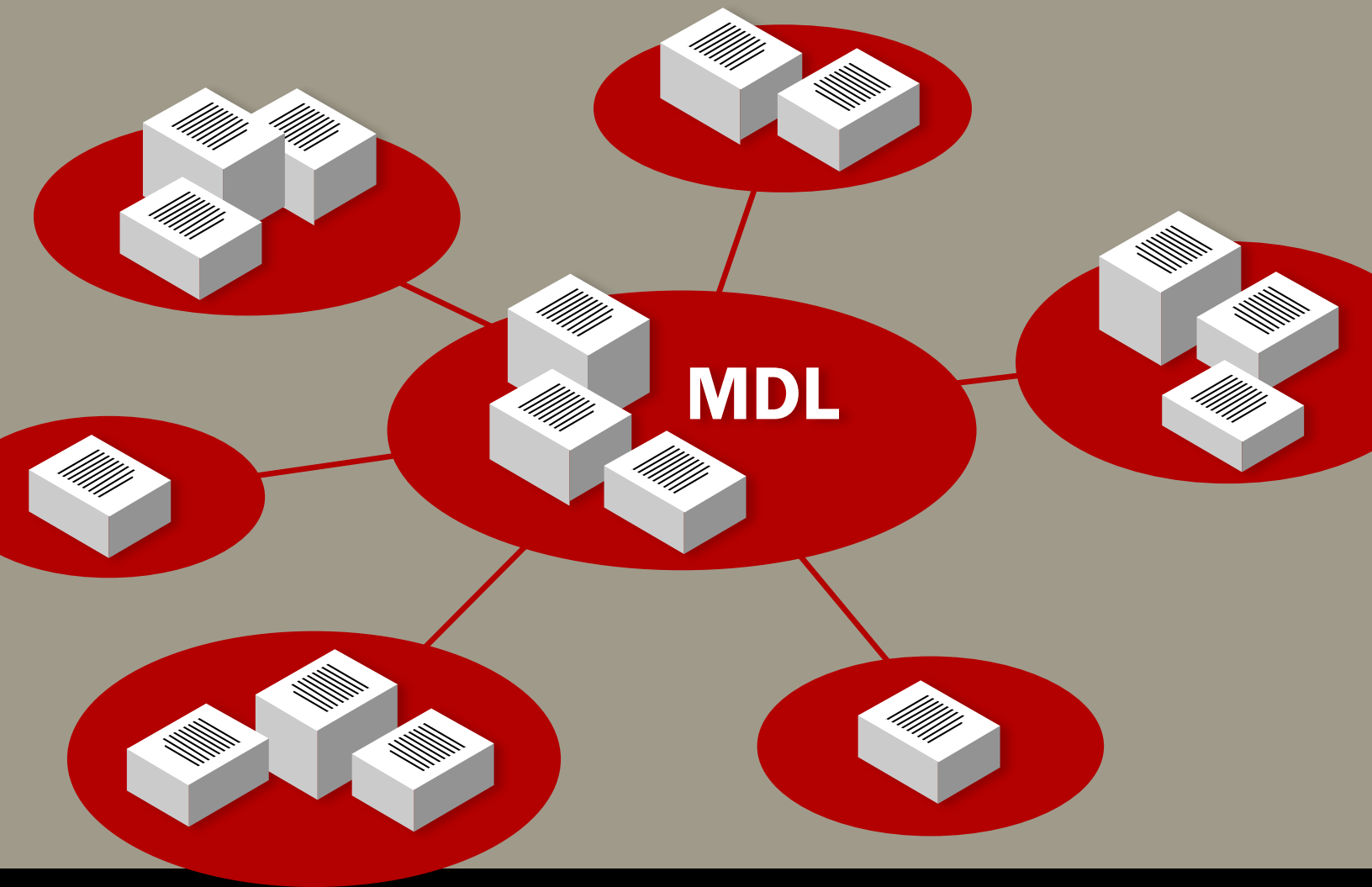


Managing MDLs

A Report from the March 2025
MDL Case Management Convening
at Stanford Law School

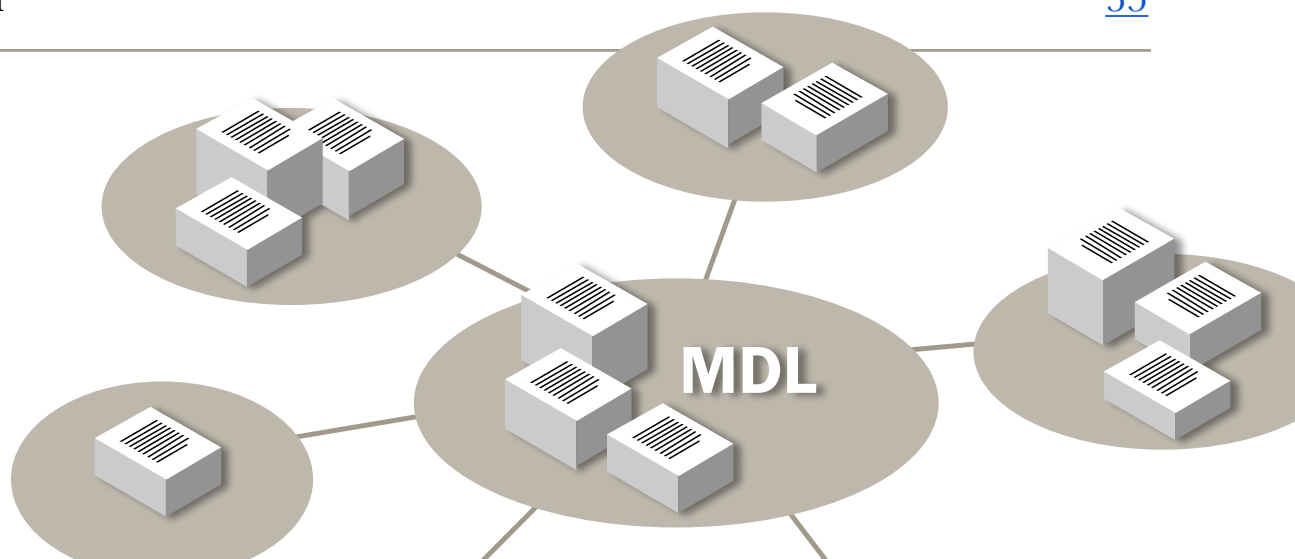
Nora Freeman Engstrom,
Brienne Holland-Stergar &
Owen Foulkes



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AS RECENTLY AS 1991, multidistrict litigation (MDL) accounted for only about 1 percent of civil cases in federal courts.¹ Today, however, that figure has grown to at least 65 percent—and the claims consolidated in MDLs affect the lives of hundreds of thousands of American litigants.²

The judges to whom MDLs are transferred are tasked with ushering these large and complex cases to conclusion—and in so doing, they face an extraordinarily daunting set of challenges: Such transferee judges are tasked with making high-stakes decisions, with little time for reflection and little formal guidance. They are often supported by small and relatively inexperienced staffs. The question thus arises: Can academics, policymakers, and practitioners work together to help make the job of the transferee judge incrementally easier?

On March 7, 2025, the Deborah L. Rhode Center on the Legal Profession at Stanford Law School brought together a small group of distinguished scholars, judges, policymakers, and practitioners to discuss this question. Building on conversations that began at our 2022 Convening,³ and on the work that culminated in the creation of the Rhode Center’s [MDL Toolkit](#)—an interactive online resource that compiles hundreds of annotated MDL orders and associated guidance—participants shared candid reflections on key MDL case management challenges, including claim integrity, common benefit fees, leadership appointment, and closure mechanisms. Together, we aimed to surface lessons learned, identify persistent gaps in knowledge, and chart promising avenues for future research and reform.⁴

We start by offering five key lessons from the March Convening:

Key Takeaways

1 | MDLs are a Venue for Laudable Experimentation & Innovation: MDLs serve as laboratories for procedural innovation where judges, attorneys, and other stakeholders can work together to develop creative solutions to complex case management challenges. From claim screening using AI tools, to sliding-scale common benefit fees, to new “pilot trials” to drive case closure, MDLs continue to evolve through experimentation. This experimentation is only possible because the rules that govern MDLs are flexible; there is no one-size-fits-all set of requirements. Convening participants tended to view this flexibility as a positive feature of MDLs, not a bug. Participants largely agreed that this flexibility permits transferee judges to tailor approaches to the unique demands of each litigation, and that MDLs can serve as incubators for practices that may eventually be adopted more broadly in civil litigation.

¹ Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 7 (2019).

² Amanda Bronstad, *MDLs Make Up More Than Half of U.S. Cases, Whether It’s 65% or 71%*, LAW360 (June 25, 2024).

³ For more on the 2022 Convening, see NORA FREEMAN ENGSTROM, TODD VENOOK, DAVID FREEMAN ENGSTROM & SILVIE SALTZMAN, PLAINTIFFS AND ATTORNEYS IN MULTIDISTRICT LITIGATION: STRENGTHS, DEFICITS, AND PATHS FORWARD (2022) [hereinafter 2022 Convening Report].

⁴ We are grateful to the many individuals who assisted with the Convening and contributed to this report, particularly Lisa Qian, Robert Vogel, Maya Rodriguez, Mariah Uustal, Reynold Orsua, Sarah Ryan, Abby Wolfe, and Jessica Wang.

2 | Early, Proactive Judicial Management Is Critical Across All MDL Phases: Participants agreed that early, proactive judicial involvement is a critical component of MDL success. Participants emphasized that transferee judges should establish clear frameworks and expectations at the outset rather than allowing issues to develop organically. This approach includes early appointment of leadership committees with regular performance reviews, establishment of common benefit protocols before disputes arise, and the creation and careful implementation of appropriate claim screening mechanisms. Indeed, many stressed that, even as an MDL is getting underway, the participants should start to think about how the litigation might eventually wrap up. As one participant put it regarding closure, “You should start at the very beginning”—a sentiment that could apply equally to all aspects of MDL management.

3 | There is a Pressing Need to Understand the Influence of Mass Tort Marketing and Third-Party Litigation Funding on MDLs: Third-party litigation funding and mass tort marketing significantly impact MDL dynamics from claim filing all the way through to case resolution. These external forces operate largely outside the traditional regulatory architecture (including traditional attorney ethical rules and court oversight), potentially undermining claim quality and altering settlement incentives. High-interest loans to lawyers can distort incentives and encourage premature or unfavorable settlements, while aggressive marketing tactics may lead some lawyers to represent clients with nonmeritorious claims. Participants queried whether the time has come for greater transparency and possibly regulation of these influences—and, if so, what calibrated regulation would look like.

4 | Structural Tensions Between Individual and Collective Interests Define MDL Practice: At the heart of MDL practice lies a fundamental tension between individual case resolution and collective efficiency. This tension manifests in various ways: the lawyers on the plaintiff steering committee (PSC) must move cases along *en masse*, while respecting each client’s interest in individualized resolution; claim integrity mechanisms must cull truly nonmeritorious claims, without deterring or impairing legitimate filings; those who communicate with individual litigants must share information efficiently, while offering personalized guidance; and closure mechanisms must resolve cases expeditiously, while respecting individual litigants’ different objectives and priorities. Successful MDL management requires acknowledging and navigating these inherent tensions rather than attempting to eliminate them.

5 | Emerging Technologies Both Solve and Create MDL Management Challenges: Technology holds both promise and peril. AI tools offer promising ways to screen claims and process voluminous records but also raise concerns about transparency and potential misuse. Online case management systems and public websites can enhance transparency but may have unintended consequences for attorney marketing. Remote proceedings increase efficiency but may do so at the expense of building the personal relationships necessary to drive complex cases to conclusion. The strategic adoption and management of these technologies represent increasingly important dimensions of effective MDL practice.

Transferee judges' case management decisions do not merely shape individual cases; they help define the contours of the American civil justice system. The Convening provided a valuable opportunity for reflection and dialogue, allowing MDL leaders to engage in discussions designed to spur meaningful action to refine and improve current MDL case management practices.

I. Introduction and Background

On March 7, 2025, the Deborah L. Rhode Center on the Legal Profession hosted a small group of distinguished scholars, judges, policymakers, and practitioners at Stanford Law School to discuss key case management decisions faced by MDL transferee judges.

Professor Nora Freeman Engstrom called the convening to order with the following observations, which set the tone for the remainder of the discussion:

Transferee judges' case management decisions not only impact the lives of hundreds of thousands of Americans, but they also shape the civil justice system overall. If we aren't getting MDLs right, we aren't getting civil justice right, period.

But, as it stands, transferee judges are tasked with making critical high-stakes decisions—including who to appoint to leadership, how to disburse common benefit funds, how to identify and cull frivolous claims, and how to engineer and administer large-scale settlements. And they are asked to make these decisions quickly, while supported by small and mostly inexperienced staffs, and in the face of little formal authority.

