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The Ethics Gap: MDL Leadership Versus the Attorney-Client Relationship

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Mass torts cases take up a massive swath of the nation's federal court docket yet are governed by little to no substantive procedural laws. Instead, a host of regular practices for multidistrict litigation ("MDL") management have emerged through repetition. One such practice is the selection of a plaintiff steering committee ("PSC"): a small group of experienced plaintiffs' attorneys that control and direct the litigation from initiation through settlement or other resolution. The PSC is extremely important—determining which experts to use, which injuries to focus on, and so forth. Yet there are no set rules dictating PSC management of the litigation, unlike those that control class action counsel selection and court approval. There are no specific ethical duties owed by any PSC member to any individual plaintiff in the litigation other than to a PSC member's own clients, if they have any. An average non-bellwether MDL plaintiff benefits from the PSC's work and will probably pay in part for it but has no true fiduciary relationship with the PSC. The PSC manages the individual's case, but there is no attorney-client relationship between them. The relationship seems contractual, but neither plaintiff nor PSC has entered into that specific contract, and neither can meaningfully terminate that contract. From the legal ethics perspective, is this sufficient? Should rules be developed, or should existing rules be applied to this kind of relationship? This Essay exposes and explores this ethical gap in MDL practice.

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INTRODUCTION

Multidistrict litigation ("MDL") typically involves the appointment of a select group of leadership able to direct pretrial proceedings, discovery, and motion practice, and to interface with the court and the defendants, to the exclusion of the rank-and-file plaintiff's attorney. Plaintiffs' steering committees ("PSC") typically hold all the power and control access to the courts, discovery, experts, and defendants. PSCs direct all plaintiff-side pretrial activity, a costly and contentious endeavor in which general causation and other substantive issues must be fleshed out to maximize potential recoveries. Individual attorneys, meanwhile, have clients with injuries and real claims against the defendants, but none of the elements possessed by the PSC that are necessary for driving their suits forward. Individual attorneys also may have clients with unusual timing, injury, or causation issues that are not reflected in the overall strategy selected by the PSC.

In the sense of formal legal ethics, PSC members have no true ethical or fiduciary relationship to general members of an MDL (setting moral, reputational, and other considerations aside).[1] There are no ethical rules binding PSCs to act in the best interests of any particular MDL plaintiff, or even *most* MDL plaintiffs. If, for example, a PSC member were to devise a settlement strategy that would benefit only that member's specific clients and absolutely no one else, that is a permissible strategy and not prevented by the ethics rules. This is not to suggest that PSC members are typically purely self-interested, or are not using legal and moral ethics to inform conduct and decisions when serving as PSC counsel. Rather, it is anomalous that they are not *required* to do so. Indeed, the fact that there is no large hue and cry for a means to address this gap implies that PSC attorneys are generally treating their PSC obligations as part of their typical ethical responsibilities as attorneys and officers of the court.[2] Yet surely this is insufficient. The legal profession imposes a system of ethics as enforceable legal duties on both typical and atypical attorney-client relationships every day, despite the general tendency of attorneys to practice ethically and responsibly. Ethical obligations are particularly scrutinized and enforced in the case of class counsel. Certainly, we should at least consider whether to do the same for this other atypical, yet hardly uncommon, type of representation.

This Essay examines the ethical obligations implicated by having a nonrepresentative PSC serving as MDL leadership and considers whether alternative models, like the class counsel model or a purely nonattorney third-party model, would be better suited to MDL leadership from an ethics perspective. Part I introduces the MDL and the PSC's role, then identifies the

1. These are not inconsiderable considerations. As explored in *Layers of Lawyers*, the reputational and inherent moral values of attorneys working in PSC roles appear to generate good outcomes for most MDL plaintiffs. 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, 489–90 (2020).

2. *Id.* at 480–82.

ethical gap created by the use of the PSC to direct much of the litigation. Part II then sets out the typical attorney-client relationship and the ethical duties inherent thereto, comparing it to the class counsel/class action plaintiff relationship. Part III then compares those typical relationships to the PSC/non-PSC-represented plaintiff within an MDL and explores options for eliminating, reducing, or at least acknowledging the ethics gap.

