee Fund and the Bard IVC Filters Expense Fund] approved by this Court.").

consent of the claimant, including the claimant’s express consent to the amount of attorneys’ fees that the claimant will pay; and (b) those who have been appointed by the MDL court to carry out various duties “for the common benefit of all plaintiffs,” including the claimant, and whose fees will be determined by the MDL court and assessed against the IRC’s contractual attorneys’ fees.

In this Part, we take up several questions with regard to each of these two broad layers of lawyers and examine the guidance provided by existing caselaw, ethics opinions, and state rules of professional responsibility. As a default matter, what obligations and liabilities attend the attorneys’ receipt of fees? What limitations on these obligations and liabilities may be imposed by contract or by order of the MDL court? Throughout this discussion, we will refer to the first group of attorneys as the Individually Retained Counsel (IRC) and the second group of attorneys as the Court-Appointed Counsel (CAC).

#### A. *The Individually Retained Counsel*

The IRC can be understood to “represent” the claimant in the usual sense—at least at the outset, before the formation of an MDL and the appointment of the CAC. The IRC’s fiduciary and contractual obligations to the client, and its attendant potential liability for any professional lapses or malfeasances, follow well established paths. The attorney-client engagement agreement will set out the scope of the representation to be provided to the client as well as the contingent fee to be paid (and expenses to be reimbursed) in the event of a recovery.<sup>22</sup> Within the agreed scope of the representation, the attorney is expected to “handle the client’s affairs with the degree of care and skill that would have been exercised by a reasonable attorney acting in similar circumstances.”<sup>23</sup> A failure to do so may be the basis for a claim that the attorney breached the attorney-client contract, breached a fiduciary duty owed to the client, and/or committed malpractice.

Two aspects of the IRC’s representation merit further note. First, although the engagement agreement can and should specify the “scope of the representation,” there are limits on the attorney’s ability to contract out of his fiduciary obligations to the client and/or his potential liability to the client for any breaches or malfeasances. Thus, existing rules of professional responsibility prohibit the attorney from making “an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.”<sup>24</sup> And a formal Comment to ABA Model Rule 1.8(h) cautions attorneys that

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<sup>22</sup> MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2019) (scope of representation); *id.* r. 1.5(c) (contingent fees).

<sup>23</sup> LAWYER’S MANUAL ON PROF’L CONDUCT § 301:101 (AM. BAR ASS’N & BUREAU OF NAT’L AFFAIRS 2018).

<sup>24</sup> See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.8(h)(1) (AM. BAR ASS’N 2018). Comment 14 to the rule explains that “[a]greements prospectively limiting a lawyer’s liability for

“a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.”<sup>25</sup>

Second, to the extent that the client’s original attorney obtains the client’s consent to associate additional counsel, each of those lawyers may be liable for any breaches or malfeasances of the other, depending on the terms of the referral arrangement or consent to associate. Current law and ethics rules provide several options.

One option is for the agreement to state that the lawyers will “assume joint responsibility for the representation” and to specify the share of the fee that each lawyer/firm is to receive.<sup>26</sup> By assuming joint responsibility, the lawyers will generally each be liable for any breaches or malfeasances of the other during the representation.<sup>27</sup> The “joint responsibility” language, however, will typically eliminate any need to specify in the agreement the scope or proportion of the work that each lawyer/firm will perform or to undertake a determination at the conclusion of the matter as to the relative services provided by each lawyer/firm.<sup>28</sup> A second option is for

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malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation.” *Id.* r. 1.8 cmt. 14.

<sup>25</sup> *Id.* r. 1.8 cmt. 14.

<sup>26</sup> *Id.* r. 1.5(e); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 (AM. LAW INST. 2000).

<sup>27</sup> ABA Model Rule 1.5, Comment 7 states that “[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” MODEL RULES OF PROF’L CONDUCT r. 1.5 cmt. 7 (AM. BAR ASS’N 2018); *see also, e.g.*, ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 85-1514 (1985) (joint responsibility involves responsibility to the client “comparable to that of a partner in a law firm under similar circumstances, including financial responsibility [and] ethical responsibility to the extent a partner would have ethical responsibility for actions of other partners in a law firm in accordance with Rule 5.1”); CO. RULES OF PROF’L CONDUCT r. 1.5 cmt. 7 (2019); N.Y. RULES OF PROF’L CONDUCT r. 1.5 cmt. 7 (N.Y. 2018); ILL. RULES OF PROF’L CONDUCT r. 1.5 cmt. 7 (2010); WIS. RULES OF PROF’L CONDUCT FOR ATTORNEYS ch. 20:1.5 cmt. 7 (2007); Ariz. Bar, Ethics Op. 04-02 (2004) (joint responsibility imposes “financial responsibility for any act of malpractice that occurs during the course of the representation”); N.C. Bar, Ethics Op. 205 (1995) (joint responsibility means that “the lawyer remains responsible for the competent and ethical handling of the matter”); Fla. Bar, Ethics Op. 90-3 (1990) (assumption of joint responsibility for the case is “quid pro quo for the attorney’s receipt of a portion of the fee that does not represent payment for work performed”); Kummerer v. Marshall, 971 N.E.2d 198, 202 (Ind. Ct. App. 2012) (joint responsibility means each lawyer “can be held liable in a malpractice suit”); LAWYER’S MANUAL ON PROF’L CONDUCT: PRACTICE GUIDE §41:711 (BUREAU OF NAT’L AFFAIRS 2020) (on “Proportionality or Responsibility”).

<sup>28</sup> *See, e.g.*, LAWYER’S MANUAL ON PROF’L CONDUCT: PRACTICE GUIDE, *supra* note 27, §41:711 (“Model Rule 1.5(e)(1) provides that unaffiliated lawyers may . . . [apportion the fee] in a manner that does not correlate with the work performed if each lawyer agrees to assume ‘joint responsibility’ for the representation.”).

the fee-sharing agreement to state the specific services that the additional attorney/firm will perform (e.g., trial counsel, settlement counsel) as well as the precise portion of the fee deemed appropriate or proportional to the specialized work to be performed.<sup>29</sup> This option seems to permit the attorneys to also specify the area(s) of the representation in which the additional attorney will be solely liable for any breaches or malfeasances. Presumably, at least one of the firms must be financially responsible for any possible breaches or malfeasances. A third scenario arises in which the original attorney “refers” the case to another firm/attorney but retains an interest in the contingent fee. When the referring firm performs no services except to refer the case to the new firm, the fee-sharing agreement will be enforceable in most states so long as the referring attorney assumes joint responsibility for the representation.<sup>30</sup> Thus, this scenario is essentially a variant of the first option described above. This scenario could also potentially be a variant of the second option, at least in some states, if the percentage fee is low and is proclaimed to match the amount of work that has been done or will be done by the referring firm.<sup>31</sup>

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<sup>29</sup> See, e.g., *id.* §41:712 (“Under the ABA’s model, if associating lawyers do not assume joint responsibility, any division of fees must be made in proportion to the services each provides.”).