Now, many believe that the relative lack of formal authority is, on balance, beneficial: Too many strict rules could stifle judicial creativity and limit flexibility. Different MDLs are different. Shouldn't management approaches differ, too? Furthermore, MDLs have been a site of innovation and experimentation. Do we really want to cut that off and freeze MDLs in their current form?

But, at the same time, many believe that, even with the new Rule 16.1, the current situation goes too far the other way: Transferee judges might not want to be told what to do. But they may want to know what's been done and how it's worked. Much like my 18-year-old son, judges might not want to be told how to drive. But, they probably don't want to have to reinvent the wheel.

The goal of the Convening, then, was not to stifle judicial creativity but, rather, to provide an opportunity for exchange where MDL leaders were invited to share their insights about what is working and what isn't working in contemporary MDL practice—while simultaneously providing an opportunity to learn from those “in the trenches” where gaps in knowledge persist and where further research is needed most.

1 | MDLs: High Stakes, Little Guidance

As the above remarks emphasize, what transferee judges do *matters*. Multidistrict litigation now makes up at least 65 percent of the federal civil caseload.⁵ That means that vast numbers of plaintiffs in the federal civil docket are subject to transferee judges’ pretrial decisions.

Furthermore, the cases themselves are significant.⁶ Take, for instance, the *In re* National Prescription Opiate Litigation. Tackling an ongoing crisis that has already claimed nearly one million American lives,⁷ the MDL has stepped in where the branches of government have failed to act.⁸ As Judge Dan Polster, the judge tapped to oversee the behemoth litigation, put it at the first hearing in 2018, “[F]ederal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it’s here.”⁹ As of May 19, 2025, the defendants in the MDL had agreed to pay out nearly \$57 billion in settlements. Also, perhaps in part as a consequence of the opioid litigation (and the disclosures it has triggered), opioid deaths in the United States are in sharp decline.¹⁰

Given the number of cases swept into MDLs and their national significance, one might expect the Federal Rules or statutory sources to provide a comprehensive set of rules and guidelines for MDL case management. That’s not the case. Instead, transferee judges are expected to oversee complex webs of thousands of consolidated actions aided only by scattered sources of case management guidance, as well as small (and typically, inexperienced) staff teams—an “immensely—almost absurdly—challenging” assignment.¹¹ For guidance, judges turn to a cobbled-together, and, in some instances, dated collection of information sources. An MDL judge might consult, for instance, the Federal Judicial Center’s Manual for Complex Litigation (last published in 2004),¹² Duke’s Bolch Guidelines and Best Practices for Large and Mass-Tort

⁵ Bronstad, *supra* note 2. Note, however, that the recent settlement in the 3M Earplug MDL—a massive case that, at one time, consolidated more than 57,600 individual cases—could lower that percentage. See Emily Field, *3M’s \$6B Deal in Earplug MDL Cut Federal Caseload 14%*, LAW360 (Mar. 12, 2025) (noting that the 3M settlement cut *overall* federal case volume by 14%); *Federal Judicial Caseload Statistics 2024*, U.S. COURTS, <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024> (last visited May 19, 2025).

⁶ See, e.g., Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1651 (2021) (“MDL . . . has been used to manage and resolve some of our largest controversies, such as the BP oil-spill disaster, the NFL concussion litigation, and the Volkswagen “clean”-diesel scandal.”); Lynn A. Baker & Andrew D. Bradt, *MDL Myths*, 101 TEX. L. REV. 1520, 1522 (2023) (“Whenever a national controversy finds its way into the federal courts, MDL stands ready to ensure that the complex and massive litigation moves as efficiently as possible to an orderly resolution.”).

⁷ *Understanding the Opioid Overdose Epidemic*, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html?CDC_AAref_Val=https://www.cdc.gov/opioids/basics/epidemic.html#cdcreference_2 (last visited May 28, 2025) (reporting 727,000 U.S. opioid deaths from 1999-2022).

⁸ For more on the Opioid MDL, see, for example, Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health through Litigation: Lessons from Tobacco & Opioids*, 73 STAN. L. REV. 285 (2021). For more about the resulting settlements, see OPIOID SETTLEMENT TRACKER, <https://www.opioidsettlementtracker.com/> (last visited May 19, 2025).

⁹ Transcript of Proceedings, *In re* Nat’l Prescription Opioid Litig., MDL No. 2804 (N.D. Ohio Jan. 9, 2018).

¹⁰ See OPIOID SETTLEMENT TRACKER, *supra* note 8; Press Release, Ctrs. for Disease Control & Prevention, CDC Reports Nearly 24% Decline in U.S. Drug Overdose Deaths (Feb. 25, 2025).

¹¹ Engstrom, *supra* note 1, at 7.

¹² FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 13 (4th ed. 2004) [hereinafter “MCL”].

MDLs,¹³ and past case management orders issued in other MDLs. So, too, might they reach out to law professors and other judges who have overseen MDLs or attend the so-called “Breakers” Conference (an MDL-focused conference for federal judges) and law school symposia.¹⁴

2 | Rule 16.1’s Adoption

Experts disagree about whether the current (loose) regulation of MDLs strikes the right balance. On one hand, creativity and flexibility are likely necessary for the efficient resolution of any MDL.¹⁵ Different MDLs are different. Shouldn’t case management techniques differ, too? On the other hand, critics contend that the lack of structure flouts the rule of law, undermines consistency and predictability, encourages the filing of meritless claims, and allows plaintiffs’ attorneys to enrich themselves at the expense of their clients.¹⁶

Responding to critics’ concerns, in late 2017, the Advisory Committee on Civil Rules appointed a subcommittee to investigate whether to make MDL-specific changes to the Federal Rules of Civil Procedure.¹⁷ Following years of study, in 2023, that subcommittee presented a proposed draft of Federal Rule of Civil Procedure 16.1—the first federal rule that would expressly address MDL practice.

As originally proposed, Rule 16.1 set forth the following four dictates: (1) upon being assigned an MDL by the Judicial Panel on Multidistrict Litigation (“JPML”), transferee judges “should” schedule an initial case management conference; (2) transferee judges “should” require the parties to submit a report for that conference addressing, among other things, leadership appointments, discovery, and pretrial motions; (3) transferee judges “may” designate “coordinating counsel” to assist with the conference; and (4) transferee judges “should” issue an initial case management order addressing the matters discussed at the conference.¹⁸

¹³ BOLCH J. INST., DUKE L. SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 109 (2d ed. 2018) [hereinafter BOLCH GUIDELINES].

¹⁴ As Appendix A reflects, we recently completed a small and informal survey of federal MDL judges to gauge which information sources they most frequently consult. See Appendix A. Respondents indicated that they most commonly consulted the Federal Judicial Center’s Manual for Complex Litigation and case management orders issued in other MDLs. *Id.* Judges also frequently relied on conversations with other MDL judges that had previously overseen MDLs, other MDL guidance published by the Federal Judicial Center, and attending the Breakers Conference. *Id.* Of the judges who responded to our admittedly very small and unscientific survey, no judge relied solely on briefing by the parties; all respondents universally consulted additional materials. *Id.*

¹⁵ See, e.g., Abbe Gluck, *Unorthodox Civil Procedure*, 165 U. PENN. L. REV. 1669, 1689 (2017) (reporting that, when interviewed, MDL judges highlighted the need for “the judge to remain flexible and creative in every case,” given that “every MDL is different”); ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 120 (2019) (noting that MDL judges are “expected” to fashion their own procedures).

¹⁶ See, e.g., David Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 423 (2019) (acknowledging the criticism that MDL’s procedural flexibility violates basic principles of the rule of law, but ultimately disagreeing with it); see also Engstrom, *supra* note 1, at 9 (similarly acknowledging this criticism and not endorsing it); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 106–07 (2017) (arguing the lack of guardrails allows plaintiffs’ attorneys to unjustly enrich themselves); LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS (2018) (arguing, on behalf of defense attorneys, that MDLs encourage frivolous lawsuits that wrongfully increase settlement pressures).

¹⁷ Andrew Bradt, *Battle for Control of MDL*, 87 FORDHAM L. REV. 86, 89 (2018) (remarking on advocacy groups’ efforts to push rule changes through the Advisory Committee).

¹⁸ FED. R. CIV. P. 16.1, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES – AUGUST 2023, U.S. COURTS, <https://www.uscourts.gov/forms-rules/pending-rules-and-forms-amendments>.

Given the decades-long debates regarding MDL guidance, it comes as no surprise that proposed Rule 16.1 provoked both substantial attention and no small amount of controversy. On one side, some cheered the proposed rule’s flexible approach—indeed, by stating only that judges “should” take certain actions, Rule 16.1 refrained from imposing any strict, affirmative requirements on the transferee judges. In comments submitted to the Advisory Committee, for instance, U.S. District Court Judge Charles Breyer “urge[d]” the adoption of proposed Rule 16.1 because, in his view, the rule balances “approaches that will result in substantial cost and time savings” with an approach “allowing the court flexibility to choose which of those approaches to employ in a particular case with a set of particular issues.”¹⁹

Yet some were more critical. Some, for instance, worried that Rule 16.1 would unintentionally disrupt practices that have long worked well. Plaintiffs’ lawyer MaryBeth Gibson, for instance, warned that premature demands for detailed case management plans threatened to “divest[] Plaintiffs’ counsel of independence to manage, plan and strategize how to litigate their case.”²⁰

Others questioned the rule’s light touch—and the value of a new provision that fails to provide any actual constraints.²¹ Defense-side group Lawyers for Civil Justice, for instance, contended that the Rule was too tentative to be meaningful. In their words, calling it a “rule” was merely aspirational, as it imposed no real requirements and instead offered what amounted to a “cafeteria plan” of suggestions.²² Indeed, at one Advisory Committee meeting, a committee member fretted that the proposed rule seemed “almost entirely to be a best practices guidance document.”²³

Ultimately, in April 2024, the Advisory Committee approved Rule 16.1 in substantially the same form as was initially proposed.²⁴ It was subsequently approved by the Judicial Conference and the Supreme Court, and it is currently slated to go into effect on December 1, 2025.²⁵ As currently written, it provides:

¹⁹ Charles Breyer, Re: Comment on Proposed Rule 16.1 - Multidistrict Litigation, at 2 (Feb. 2, 2024).

²⁰ MaryBeth V. Gibson, Re: Proposed Amendments to Rule 16.1 (Multidistrict Litigation), at 2 (Feb. 16, 2024).

²¹ See Draft Minutes, Civil Rules Advisory Committee, March 28, 2023, at 5:175–178, https://www.uscourts.gov/sites/default/files/2023-03_advisory_committee_on_civil_rules_meeting_minutes_final_1.pdf [hereinafter Draft Minutes].

²² Lawyers for Civil Justice, Comment to the Advisory Committee on Civil Rules, at 3 (Sept. 18, 2023).

²³ See Draft Minutes, *supra* note 21, at 8:342–344; see also Lawyers for Civil Justice, *supra* note 22, at 2 (“If the shibboleth that ‘there’s no one-size-fits-all’ is steering the Committee to eschew a bona fide rule or any genuine structure in a Rule 16.1, then the Committee should re-think this supposition.”).

²⁴ As approved, the Rule no longer states that judges may designate coordinating counsel to assist with the initial case management conference; the other provisions were subject to minor revisions. See FED. R. CIV. PROC. 16.1, U.S. COURTS, CONGRESSIONAL RULES PACKAGE – 2025, at 109 (Apr. 23, 2025), <https://www.uscourts.gov/forms-rules/records-rules-committees/packages-submitted/congressional-rules-package-2025>.

²⁵ *Id.* at 3.

Rule 16.1. Multidistrict Litigation

a | Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

b | Report for the Conference.

1. Submitting a Report. The transferee court should order the parties to meet and to submit a report to the court before the conference.

2. Required Content: the Parties' Views on Leadership Counsel and Other Matters.

The report must address any matter the court designates—which may include any matter in Rule 16—and, unless the court orders otherwise, the parties' views on:

- A** whether leadership counsel should be appointed and, if so:
 - i the timing of the appointments;
 - ii the structure of leadership counsel;
 - iii the procedure for selecting leadership and whether the appointments should be reviewed periodically;
 - iv their responsibilities and authority in conducting pretrial activities and any role in resolution of the MDL proceedings;
 - v the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;
 - vi any limits on activity by nonleadership counsel; and
 - vii whether and when to establish a means for compensating leadership counsel;
- B** any previously entered scheduling or other orders that should be vacated or modified;
- C** a schedule for additional management conferences with the court;
- D** how to manage the direct filing of new actions in the MDL proceedings; and
- E** whether related actions have been—or are expected to be—filed in other courts, and whether to adopt methods for coordinating with them.

3. Additional Required Content: the Parties' Initial Views on Various Matters.

Unless the court orders otherwise, the report also must address the parties' initial views on:

- A** whether consolidated pleadings should be prepared;
- B** how and when the parties will exchange information about the factual bases for their claims and defenses;

- C** discovery, including any difficult issues that may arise;
- D** any likely pretrial motions;
- E** whether the court should consider any measures to facilitate resolving some or all actions before the court;
- F** whether any matters should be referred to a magistrate judge or a master; and
- G** the principal factual and legal issues likely to be presented.