I. PLAINTIFF STEERING COMMITTEES: THEIR STRUCTURE, ROLES, RESPONSIBILITIES, AND LIMITS

Federal MDL cases dominate the national federal civil litigation docket.[3] In 2019, cases filed or transferred into an MDL accounted for forty-seven percent of pending civil cases in federal courts, by one center's analysis.[4] Many of these MDLs involve product liability matters,[5] which can involve thousands of individual cases asserting the same or similar claims against the same defendant.[6]

Multidistrict litigation is (in general) governed by a single federal statute establishing the Judicial Panel on Multidistrict Litigation ("JPML").[7] The JPML, which consists of a group of seven federal judges from across all districts that meets quarterly, is authorized by 28 U.S.C. § 1407, which creates the panel

3. According to a statistical report released by the JPML, "[d]uring the twelve-month period ending September 30, 2019, 49,042 civil actions" were filed directly in or transferred into active MDLs. U.S. JUD. PANEL ON MULTIDIST. LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407 FISCAL YEAR 2019 (2019), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf. While it is difficult to find statistics on the total federal cases filed within the same time period, there were 94,206 total civil suits filed under diversity jurisdiction in 2019. *Federal Judicial Caseload Statistics*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 (last visited May 12, 2023).

4. *MDL Cases Continue To Dominate the Federal Caseload*, RULES4MDLS (Mar. 19, 2020), https://www.rules4mdls.com/mdl-cases-continue-to-dominate ("[T]he concentration of federal civil cases in multidistrict litigation (MDLs) continues a five-year trend, hovering at nearly half of the total federal civil caseload when adjusted for social security and non-death penalty prisoner cases."). Note that MDLs are distinct from class actions, which consolidate many cases into a single suit. The MDL is a consolidation, only for pretrial purposes, of many individual actions that nonetheless are filed individually and retain their individual character. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 791–93 (2012) ("MDL's primary difference from the class action is that the cases within it retain their individual identities. In other words, instead of the case being formally litigated by a representative on behalf of a group of absentee plaintiffs, the cases in an MDL keep their individual character. . . . [I]t is important to note the ways in which an MDL is different from a class action. Indeed, although MDL resembles in important ways a representative suit, it is not quite the same, because the cases retain their individual character. Unlike a class action, there are no absentee plaintiffs, and the cases are separately filed and prosecuted. And there will not be a single jury trial to decide the entirety of the case. As a result, the MDL has something of a hybrid character—not quite as aggregated as a class action but consolidated to a significant degree.").

5. JUD. PANEL ON MULTIDIST. LITIG., CALENDAR YEAR STATISTICS JANUARY THROUGH DECEMEBER 2019 (2019), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf.

6. For example, over 52,000 cases were filed into the Round-Up MDL, *In re Roundup Products Liability Litigation*, No. 16-md-2741 (N.D. Cal.), and over 140,000 were filed in 2019 into the 3M Earplugs MDL, *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 19-md-2885 (N.D. Fla.).

7. 28 U.S.C. § 1407.

and authorizes it to review cases for potential consolidation.[8] The JPML can order the consolidation of suits that have common issues of fact.[9] They can decide to transfer the related matters to any district court, although the panel will also consider convenience of the forum and other issues, like whether an experienced (and willing) judge is available to handle the MDL. Cases are only consolidated for pretrial matters; once the issues are ready for trial, there is no further MDL jurisdiction over the matter.[10] Once matters are through discovery, motion practice, and are considered ready for trial, the MDL court loses its jurisdiction, and the matters are to be remanded for trial.[11]

Upon the transfer of the cases to the MDL court, there are no formal rules directing how the transferee judge in charge of the MDL must handle all pretrial proceedings.[12] There are, however, typical practices as well as formal recommendations from the Federal Judicial Center on how best to manage massive MDL dockets.[13] For example, an MDL judge will typically start early in the case by establishing a plaintiffs' counsel leadership group, or PSC. This group will serve as the liaison between the court and the hundreds or thousands of individual attorneys involved in the consolidated cases.[14] As the Federal

8. *Id.* § 1407(a), (d).

9. As the district court explained in the Bard Hernia Mesh MDL:

> This Multidistrict Litigation ("MDL") was created by Order of the United States Judicial Panel on Multidistrict Litigation ("JPML") on August 2, 2018. In its August 2, 2018, Order, the JPML found that the actions in this MDL "involve common questions of fact, and that centralization in the Southern District of Ohio will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." The JPML continued that, "[a]ll of the actions share common factual questions arising out of allegations that defects in defendants' polypropylene hernia mesh products can lead to complications when implanted in patients, including adhesions, damage to organs, inflammatory and allergic responses, foreign body."

Introduction - MDL 2846, U.S. DIST. CT. S. DIST. OHIO, https://www.ohsd.uscourts.gov/introduction-mdl-2846 (last visited May 12, 2023) (citing *In re* Procter & Gamble Aerosol Prods. Mktg. & Sales Pracs. Litig., 600 F. Supp. 3d 1343, 1343 (J.P.M.L. 2022); *In re* Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig., 316 F. Supp. 3d 1380, 1380 (J.P.M.L. 2018)).