<sup>30</sup> See, e.g., *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 178 F. Supp. 2d 9, 23 (D. Mass. 2001) (“Today most states will allow a simple referral agreement provided that all of the attorneys assume, in writing, joint responsibility for the representation.”); D.C. RULES OF PROF’L CONDUCT r. 1.5 cmt. 12 (2010) (“The concept of joint responsibility does not require the referring lawyer to perform any minimum portion of the total legal services rendered. The referring lawyer may agree that the lawyer to whom the referral is made will perform substantially all of the services to be rendered in connection with the representation, without review by the referring lawyer. Thus, the referring lawyer is not required to review pleadings or other documents, attend hearings or depositions, or otherwise participate in a significant and continuing manner.”). But see, e.g., LA. RULES OF PROF’L CONDUCT r. 1.5(e) (2018) (requiring that each firm sharing in the fee provide “meaningful” legal services to the client).

<sup>31</sup> See, e.g., Me. Bd. of Overseers of the Bar, Ethics Op. 103 (1990) (lawyer who refers personal injury matter to another lawyer and has no further responsibility may enter into fee agreement that provides him one-ninth of any recovery, if client consents after full disclosure of arrangement and the total fee is reasonable). Such an arrangement, however, likely would not pass muster in the handful of states that expressly prohibit “pure forwarding fees.” See, e.g., CO. RULES OF PROF’L CONDUCT r. 1.5(d)(3) (2019) (requiring that a total shared fee to be reasonable); LA. RULES OF PROF’L CONDUCT r. 1.5(e) (2018) (requiring each firm sharing in the fee to provide “meaningful” legal services); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT r. 1.04 cmt. 14 (2019) (“In the aggregate, the minimum activities that must be undertaken by referring or associating lawyers pursuant to an arrangement for a division of fees are substantially greater than those assumed by a lawyer who forwarded a matter to other counsel, undertook no ongoing obligations with respect to it, and yet received a portion of the handling lawyer’s fee once the matter was concluded, as was permitted under the prior version of this rule.”); WYO. RULES OF PROF’L CONDUCT FOR ATTORNEYS AT LAW r. 1.5(f) (2014) (prohibiting fees charged “solely for referring a case to another lawyer”); Wash. Bar, Informal Ethics Op. 2201 (2009) (pure “forwarding” fee is not made permissible by being characterized as a fee-sharing arrangement).

### B. *The Court-Appointed Counsel*

The counsel appointed by the MDL court “represent” the individual claimant in a very different way than do the IRC, in virtually every respect. To begin, as discussed above, the CAC are neither chosen nor consented to by the claimant (or the claimant’s IRC). The claimant has no engagement agreement with the CAC. Instead, the scope of representation and any fees to be paid to the CAC (typically out of the fees the client has already contracted to pay his or her IRC) are determined by an order of the MDL court.

The order appointing the leadership counsel typically sets out both the governance structure for the attorneys who will be representing the plaintiffs in the MDL, as well as the duties that the court mandates those attorneys to perform.<sup>32</sup> This list of responsibilities might be viewed as analogous to, but much more detailed than, the “scope of representation” stated in the client’s engagement agreement with his or her IRC. The order, however, will also, both explicitly and implicitly, alter the responsibilities of the client’s own IRC, by stating that the MDL leadership attorneys are “the only attorneys permitted” to undertake various tasks and mandating those attorneys to perform various tasks “on behalf of all plaintiffs.”<sup>33</sup>

Given the specificity of its role, the CAC’s relationship with the individual client is somewhat similar to that of specialized counsel whom the client’s original IRC might seek to retain to assist with the client’s representation.<sup>34</sup> At the same time, however, it is important to note that the motivation that underlies the court’s appointment of the CAC is unrelated to the needs of any individual client. The Fifth Circuit, for example, has distinguished CAC from IRC by noting:

the broader responsibilities that lead counsel bear and the larger interests that they serve. Because of the nature of the case that will trigger appointment, lead counsel’s services are in part for all parties with like interests and their lawyers. To a degree, lead attorneys become officers of the court. By making manageable litigation that otherwise would run out of control they serve interests of the court, the litigants, the other counsel, and the bar, and of the public at large, who are entitled to their chance at access to unimpacted courts.<sup>35</sup>

This conception of the CAC as enabling the MDL court to better manage the litigation is consistent with the “managerial” basis of the court’s authority to appoint the CAC. Insofar as an MDL involves a consolidation of civil actions, the sources for the court’s authority to appoint leadership attorneys are generally understood to

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<sup>32</sup> See, e.g., Case Mgmt. Order No. 1, *In re Bard IVC Filters Prod. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz. Oct. 30, 2015).

<sup>33</sup> *Id.* at 3, 5.

<sup>34</sup> See text accompanying *supra* notes 16–17. Of course, the absence of any consent by the client or his or her IRC importantly distinguishes the CAC from any such specialized counsel whom the IRC might seek to retain on behalf of, and with the consent of, the client.

<sup>35</sup> *In re Air Crash Disaster*, 549 F.2d 1006, 1017 (5th Cir. 1977).

include the MDL statute,<sup>36</sup> Federal Rule of Civil Procedure 42(a),<sup>37</sup> and the court’s “inherent managerial authority.”<sup>38</sup> For several decades, MDL courts have stated that “[i]t is now commonly accepted in complex multiparty litigation that a court can and in fact should appoint a committee . . . to coordinate the litigation and ease the administrative burden on the court.”<sup>39</sup>

This same managerial authority is also a commonly cited basis for the MDL court’s assessment of “common benefit” fees and costs against the client and his or her IRC. Courts have repeatedly observed that “[a]s a corollary to this appointment [of leadership attorneys], the court must be permitted to compensate fairly the attorneys who serve,” and that the “court’s power is illusory if it is dependent upon lead counsel’s performing the duties desired of them for no additional compensation.”<sup>40</sup> Other commonly cited sources of the authority of the MDL court to assess common benefit fees and costs include the “common fund doctrine” and the court’s equitable powers to avoid “unjust enrichment.”<sup>41</sup>

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<sup>36</sup> See 28 U.S.C. § 1407(a) (2012) (authorizing transfers by the JPML of “civil actions involving one or more common questions of fact [that] are pending in different districts” to “any district for coordinated or consolidated pretrial proceedings. . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”). Courts commonly infer this power of appointment from language of the statute that does not expressly grant it. *E.g.*, *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 773 (9th Cir. 1977).

<sup>37</sup> “Consolidation. If actions before the court involve a common question of law or fact, the court may: . . . (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” FED. R. CIV. P. 42(a); *see also In re Air Crash Disaster*, 549 F.2d at 1013 (stating that “[t]he trial court’s managerial power is especially strong and flexible in matters of consolidation” and quoting Fed. R. Civ. P. 42(a)).