4. Permitted Content. The report may include any other matter that the parties wish to bring to the court’s attention.

c | Initial Management Order. After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court’s discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

Rule 16.1 is, at least for the time being, the only federal rule that expressly addresses MDLs, and the impact of the Rule remains to be seen. Furthermore, even if the Rule has an impact, it’s likely that the Rule will only affect front-end case management decisions. It will presumably have no impact on the myriad other decisions an MDL judge confronts—from whether to appoint settlement masters, to how to select and conduct bellwether trials, to how to assess and allocate common benefit fees. Today, judges are left to make these and other high-stakes decisions with the same patchwork of nonbinding sources that existed prior to Rule 16.1.

II. The Convening

In the wake of the approval of Rule 16.1, our Convening sought to provide a setting for reflection, discussion, and agenda setting. Assuming that Rule 16.1 will stand, at least for a while, as the only federal rule to expressly address MDL management, how can leaders of the profession further refine and rationalize MDL case management practices? Which practices work best? Which don’t work? Which innovations seem promising but haven’t yet been tried? And what research questions must be answered to better understand the consequences of judicial decision-making in MDLs?

To ensure some structure to the day’s discussions, we focused on the following four pivotal case management decisions, each of which is addressed in the pages that follow:

■ **Promoting Claim Integrity:** How do MDL judges fairly and efficiently identify and cull nonmeritorious claims? From *Lone Pine* orders, to plaintiff fact sheets, to case censuses, to other, creative approaches, how can judges equitably and efficiently weed out nonmeritorious claims, while simultaneously ensuring that meritorious suits can proceed as expeditiously as possible?

■ **Common Benefit Fees:** How can judges equitably assess and then efficiently distribute common benefit fees (“CBFs”)? Assuming CBFs continue to be a key feature in MDLs, what is the transferee judge’s role in

overseeing the CBF process, including approving holdback percentages and requiring party documentation of common benefit work?

■ **MDL Leadership:** What is the role of the transferee judge in selecting and appointing MDL leadership? Namely, how can transferee judges ensure that MDLs are quarterbacked by seasoned, knowledgeable, dedicated, and well-resourced plaintiffs’ counsel, while also providing the next generation of MDL practitioners an onramp to leadership?

■ **Case Closure Mechanisms:** How can MDL judges equitably and effectively close individual cases? From “inventory” settlements to the decision to remand individual cases to transferor courts, how can judges wind down MDLs to provide the defendant the closure it needs, while also ensuring that plaintiffs’ individual priorities and interests aren’t trampled in the quest for “global peace”?

We featured each of the four topics in a 75-minute panel. Following the four panels, participants broke into small discussion groups to discuss these topics in depth.

In tackling these pressing topics, we were fortunate to be joined by a truly exceptional group of judges, practitioners, academics, and policymakers. These individuals, who offered their perspectives pursuant to the Chatham House Rule,²⁶ brought deep experience, diverse perspectives, and remarkable candor to our shared table—enriching our conversations and sharpening our collective understanding of the challenges and opportunities that define the MDL landscape. The March 2025 Convening participants were as follows:

Hon. Robert Dow Judge, U.S. District Court for the Northern District of Illinois and Counselor to the Chief Justice of the Supreme Court of the U.S.

Hon. Matthew F. Kennelly Judge, U.S. District Court for the Northern District of Illinois

Hon. Enjoliqué Lett Magistrate Judge, U.S. District Court for the Southern District of Florida

Hon. William H. Orrick Senior Judge, U.S. District Court for the Northern District of California

Hon. Dan Polster Judge, U.S. District Court for the Northern District of Ohio

Hon. Casey Rodgers Judge, U.S. District Court for the Northern District of Florida

Hon. Yvonne Gonzalez Rogers Judge, U.S. District Court for the Northern District of California

Hon. Amy St. Eve Judge, U.S. Court of Appeals for the Seventh Circuit

Hon. Jon S. Tigar Judge, U.S. District Court for the Northern District of California

Elizabeth Cabraser Partner, Lieff, Cabraser, Heimann & Bernstein, LLP

Lexi Hazam Partner, Lieff, Cabraser, Heimann & Bernstein, LLP

²⁶ Under the Chatham House Rule, participants in a meeting are free to discuss comments made during a meeting, but neither the identity nor the affiliation of the speaker may be revealed. *Chatham House Rule*, CHATHAM HOUSE, <https://www.chathamhouse.org/about-us/chatham-house-rule> (last visited June 17, 2025).

Bronwyn F. Pollock	Partner, Mayer Brown
Ellen Relkin	Partner, Weitz & Luxenberg P.C.
Kristen Richer	Partner, Barnes & Thornburg LLP
Ashley Simonsen	Partner, Covington & Burling LLP
Kalpana Srinivasan	Partner, Susman Godfrey LLP
Aimee Wagstaff	Partner, Andrus Wagstaff
Alexandra Walsh	Shareholder, Anapol Weiss
Kathleen Warin	Partner, Wilson Elser Moskowitz Edelman and Dicker LLP
Gregg Webb	Shareholder, Blue Raven LLP
Genevieve Zimmerman	Partner, Meshbeshier & Spence
Lynn Baker	Frederick M. Baron Chair in Law, University of Texas School of Law
Sergio Campos	Professor of Law, Boston College Law School
Zachary Clopton	Professor of Law, Northwestern Pritzker School of Law
David Freeman Engstrom	Professor of Law, Stanford Law School
Nora Freeman Engstrom	Professor of Law, Stanford Law School
Brianne Holland-Stergar	Civil Justice and Innovation Fellow & Lecturer in Law, Deborah L. Rhode Center on the Legal Profession
Timothy Lau	Senior Research Associate, Federal Judicial Center
David Noll	Professor of Law, Rutgers Law School
Teddy Rave	Professor of Law, University of Texas School of Law
Todd Venook	U.S. Department of Justice, Office of Access to Justice [<i>attending in personal capacity</i>]
Diego Zambrano	Professor of Law, Stanford Law School
Adam Zimmerman	Professor of Law, USC School of Law

A final note on our mission. The Deborah L. Rhode Center on the Legal Profession convened this group of policymakers, academics, judges, and practitioners with an ambitious but straightforward aim: to foster dialogue, surface shared priorities, and spark careful reflection on avenues for reform. This document captures a slice of the conversations that ensued. It synthesizes major themes, identifies tensions, and highlights possible paths forward. But it does not purport to represent a consensus view—nor could it. Indeed, we are grateful for the spirited disagreements that animated virtually every topic we discussed. We have sought, in the pages that follow, to honor both the points of commonality and the areas of sharp contestation that emerged.

III. Summary of Possible Case Management Strategies

Before diving into a substantive summary of our discussions, we provide this brief list of case management strategies endorsed by at least some of the Convening participants. Each of these strategies is discussed in greater detail in the pages that follow. We compile this material not necessarily because we—much less, the majority of Convening participants—endorse these possible reforms. Rather, we offer this rough menu to demonstrate the breadth of the Convening discussions.

CLAIM INTEGRITY: Possible Strategies

- Assign plaintiffs’ leadership the task of actively monitoring attorneys’ efforts to vet claims.
- Request that all attorneys describe their claim vetting processes early in the litigation.
- Request information regarding attorneys’ use of lead generators.
- Experiment with incentives to discourage firms from building case “inventories” without regard for claim integrity, such as Nora Freeman Engstrom and Todd Venook’s proposal to levy a higher CBF assessment on attorneys who file high proportions of nonmeritorious claims and, conversely, reward lawyers who carefully vet their claims by having these lawyers pay a reduced CBF “tax.”²⁷
- Explore the use of AI tools to assist in vetting claims.

COMMON BENEFIT FEES (“CBFS”): Possible Strategies

- Early in the litigation, appoint dedicated CBF committees and/or neutral special masters to manage and steer the CBF process.
- Early in the litigation, adopt standardized procedures for submitting and reviewing the time and cost entries of those who perform common benefit work.
- In CBF orders, clearly delineate how CBF assessments will be apportioned between fees and costs (and, again, establish this breakdown early in the litigation).
- Task a neutral special master with conducting real-time audits of attorneys’ time submissions.
- Establish clear expectations regarding state court attorneys’ use of common benefit work product and any associated CBF assessments that will be levied on those attorneys who utilize these materials.

LEADERSHIP: Possible Strategies

- When appointing leadership, request that attorneys seeking leadership positions give short presentations on their plan for seeing the case to resolution.
- Do not use case volumes as a proxy for leadership fitness. Sometimes, lawyers with the most cases have lots of cases precisely because they have not carefully vetted their case inventories. Indiscriminate filings should be discouraged, not encouraged.
- When appointing leadership, inquire into candidates’ ability to devote financial resources and time to the litigation, among other things.
- Require ongoing reporting from MDL leadership.

²⁷ Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEX. L. REV. 1623 (2023).

- Consider reappointing leadership on an annual basis, guided by annual reporting and performance reviews.
- Do not defer to proposed leadership slates without assessing individual attorneys' leadership capacity.

CASE CLOSURE: Possible Strategies

- Seek to map the “universe of claims” early in the litigation.
- Consider the pros and cons of requiring *in camera* disclosure of third-party litigation funding.
- Employ traditional tools that encourage resolution, such as setting firm trial dates.

MISCELLANEOUS: Possible Strategies

- To promote transparency and information sharing, consider requiring leadership to create and maintain user-friendly, public-facing websites featuring information about the MDL. On these websites, provide information enabling far-flung litigants to attend hearings via telephone or Zoom.
- For hearings that occur at key junctures in an MDL, hold in-person, not (exclusively) remote, hearings.

IV. Topics of Discussion

TOPIC 1 Claim Integrity

Few issues provoke as much concern as claim integrity.²⁸ At the March 2025 Convening, participants from across the MDL community agreed that nonmeritorious claims can undermine the legitimacy of the litigation, strain judicial resources, distort settlement dynamics, frustrate defendants, and harm deserving plaintiffs. Yet participants also recognized that efforts to promote claim integrity must be carefully designed, lest they sweep too broadly and curtail valid claims. The following section details key discussion points as well as several corresponding areas for further research.

1. Improper Claims are Bad, But Nobody Knows How Often Improper Claims are Filed Participants agreed that nonmeritorious claims exist in *some* mass tort MDLs, but they emphasized that the size and impact of the problem remains poorly understood. At the outset of the panel, one participant framed the issue succinctly: “The first point is pretty simple: Nonmeritorious claims in MDL are a problem, though we don’t know exactly how big of a problem they are.”²⁹

Supporting that view, in a recent piece, Nora Freeman Engstrom and Todd Venook acknowledged that at least some MDLs have been afflicted with some nonmeritorious filings:

²⁸ See generally, e.g., D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEX. L. REV. 1595 (2023) (discussing the common complaint that plaintiffs’ lawyers often file meritless claims in an MDL, but noting a staggering lack of empirical evidence suggesting this phenomenon does, in fact, occur); S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 599 (2012) (discussing specious claims in the asbestos and fen-phen settlements); Engstrom & Venook, *supra* note 27, at 1624–25 (“[O]ne aspect of MDLs . . . is garnering particular attention and is seen by experts on both sides of the proverbial aisle as especially problematic: MDLs’ apparent tendency to attract patently nonmeritorious claims.”).

²⁹ See Rave, *supra* note 28, at 1598 (making a similar point).

[I]n *Vioxx*, plaintiffs’ lead lawyer recently explained that, of the roughly 45,000 claimants, “there were a couple thousand claims of people that didn’t take Vioxx; they couldn’t produce a medical record that they even took the drug.” In *Deepwater Horizon*, a single lawyer (Mikal Watts of Texas) submitted more than 40,000 claims, the overwhelming majority (at least 39,000) of which were bogus. Indeed, Watts’s initial roster of clients—supposedly consisting of “deckhands”—was pulled seemingly at random from the telephone book and included, among others, a cosmetologist, a dog, a librarian, a Buddhist monk, and a person who, at the time of the rig explosion, had been dead for five years. In *Fosamax*, the exasperated transferee judge observed that plaintiffs had something of a “habit” of dismissing cases once they were slated for scrutiny. In *Digitek*, it is doubtful that any plaintiff actually came into contact with an allegedly defective pill. In *Abilify*, even three years into the litigation, certain plaintiffs “conceded that they [were] unable to provide any evidence that they used” the targeted pharmaceutical. In *Zostavax*, at least 173 complaints were dismissed because, among other infirmities, the plaintiffs alleged “that they were induced to obtain a Zostavax vaccination by advertisements that began running years after plaintiffs were inoculated.” And, in the *3M* litigation, where some 290,000 (supposed) veterans allege that the company’s earplugs offered them inadequate protection, Judge M. Casey Rodgers recently dismissed about 20,000 claims for failure to provide “basic proof of military service.”³⁰

Yet the Engstrom-Venook piece—and the Convening participants—equally stress that no reliable empirical data establishes the frequency or proportion of such claims.³¹ “Though the estimate of 30% or 40% commonly gets thrown around,” the moderator observed, “that assertion has basically no empirical support.”³² Another participant voiced that they were “troubled” by “a narrative that this problem is overwhelming.”