10. Lexecon Inc. v. U.S. Dist. Ct. for the Dist. of Ariz., 61 F.3d 911, 911 (9th Cir. 1995) (unpublished table decision) (Kozinski, J., dissenting) ("Section 1407(a) authorizes the Multidistrict Panel to transfer cases for pretrial proceedings; after those proceedings are completed, and before trial, 'each action so transferred *shall* be remanded by the panel.' It's hard to imagine a clearer statutory command . . . .").

11. § 1407(a) ("Each action so transferred *shall* be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." (emphasis added)).

12. The lack of formal rules is another way MDLs are distinct from class action procedures, which are more formally regulated. *See* Bradt, *supra* note 4, at 791–92 ("[T]he due process concerns of class actions are present in MDL, and may be even more pronounced since the MDL structure has fewer formal procedural protections than the class action.").

13. *See generally* MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004). Federal Judicial Center pocket guides focusing on specific areas of practice are available at *Manuals, Monographs, & Guides*, FED. JUD. CTR., https://www.fjc.gov/education/manuals-monographs-guides (last visited May 12, 2023).

14. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 13, §§ 10.221–.222; DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 9:15 (2022) (citing City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972); John T. McDermott, *The Transferee Judge—the Unsung Hero of Multidistrict Litigation*, 35 MONT. L. REV. 15, 16–19 (1974)).

Judicial Center warns MDL judges with regard to PSC selection: "This is one of [their] first and most important decisions."[15]

The PSC is often divided into a sort of leadership or executive group, as well as into committees on topics like "Law and Briefing," "Discovery and Experts," "Settlement," and so forth.[16] There may be any number of subcommittees created as needed as well.[17] The judge also may decide, initially or at a later date, to appoint a Special Master for any purpose.[18] In *In re Taxotere (Docataxol) Products Liability Litigation*, the judge also appointed two "Liaison Counsel," who were specifically charged with communicating, on a regular basis, procedures, orders, and significant updates to all of the various plaintiffs' attorneys with consolidated clients.[19]

"There is no magic formula for" selecting the PSC, despite its importance.[20] MDL judges may request that lawyers vying for PSC positions "submit their résumés, descriptions of their prior experience in other complex litigation, and their proposed fee arrangements. Judges often hold a hearing to observe and assess counsels' competence and professionalism."[21] For example, the *Taxotere* MDL judge requested a written application covering: (a) willingness and availability to commit to a time-consuming project, (b) ability to work cooperatively with others, (c) professional experience in this type of litigation, and (d) willingness to commit the necessary resources to pursue this matter.[22]

PSC members are typically experienced and wealthy attorneys with significant numbers of relevant clients;[23] however, there is no requirement

15. FED. JUD. CTR., TEN STEPS TO BETTER CASE MANAGEMENT 2 (2d ed. 2014), https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Judges-2D.pdf.

16. *See generally, e.g.*, *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. 14-md-02592 (E.D. La. Feb. 9, 2015) (appointing PSC). There is typically a requirement to "buy in" to the PSC if appointed. This is called the "common benefit fund." The PSC members also typically track the time they spend on PSC-related matters and submit statements of work to the court, special master, or a PSC designated to handle billing. If the MDL resolves successfully, the hours billed will be repaid in keeping with what is available. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 13, § 10.22. *See generally*, *e.g.*, *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. 14-md-02592 (E.D. La. Feb. 13, 2015) (establishing standards and procedure for counsel seeking reimbursement for common benefits and fees).

17. *See* BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUD. CTR., MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES, A POCKET GUIDE FOR TRANSFEREE JUDGES 12 (2001), https://www.fjc.gov/sites/default/files/2012/MDLGdePL.pdf.

18. *See generally In re* Taxotere (Docataxol) Prods. Liab. Litig., No. 16-md-02740 (E.D. La. Feb. 13, 2017) (appointing Kenneth DeJean as special master).

19. *In re Taxotere (Docataxol) Prods. Liab. Litig.*, slip op. at 1 (E.D. La. Oct. 13, 2016).

20. FED. JUD. CTR., *supra* note 15, at 2; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 13, §§ 10.224, 14.211, 22.62.

21. FED. JUD. CTR., *supra* note 15, at 2.

22. *See In re Taxotere (Docataxol) Prods. Liab. Litig.*, slip op. at 9 (E.D. La. Oct. 13, 2016). The Manual for Complex Litigation asks that judges inform PSC members that "[c]ounsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel." MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 13, § 10.22.

23. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 83, 164–65 (2017).

whatsoever that PSC members are actually attorneys already in the MDL, and it is possible that a PSC member could have none, one, or several thousand clients.[24]

The PSC directs and controls the plaintiffs' side in the litigation, communicating directly with the judge, defense counsel, and experts. A pocket guide for MDL judges from the Federal Judicial Center actually encourages in-chambers private discussions between the PSC, the judge, and defense counsel, without a court reporter or non-PSC counsel present.[25] Typically, only the PSC is authorized by the MDL judge to conduct general discovery; individual plaintiffs' lawyers cannot propound requests or take depositions.[26] A good example of an order appointing the PSC and assigning its duties appears in the *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation* initial order, which contains several pages of duties and responsibilities of the PSC, including "[i]nitiating], coordinat[ing] and conduct[ing] all pretrial discovery on behalf of all Plaintiffs," and "submit[ing] and argu[ing] . . . any motions presented to the Court or Magistrate Judge on behalf of all Plaintiffs as well as oppos[ing] when necessary any motions submitted by Defendants."[27] Further, only PSC members are openly able to communicate with the court and the opposing side.[28]

In the typical MDL model, the decisions about general causation, expert selection and preparation, discovery parameters, document review, and so forth, are now entirely in the hands of the PSC.[29] There are significant benefits to this: it streamlines procedures and eliminates repetition and inconsistencies between cases, ensures a single point of contact for the opposing counsel and judge to work with, and often imbues the proceedings with knowledge and experience

24. In the Taxotere pretrial order, the judge specifically required that all PSC applicants have at least one filed case. *See In re Taxotere (Docataxol) Prods. Liab. Litig.*, slip op. at 9 (E.D. La. Oct. 13, 2016). Plaintiffs' lawyers may also work with third-party financial companies to fund their MDL cases. Defendants often try to seek information about those arrangements, arguing that the interests of unknown third-party lenders directly impact how plaintiffs' lawyers will pursue the case. In the Valsartan MDL, for example, the judge heard such a dispute and determined that without evidence of actual impacts on the plaintiffs' representation, there would not be disclosure of any third-party loans. *See generally In re* Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612 (D.N.J. 2019). However, in *In re National Prescription Opiate Litigation*, the judge ordered complete disclosure of any and all "third-party contingent litigation financing" agreements. *See generally* No. 17-md-02804, 2018 WL 2127807 (N.D. Ohio May 7, 2018).

25. ROTHSTEIN & BORDEN, *supra* note 17, at 9 ("[B]efore each monthly conference in open court with a court reporter, hold a short off-the-record meeting with lead and liaison counsel in chambers to hash out any particular problems and allow for the free flow of ideas and information that may be too delicate or premature for open court.").

26. *In re Taxotere (Docetaxol) Prods. Liab. Litig.*, slip op. at 4 (E.D. La. Aug. 23, 2017) ("All general discovery propounded to the Sanofi Defendants by Plaintiffs in this MDL proceeding pursuant to this Order, including deposition notices, interrogatories, requests for admission, and production requests, shall be undertaken by, or under the direction of, the Plaintiffs' Steering Committee on behalf of all Plaintiffs with cases in these MDL proceedings.").

27. *In re* Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig., No. 18-md-2846, slip op. at 7–8 (S.D. Ohio Sept. 19, 2018).

28. *Id.* slip op. at 8–9.

29. *See* ROTHSTEIN & BORDEN, *supra* note 17, at 11.

(given the "repeat players" involved in many of the consumer product–type MDLs).[30] At the same time, the exclusive control by the PSC can lead to a lack of communication with non-PSC attorneys (and, consequently, their clients), or the minimization of certain types of injuries or exposure claims. Individual attorneys cannot seek discovery, may not have access to experts or information gained in the discovery and pretrial processes, and may not understand that decisions on types of injuries or exposure are being made to the detriment of their clients.

This is no secret or surprise to MDL judges or experienced counsel.[31] There are often efforts made to minimize these problems, including appointment of special "liaison counsel" who acts as a liaison between the PSC and all the rest of plaintiffs' counsel, communicating updates and key information.[32]

Nonetheless, there is a gap between the PSC members actually litigating these cases at the mass scale and the individual attorneys and plaintiffs with single cases who are more or less unable to litigate meaningfully (beyond submitting plaintiff information sheets and attending liaison counsel presentations). The PSC members do not always represent the typical plaintiff (PSC members can of course have their own clients;[33] but for this discussion, consider the individual plaintiff not represented by any PSC member). The PSC