<sup>38</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 648 (E.D. La. 2010) (stating that “[t]he Fifth Circuit has long recognized that a court’s power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison counsel” and citing *In re Air Crash Disaster*, 549 F.2d at 1006).

<sup>39</sup> *In re Diet Drugs*, No. 99-20593, 2002 WL 32154197, at \*17 (E.D. Pa. Oct. 3, 2002) (citing *Vincent*, 557 F.2d at 773–74); *In re Air Crash Disaster*, 549 F.2d at 1014–15; MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.221 (1995); *see also, e.g.*, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708 (DWF/AJB), 2008 WL 682174, at \*5 (D. Minn. Mar. 7, 2008) (quoting *In re Diet Drugs*, 2002 WL 32154197, and stating: “In addition, responsible case management requires such an appointment to promote efficiencies and to maximize the economies of scale.”). Even critics of the process by which MDL courts commonly appoint the leadership attorneys acknowledge that such appointments are the prevailing judicial practice. *See, e.g.*, Silver & Miller, *supra* note 14, at 118 & n.33 (observing “the need to centralize control” that arises in MDLs and noting that “The Manual for Complex Litigation encourages judges to impose governance structures”).

<sup>40</sup> *In re Diet Drugs*, 2002 WL 32154197, at \*17; *see also, e.g.*, *In re Guidant Corp.*, 2008 WL 682174, at \*5; *In re Air Crash Disaster*, 549 F.2d at 1016.

<sup>41</sup> *See, e.g.*, *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939) (stating that the common benefit doctrine is an application of a court’s “original authority . . . to do equity in a

Given all the above, what potential liabilities attend the leadership attorneys' anticipated receipt of fees from the client, albeit via the court-ordered assessment process? As was discussed in Part II.A above, the association of additional counsel for the client via contract follows one of two general routes: (1) the additional counsel assume "joint responsibility" for the representation in exchange for their share of the contractual attorneys' fees; or (2) the agreement states the specific services that the additional counsel will perform as well as the precise portion of the fee deemed appropriate or proportional to those services—and those counsel are presumably liable for any malfeasances related to their performance of those specific services. Neither in its order appointing the CAC nor in its order mandating the common benefit fee assessment from which the CAC will be paid does the MDL court address the issue of liability. One is left to infer that the CAC, analogous to counsel associated through the second type of fee-sharing agreement above, would be liable for any malfeasances related to its performance of the responsibilities set out in the court's order of appointment. And since the CAC will be explicitly displacing the client's IRC with respect to those court-ordered responsibilities, one infers that the client's IRC would not be held liable for any acts or omissions of the CAC involving those court-ordered responsibilities. One is also left to infer that the CAC will not be liable for any acts or omissions by the client's IRC. Indeed, since the IRC will be responsible only for those aspects of the client's representation outside of the areas that the court mandates to be the exclusive province of the CAC, it would seem that the CAC has no possible supervisory role regarding, or authority to interfere with, those residual responsibilities and fiduciary obligations of the client's IRC.

### III. TWO CASE STUDIES

The discussion in Part II above largely presents our reasoning from first principles given the absence of any caselaw or state bar ethics opinions that take up the specific issue of how attorney obligations and attendant liability are allocated among the layers of lawyers in MDLs in various contexts. In this Part, we extrapolate from our discussion above to offer an answer to these questions in two contexts of recurring significance in mass tort MDLs: the making of an "aggregate settlement" (whether "inventory" or "global") and the negotiation by a court-appointed leadership attorney of an "inventory" settlement involving only clients who individually

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particular situation"); *In re Vioxx*, 760 F. Supp. 2d at 647–48 ("In addition to judicial precedent the Court also finds authority to assess common benefit attorneys' fees in its inherent managerial authority, particularly in light of the complex nature of this MDL."); *In re Guidant Corp.*, 2008 WL 682174, at \*5 ("One measure used by courts (and parties) to avoid unjust enrichment of persons who benefit from a lawsuit without shouldering its costs, and to fairly compensate those attorneys who coordinate the litigation and shoulder the heaviest burden, is to create a common fund from which attorney fees will be paid for those who worked for the common benefit of all plaintiffs.").

retained her. The answers are of added importance in light of recent lawsuits against plaintiffs' attorneys in these two contexts.<sup>42</sup>

#### A. Attorneys' Obligations Under the "Aggregate Settlement" Rule

ABA Model Rule 1.8(g) states in relevant part that:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of . . . the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.<sup>43</sup>

The relevant state(s)' equivalent of this rule plays a critical role in virtually every non-class mass tort MDL settlement.<sup>44</sup> And claimed violations of the rule are a frequent focus of litigation when clients sue mass tort plaintiffs' lawyers for alleged malpractice or breach of fiduciary duty.<sup>45</sup>

Which layer(s) of lawyers are responsible for complying with this rule? And which layer(s) of lawyers are liable for any failures to comply? To begin, it is important to note that the rule applies to lawyers who *both* "represent" two or more clients covered by the potential settlement *and* "participate in making" the settlement. Both the CAC and the IRC for a given mass tort claimant can be said to simultaneously "represent" the claimant.<sup>46</sup> But whether the lawyers who "participate in making" the settlement are IRC, CAC, or both will depend in large part on the

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<sup>42</sup> For a discussion of various lawsuits against mass tort plaintiffs' lawyers involving the aggregate settlement rule, see Baker, *supra* note 6, at 291 & n.1. *See also, e.g.*, Pl.'s Original Petition at 6, Tietelbaum v. Nations, No. 2019-18460/Court: 165 (Harris Co., Tex. Mar. 13, 2019); Casey v. Denton, No. 3:17-CV-00521, 2018 WL 4205153, at \*6 (S.D. Ill. Sept. 4, 2018); *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL 1441804, at \*4 (S.D.N.Y. Apr. 12, 2016).

<sup>43</sup> MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2019).

<sup>44</sup> That is because virtually all non-class mass tort settlements involve "interdependence" among the claims covered by the settlement, which is the key characteristic that makes a group settlement one that is subject to the rule's disclosure and consent requirements. *See* Baker, *supra* note 6, at 309 ("The resolution of claims in a non-class aggregate settlement is interdependent if: (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims; or (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations" (quoting PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.16 (AM. LAW INST. 2010)); *see also* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1946–52 (2016) (discussing minimum participation thresholds as a core component of the comprehensive finality sought by defendants in mass tort settlements).

<sup>45</sup> Baker, *supra* note 6, at 304.