³⁰ Engstrom & Venook, *supra* note 27, at 1631–33.

³¹ *Id.* at 1630 (“It is clear that MDLs—and especially large mass tort MDLs—have become home to at least some nonmeritorious claims. But how big of a problem is this, exactly? It is impossible to say for sure.”); Rave, *supra* note 28, at 1598–99 (“I am not aware of any serious empirical study of the number of meritless claims in MDLs.”).

³² See also Rave, *supra* note 28, at 1598–99 (“In their submissions before Congress and the Rules Committee, defense-side interests routinely assert that 30–40% of claims in mass tort MDLs are frivolous (e.g., filed by people who have not been injured, who never used the drug or product at issue, or who have duplicative claims). But however often it is repeated, this number has very little empirical evidence backing it up.”); Engstrom & Venook, *supra* note 27, at 8 (making the same point).

AREA FOR FURTHER RESEARCH: The Prevalence of Nonmeritorious Claims

Participants suggested research into the following questions regarding the prevalence of frivolous claims:

- What is the best method for calculating the number of nonmeritorious claims filed in MDLs?
- Are there “repeat player” firms that are most responsible for filing frivolous claims?
- Are there certain case characteristics that correlate with increased numbers of frivolous claims?

2. Nonmeritorious Claims vs. Low-Value or “Adventurous” Claims

While acknowledging the existence of nonmeritorious claims, many cautioned (correctly, in our view) that it is important to distinguish between various claim categories, including truly meritless claims (i.e., claims where the victim truly has no entitlement to relief under governing law), low-value claims (i.e., meritorious claims with modest damages), and what we might call “adventurous” claims (i.e., possibly meritorious claims that are only spottily recognized and/or push the boundaries of existing law).

	DEFINITION	EXAMPLE
Truly Nonmeritorious Claims	Plaintiff has no entitlement to relief.	Plaintiff is alleging injury from a drug that she never took.
Low-Value Claims	Meritorious claims with modest damages.	Plaintiff is claiming injury though, for her, the illness was temporary and minor.
“Adventurous Claims”	Possibly meritorious claims, not everywhere accepted and/or that push the boundaries of existing law.	Plaintiff was exposed to the drug and the drug causes latent injury, but the plaintiff is seeking compensation for fear that a drug-induced injury will manifest. (Some but not all jurisdictions currently authorize these fear-based claims; the plaintiff is pushing for broader acceptance.)

Participants also stressed (again, correctly, in our view) that those eager to combat nonmeritorious claiming ought to focus on only the first claim category. Only those claims are truly “nonmeritorious.” And only they threaten the integrity of the system. Unfortunately, however, sometimes, low-value claims are lumped into the “nonmeritorious” claim category, which can skew judicial perceptions and distort settlement dynamics. In fact, some explained, these low-value claims serve important purposes in settlement: “I was in the room with settlement [defense] counsel in [one MDL]. They were saying, ‘We’ll pay you, but you have to dilute the per-case average.’ So we’ve been taught from day one that we have to have low-value claims to settle our high-value claims.”

3. Many Plaintiffs' Attorneys Have Robust Screening Practices—But Identifying Bad Apples is Difficult

Participants uniformly agreed that *many* plaintiffs' firms engage in careful screening practices to weed out nonmeritorious claims at the outset. But, participants also acknowledged, some firms don't. And participants lamented that judges aren't always clued in as to which plaintiffs' lawyers are perennially sloppy.

Further, participants noted that those on PSCs may not be focused on the issue. As one participant noted, plaintiffs' leadership rarely address nonmeritorious claims in their internal discussions: "Everyone just assumes the other firms are handling that. We don't talk about [screening] in PSC meetings unless there's a specific reason, like a lot of cases have been dismissed." That person further noted that engaging in such discussions "could be a value add." Others agreed that plaintiffs' leadership might play a stronger role in promoting claim integrity. As one participant put it: "Lead counsel can help scrutinize. They could create a position or committee to help vet nonmeritorious claims to weed some out."

While most agreed that vetting could be improved, some also stressed that vetting should not be so stringent as to erroneously knock out meritorious claims. One participant emphasized that requiring documentary proof of product usage, such as receipts, could quash worthy claims. "A client's testimony can also be evidence of use—they can't pull up a receipt from 20 years ago, but they can tell a jury, I bought the drug at this place, around this time." A claim isn't necessarily nonmeritorious just because the plaintiff lacks documentary proof.

4. Different Cases Involve Different Kinds of Proof, Particularly Concerning Exposure

Further regarding nonmeritorious claims, some pointed out that the narrative that MDLs are "swamped" with nonmeritorious claims can, itself, be damaging. Among other drawbacks, it can lead some judges to wrongly discount competent evidence supporting a plaintiff's case. Picking up on the drugstore example above, one participant observed that, at least in some cases, plaintiff affidavits or deposition testimony should be sufficient to establish harm: In the *Baby Food* MDL, for example, it's highly unlikely that a plaintiff "could pull receipts for all the baby food they've bought" or recall "the specific date it was bought or the specific flavor." If the plaintiff testifies that she bought x or y baby food, that testimony ought to be plenty to withstand a motion for summary judgment. Another agreed: "If I have no medical records of ever receiving, for instance, vaginal mesh implanted into my body, that's suspicious. But the standard should be different" for other kinds of consumer products.

More broadly, participants stressed that the evidence of exposure one would expect the plaintiff to have is context dependent. When assessing whether the plaintiff was exposed to the defendant's allegedly tortious conduct or defective product, proof simply is not one-size-fits-all.

5. Current Vetting Tools Are Imperfect and Asymmetrical

Participants broadly agreed that the two most commonly used judicial tools to promote claim integrity

in MDLs—plaintiff fact sheets (PFSs) and *Lone Pine* orders³³—are both limited in their effectiveness. One participant succinctly diagnosed what may be called a “Goldilocks problem:” “Fact sheets [are] arguably too mild, and . . . *Lone Pine* orders are too strong.”

PFSs, which have become “widespread in the largest MDL proceedings,” generally require claimants to answer structured questions about their injuries, product use, and medical history.³⁴ Some participants viewed PFS’s deterrent and screening functions as inadequate. In particular, some worried that, even when a plaintiff fails to complete a fact sheet fully or on time, consequences are often limited. One participant described fact sheets as a “check-the-box exercise” that fails to produce usable data unless accompanied by robust judicial oversight. “We’ve seen plaintiffs go years without filling them out,” a participant lamented, emphasizing the administrative burden this delay places on the court and the frustration it generates for defendants seeking to assess the contours of the docket.³⁵

By contrast, *Lone Pine* orders, which typically demand expert certification of specific causation early in the case, were viewed as too aggressive.³⁶

Moreover, participants agreed that both mechanisms suffer from a deeper structural problem: they operate on a case-by-case basis, and they therefore address only the *symptom* of over-filing rather than its root *cause*. As a participant noted: “These mechanisms both just weed cases out one-by-one. As such, they consign judges to a game of judicial whack-a-mole. They do nothing, in other words, to fix underlying incentives or discourage such claims moving forward.”

6. Volume-Based Incentives and Creative Reforms

Participants broadly agreed that nonmeritorious claims cannot be understood—or effectively addressed—without accounting for the structural incentives that drive their inclusion. One reason for the continued impact of such claims can be attributed to what Judge Jack Weinstein has called the “vacuum cleaner effect”: Attorneys scoop up claims *en masse* to gain influence in leadership or settlement negotiations, regardless of the individual merit of each case.³⁷ As a participant put it, “I have heard plaintiff attorneys say, ‘I’m going to get money on this through volume. I’m going to sign so many clients that they can’t ignore me.’” When defendants turn first to high-volume firms to discuss settlement, another pointed out, “that creates poor incentives.”

³³ For more on these case management tools, see the Deborah L. Rhode Center on the Legal Profession, Multidistrict Litigation Toolkit: Promoting Claim Integrity, <https://clp.law.stanford.edu/methods-to-reduce-nonmeritorious-suits-in-an-mdl/> (last visited May 19, 2025); Engstrom, *supra* note 1 (discussing *Lone Pine* orders); Margaret S. Williams, Jason A. Cantone & Emery G. Lee III, Plaintiff Fact Sheets in Multidistrict Litigation Proceedings: A Guide for Transferee Judges, Fed. Jud. Ctr. (2019) (discussing plaintiff fact sheets).

³⁴ See Engstrom & Venook, *supra* note 27, at 1637.

³⁵ Others, however, saw these critiques as overstated. Some pointed out that fact sheets are, by design, a light-touch method of early vetting, intended to gather baseline information without imposing the costs and evidentiary burdens associated with more intrusive procedures.

³⁶ Engstrom, *supra* note 1 (discussing *Lone Pine* orders).

³⁷ Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 494–95 (1994); see also Engstrom, *supra* note 1, at 25 (discussing the same phenomenon). Cf. 2022 Convening Report, *supra* note 3, at 29 (citing beliefs that client inventories “have grown too large for attorneys to effectively and zealously represent each plaintiff individually”).

Participants explored interventions that would rejigger these structural incentives. They were intrigued by Nora Freeman Engstrom and Todd Venook’s *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEX. L. REV. 1623 (2023), which calls for sliding-scale CBFs. As Engstrom and Venook explain:

We propose that transferee courts take three steps to ensure the integrity of MDL filings. In particular, courts should: (1) [use no-frills plaintiff fact sheets to] weed out nonmeritorious (i.e., entirely unsupported) claims early in the litigation’s life cycle, (2) assess how each lawyer’s claims fared when subject to the foregoing scrutiny, and (3) levy a higher CBF assessment on those lawyers who filed a high proportion of “failing” claims and a lower CBF assessment on those lawyers who didn’t.³⁸

In other words, attorneys that file low percentages of nonmeritorious claims relative to their case inventory would be rewarded with a discount when CBFs are assessed. For instance, rather than having to contribute 6% to the CBF pot, they would have to contribute 2%. As a participant noted, “[t]he potential [is] to give the really scrupulous law firms a huge financial break. That only has to happen a few times to start implementing better case screening.”

Many expressed significant interest in the proposal. Others were open to experimentation but had concerns. Most notably, some worried that the proposal might disincentivize lawyers from taking on lower-value or harder-to-prove claims, particularly for vulnerable populations. “The truth is,” one participant warned, “we’re still dealing with a system where many legitimate claims won’t have full documentation early on—and if you start punishing people for that, you’re going to shut out a lot of meritorious plaintiffs.” Certain skeptics also worried about burdening plaintiffs’ attorneys with more paperwork, making it less economically feasible to bring claims.

AREA FOR FURTHER RESEARCH: The Impact of Volume-Based Incentives

Participants called for further research into the extent to which case volume impacts leadership and settlement decisions, including:

- Whether leadership appointments correlate with firm filing volumes;
- The extent to which case volume impacts settlement;
- The likely effectiveness—and potential unintended consequences—of incentive-based reforms such as the Engstrom-Venook reform proposal, above, involving assessing CBFs on a sliding scale.

³⁸ Engstrom & Venook, *supra* note 27, at 1640. For more on this reform proposal, see 2022 Convening Report, *supra* note 3, at 31–33.

7. Shining a Light on Lead Generators

Several participants argued that third-party marketers play a major role in the proliferation of nonmeritorious claims and thus deserve greater attention.³⁹ Concern centered around the fact that lead generators and marketing firms operate outside the traditional attorney regulatory architecture. As one participant acknowledged: “Lead generators don’t have the same ethical responsibilities” as attorneys. They referenced some MDLs that featured “obviously fraudulent” claims from clients “with names like Kitty Kat.” This lack of professional accountability on the part of marketers, some argued, undermines claim quality and forces courts and parties to expend resources on unnecessary screening.

For these reasons, a few participants floated the idea that judges should ask litigants to disclose whether, and to what extent, they have relied on these generators, at least in cases in which there is evidence that intake practices are producing frivolous claims.⁴⁰ Others, however, raised serious concerns about doing so. Some, in particular, worried that exposing marketing company practices could inadvertently reveal privileged or strategic information. “It gives me pause,” a plaintiffs’ lawyer cautioned, “to have marketing companies put our playbook out in front of defense counsel, when we’re not doing the same to them.” One participant instead suggested that judges “ask how a firm’s case management works,” noting that the focus should be on “what the law firm does” to vet cases delivered by marketers or lead generators.