30. Baker & Herman, *supra* note 1, at 474.

31. BOLCH JUD. INST., DUKE L. SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 59–60 (2d ed. 2018), https://scholarship.law.duke.edu/bolch/5/ ("Where the court is advised of issues that create potential conflicts among counsel, it should institute measures that permit non-leadership counsel to provide input. Disagreements among lead and non-leadership counsel commonly arise at certain, discrete decision points in an MDL, including: (1) selection of bellwether trial counsel; (2) decisions to pursue or abandon claims/theories in discovery and bellwether trials; and (3) resources (discovery, trial packages, experts) provided to lawyers preparing individual cases. In consultation with lead counsel, the court should develop a process whereby non-leadership counsel can report issues or concerns to the court on a regular basis (perhaps quarterly). The court may seek explanation from lead counsel as to how these matters are being handled.").

32. *See generally In re* Taxotere (Docataxol) Prods. Liab. Litig., No. 16-md-02740 (E.D. La. Oct. 13, 2016).

33. Jack Weinstein discusses this at length:

> When we impose this adversarial model—the lawyer as fiduciary to the client—on the mass tort case, we find that the notion of the lawyer standing in the shoes of the client is sometimes ludicrous. In asbestos litigation, for example, some lawyers represent more than ten thousand plaintiffs. . . . The efficiency advantages due to economies of scale in such circumstances are obvious. Amassing large numbers of cases in the hands of relatively few specialized lawyers can greatly facilitate settlement and afford plaintiffs the benefit of attorneys experienced in complex cases.
>
> But plaintiffs in mass cases pay a price for these advantages. Many of these lawyers do not maintain meaningful one-to-one contact with their clients, nor can they represent these people as individuals, each with his or her own needs and desires. The client becomes no more than an unembodied cause of action. . . .
>
> At best these plaintiffs' lawyers construct small bureaucracies including paralegals, newsletters, and phone banks to maintain contact with their clients. At worst the lawyers neglect their clients. Injured persons may find that they have surrendered their rights to a system in which they have little or no input. Even with the best-intentioned lawyers, some alienation of the individual seems inevitable.

Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 494 (1994).

members do not owe any ethical or legal duty to the non-PSC attorneys' clients.[34] There is no agreement to jointly represent the client, and there is no implied agreement by the individual client. Beyond moral or reputational (and thus, unenforceable) reasons, there is no basis for the PSC to act as the zealous advocate of any specific individual client whatsoever. To put this in terms of malpractice—or an ethics complaint to the bar—the individual client cannot fire the PSC, cannot opt out of the PSC's involvement, and cannot hold the PSC accountable for decisions made that directly affect the outcome of that individual client's case, for better or for worse. Yet the PSC's "representation" of the individual client has a direct effect on the individual client's case because the PSC directs all discovery, retains experts, develops a strategy for motion practice, and so forth.

This apparent gap is widely ignored.[35] Again, it should be stressed that the general professionalism of a typical PSC may prevent the inchoate ethics complaint or malpractice lawsuit from becoming necessary.[36] Certainly, the accompanying symposium essay on sanctions seems to bear this out at least in part.[37] But the individual attorney—who cannot direct the litigation, pursue discovery, or set motion timelines—is still fully on the hook for any ethical lapses they commit. Does their ethical obligation become narrowed to simply monitoring the MDL docket and communicating relevant updates to the client? No. The full panoply of attorney obligations to their clients under the rules of professional conduct apply in full, even though the attorney can only represent that client in part.[38] So again, here is the gap: the individual MDL plaintiff is

34. BOLCH JUD. INST., *supra* note 31, at 51 ("Plaintiffs' lead counsel in an MDL does not have a fiduciary relationship with all plaintiffs in the case, notwithstanding a perception sometimes expressed to the contrary. Despite contrary statements, the better view is that the authority of lead counsel, including liaison counsel and plaintiffs' executive or steering committees' members in an MDL, emanates solely from the court. MDL leadership appointments are distinguished from the typical attorney-client situation, in which the lawyer's authority arises from a formal retainer agreement between the attorney and the plaintiff. Although reasonable attorney/client agreements may limit the scope of the lawyer's responsibility, it is ordinarily the case that the lawyer will undertake any and all actions reasonably necessary to achieve the desired results and objectives of the litigation. By contrast, in an MDL court-appointed counsel situation, lead counsel's authority—and concomitant responsibility—is often defined not in terms of the ultimate goals sought by plaintiffs, or by the law governing attorney-client relationships but only in terms of the procedural responsibilities conferred by the MDL court. These steps are generally set forth in an appointment order, which describes the services that lead counsel are asked and directed to perform.").