<sup>46</sup> Indeed, the CAC can be understood to effectively "represent" all of the claimants in the MDL—at least with respect to those specific functions delegated or assigned to the CAC by the MDL court.

type of aggregate settlement at issue. The fact that the order of the MDL court appointing the plaintiffs' leadership attorneys may have charged them to "[e]xplore, develop, and pursue all settlement options pertaining to any claim or portion thereof of any case filed in this litigation"<sup>47</sup> does not mean that they will have necessarily "participate[d] in making" a particular aggregate settlement.

There are two basic types of non-class aggregate settlements subject to Rule 1.8(g).<sup>48</sup> The most common type by far is an "inventory" settlement in which the defendant enters into a confidential agreement with an individual law firm or consortium of firms to potentially settle the claims of the clients represented by that particular firm or consortium. The other, much more rare type is the truly "global" settlement in which the defendant enters into an agreement with designated MDL leadership attorneys to attempt to resolve all of the claims pending against the defendant in the MDL court (and sometimes also state courts).<sup>49</sup>

An inventory settlement involves only the relevant IRC in its making. Indeed, given the confidential nature of such settlements, the CAC often may not even know that an IRC has entered into a settlement agreement (although eventually the CAC will be able to discern from the docket that some number of cases in the MDL have been dismissed). Thus, Rule 1.8(g)'s disclosure and consent obligations for this type of aggregate settlement would rest solely on the relevant IRC who would therefore be solely liable for any failures to comply with the rule.

A true "global" settlement, in contrast, will necessarily involve the CAC in its making. Some or all of the court-appointed leadership attorneys will have negotiated, and will be the only plaintiffs' counsel signatories to, such a settlement agreement.<sup>50</sup> The various IRC for the clients covered by the settlement agreement will typically have played no role in the making of the global settlement. Thus, the

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<sup>47</sup> Case Mgmt. Order No. 1 at 6, *In re Bard IVC Filters Prod. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz., Oct. 30, 2015).

<sup>48</sup> As stated at the outset of this Article, our focus is on MDLs that are neither litigated nor settled as class actions. It is generally understood that Rule 1.8(g) does not apply to class actions settlements whose disclosure of settlement values and terms and obtaining of client consent to the settlement are all closely supervised, and must ultimately be approved, by the relevant court. See Baker, *supra* note 6, at 294 n.8 (observing, *inter alia*, that "[t]wo states provide in the text of the Rule that it does not apply in class actions" and citing to Louisiana Rule 1.8(g) and North Dakota Rule 1.8(g)).

<sup>49</sup> The public, nationwide *Vioxx* settlement is the best known global settlement. See, e.g., Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto Dated as of Nov. 9, 2007, available at <https://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement%20-%20With%20Exhibits.pdf>.

<sup>50</sup> See, e.g., *id.* In the *Vioxx* litigation, the MDL court appointed a Plaintiffs' Negotiating Committee, consisting of certain appointed MDL counsel and representatives from the most highly concentrated pieces of state court litigation, to negotiate with Merck on a strictly confidential basis.

CAC—and not the IRC—should assume primary responsibility for making the disclosures mandated by Rule 1.8(g).<sup>51</sup> Indeed, typically only the CAC will have the information about all the claims covered by the global settlement which must be disclosed to each covered claimant before seeking their consent to the settlement.

One further type of aggregate settlement merits mentioning. In some cases, the defendant may enter into a settlement agreement with a particular attorney/firm (“the signatory IRC”) which has itself entered into agreements with various other IRCs to include them in its settlement in exchange for a share of those IRCs’ contractual attorneys’ fees. Under this scenario, the IRC that is the signatory to the settlement agreement represents all of the claimants covered by the agreement, and that attorney/firm therefore has primary responsibility for ensuring that the disclosure and consent obligations of Rule 1.8(g) are met. Critically, the disclosures should include information about all of the claimants covered by the agreement when the claims are interrelated in the critical sense.<sup>52</sup> Thus, in our view, the signatory IRC would not be complying with the rule if he or she simply allocated to each of the other firms a portion of the total settlement fund and told each of them to further allocate that portion however they wanted among their own sub-group of covered clients.<sup>53</sup> Without information about the settlement offers to be made to *all* of the clients included in the settlement, these other IRCs have limited ability to provide their clients the information that all of the clients must have in order to give valid consent to the settlement.<sup>54</sup>

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<sup>51</sup> The signatory CAC could comply with the rule by preparing templates of the disclosure documents, critically including the allocation information for the entire settlement, as happened in the *Vioxx* settlement, and delegate to the IRC the task of communicating that prepared information about the entire settlement to their clients. These documents (available from Baker) were publicly available for more than a decade at officialvioxxsettlement.com, but that website no longer exists. If appropriate disclosure document templates are not provided by the CAC to the IRC, it is not entirely clear whether the claimant would have a breach of fiduciary duty claim against the CAC for failure to comply with Rule 1.8, and/or whether the settlement might be deemed void and unenforceable. The remedy may be determined in part by any language in the global settlement agreement stating, for example, that the signatory CAC would be responsible for complying with Rule 1.8 in effectuating the settlement. To the extent that the CAC refuses or otherwise fails to provide the disclosures, the IRC is going to be caught between the requirements of Rule 1.8 on the one hand and the IRC’s responsibility to inform his or her client(s) of the settlement offer(s) under Rules 1.4(a)(1) and 1.2(a) on the other.

<sup>52</sup> See Baker, *supra* note 6, at 310–11.

<sup>53</sup> Proceeding in this way would be permissible only if the group settlement were not an aggregate settlement to which Rule 1.8(g) applies. For the settlement to be exempt from the rule, the settlement would need to be devoid of any interdependence among the covered claims. This means that the settlement agreement could not include a “walk away” provision or participation threshold and would also specify the value of each individual’s claim based solely on its individual facts and without regard to any other claim included in the settlement. *See id.* at 308–10, 319–23.

<sup>54</sup> *See id.* at 306–23; *see also* text accompanying *supra* note 51.

### B. Potential Settlement-Related Conflicts Arising from an Attorney's Dual Role as Individually Retained Counsel and Court-Appointed MDL Leadership

A second context in mass tort MDLs in which questions regularly arise involving attorney obligations and attendant liability is the negotiation by a CAC of an "inventory" settlement involving only clients who individually retained him. Here the focus is on the CAC and involves potential conflicts between the clients who individually retained that lawyer and the other claimants in the MDL whom that lawyer also effectively represents (at least for some purposes) via the court's order.<sup>55</sup>

Initially, it must be noted that resolution efforts are largely driven and defined by the defendant. An MDL defendant typically has the power and the freedom to decide whether to negotiate globally or on an inventory basis, whether to extend plaintiff-specific or aggregate offers, whether to require minimum participation rates, and whether to condition settlement on a promise of secrecy. The ethical concerns that often arise from such proposals, however, focus largely, if not exclusively, on counsel for the plaintiffs.<sup>56</sup> One of us (Herman) has therefore suggested that policy makers concerned with regulating or prohibiting certain types of settlements might most effectively focus their efforts on defense counsel whose settlement offers