AREA FOR FURTHER RESEARCH: The Impact of Lead Generators

Today, little hard data exists about the prevalence of lead generator-acquired claims in MDLs, the extent of attorney vetting after acquisition, or the comparative quality of these claims versus traditionally sourced cases. Further research is needed to better understand:

- How significant a role lead generators now play across different types of MDLs;
- How plaintiffs’ firms integrate—or fail to integrate—internal screening after purchasing leads;
- Whether claims originating through lead generators differ systematically in quality, dismissal rates, or settlement values.

8. AI as a Vetting Tool

Convening participants expressed both optimism and caution about the role of artificial intelligence (AI) in promoting claim integrity. Several participants cited their own experience deploying AI tools to assist with early-stage claim screening. Some also noted that AI could be useful in triaging voluminous records;

³⁹ Lawyer advertising, long the subject of debate, sparks considerable controversy in the mass tort context, where attorneys can spend millions of dollars on ads and lead generation aimed at attracting plaintiffs. See Sara Randazzo & Jacob Bunge, *Mass-Tort Machine that Powers Thousands of Roundup Lawsuits*, WALL ST. J. (Nov. 25, 2019) (reporting that nine months of advertisements aimed at potential plaintiffs in the *Roundup* MDL were estimated to have cost \$77.8 million and that in a ten month period that included those nine months, the number of plaintiffs in the case more than doubled); see also Diana Novak Jones, *Camp Lejeune Litigation Dominates Law Firm Advertising Spend*, REUTERS (Mar. 10, 2023) (reporting that \$116 million had been spent on ads aimed at potential plaintiffs in the Camp Lejeune litigation). Critics claim that advertising raises costs, encourages frivolous lawsuits, and creates undue settlement pressure. See generally Randazzo & Bunge, *supra*. Proponents say that attorney advertising allows plaintiffs to find and advocate for injured consumers who lack other recourse against big companies. *Id*

⁴⁰ Another participant suggested developing a system to accredit mass marketers.

one explained, for instance, that firms have already started using AI to help winnow out irrelevant pages in medical records.⁴¹ That person described using AI “to find the pages that a human needs to look at,” not “to make final decisions, but to help with volume.” With the help of AI, in other words, lawyers can carefully vet even large case volumes in a fraction of the time.

Yet even as participants recognized AI’s promise, some worried about its potential misuse. Some warned that AI could be deployed, not just to screen frivolous claims, but to manufacture them, creating new forms of fraud.⁴² As one participant cautioned: “It can be used to generate bad claims as much as to weed them out.” Others worried about bias, opacity, and error in AI-driven processes.⁴³

AREA FOR FURTHER RESEARCH: AI as a Vetting Tool

To evaluate the utility of AI as a vetting tool, participants called for descriptive research into:

- How AI is being used in plaintiff intake, record review, and case triage;
- The accuracy and reliability of AI-driven screening processes.

Participants also urged the technology community to enter this space and create solutions that could improve claim integrity.

TOPIC 2 Common Benefit Fees (“CBFs”)

As with claim integrity, the structure, scope, and legitimacy of CBFs spark persistent debate.⁴⁴ Designed to compensate lawyers who expend effort for the collective good, CBFs play a central role in aligning incentives, financing litigation, and supporting MDL resolution. Yet, they remain controversial. Judges disagree about their reach. Parties dispute their fairness. And scholars continue to question their legal foundation.

Against this backdrop, the judges, practitioners, and academics at the Convening asked: Are CBFs working as intended? What are their risks and drawbacks? And what improvements, if any, are needed?

What emerged was a shared recognition that, while CBFs may be indispensable, they require careful

⁴¹ Numerous software vendors offer products that they claim perform this service. See, e.g., Supio, <https://www.supio.com/> (last visited May 19, 2025) (claiming to analyze medical records); LawPro.ai, <https://www.lawpro.ai/> (same).

⁴² Following a class settlement in the *Juul* MDL, for instance, the claims administrator received a whopping 14 million claims (far more than had been initially anticipated). Dorothy Atkins, *Juul MDL Judge Asks Feds to Probe AI Fraud in \$45.4M Deal*, Law360 (Mar. 6, 2024). Some claims were clearly fraudulent, and the claims administrator believed that they had been submitted by AI bots—a hypothesis supported by the fact that the number of claims dropped by approximately 130,000 per week after the claims administrator implemented reCAPTCHA software on its claims submission website to verify that the website’s users were human. *Id.*

⁴³ For more on potential shortcomings in AI’s application to legal problems, see, e.g., W. Bradley Wendel, *The Promise and Limitations of Artificial Intelligence in the Practice of Law*, 72 OKLA. L. REV. 21 (2019); Rachel Beithon & Jonathan Germann, *AI Diversity and the Future of “Fair” Legal AI*, 40 GA. ST. U. L. REV. 3 (2024); Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Zuzgun, Christopher D. Manning & Daniel Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, 2025 J. EMP. L. STUD. 1 (2025).

⁴⁴ For a primer on common benefit fees, see, e.g., Deborah L. Rhode Center on the Legal Profession, Multidistrict Litigation Toolkit: Common Benefit Fees, <https://clp.law.stanford.edu/common-benefit-funds-establishing-administering-and-disbursing/> (last visited May 19, 2025); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014); Engstrom & Venook, *supra* note 27.

stewardship—particularly as litigation financing grows more complex, state and federal cases proceed in parallel, and the legitimacy of aggregate litigation itself comes under renewed scrutiny.

1. Common Benefit Fees Are Justified and Necessary

Participants broadly agreed that CBFs are both legally grounded and operationally essential to MDL practice. Citing scholarly critiques of CBFs,⁴⁵ one participant exclaimed, “it’s surprising to see existential attacks on a practice that predates the federal income tax.” Another noted that CBFs “go back 50 years” in the MDL context and emphasized their “necessity.”

Ultimately, participants agreed that CBFs are vital to addressing the collective action challenges endemic to MDL. As one speaker observed, “It’s very easy to let someone else do your work and eat your costs.” Without a coordinated fee structure, the risk of underinvestment in discovery, bellwether preparation, and settlement negotiation would threaten the viability of large-scale litigation.⁴⁶

2. Early Planning and Process Design Are Critical

Participants agreed that early, transparent, and well-structured planning is essential to the effective administration of CBFs in MDLs. The CBF process, one participant pointed out, “is messy” and “can provoke infighting among lawyers,” so “many judges are all too happy to put the process off until the end of the MDL.” But, Convening participants emphasized, such deferral often exacerbates disputes, fuels distrust, and creates administrative chaos. As one participant put it plainly, “It’s best done at the beginning of the litigation—[it can] minimize a lot of the problems.”

Across discussions, a core set of best practices emerged. First, participants endorsed the early appointment of a dedicated CBF committee, comprised of lawyers selected for their credibility, fairness, impartiality, and judgment.⁴⁷ Second, participants emphasized the utility of independent oversight, typically through the appointment of a neutral special master or CPA—one “with no financial interest in the fund.”⁴⁸ Third, participants stressed that standardized procedures for submitting and reviewing time and cost entries should be adopted early, rather than cobbled together post hoc.⁴⁹

Finally, participants agreed that hours were not the sole consideration for payment out of the CBF fund.

⁴⁵ See, e.g., Charles Silver, *The Suspect Restitutionary Basis for Common Benefit Fees in Multi-District Litigations*, 101 TEX. L. REV. 1653 (2023) (arguing that judges don’t have the power to award CBFs in MDLs at all); Letter from Shanin Specter to the Committee on Rules of Practice and Procedure, at 8-9 (Dec. 18, 2020), <https://perma.cc/CEU3-DHPK> (arguing that it is “likely unnecessary for CBFs to exist,” since, even without them, plaintiffs’ attorneys should be sufficiently motivated by their obligations to their individual clients).

⁴⁶ See Marina Corodemus & Mark Eveland, *Four Ways Plaintiffs’ Firms Can Prevent Common Benefit Fund Fee Disputes*, LAW.COM, Dec. 14, 2023 (“Certainly, attorneys who take on the risks and leadership roles in complex litigation deserve fair compensation for their efforts.”).

⁴⁷ See *id.* (“When plaintiffs’ leadership teams collect, review, and approve CBF allocations, and stand to benefit personally from those decisions, it is easy to see how this lack of independent oversight can cause CBF disputes and give rise to accusations of conflicts of interest and self-dealing. Appointing a neutral third party to oversee time and expense submissions to the CBF and mediate disputes can remedy this problem.”).

⁴⁸ As one participant commented, appointing a CPA could avoid infighting and ensure fairness and transparency: “In my view,” the participant said, “turning the common benefit fund completely over to leadership counsel to make recommendations about time and expense reimbursement with no oversight at all, is letting the foxes guard the henhouse.”

⁴⁹ See also 2022 Convening Report, *supra* note 3, at 43–45 (outlining a reform proposal that includes the same key attributes).

One posed the following hypothetical: “Suppose a great trial lawyer spends substantial time preparing for a bellwether trial, and, the day before trial, a global settlement is negotiated because the defendants believe that the lawyer’s trial prowess poses an existential threat to the litigation.” “Merely counting attorney hours,” the participant continued, “won’t compensate for that value add.” Concurring, another emphasized the importance of considering qualitative factors when apportioning CBFs: “Hours will be important, but it won’t be the beginning or the end of the allocation decision”—qualitative factors matter too.

While the precise structure may differ depending on the MDL’s scale, the underlying principle was clear: Deliberate process design at the front end reduces conflict, deters abuse, and facilitates defensible and efficient allocation.

3. Common Benefit Orders Should Clearly Break Down Fees and Costs

There was broad consensus that common benefit assessment orders should clearly delineate the portion of the assessment to be allocated to fees as against costs.⁵⁰

As one participant recounted, when the assessment is a flat percentage—say, “8 percent of the gross recovery”—without specifying how much is intended for fees versus reimbursable costs, “you get to the end of the litigation, and people start fighting.” The absence of a breakdown can muddy the waters when attorneys attempt to calculate their take-home share or when courts later try to evaluate whether the fee structure was fair.

Others warned that ambiguity can undermine compliance with local or state ethical rules governing contingency fees. One participant explained that, when assessments are not broken out, “the math gets very hard,” and courts may be left in the untenable position of having to retroactively disentangle costs from compensation, often without clear records. This, in turn, can sow distrust among counsel, increase friction, and delay disbursements.

4. Deterring Overbilling of CBF Hours

Participants responded to concerns that some attorneys overbill their CBF-eligible work. While formal oversight mechanisms—such as court-appointed auditors or special masters—are important, participants emphasized that an attorney’s reputation within the MDL bar and informal norms of peer monitoring often exert equal, if not greater, force in shaping attorney behavior.

As one participant put it bluntly: “There is a very high reputational cost to cheating,” especially in high-profile MDLs where leaders and contributors expect transparency and accountability. This peer-policing dynamic was cited as especially potent during allocation. When a lawyer claims that he has performed significant

⁵⁰ *Accord* Corodemus & Eveland, *supra* note 46 (“Many CBF disputes are caused by the absence of well-defined requirements and standards for billing common benefit time and expenses. Ambiguity surrounding billing practices leads to inconsistencies in the way attorneys record and submit their costs, giving rise to misunderstandings and disputes when fees are allocated.”); *id.* (“Agreed-upon CMOs that set forth procedures, guidelines, and limitations for submitting applications for reimbursement of litigation fees and expenses inuring to the claimants’ common benefit can be instrumental in resolving or avoiding CBF disputes.”).

common benefit work, but the work product does not reflect it, “the committee will know,” one participant observed.

At the same time, participants noted that, in the absence of clear rules or timely oversight, some lawyers may feel pressured to inflate their hours out of fear that “everyone else is doing it.” One likened this to “a doping problem”: if enforcement is lax, honest billing may become the exception rather than the norm. As a result, multiple participants urged that courts pair reputational incentives with robust, real-time auditing to avoid creating distorted norms.

AREA FOR FURTHER RESEARCH: Prevalence and Deterrence of CBF Overbill

To better understand CBF billing practices, participants called for research into:

- The prevalence of CBF overbilling;
- Analysis of how different methods of policing CBFs deter the practice.

5. CBFs Can Apply to State Court Cases

Finally, many in attendance agreed that lawyers litigating related state court cases may permissibly be subject to CBF assessments—provided they receive the benefit of MDL work product.⁵¹ While judicial authority to impose such assessments has been contested, especially following rulings in the *Roundup* litigation,⁵² most Convening participants agreed that key procedural predicates can legitimize such assessments when clearly established upfront.

One participant observed that the creation of a centralized discovery repository—widely used by lawyers across jurisdictions—provided a valid basis for assessing CBFs from state court counsel in the opioid MDL. Another participant echoed this view, explaining that a judge may state clearly, from the outset, that any lawyer who accepts MDL work product, even informally, will be subject to common benefit obligations. As that person put it: “It’s about notice”; once notice is given, “it’s up to the state court attorneys as to whether they want to take advantage of the common benefit work product.” And, “if they know upfront and choose to benefit, then they should contribute.”