35. Widely, but not entirely ignored. *See* Weinstein, *supra* note 33, at 534–35 ("Even if attorneys in these situations are not clearly violating the *Model Rules*, their conduct falls short of the ideal of the loyal advocate for an individual client envisioned by the traditional model of ethics. Trade-offs will be required in any solution. How much dissonance between client and attorney are we willing to tolerate in the name of efficiency and practicality?").

36. Baker & Herman, *supra* note 1, at 489–90.

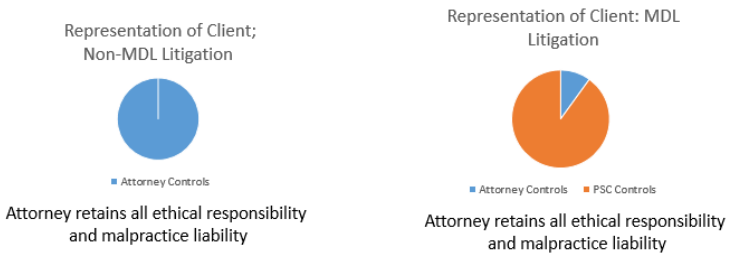
37. *See generally* Roger Michalski, *Ethics by Appointment: An Empirical Account of Obscured Sanctioning in MDL Cases*, 74 HASTINGS L.J. 1373 (2023).

38. Burch, *supra* note 23, at 125 ("But judges pay little attention to adequate representation on the front end—often appointing leaders before conflicts are known. And though plaintiffs have individually retained counsel (unlike all but the named plaintiff in class actions), that attorney has little to no control once the judge empowers the leaders. She cannot fire lead attorneys even when she feels they are not acting in her clients' best

fully represented in the MDL court by a combination of that client's own attorney and the PSC. However, the non-PSC attorney cannot direct or control major decisions in the pretrial portion of the representation.

Consider this visual representation of the difference in control versus ethical obligations in two representation scenarios below.

FIGURE 1: REPRESENTATION OF THE CLIENT IN NON-MDL VERSUS MDL LITIGATION



The first chart shows the typical relationship; the attorney controls the attorney-assigned tasks of the representation and retains all ethical responsibility and malpractice liability. The blue circle acts as two entirely overlapping circles of power and responsibility. The second chart shows the non-PSC attorney's reduced control over the decisionmaking and advising inherent in the attorney-client relationship once their client's case is in an MDL setting (for all pretrial proceedings, pre-remand). The PSC is responsible for conducting discovery, such as interviewing, and retaining experts on general causation, in addition to advancing and defending theories as to notice, causation, warning, and so forth. The individual attorney cannot control or direct any aspect of that process and may not get access to the key discovery documents until the PSC has completed its review and shared its results (if indeed the PSC shares its key findings).[39]

The orange section in the right-hand chart illustrates two things: the amount of control over litigation that the PSC exercises *and* the ethical gap in representation. This ethical gap is the difference between the individual attorney's ethical obligation to the individual client and that attorney's ability to control and direct the course of litigation. Who is responsible for problems, conflicts, and ethical lapses that arise in the decisions and actions represented by

interest, and she regains control of her clients' suits only in the unlikely event of remand. Often, the most she can do is complain that the leaders have violated their fiduciary obligations to the whole group—a move that risks alienating her from receiving common-benefit work and future lead roles.").

39. *See* Thomas Cartmell, *MDL Remands: Plaintiffs' Perspective*, 89 UKMC L. REV. 983, 988 (2021) (discussing trial packages that may be available after remand).

the orange piece of the pie? Currently, it remains the ethical obligation of the attorney, despite that attorney's inability to do much of anything about the orange piece of the pie. Is that fair, or should the control and power over the case be inextricably linked to (and travel with, hand in glove) the ethical responsibility for that client? And yet if that were the case, how could the PSC be made ethically responsible for a client it has not chosen or vetted?

II. ATTORNEY-CLIENT RELATIONSHIPS: TRADITIONAL AND NONTRADITIONAL SETTINGS

This Part will briefly explore the basis of the traditional attorney-client relationship and the ethical obligations that arise from that relationship, and contrast that with the less typical attorney-as-class-counsel relationship, where the ethical obligations change with changes to the relationship.