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<sup>55</sup> In contrast, the aggregate settlement issues discussed in Part III.A involve conflicts that might arise at the time of settlement between and among the individually retained clients of a single attorney or firm representing multiple plaintiffs in a mass tort litigation. Those conflict issues have received significant attention from commentators (including one of us) and courts. For commentary, see, for example, Baker, *supra* note 6, at 319–23; Baker, *supra* note 44, at 1946–52; Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 228–37 (1999); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1539 (1998); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 753 (1997) [hereinafter Silver & Baker, *Mass Lawsuits*]; Matthew L. Garretson, *A Practical Approach to Proactive Client-Counseling and Avoiding Conflicts of Interest in Aggregate Settlements*, 6 LOY. J. PUB. INT. L. 19, 22 (2004); Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172 (1995); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 177–78 (1999); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 491 (1994). For judicial opinions, see, for example, Hayes v. Eagle-Picher Indus., 513 F.2d 892, 894 (10th Cir. 1975); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708 (DWF/AJB), 2009 WL 5195841, at \*9 (D. Minn. Dec. 15, 2009); Arce v. Burrow, 958 S.W.2d 239, 243 (Tex. App. 1997), aff'd in part, rev'd in part sub nom. Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999); Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 227–28 (Tex. App. 1985).

<sup>56</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.7, 1.8(g), 1.15(e) (AM. BAR ASS'N 2019). There are two notable exceptions: Rule 5.6(b), which makes it unethical to "participate in offering or making" a settlement that restricts a lawyer's right to practice, *id.* r. 5.6(b) (emphasis added); and Rule 8.4(a), which states that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, *knowingly assist or induce another to do so, or do so through the acts of another . . .*" *id.* r. 8.4(a) (emphasis added).

often create the perceived or potential conflict.<sup>57</sup> In the meantime, however, it remains largely the responsibility of the plaintiffs' lawyer to take appropriate action in responding to settlement overtures from the defendant and in approaching a defendant about possible settlement opportunities.

Absent extenuating circumstances, there are currently no ethical or other restrictions on a lawyer in MDL leadership accepting an offer from a defendant to negotiate the settlement of only cases within his or her own inventory.<sup>58</sup> Indeed, if the defendant were to reduce to writing a formal offer to settle some or all of that attorney's own inventory of cases, the attorney would clearly have an obligation to communicate those offers to the relevant clients.<sup>59</sup> At the same time, however, the CAC has obligations to all of the claimants in the MDL. While the precise nature and extent of these obligations continues to be debated,<sup>60</sup> it is generally accepted that an attorney serving in MDL leadership has some level of responsibility to all plaintiffs in the MDL within the scope of the CAC's court-ordered obligations.<sup>61</sup>

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<sup>57</sup> See, e.g., Herman, *supra* note 3, at 20–21.

<sup>58</sup> See, e.g., *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL 1441804, at \*10 (S.D.N.Y. Apr. 12, 2016) (“[T]he Cooper Plaintiffs point to no authority suggesting, let alone holding, that a lead counsel outside of the Rule 23 class action context cannot freely settle his or her own cases.”). An extenuating circumstance, however, might include a settlement conditioned on a violation of Rule 5.6(b) or 1.8(g).

<sup>59</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(1) (AM. BAR ASS'N 2019) (“A lawyer shall . . . promptly inform the client of any . . . circumstance with respect to which the client's informed consent . . . is required . . .”); *id.* r. 1.4 cmt. 2 (“[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance . . .”); *id.* r. 1.2(a) (“A lawyer shall abide by a client's decision whether to settle a matter.”); *id.* r. 1.2 cmt. 1 (A decision “such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions.”).

<sup>60</sup> Compare, e.g., Silver, *supra* note 3, at 1987–91 (attorneys in MDL leadership should be considered fiduciaries with respect to plaintiffs in the MDL), with Herman, *supra* note 3, at 8–12 (no fiduciary duty running to each plaintiff in the traditional sense; responsibility more analogous to an ERISA fiduciary's functional duties to the collective interests of the beneficiaries); see also, e.g., *In re Gen. Motors*, 2016 WL 1441804, at \*6 (observing that plaintiffs asserting that MDL leadership attorney “owes all plaintiffs in the MDL fiduciary duties . . . cite no legal authority for that proposition”).

<sup>61</sup> See, e.g., *Casey v. Denton*, No. 3:17-CV-00521, 2018 WL 4205153, at \*5 (S.D. Ill. Sept. 4, 2018) (MDL leadership attorneys are responsible to “put the common and collective interests of *all* plaintiffs first while they carry out their enumerated functions”) (emphasis added) (citing Herman, *supra* note 3); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004) (“Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel.”); cf. *In re Gen. Motors*, 2016 WL 1441804, at \*7 (observing that the duties MDL co-lead counsel “owe[] to personal injury and wrongful death plaintiffs represented by other counsel are significant,” although also concluding that “they are not as strong as the duties that lead counsel owes to absentee members of a class action”).

Certainly, as was discussed in Part II.B above, the leadership attorney is obligated by the court's order of appointment to fulfill the responsibilities detailed in that order.<sup>62</sup> That order will often include among the stated responsibilities of the leadership attorneys an obligation to “[e]xplore, develop, and pursue all settlement options pertaining to any claim or portion thereof of any case filed in this litigation.”<sup>63</sup>

If a defendant offers to negotiate an inventory settlement with a CAC, it may benefit the clients who individually retained the CAC as well as the other claimants in the MDL for the attorney to attempt to convince the defendant to negotiate a larger, global settlement instead.<sup>64</sup> In most cases, however, the defendant has historically insisted upon an inventory-by-inventory or other non-global approach.<sup>65</sup>

Some have suggested that a potential “structural conflict” will now arise for the leadership attorney who proceeds to negotiate a settlement of the claims of her individually retained clients.<sup>66</sup> The claimed concern is that the attorney will be incentivized to enrich her individually signed clients at the expense of the other claimants who remain in the MDL.<sup>67</sup> But how exactly will this occur? Various possibilities can be imagined, but we start by considering two. The leadership attorney might seek a premium for her inventory relative to the settlement(s) she later negotiates for other

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<sup>62</sup> See *supra* notes 34–41 and accompanying text.

<sup>63</sup> E.g., Case Mgmt. Order No. 1 at 1–3, *In re Bard IVC Filters Prod. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz. Oct. 30, 2015).

<sup>64</sup> The benefit of a global settlement to both groups of claimants would typically be due to some or all of the following: a finality premium which the defendant might be expected to pay if substantially all the cases will be resolved, and reduced litigation costs and settlement-related transaction costs for each claimant. See Baker, *supra* note 44, at 1944, 1946–47, 1966.