⁵¹ For more on state/federal coordination of common benefit fees, see BOLCH GUIDELINES, *supra* note 13, at 69.

⁵² In the *Roundup* MDL, Judge Vince Chhabria denied lead counsel’s motion to require state court plaintiffs to participate in a common benefit fund, finding the court lacked authority to order those plaintiffs to hold back a portion of their recovery for CBF payments. See Pretrial Order No. 236: Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage, In re *Roundup Products Liab. Litig.*, No. 16-md-2741 (N.D. Cal. June 22, 2021), ECF No. 13192. For discussion of this decision, see Silver, *supra* note 45, at 1663, 1667–71. For another more recent opinion reaching roughly the same conclusion, see In re Hair Relaxer Mktg. Sales Pracs. & Prods. Liab. Litig., 2024 WL 3904650, at *2 (N.D. Ill. 2024) (“The Court’s jurisdiction does not extend to cases that are not actually before it even if the plaintiffs in those cases might benefit from work performed in the MDL.”).

TOPIC 3 Leadership

The selection and supervision of plaintiffs' leadership is highly consequential.⁵³ These appointments not only determine who will steer the litigation day-to-day; in many cases, the appointments also determine who will construct the broader litigation strategy, potentially with far-reaching policy implications. Thus, the decision of who gets to quarterback an MDL (and who is relegated to the sidelines) can reverberate far beyond the litigation. At the Convening, judges, practitioners, and scholars explored these crucial appointments.

There were many points of consensus. Participants agreed that judges are playing a more active role in leadership selection; that courts should weigh attorneys' capacities and commitment to the litigation, not just assign lawyers to leadership based on the size of the lawyer's "inventory"; and that tools like periodic reviews can promote accountability. This section details those points of convergence and identifies questions ripe for further study.

1. Judges Are Becoming More Involved in Leadership Selection—and That's a Good Thing

Participants broadly agreed that there has been a marked trend toward more active judicial involvement in the appointment of MDL leadership. While early MDLs often saw judges defer almost entirely to litigants' proposed slates, today's transferee judges are more frequently "engaging early and proactively in leadership selection," aiming to promote broader participation, ensure preparedness, and prevent dysfunction. One participant, for instance, recalled a case where the judge had "asked attorneys to state their vision for the case," and made leadership decisions, in part, based on the attorneys' stated positions. Another participant commented on a similar method, where a judge asked attorneys vying for leadership positions to "give two-minute elevator speeches on why they deserved to be appointed."

Meanwhile, participants broadly agreed that this turn toward greater judicial involvement is generally salutary.⁵⁴ In the view of participants, judges should not defer to proposed leadership slates (i.e., packaged proposals for leadership teams). As one participant summarized: "Slates can be helpful, but they shouldn't be controlling." While slates can reflect a measure of consensus among plaintiffs' counsel, treating them as presumptively valid or beyond judicial scrutiny can lead to leadership teams that lack key attributes. Several participants emphasized that slates may not reflect the optimal mix of experience, diversity, and capacity.

Judges, therefore, should feel empowered to probe beyond the slate—asking whether the proposed team

⁵³ For a primer on MDL leadership decisions, see, e.g., Deborah L. Rhode Center on the Legal Profession, Multidistrict Litigation Toolkit: Structuring Leadership and Leadership Personnel Decisions, <https://clp.law.stanford.edu/psc-and-leadership> (last visited May 20, 2025); David Noll, *What do MDL Leaders Do?: Evidence from Leadership Appointment Orders*, 25 LEWIS & CLARK L. REV. 433 (2020); Stephen R. Bough & Elizabeth Chamblee Burch, *Collective Wisdom on Selecting Leaders and Managing MDLs*, 106 JUDICATURE 69, 73–75 (2022).

⁵⁴ Other prominent voices have said much the same. See David L. Noll & Adam Zimmerman, *Diversity and Complexity in MDL Leadership: A Status Report from Case Management Orders*, 101 TEX. L. REV. 1679, 1687 (2023) (observing that, in recent years, a number of prominent academics and policymakers have "urged courts to oversee open, competitive, and iterative application processes for leadership appointments to counteract the effects of appointments negotiated behind closed doors"); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 92–93 (2015) ("[W]hen judges ratify plaintiffs' attorneys' picks for key positions, they can amplify adequate-representation concerns . . ."); accord MCL, *supra* note 12, § 10.224 ("Deferring to proposals by counsel without independent [investigation or] examination. . . . invites problems down the road . . .").

structure meets the needs of the litigation and whether the appointments provide opportunities for a broader array of attorneys.⁵⁵ “You have to be willing to say no,” one participant noted, especially when a proposed slate risks entrenching familiar power dynamics or excluding newer voices.

Participants also highlighted the challenges that can emerge when judges force collaboration between lawyers with no prior relationship—what one participant memorably called “arranged marriages.” These pairings can sometimes function well, but not without strife. As one participant explained: “Once it’s formed, it’s who you’ve got. It’s like going to sleepaway camp where you just have to learn to get along.”

For that reason, participants advised judges to consider not just individual qualifications, but also team cohesion and history of collaboration—while still avoiding rubber-stamping self-selected slates. Participants noted that yearly reviews are especially beneficial to maintain positive leadership team dynamics.

2. Judges Should Assess Attorneys’ Capacity—and Not Defer to Case Volumes—When Making Leadership Appointments

Participants also agreed that judges must look beyond the number of cases an attorney has when selecting MDL leadership. Judges should consider each candidate’s actual capacity—both financial and temporal—to fulfill the demanding responsibilities of leadership. As one participant cautioned directly: “Judges should be [conscious] about not giving leadership to lawyers with [the] largest number of cases.”

Rather than defaulting to case volume as a proxy for leadership fitness, participants urged judges to ask harder and more targeted questions: Do candidates have the time and financial wherewithal to see the litigation through? As one participant explained: “Do they have time to commit, [and] financial resources? This is expensive.” Another added that judges should assess “what other litigation they’re involved with,” especially because “if they’re lead in multiple MDLs, they’re going to be in for” a lot of financial investment.

Still, participants acknowledged that probing financial capacity can be difficult. As one asked pointedly: “What can a judge ask to actually get at that? Because everyone will say they have the resources.” Even so, there was consensus that the inquiry is essential—and that it should include requiring applicants to disclose “how many other leadership appointments they have” and to offer both a “financial indication and a time indication” of whether they can realistically take on a new leadership role.

⁵⁵ See also 2022 Convening Report, *supra* note 3, at 39 (similarly suggesting that judges appoint leadership using competitive processes that look beyond leadership slates).

AREA FOR FURTHER RESEARCH: Leadership Composition

Participants called for more research into the extent to which different factors influence leadership appointments. Questions include:

- The extent to which there is a correlation between attorneys' case volume and leadership appointment;
- How courts should assess a candidate's financial resources.

3. Regular Leadership Reviews and Reports

There was broad support for the idea that transferee judges should order ongoing reporting from MDL leadership and should regularly review leadership's performance. In participants' view, doing so can both (a) improve the functioning of the MDL, and (b) provide useful leadership demographic information.

First, participants tended to support the idea of a yearly review and reapplication process.⁵⁶ One participant noted that an annual review could show judges which attorneys “are really involved and doing the work.” Without that kind of annual assessment, that person warned, “sometimes people go dark for a long time,” and then “spring out” around the time of settlement. Other participants pointed out that these periodic reviews can give judges the opportunity to seek information about attorneys' case inventories, which in turn, can inform how the court will guide the case toward resolution.

Another participant described periodic leadership reviews as allowing the elevation or promotion of “those actually doing the work” on the leadership committee—a group that includes the junior lawyers who sometimes toil away, without adequate recognition. That recognition, once provided, can pave the way for future leadership opportunities.

Second, some participants suggested that transferee judges should seek reports providing periodic leadership demographic metrics. A leadership demographics report wouldn't be tied to “any firm goals or targets,” but instead would ask for “a report about what different lawyers did by various demographic categories.”⁵⁷ As one participant emphasized, this reporting would be “just for information.” Still, some saw these reports as a promising and low-cost way to surface who is doing what—and whether opportunities for meaningful participation are being distributed equitably. Participants also suggested that such reviews could help identify emerging talent and ensure that younger and/or historically underrepresented lawyers are not unnecessarily relegated to peripheral roles. While the reporting itself may not be determinative, many observed that transparency, even without enforcement, can promote reflection and, ultimately, reform.

⁵⁶ For a similar reform proposal to require regular review and reappointment of leadership, see 2022 Convening Report, *supra* note 3, at 41–43 and Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 495 (2020).

⁵⁷ For more on demographic and experiential diversity in MDLs, see Noll & Zimmerman, *supra* note 54 (studying MDL leadership appointment orders and finding, among other things, that women have been more commonly appointed to leadership positions in recent years, as have younger attorneys with less MDL experience).

AREA FOR FURTHER RESEARCH: Impact of Reporting and Reappointment

Participants called for more research into the effects of MDL Leadership appointments, in particular, into the impact of reporting and reevaluation. Questions include:

- Whether reporting requirements correlate to differences in appointment decisions;
- The effect of requiring attorneys to reapply for leadership, including on case length, settlement amounts, and litigant satisfaction;
- The extent to which judges decline to reappoint leadership, the reasons that judges do so, the process by which they remove individuals from leadership, and whether leadership removal is disruptive to the litigation;
- Any unintended consequences of leadership reappointments (e.g., making counsel focus on a judge's demands rather than the interests of the clients);
- The amount of time and resources required to prepare annual leadership reports.

TOPIC 4 Case Closure Mechanisms

Every MDL must end, but the path to closure can be long and winding.⁵⁸ At the Convening, participants returned again and again to the question of how transferee judges should guide the litigation toward an equitable resolution. Whether through remand to transferor courts, settlement, dismissal, summary judgment, or some combination of the above, closure mechanisms shape not only the MDL's administrative legacy but also the substantive justice afforded to litigants. While participants disagreed on the best strategies in particular contexts, they shared a conviction that closure must be intentional, transparent, and thoughtfully timed.

1. The Endgame Must be Top of Mind from the Start

One point of consensus was that MDL closure mechanisms cannot be an afterthought; judges must begin with the end in mind. From the earliest stages of an MDL, transferee judges ought to consider how the litigation will eventually wind down. As one participant put it, “You should start at the very beginning.” Another participant emphasized that defendants, in particular, “need a visible, predictable pathway and plan” for how cases will be wrapped up in order to litigate productively.

Participants particularly stressed that, in reaching a resolution, the “universe of claims is paramount”—if the parties don't know which claims have been filed, the parties won't know how the claims ought to be resolved. For instance, in a case involving side-effects from a prescription medication, will there be a cut-off as to dosage, such that individuals who took the 25 mg dose will have compensable claims but those who

⁵⁸ For more on MDL closure, see Deborah L. Rhode Center on the Legal Profession, Multidistrict Litigation Toolkit: Facilitating and Structuring Settlements, <https://clp.law.stanford.edu/facilitating-and-structuring-settlements/> (last visited May 20, 2025); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175 (2017) (examining case closure strategies employed in publicly available MDL settlements); Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial “Approval” and “Rejection” Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011) (discussing whether judges should approve or opine on MDL settlements); Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943 (2017) (discussing ethical implications of seeking finality in mass tort litigation).

took only the 10 mg dose won't? Or will only certain injuries or illnesses be compensable? If so, what kind of proof of injury or diagnosis will suffice? Meanwhile, if claimants have sustained a range of injuries of varying severity, how many claimants are in each bucket? If a grid settlement is likely to be in the offing, everyone needs to know what the cells on the grid will be and roughly how many claimants will fall into each claim category.⁵⁹

Or consider a situation where a statute of limitations is at issue. Will only injuries that manifested by a certain date be eligible for payment? What kind of manifestation will suffice? Will independent medical examinations or objective scans be required? And again: Once that threshold is established, how many claimants are in—and how many are out? That foundational clarity, in turn, informs how a judge and the parties chart a closure strategy. As one participant summarized, lawyers need to know which claims are in and which are out—and, in identifying these boundary markers, “early orders limiting the case make a huge difference.”

Then, no matter the strategy, participants agreed that “everyone is sensitive to holdouts,” i.e., individual plaintiffs who reject a settlement offer, in favor of continued litigation. Plaintiffs’ counsel “don’t want to lose money,” and defendants “don’t want to clean up holdouts.” There was a sense that settlements don’t have to be—and generally aren’t—*truly* “global,” in that *some* holdouts are fine and very likely inevitable.⁶⁰ Indeed, many noted that inventory settlements are, in some ways objectively better than “global” settlements because, as one participant put it, they are “more manageable and predictable” and, in the eyes of another participant, allow “differentiation on quality cases.”⁶¹

But, even if inventory settlements are adequate, *ultimately* reaching roughly “95%” of eligible claimants emerged as a recurring target, with parties often working to build structures to help reach that critical threshold.