A. THE TYPICAL ATTORNEY-CLIENT RELATIONSHIP

To address the typical attorney's obligations to a client is to cover the basics. For example, the duty of loyalty and the fiduciary obligation to a client are both ethical obligations of the profession and enforceable obligations that can be used to sanction or disbar an attorney who falls short of that duty.[40] The ethical rules vary slightly from state to state, but all states require that lawyers maintain some minimum standard of behavior that, if not met, can lead to sanctions by that state's bar.[41] "Trust . . . is the hallmark of the client-lawyer relationship."[42] The Model Rules of Professional Conduct group the types of ethical obligations under areas like "client-lawyer relationship," "counselor," and "advocate."[43] In the client-lawyer-relationship area, the lawyer is assigned duties of competence, diligence, and confidentiality, and is charged with ensuring that communications are maintained, fees are reasonable, and conflicts are avoided.[44] As a counselor, a lawyer must exercise independent professional judgment and render candid advice.[45] In the area of "advocate," a lawyer is directed to bring only meritorious claims and contentions, reasonably expedite

40. Weinstein, *supra* note 33, at 493–94.

41. Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 SAN DIEGO L. REV. 579, 587 (2021) ("The lawyer acts as the agent of the client, indicating that the lawyer-client relationship will be subject to standard principal-agent problems. Clients are typically unsophisticated in the law and are, therefore, incapable of adequately monitoring their agent's behavior, thus freeing up the lawyer to engage in self-dealing. Lawyers are governed by fiduciary standards regarding their clients, and professional standards also act as a counterbalance to the incentive to shirk or extract additional benefits from the client. A client can sue to recover damages resulting from lawyer self-dealing and violations of professional standards can, theoretically, be punished severely, impairing a lawyer's ability to practice law.").

42. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 2023).

43. *See id.*

44. *See id.* r. 1.1 (competence), r. 1.3 (diligence), r. 1.4 (communications), r. 1.5 (fees), r. 1.6 (confidentiality), r. 1.7–.8 (conflicts).

45. *Id.* r. 2.1.

proceedings, exhibit candor toward the tribunal, and treat opposing counsel fairly.[46]

Former judge Jack Weinstein—a frequent author on MDL issues—once wrote:

> Perhaps most fundamental to our model of professional ethics is the lawyer's duty of loyalty to his or her client. We have constructed an adversarial system in which, for the most part, the individual does not stand alone but is represented by a trained officer of the court. . . .
>
> Loyalty is promoted through two basic rules. First is the duty of the lawyer to be a zealous and effective advocate. . . . Second is the duty to communicate with the client. The rules direct the lawyer to keep the client "reasonably informed" of the status of the case and to explain the matter to the extent necessary for the client to make informed decisions.[47]

Yet the Model Rules of Professional Conduct are simply not designed for mass litigation.[48] The Rules are framed in the "single client, single lawyer" model of representation, though a few do address the concept of multiple clients.[49]

In the MDL context specifically, the non-PSC attorney may struggle with maintaining compliance with the expectations imposed by the ethical rules. For example, "[l]awyers have ethical obligations to . . . keep clients 'reasonably informed' and comply with 'reasonable requests for information.'"[50] Yet the non-PSC attorney may not know what is happening (at least contemporaneously) in discovery, settlement conversations, and meetings among PSCs, and the PSC may not be equipped to—or even be particularly inclined to—answer the questions of non-PSC attorneys at every juncture in order to allow them to then respond to the questions of their clients. Similarly, the non-PSC attorney is hardly in a position to exercise independent professional judgment when the PSC attorneys alone control what avenues and defenses are being pursued in a case during the MDL.

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46. *Id.* r. 3.1–.4.

47. Weinstein, *supra* note 33, at 493 ("The lawyer is required to be an absolutely loyal surrogate for the client. This ensures that justice is served, and the client receives the full and fair hearing to which he or she is entitled. . . . The *Model Rules of Professional Conduct* state in their preamble that 'when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.' The rules require that a lawyer provide competent representation and act with diligence and promptness. The precepts against serving clients under conditions that present conflicts of interest ensure that the lawyer's loyalty is not compromised.").

48. Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1916 (2022).

49. *See* MODEL RULES OF PRO. CONDUCT r. 1.7(b), r. 1.8(g) (AM. BAR ASS'N 2023).

50. Burch & Williams, *supra* note 48, at 1876–78 ("Lawyers' ethical obligations go beyond merely communicating with clients—they must also explain things so clients can make informed decisions.").