<sup>65</sup> See, e.g., *id.* at 1945–46 n.7 (observing that there have been “vastly more personal injury mass torts resolved via multiple confidential inventory settlements” than true global settlements such as the *Vioxx* settlement); see also, e.g., Def.’s Combined Response to Mot. to Remove the Co-Leads and Reconsider the Bellwether Trial Schedule and Mot. to Reconsider the Order Approving the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund at 14, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-02543-JMF (S.D.N.Y. Feb. 1, 2016) (“[I]t is common for groups or subsets of claims—particularly personal injury claims—to be settled at various times in an MDL proceeding”).

<sup>66</sup> See, e.g., Decl. of Charles Silver at 6–7, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-02543-JMF (S.D.N.Y. Feb. 5, 2016) (contending that “a clear and well-recognized potential for a serious conflict of interests exists when a lead attorney negotiates a side-settlement of his firm’s inventory of cases while retaining control of an MDL,” and terming this a “structural conflict”).

<sup>67</sup> See, e.g., *id.* at 6–7 (“[A] lead attorney may encounter countless opportunities to gain additional relief for the signed clients by reducing the defendant’s exposure in the unsettled cases that remain in the MDL” and the leadership attorney’s “desire to get the largest possible sum for his signed clients . . . would naturally have led him to tap any opportunity to enrich the signed clients that arose in the course of settlement negotiations with [the defendant], including opportunities with the potential to reduce [the defendant’s] liability exposure to other MDL claimants”).

claimants in the MDL, or the leadership attorney might agree as a condition of the settlement of her own inventory that she will undertake to withdraw from her leadership position, thereby depriving the remaining MDL plaintiffs of her knowledge, resources, and continued work in the litigation.<sup>68</sup> Neither of these possibilities is likely to occur, however, or to disadvantage the remaining claimants in the MDL if it does.

If a leadership attorney is able to negotiate a premium settlement value for her inventory, that does not necessarily signal collusion between the attorney and the defendant to “sell out” the other claimants in the MDL. Indeed, such collusion may not even be possible. No one leadership attorney generally controls the negotiation of a global settlement, so collusion regarding the value of a future global settlement of the remaining claims in the MDL is not likely. In addition, the fact that the defendant settled the leadership attorney’s cases via an inventory settlement may well mean that the defendant will be undertaking only inventory settlements, and the leadership attorney whose own inventory has been resolved will presumably not play any role in the defendant’s future inventory settlements with other law firms.

Thus, if a leadership attorney is able to negotiate a premium settlement value for her own inventory, that premium will simply reflect the heightened value the defendant places on resolving that attorney’s inventory. An attorney serving in MDL leadership is frequently a lawyer who, even without a leadership appointment, would warrant or demand premium recoveries for her clients, based on her own knowledge, experience, skill at trial (including trial verdicts to date), reputation, commitment, financial wherewithal, or the size and quality of her inventory. From a pure conflicts approach, disparate treatment alone is not a “conflict.” Even among the clients who individually retained the attorney, a conflict only arises when the interests of the clients are “directly adverse” or where there is a significant risk that the representation of one will be “materially limited” by the representation of another.<sup>69</sup> Here, absent a limited fund or some other extenuating circumstance, the leadership lawyer would remain free to zealously and independently advance the interests of both her own inventory and the other claimants in the MDL.<sup>70</sup> That the

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<sup>68</sup> Professor Silver has suggested that the mere possibility of these types of trade-offs gives rise to a “structural conflict” which can only be cured by the resignation of the attorney from MDL leadership prior to the commencement of such “inventory” settlement negotiations. *See id.* at 6–13.

<sup>69</sup> *See MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1)–(2) (AM. BAR ASS’N 2019).*

<sup>70</sup> *See, e.g., In re Covenant Fin. Grp. of Am., Inc.*, 243 B.R. 450, 455 n.6 (Bankr. N.D. Ala. 1999) (“There is no conflict of interest inherent in an attorney’s representation of multiple plaintiffs or defendants. Consequently, there is no *per se* prohibition of the practice under ethical rules which govern the conduct of lawyers.”); *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL 1441804, at \*10 (S.D.N.Y. Apr. 12, 2016) (“In a limited fund situation, the potential conflict of interest between lead counsel’s own clients and other plaintiffs could be a significant issue and the court may well have a role to play. . . . That may even be the

timing of the settlements, or the level of compensation negotiated, for the two groups of claimants ends up being different is not alone a basis to question the leadership lawyer's loyalty to either group.<sup>71</sup>

What about the second "structural conflict" possibility: that the defendant might want the leadership attorney to agree as a condition of the settlement of her own inventory that she will undertake to withdraw from her leadership position, thereby depriving the remaining MDL plaintiffs of her knowledge, resources, and continued work in the litigation? First, it merits note that such a withdrawal by the leadership attorney is suggested paradoxically by one scholar as a cure for the claimed structural conflict.<sup>72</sup> In any event, ABA Model Rule 5.6(b) clearly prevents the lead lawyer and the defendant from conditioning a settlement of the lawyer's inventory

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case outside the Rule 23 context, to ensure that a race to the courthouse door (or, more precisely, to the settlement table), does not leave some litigants out in the cold." (citation omitted)); *Allegretti-Freeman v. Baltis*, 613 N.Y.S.2d 449, 451 (N.Y. App. Div. 1994) ("We agree with plaintiffs that the mere representation of multiple parties does not alone pose a conflict requiring separate counsel . . . ."); 1 TOXIC TORTS PRACTICE GUIDE § 14:6 (2d ed. 2019) ("In evaluating whether the counsel has a conflict of interests, at least one court will hold that counsel can represent both the class and an opt-out plaintiff—where there is no limited fund available for which the parties will be competing." (citing *In re Asbestos Sch. Litig.*, No. 83-0268, 1986 WL 10789, at \*3 (E.D. Pa. Sept. 30, 1986)); Tex. Comm. on Prof'l Ethics, Op. 500 (1994) (lawyer would violate Texas Rule 1.06(a) by representing multiple plaintiffs involved in a single accident where the value of the parties' claims substantially exceeds the assets out of which they might be satisfied).

<sup>71</sup> Additionally, courts have recognized in the class action context that it would be impractical and inappropriate to attempt to mechanically apply Rules 1.7 and 1.9 in complex proceedings. *See, e.g.*, *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 588–91 (3d Cir. 1999); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18–19 (2d Cir. 1986); *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring); *White v. Nat'l Football League*, 822 F. Supp. 1389, 1405 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1995). Some commentators have similarly argued for the modification of, or an exception to, Rule 1.8(g), even with respect to an attorney's own individually retained clients, in mass tort cases. *See, e.g.*, *Silver & Baker, Mass Lawsuits*, *supra* note 55, at 744.