2. While Settlement Demands a Predictable Universe of Claims, the “How” and “When” for Mapping that Universe is Less Clear

As noted, Convening participants agreed that, in MDLs, predictability as to the universe of claims is key to closure. But while they agreed that—ultimately—there needs to be clarity regarding the scope and contours of the claims within the MDL, they disagreed as to when—and how—the parties should be expected to provide that clarity.

⁵⁹ Some noted that AI might be able to help in this regard by providing the parties with a more definite mapping of the universe of claims, possibly by examining aggregated sales or medical records.

⁶⁰ Baker & Bradt, *supra* note 6, at 1546 (observing that MDL claims “are typically resolved through a series of confidential ‘inventory’ settlements and only rarely through a single, truly global settlement”).

⁶¹ The participant juxtaposed inventory settlements with global settlements which, in the participant’s view, may disadvantage “high value [plaintiff] firms,” particularly in the face of mass tort marketing and third-party litigation funding. “When you push everyone together, it seems like a loss for high value plaintiff firms. So it makes it unfair.” On the other hand, some participants expressed a preference for global settlements. “I prefer a global settlement in most situations,” one participant said, citing “transparency,” the ability for “people without representation [to] access it,” and the “equitable treatment of claims,” which promotes “fairness and speed.” The notion here is that, if the case is resolved via inventory settlements, different lawyers’ inventories are apt to be valued differently, meaning that certain claimants—and, often, those claimants lucky enough to be represented by particularly capable counsel—are apt to have a leg up.

“At the beginning everyone is posturing not to give up anything early,” one participant observed, suggesting that the adversarial context often delays meaningful disclosure. Others commented that many of the “universe trimming” methods are “challenging to do very early” as they “depend on fact discovery and expert discovery.”

Participants also debated the appropriate methods of establishing a “baseline pool” of cases. One advocated for “aggressive” asks for early court rulings and deadlines, including on issues like the applicable statute of limitations. Another warned that these aggressive efforts can backfire.

3. Third-Party Litigation Funding, Settlement, and Case Closure

When discussing settlement, participants raised the issue of third-party litigation funding—and some specifically wondered whether these funding streams influence (and possibly distort) lawyers’ settlement incentives (and, by extension, the advice they give clients). This discussion took place against a backdrop where third-party funding is in the spotlight: the Judicial Council Advisory Committee recently agreed to form a subcommittee to explore new federal rules governing the disclosure of third-party financing.⁶²

One participant recounted a moment in settlement negotiations where progress was stymied, not by any party formally before the court, but by an absent stakeholder: “[The court] ordered the parties to appear, and [the court] ordered the insurance companies [to appear].” But then the court discovered that “the litigation funders were actually in control, and they weren’t in the room. So they couldn’t resolve the cases.”

Some participants also described the consequences of high interest rates for third-party loans on settlement and explained that, in deciding whether a settlement was sufficient, these rates frequently factored in.

Finally, participants observed that defense counsel may exploit these dynamics. Defense lawyers in settlement discussions, one participant said, “know people will crack under compounding interest.” Third-party

⁶² Third-party litigation loans to lawyers have become prominent in the mass tort context, with third-party litigation funders committing billions of dollars to lawsuits on an annual basis. Sara Merken, *US Litigation in ‘State of Flux’ as Deal Commitments Dip, Says Report*, REUTERS (Mar. 27, 2024). There have been numerous proposals to require litigants to disclose third-party funding they have received, including U.S. Congressman Darrell Issa’s introduction of the Litigation Transparency Act in February 2025. Press Release, Rep. Darrell Issa, Issa, House Colleagues Launch Reform of Third-Party Financed Civil Litigation (Feb. 7, 2025). If passed, the act would mandate disclosure of third-party funding agreements, as well as the terms of those agreements, in federal lawsuits. Meanwhile, the Advisory Committee recently agreed to consider whether to require third-party funding disclosures. *Court Advisory Committee OKs Look at Third-Party Funding Disclosure*, LEGALDIVE (Oct. 30, 2024). Proponents of mandated disclosures contend, among other things, that third-party litigation funding can facilitate the filing of nonmeritorious claims, may provide a window for foreign investors to finance litigation aimed at harming critical U.S. industries, and provides funders with impermissible control over the outcome of the lawsuit. *See, e.g.*, Letter from Sens. John Cornyn & Thom Tillis to H. Thomas Byron III, Secretary of the Comm. on Rules of Practice and Procedure (July 11, 2024) (arguing that undisclosed litigation funding can lead to frivolous cases and “is an available weapon for foreign investors to attack domestic businesses”); Rules Suggestion by Lawyers for Civil Justice & the U.S. Chamber of Commerce Inst. for Legal Reform to the Advisory Committee on Civil Rules (Oct. 2, 2024) (arguing that confidential funding agreements prevent parties from having control over their lawsuit). Opponents—primarily, litigation funders themselves—dispute these claims, arguing that litigation funders do not exert undue control and that litigation finance provides an important source of funding to ensure that attorneys can bring meritorious claims. *See, e.g.*, Letter from Burford Capital to Rebecca A. Womeldorf, Secretary of the Comm. on Rules of Practice and Procedure (Sept. 1, 2017) (stating these and other points).

For more on third-party litigation funding, see Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377 (2014); Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. Disc. 110 (2013); Mark Behrens, *Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product that Is Transforming the Civil Justice System*, 34 CORNELL J. OF L. & PUB. POL’Y 1 (2025) (providing commentary as a defense-side attorney); Seth Katsuya Endo, *Targeting Third-Party Litigation Funding Reform* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5051400.

litigation funding, then, can pose a real risk to plaintiffs who unwittingly enlist firms that rely too heavily on outside funds.

More broadly, participants agreed that the advent of third-party litigation funding raises a host of legal, ethical, and practical questions. They expressed dismay at the lack of information available regarding the prevalence of third-party litigation funding, as well as its impact on the course of MDL litigation. Some questioned whether third-party litigation funders exercised undue influence over the course of litigation. Many suggested that attorneys should be required to disclose to the court, *in camera*, whether they had received funding.⁶³

AREA FOR FURTHER RESEARCH: The Impact of Third-Party Litigation Funding on Settlement

In light of these discussions, participants called—explicitly and implicitly—for more research into the impact of third-party litigation funding on settlement. Questions include:

- The entities that most commonly provide capital to MDL litigators;
- The terms of this financing;
- The influence of third-party financing on settlement, both in terms of settlement timelines and amounts;
- Whether judges should review funding arrangements (in camera or publicly), and if so, the factors that should guide their review;
- The appropriate standard for judicial review of funding agreements.

4. Numerous Tools Can Encourage Settlement, Chief Among Them Setting a Trial Date

While MDLs may appear procedurally distinct, participants agreed that there’s nothing special about the core drivers of resolution. Chief among them: trial dates. Setting a firm trial date—and maintaining momentum toward it—was described as one of the most powerful tools to incentivize settlement. “In any case, you’re looking [at] when does this go to trial, how do I get it to settle,” one participant remarked. “It’s a little precious to have all of this focus on the MDL because they’re not all that different [from regular cases].” Another participant agreed, saying, “Trial dates are what settles [MDLs].”

Other strategies, too, were raised. One participant affirmed that case closure strategies “can be as varied as the imagination of the parties.” Options include inventory settlements to peel off certain lawyers’ claims. Issue-narrowing rulings (as referenced above concerning mapping or narrowing the universe of claims) are also helpful. As one participant opined, in one litigation, the key to encouraging settlement could be a “*Daubert* on causation,” while in another, it might be “a structure to make settlement posture possible” and “a mechanism for allocating any settlement among” various plaintiffs.

Another participant flagged as promising a new strategy used in the *Depo-Provera* litigation. There, the court chose five cases to work up for “pilot trials” before discovery had begun, as opposed to selecting bellwethers

⁶³ Participants did not discuss the pros and cons of public filings, only *in camera* disclosures.

later in the litigation. The court's stated aim was to provide quick decisions to propel resolution, including by rapidly identifying and resolving common issues; the thought was that these expeditious rulings on cross-cutting issues would allow the court and the parties to zero in on the genuine points of contention.⁶⁴

AREA FOR FURTHER RESEARCH: Tools to Drive Settlement

In light of these discussions, participants called for more research into mechanisms that most effectively encourage settlement. Questions include:

- Whether AI tools can be utilized to help map the universe of claims early in the litigation;
- Whether some closure mechanisms are more effective than others.

5. Are MDLs the Best Tools for Achieving Closure?

While much of the Convening focused on how to manage MDLs effectively, one discussion returned to first principles: Are MDLs the right tool for the job? “I mean, go back to basic questions,” one participant urged. “Are MDLs the best way to do this? Or are they actually an impediment to litigation progressing and resolving?” Another noted this common critique: “People attack MDLs, [say] it’s a black hole, cases go there forever.” Another continued: “I think there are a lot of people who think they’re an impediment and are better off not to have it.”

But many pushed back on the idea that decentralized litigation would improve outcomes. One participant recalled early pharmaceutical litigation involving a New Jersey drug company: “We were in federal court in New Jersey with a great magistrate, when new lawyers came in and moved to transfer. Suddenly we were litigating in eight districts; it was inefficient, expensive, and horrible.” That experience proved decisive: “That’s when I realized I should have moved for an MDL. It’s just crazy to have these everywhere.”

Ultimately, the discussion surfaced a core tension: While MDLs promise coordination and efficiency, they also risk delay, procedural complexity, and centralized control. Whether those tradeoffs are justified remains, for some, an open question.

⁶⁴ More specifically, the court explained the following:

The work of the MDL will be accomplished through the Pilot cases. In short order, the Defendants will be required to respond to the five Pilot complaints, raising all defenses. Common issues and defenses will be identified and ruled on early, and subsequent case specific discovery will essentially provide a vetting opportunity for the litigation that will narrow the issues for the entire MDL. There will be separate and specific discovery tracks for common defense issues such as preemption and general causation. After resolution of these issues and with the Parties’ input, the Court will establish a detailed case management order for traditional case-specific fact and expert discovery, including deadlines for *Daubert* and dispositive motions. If the case is not dismissed or settled, it will be tried or remanded. The work done in these cases will be eligible for common benefit consideration.

Case Management Order No. 1 at 3–5, *In re Depo-Provera (Depot Medroxyprogesterone Acetate) Prods. Liab. Litig.*, No. 3:25-md-3140 (N.D. Fla. Feb. 23, 2025), ECF No. 71.

Miscellaneous Observations

During the Convening, participants raised a number of points that fail to fit neatly into one of the four issue areas set forth above. Here, we summarize three of those miscellaneous observations. They include: (1) the structure of status conferences and, in particular, whether transferee judges ought to schedule status conferences in-person or online, (2) the merits of case-specific, public-facing MDL websites, and (3) techniques to coordinate state and federal proceedings.

1. Hybrid Hearings Are Useful—But Some Face-to-Face Interaction Is Indispensable

One issue that organically arose was whether MDL status hearings ought to be online or in-person.

Generally, participants supported in-person interaction, particularly at key junctures in complex litigation. “There’s a lot that gets done when people are in person in the same city,” one said. Another agreed, noting the subtle but significant advantages of face-to-face interaction: “Even resolving discovery, you do it in the hallways before a conference. It feels noticeable.” Concurring, another observed: “Things do get done face to face.” “There are points in litigation when you need that.” Another participant went further: “Zoom is too easy to revert to antagonistic attacking.” In that person’s view, when litigation begins to “break down,” it might be time “to go back to in-person” proceedings.

Still, participants acknowledged that cost-consciousness and technological progress have changed expectations, such that some phone or video conference meetings may be appropriate in certain circumstances.

A mixed model emerged as a best practice. Endorsing that model, one participant specifically recommended that transferee courts convene four in-person status conferences per year “and the rest over Zoom.” Another agreed: “Exactly.” Short matters—“15 to 20 mins,” in one participant’s view—could remain remote. But “we can be too dependent on it,” that person warned. “It’s easy, but we lose something.”

2. MDL Websites Can Be Valuable

Second, there was consensus that better public-facing websites—both concerning individual MDLs and featuring aggregated MDL data—could be useful. One participant noted that, in the *Camp Lejeune* litigation, for instance, plaintiffs’ leadership was required to maintain a public-facing website featuring a range of information to keep individual litigants informed about the case’s progress.⁶⁵ That person suggested that leadership should continue to create such websites in other cases to increase transparency and promote access to information.