<sup>72</sup> *See* Decl. of Charles Silver, *supra* note 66, at 9–10 ("Nothing prevents an attorney who holds a lead position in an aggregate proceeding from negotiating a side-settlement of an inventory of signed cases. The attorney need only recognize the conflict and resign the lead position. By resigning, the lawyer preserves good incentives by eliminating the possibility that the unrepresented claimants will be treated like sacrificial lambs. . . . The problem with side-settlements is not that the lawyers who negotiate them are bad people. It is that the structure—negotiating a side-settlement while also controlling a separate aggregate proceeding—creates incentives and opportunities to help one group of people at the expense of another, and that the opportunities cannot be policed."). *But see In re Gen. Motors*, 2016 WL 1441804, at \*11 (S.D.N.Y. Apr. 12, 2016) ("[T]here is no law or logic for the proposition that Lead Counsel cannot settle their own cases—or alternatively, as Professor Silver suggests, to require them to step down as Lead Counsel if they desire to settle some of their own cases. Indeed, if anything, such a rule would be a serious disincentive for any lawyer to seek a lead counsel position in the first instance and would do a disservice to the interests of plaintiffs as a whole." (citations omitted)).

on the agreement of the attorney not to represent other plaintiffs in the same or other related litigation.<sup>73</sup> An inventory settlement conditioned on the agreement of a lead lawyer not to perform any further common benefit work on behalf of other claimants in the MDL would seem to be a similarly problematic restriction on the lawyer's practice of law under Rule 5.6(b).<sup>74</sup> Yet, irrespective of the letter or spirit of Rule 5.6(b), an attorney appointed to the leadership of an MDL serves at the direction of the court.<sup>75</sup>

Such an attorney, therefore, cannot simply "agree" with the defendant not to perform functions that she has been appointed and instructed by the court to carry out. The attorney must petition the court for leave to be excused from further service

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<sup>73</sup> MODEL RULES OF PROF'L CONDUCT r. 5.6(b) (AM. BAR ASS'N 2019); *see also* Baker, *supra* note 44, at 1959–60 (discussing "no present intention" language in settlement agreements, including the commonly mis-read *Vioxx* settlement agreement, as a frequently used and judicially sanctioned way of obtaining certain types of closure without running afoul of Rule 5.6(b)).

<sup>74</sup> See, e.g., ABA Comm'n on Ethics and Prof'l. Responsibility, Formal Op. 93-371 (1993) ("A restriction on the right of plaintiffs' counsel to represent present clients and future claimants against a defendant as part of a global settlement of some of counsel's existing clients' claims against that same defendant represents an impermissible restriction on the right to practice which may not be demanded or accepted without violating Model Rule 5.6(b)."); MANUAL FOR COMPLEX LITIGATION, *supra* note 61, § 13.24 ("[I]t is an ethical violation for an attorney to enter into or propose such an agreement."). At the same time, however, it is important to view such provisions within the context of the particular facts and circumstances. In the *Xarelto* litigation, for example, one IRC challenged certain provisions in a "global" settlement agreement that had been negotiated by the PSC. *See In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 2019 WL 6877651, at \*2 (E.D. La. Dec. 17, 2019). Unlike an "inventory" settlement available to only the clients of one or more PSC firms, this confidential settlement was offered to all eligible plaintiffs in the MDL, and was intended to resolve all, or substantially all, of the outstanding litigation. *Id.* at \*3. The court noted that "thus far, over 99 percent of the plaintiffs in this litigation have chosen to opt into the settlement," but added that the PSC "has assembled a 'trial package'" which "is available to any litigant who decides to not opt into the settlement program and instead proceeds to trial." *Id.* First, addressing the standing of the IRC to challenge the settlement, the Court concluded:

[T]he private settlement agreement does not legally prejudice Movants because they are free to not opt-in—as they have thus far decided—and proceed with their individual cases utilizing the trial package prepared by the PSC. At best, the Court only sees a potential 'tactical disadvantage' that Movants may suffer; namely, that the plaintiffs' counsel who were involved throughout the course of this litigation will no longer be involved in this litigation and will not aid Movants in preparation of their individual cases beyond what they have already done in preparing the trial package materials. This is not sufficient to support a claim of legal prejudice.

*Id.* at \*7. The IRC also challenged certain provisions within the settlement agreement that the IRC argued placed restrictions on their own right to practice. The court, however, found that "Movants' counsel—and all counsel—are protected by the 'safe harbor' provision language in the settlement agreement, which means the applicable restrictions of local ethics rules will govern and, if necessary, modify or override the agreement provisions." *Id.* at \*7–8.

<sup>75</sup> See, e.g., Herman, *supra* note 3, at 6–8.

in the MDL. Hence, the most the leadership attorney could promise the defendant as an enforceable term of an inventory settlement is that she will seek the permission of the MDL court to be relieved of any future leadership duties. Such a provision would obligate the defendant to proceed with the settlement if its other conditions are met, even if the MDL judge does not grant the lead attorney permission to withdraw from her leadership position and do no further work in the MDL. Critically, for purposes of any claimed “structural conflict,” the judge has complete power to protect the interests of the claimants remaining in the MDL by determining whether those claimants will be better served by permitting the leadership attorney to withdraw from her position or by requiring her to continue to serve in that leadership role.

In some instances, the court may decide that it would be appropriate to substitute the CAC who has settled her inventory of cases with a different or additional CAC. And if an attorney in MDL leadership, having been appointed to faithfully carry out certain functions and responsibilities on behalf of all plaintiffs, were to consciously sacrifice the interests of other plaintiffs in an attempt to secure an advantage for the clients who individually retained him or her, the attorney should arguably be removed.<sup>76</sup>

If the court determines that the lawyer in question remains motivated to serve in MDL leadership, it may also reasonably conclude that the claimants remaining in the MDL will generally benefit from those attorneys’ knowledge, skill, experience, and insight, both generally and as uniquely gained in that particular litigation.<sup>77</sup> If

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<sup>76</sup> While declining, for lack of jurisdiction, to address the duties owed by MDL leadership to other MDL plaintiffs and their attorneys generally, the Seventh Circuit once noted:

A side-agreement is not of itself intrinsically improper, though we do note that parties, like those in the case before us, with dual and potentially conflicting loyalties, like Smith [a member of the MDL leadership] toward both the *Fentress* [a state court client] and MDL-907 plaintiffs . . . might be well advised in crafting any side-agreement to proceed in such a manner that all interested parties, including the court, could rely on their good faith and integrity.

Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1205 (7th Cir. 1996). *But see In re Gen. Motors*, 2016 WL 1441804, at \*11 n.9 (“If there were evidence that the agreements were part of some *quid pro quo* and that counsel had sought and obtained benefits for some clients at the expense of others . . . that would certainly raise colorable professional ethics issues. But those issues would not necessarily be within this Court’s purview.”).

<sup>77</sup> See, e.g., *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 590 (3d Cir. 1999) (“[W]hen an action has continued over the course of many years, the prospect of having those most familiar with its course and status be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution.” (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 800 F.2d 14, 18–19 (2d Cir. 1986))); *White v. Nat’l Football League*, 822 F. Supp. 1389, 1405 (D. Minn. 1993), *aff’d*, 41 F.3d 402 (8th Cir. 1995) (“Several objectors contend, however, that class counsel’s loyalty to the class has been compromised as a result of counsel’s representation of the NFLPA, as well as individual players, in various other lawsuits. . . . [R]ather than creating conflict, the experience

the court requires the leadership attorney to continue working in the MDL, that attorney has financial incentives similar to those she had at the outset of her leadership appointment to maximize the recoveries of the claimants remaining in the MDL since she will ultimately share in the contingent common benefit fees generated by the resolution of the remaining claimants' claims.<sup>78</sup>

Finally, we would argue that any decision regarding whether a CAC should continue to serve in an MDL after negotiating a settlement of her own inventory should remain within the complete and sole discretion of the MDL court. Insofar as that court appointed the attorney to the leadership, it retains the authority to terminate or revise the scope and terms of that appointment. Any attempt to restrict that authority via legislation or rules may ultimately disadvantage the claimants remaining in the MDL. For example, if a CAC were to be automatically disqualified from further service in the MDL upon negotiating a settlement of her own inventory, defendants would be incentivized to serially "buy off" the MDL leadership via such settlements in order to deprive the rest of the MDL claimants of the attorneys who are especially well-suited to lead the litigation—precisely the type of conduct sought to be avoided.<sup>79</sup>

#### IV. SOME PROPOSED BEST PRACTICES FOR MDL COURTS AND THEIR APPOINTED PLAINTIFFS' LEADERSHIP COUNSEL

Our goal in this Article has been to begin to fill a critical void in the caselaw and scholarship by providing a positive and normative assessment of the scope of and basis for the fiduciary obligations, and potential liability, of the different, overlapping layers of plaintiffs' lawyers involved in prosecuting claims that proceed through the mass tort MDL process. Courts especially may find our analysis useful in a world in which "there is no direct case law on point with regard to what lead and liaison counsel's duties are in the MDL context."<sup>80</sup>

In light of our analysis above, and our own involvement in numerous MDLs,

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gained thereby was likely a prerequisite to the parties' ultimate agreement to settle."); *see also, e.g.*, Weinstein, *supra* note 55, at 494 ("Amassing large numbers of cases in the hands of relatively few specialized lawyers can greatly facilitate settlement and afford plaintiffs the benefit of attorneys experienced in complex cases.").

<sup>78</sup> Such an attorney's financial incentives will be similar to, but may not be quite as strong as, those she had at the outset of her appointment to the leadership. Physical and mental fatigue aside, the extent to which the attorney's financial incentives may be diminished, if at all, will depend on a range of factors including how many hours the attorney has already logged on leadership work, how many hours she is likely to log on that work in the future, and the proportion of the attorney's total fees in the litigation that will be derived from common benefit work versus the resolution of her own inventory of cases.

<sup>79</sup> See, e.g., *In re Gen. Motors*, 2016 WL 1441804, at \*11; *see also* Herman, *supra* note 3, at 21–22.

<sup>80</sup> *Casey v. Denton*, No. 3:17-CV-00521, 2018 WL 4205153, at \*3 (S.D. Ill. Sept. 4, 2018).

we offer below some best practices that future MDL courts and their appointed plaintiffs' leadership counsel might employ to reduce some of the confusion and claims of problematic conflicts of interest regarding the overlapping layers of lawyers who represent claimants in an MDL.<sup>81</sup>

1. In its order appointing plaintiffs' leadership and setting out their duties, the MDL court should make explicit:
  - that the only responsibilities of the leadership attorneys are those set out in the court's order;
  - that the court's order displaces what would otherwise be the obligations of a client's individually retained counsel *only* with regard to the specific responsibilities imposed on the leadership attorneys via the court's order; and
  - that each plaintiff's individually retained counsel remains responsible for all other aspects of a plaintiff's representation, especially including "specific matters unique to each case."<sup>82</sup>
2. In its order appointing plaintiffs' leadership, the MDL court should state that any leadership attorney who is a signatory to a settlement agreement that resolves one-half or more of her (or her firm's) inventory of cases in the MDL, or who will have one-half or more of her (or her firm's) inventory of cases in the MDL potentially resolved by a settlement agreement to which the leadership attorney is not a signatory, must notify the court and provide it with a copy of the settlement agreement for *in camera* review within three (3) business days of the signing of the settlement agreement. The sole purpose of the court's review will be to determine whether, in light of that settlement agreement, it is in the best interests of the claimants remaining in the MDL for the attorney to continue in her current leadership role.
3. In its order appointing plaintiffs' leadership, the MDL court should state that if the leadership attorneys negotiate a non-class global settlement with the defendant(s), the leadership attorneys are responsible for complying with the disclosure requirements of the relevant state(s) equivalents to ABA Model Rule 1.8(g). Relatedly, the court might further state that the leadership attorneys should provide the court for *in camera* review of an opinion letter from an expert in legal ethics affirming that the disclosure and consent requirements of

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<sup>81</sup> This is a matter also for the leadership attorneys since an MDL court will often mandate in an early case management order that the newly appointed plaintiffs leadership attorneys "shall submit to the Court a proposed Case Management Order concerning: (a) the duties and authority of Plaintiffs' Leadership Counsel in coordinating pretrial practice in this MDL." Case Mgmt. Order No. 2 at 1, *In re Bard IVC Filters Prod. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz. Oct. 30, 2015).

<sup>82</sup> *Casey*, 2018 WL 4205153, at \*5 ("It was never the intention or spirit of [a particular Case Management Order of the MDL court] to supersede the authority or importance of each plaintiff's individually-retained counsel when it came to specific matters unique to each case.").

the relevant state(s) equivalents to ABA Model Rule 1.8(g) have been met and attaching a copy of the relevant disclosure documents.

4. Finally, the MDL court should appoint attorneys to the plaintiffs' leadership for a term of one year, unless terminated earlier by the court. The order of appointment should further require Lead and Liaison Counsel thirty days before the expiration of the one-year term to "file a memorandum notifying the Court of the need to make further appointments and making recommendations regarding those appointments."<sup>83</sup> (It might be appropriate to request such submission *in camera*.) This annual review process will assist the court in ensuring that all of the leadership attorneys continue to be appropriately invested in the larger mission of the MDL, and are continuing to "put the common and collective interests of all plaintiffs first while they carry out their enumerated functions."<sup>84</sup>

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<sup>83</sup> Some MDL courts are already doing this. *E.g.*, Case Mgmt. Order No. 1 at 7–8, *In re Bard IVC Filters Prod. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz., Oct. 30, 2015).

<sup>84</sup> *Casey*, 2018 WL 4205153, at \*5.