Participants pointed out that many MDLs *have* websites, but quality varies; many of these sites are clunky,

⁶⁵ The *Camp Lejeune* litigation is technically not an MDL, as cases were consolidated by virtue of the Camp Lejeune Justice Act (CLJA), which requires all claims to be filed in the Eastern District of North Carolina. Consolidation did not occur pursuant to 28 U.S.C. § 1428. See Information Concerning Camp Lejeune Water Litigation, U.S. DIST. CT. FOR THE E. DIST. OF NORTH CAROLINA, <https://www.nced.uscourts.gov/attorney/cwl.aspx> (describing the CLJA). Still, because the litigation consolidates thousands of claims before a handful of judges, it provides a useful corollary.

dated, and chock full of legalese.⁶⁶ Participants therefore emphasized the importance of thoughtful, litigant-centered web design and the need to keep websites current by providing up-to-date case information. For instance, the court may impose requirements that plaintiffs’ leadership post all court filings on the website on the same day they are entered on the docket. Other ideas for thoughtful website design are summarized in a book chapter by Todd Venook and Nora Freeman Engstrom, which suggests that websites should be designed and customized to optimize use by litigants, that websites should be visible and up to date, and that websites should clearly publicize hearings and status conferences, particularly when remote attendance options are available.⁶⁷

Other participants voiced support for a centralized website featuring data regarding leadership appointments across different MDLs. But, at the same time, participants cautioned that such a website would have to be designed with care. For instance, listing leadership appointments on a government or educational (.gov or .edu) website might have unintended reputational effects. As one participant warned: “The danger of that coming from .edu or .gov is that people will use that to market themselves,” especially if the site becomes known for showcasing who is “most appointed.”

The upshot: websites could provide desirable transparency into specific MDLs *and* MDLs more generally—but the structure, content, and presentation of these websites matter.

3. Need to Coordinate State and Federal Cases

Participants agreed that, when mass torts unfold in both federal and state courts, coordination is essential. But most also agreed that this coordination should not be compelled. Rather, it should be cultivated through deliberate, respectful, and reciprocal communication. Participants concluded that communication must be regular, voluntary, and judge led.

Judges, in particular, spoke of the importance of reaching out to their state court counterparts to seek out status reports and offer assistance. Most important, some stated, was establishing an “open door” policy so that state and federal judges would feel comfortable reaching out to one another when questions arose. Participants also identified specific vehicles for collaboration, such as joint science days between federal and state proceedings.

⁶⁶ For more on MDL websites, see Todd Venook & Nora Freeman Engstrom, *Toward the Participatory MDL: A Low-Tech Step to Promote Litigant Autonomy*, in *LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE* 173 (David Freeman Engstrom ed., 2023), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C0DD8172CCE266DBA6CA34E2BBFF16A5/9781009255356c8_173-196.pdf/toward-the-participatory-mdl.pdf.

⁶⁷ *Id.* at 193–94; see also 2022 Convening Report, *supra* note 3, at 34–36 (similarly setting forth a reform proposal for accessible MDL websites).

Conclusion

As MDLs continue to shape the federal civil docket, the stakes of effective MDL case management continue to grow. The Rhode Center's March 2025 Convening underscored both the promise and the peril of a system defined by procedural flexibility and institutional experimentation. While some view this flexibility as a positive feature—enabling responsiveness, innovation, and bespoke justice—others worry that it leaves too much to chance, undermining transparency, accountability, and predictability.

Over the course of the day, participants brought candor, insight, and experience to bear on the core challenges facing transferee judges today: promoting claim integrity, structuring common benefit fees, selecting and supervising leadership, and achieving meaningful closure. In each domain, the Convening revealed both promising practices and persistent gaps. And across these disparate topics, one theme emerged with clarity: Judges do not need rigid mandates. They need more robust tools—grounded in past experience, empirical insight, and peer wisdom—to navigate the complexity of modern MDL practice.

Appendix A

Below, we present data collected in an informal survey distributed in early 2025 to the judges assigned the most recent 100 MDLs by the Judicial Panel on Multidistrict Litigation (because some judges had been assigned multiple MDLs, 91 judges received the survey). 27 judges responded to the survey, yielding a response rate of 29%. However, only 10 judges completed the majority of the questions (an 11% response rate).

FIGURE 1 | Types of Case Management Guidance Judge Consulted when Overseeing First MDL ■ Choice count

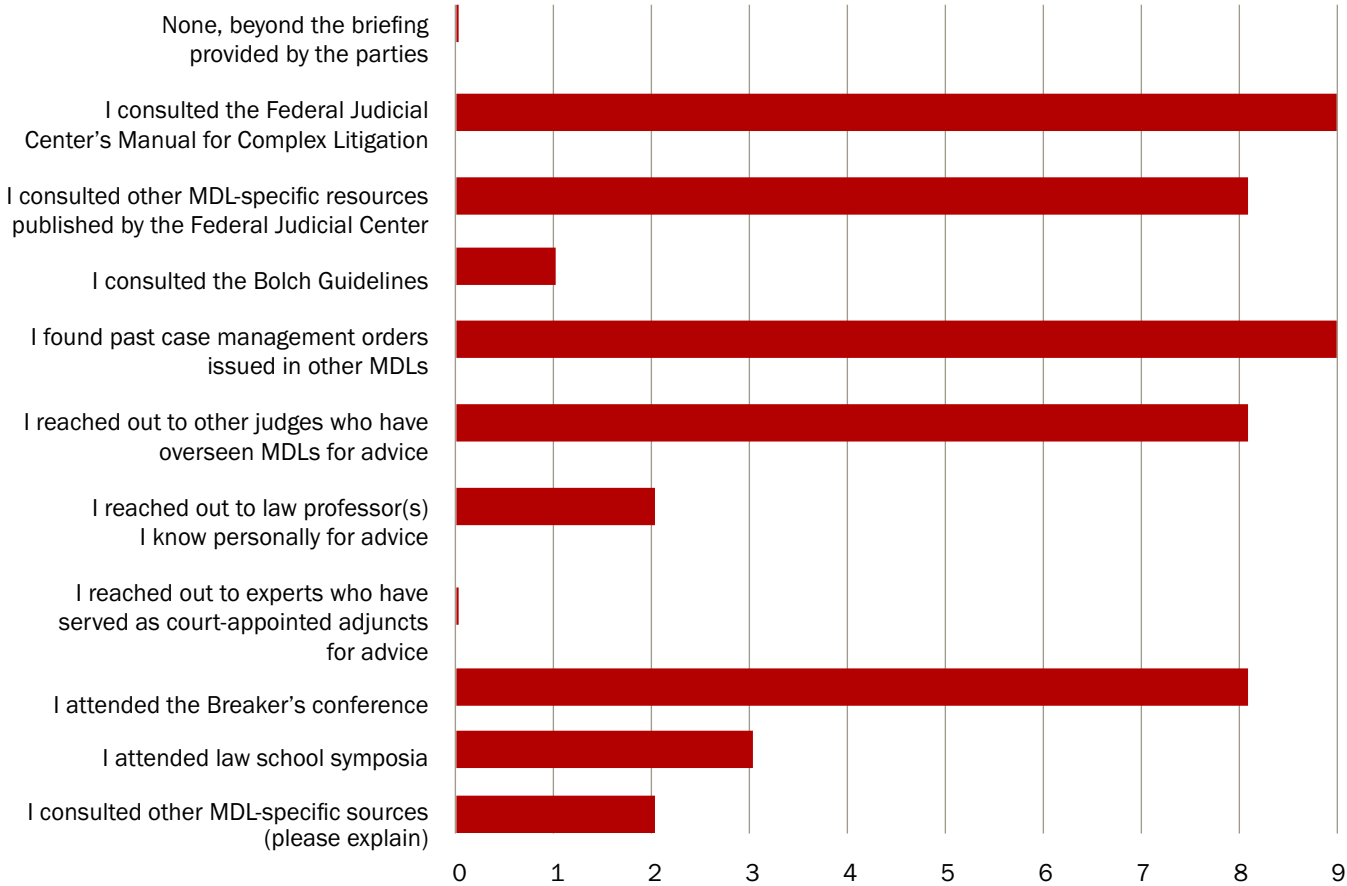


Figure 1 illustrates the types of case management guidance MDL judges consulted when overseeing their first MDL. (For more discussion, see note 14, *supra*.) In terms of case type, five of the judges who responded to most of the survey’s questions oversaw a mass tort case as their first MDL; four oversaw an antitrust case; and one oversaw a data breach case.

FIGURE 2 | Judges’ Opinions Regarding MDL Guidance

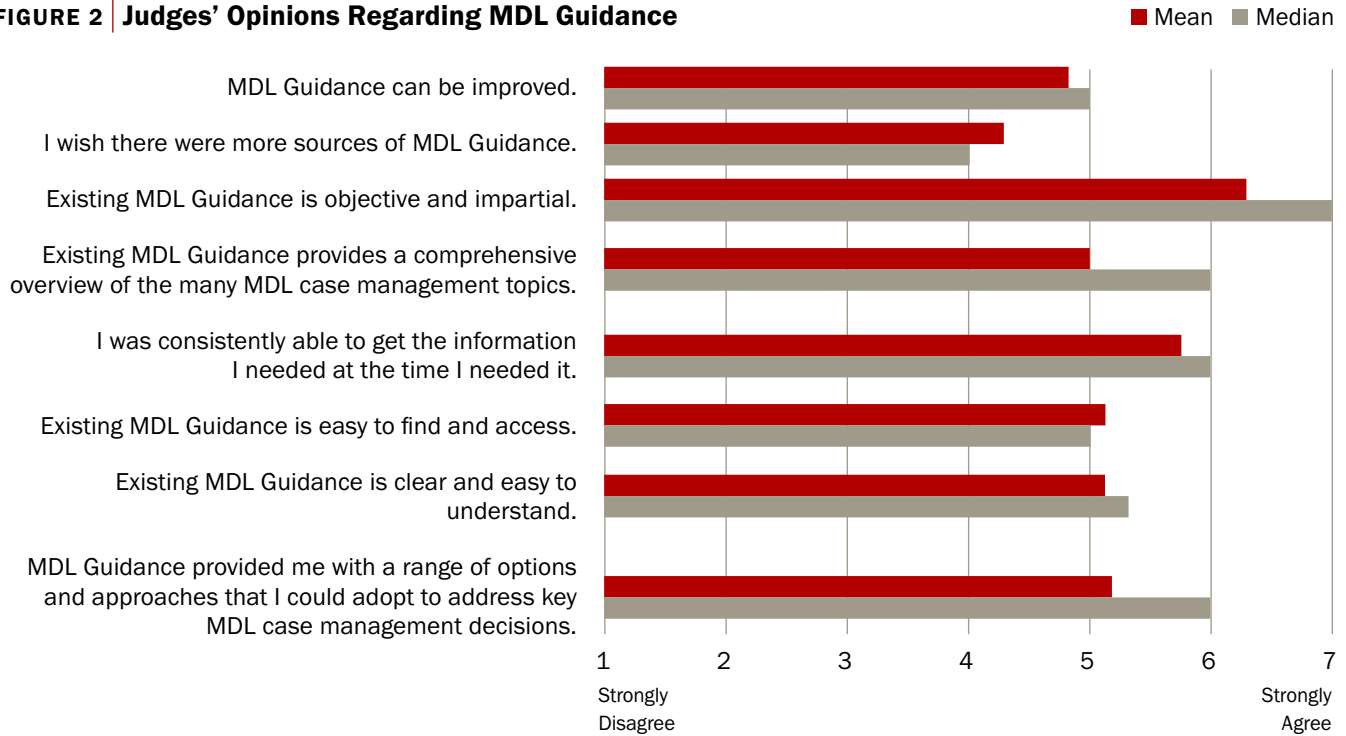


Figure 2 reflects the mean and median responses judges provided to a series of questions asking them to rank their agreement or disagreement with a number of statements regarding MDL case management guidance on a scale from 1 to 7. As reflected in the figure, the judges mostly agreed that existing MDL guidance is comprehensive, objective, easy to access, easy to understand, and provided them with a range of options and approaches. Still, judges generally believed that, despite these laudable qualities, MDL guidance could be improved.

TABLE 1 | “If you believe that existing MDL Guidance can be improved, how could it be improved?”

- New MDL judges don’t know anything, we learn by trial and error.
- There are quirks in MDLs that a good practice guide could address, such as techniques in selecting class counsel, Lone Pine Orders, and Common Benefit Orders.
- More materials, more analysis always helps. Some unique to data breach issues would be good.
- The Manual on Complex Litigation should be updated with more complete MDL advice.
- Provide further training re R 16.1

Table 1 reflects judges’ answers to the question, “If you believe that existing MDL Guidance can be improved, how could it be improved?”

TABLE 2 | **“How does MDL Guidance compare to the case-management guidance that is available for non-MDL cases in terms of quality, accessibility, and/or comprehensiveness?”**

behind the 8 ball

There is more MDL guidance and resources available

MDL Guidance seems robust and comprehensive, similar to non-MDL cases.

There is a dearth of MDL Guidance compared to case management guidance in non-MDL cases

About the same

Not as good.

Same

About the same

Table 2 reflects judges’ answers to the question, “How does MDL Guidance compare to the case-management guidance that is available for non-MDL cases in terms of quality, accessibility, and/or comprehensiveness?” Most judges found the quality of MDL case management guidance was either lacking in comparison to non-MDL case management guidance, or about the same. Only one commented that they believed more MDL guidance and resources were available in comparison.