B. THE NONTRADITIONAL ATTORNEY-CLIENT RELATIONSHIP: CLASS COUNSEL

The representation of a class of similarly situated plaintiffs departs from the typical attorney-client relationship envisioned by the ethical rules. Courts have addressed this by imposing additional requirements to prove and defend the adequacy of the attorney's representation of the many plaintiffs. For example,

> Rule 23 of the Federal Rules of Civil Procedure attempts to protect absent unnamed class members . . . who are not actively participating in the lawsuit, but who will nevertheless be bound by the class judgment, by ensuring that their interests are adequately represented by . . . class counsel and the class representative with additional oversight protection from the court.[51]

The court's evaluation of class counsel's adequacy of representation "is, ultimately, an ethical determination that includes consideration of the Model Rules[']provisions governing competence, diligence, communication, and conflicts of interest."[52] The Model Rules are an imperfect fit, yet they are nonetheless applied to class counsel just as they would be to a single attorney representing a single plaintiff. To make this work, courts treat the interests of the class as a singularity, as though the many class members really could be collapsed into a single "client." The Eleventh Circuit spelled this out in *Medical & Chiropractic Clinic, Inc. v. Oppenheim*, noting that while "counsel in class actions have different ethical duties to their clients than in ordinary cases[,] . . . [o]ne cardinal rule defines the scope of counsel's ethical obligations: class counsel owes a duty to the class as a whole and not to any individual member of the class."[53]

There are other kinds of departures from standard representation that could be useful to consider. For example, complex litigation will often involve multiple lawyers from separate firms handling pieces of the litigation, or a "local counsel" who appears in court and vouches for the out-of-town attorneys when getting them admitted pro hac vice while also imputing knowledge of local

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51. Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 931 (2004).

> Class actions are a procedural device distinctive from traditional individualized litigation. Most class members never attend court proceedings. In fact, they may not even know that a lawsuit has been filed on their behalf. A class action is representational litigation, in which the class members who are specifically named in the lawsuit represent both themselves and a class of similarly situated others in pursuing a remedy. As a representative action, a class action thus serves to bind every class member, including similarly situated individuals who did not actually participate in the class action lawsuit. However, unless those who actually participated in the lawsuit were adequate representatives of all of the diverse interests within the purported class, the class action judgment cannot be used to preclude a subsequent action involving the inadequately represented interests.

Id. at 936–37.

52. *Id.* at 961.

53. Med. & Chiropractic Clinic, Inc. v. Oppenheim, 981 F.3d 983, 991 (11th Cir. 2020); *see also* Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions*, 72 MERCER L. REV. 1049, 1054 (2021).

practices and rules. The ethical liability of the local attorney versus the out-of-town attorney varies widely depending on the jurisdiction.[54]

III. THE PSC'S UNUSUAL RELATIONSHIP WITH MDL PLAINTIFFS

The world of enforceable and constraining attorney-client relationships includes multiple iterations of that relationship: the single attorney-client, the joint representation of multiple parties by a single attorney (or firm),[55] joint defense agreements involving multiple attorneys and multiple clients (although these relationships may be contractual rather than ethical),[56] and the appointment as class counsel by a single attorney (or firm) over a potentially huge and possibly unknown group of individuals.[57] For example, while class counsel may not consider an unnamed class member as a client in the sense of having to run conflicts checks or turn over the full case file on demand, there are

54. Compare, for example, Texas and Wyoming. In Texas, the liability of local counsel is limited to the written agreement between counsel, while in Wyoming, there is no distinction between the ethical responsibilities of a Wyoming lawyer who is primary counsel and one who is local counsel. David J. Beck & Alex B. Roberts, *Legal Malpractice in Texas*, 70 BAYLOR L. REV. 213, 342–43 (2018) ("The Texas Supreme Court has embraced the proposition that an attorney retained as local counsel is not responsible for legal tasks beyond those which he or she was hired to perform, stating: 'We are not to be understood as saying that in each transaction where one law firm solicits another firm to file an answer that an agency is established to the point that the filing firm is responsible to the requesting firm for all later transactions involving that case.' To hold otherwise would mean an attorney expressly hired to play a limited role in a matter is, contrary to the knowledge and agreement of the contracting parties, actually accepting a much greater responsibility. It is thus prudent for local counsel to define carefully their responsibilities in an engagement letter, documenting the intended scope of their work and services."); John M. Burman, *The Duties of Lawyers Admitted Pro Hac Vice and Local Counsel with Whom They Associate*, WYO. LAW., June 1999, at 13 ("The Wyoming Rules of Professional Conduct make no distinction between the ethical responsibilities of a Wyoming lawyer who is primary counsel and one who is local counsel. The myriad of ethical obligations which exist whenever there is an attorney-client relationship will apply with full force, therefore, regardless of the lawyer's role."). Georgia recently penalized a local counsel for ignoring the out-of-state attorney's misconduct. David Dodge, *Local Counsel May Be Disciplined for Out-of-State Lead Counsel's Unethical Conduct*, ARIZ. ATT'Y, Feb. 2000, at 20.

55. This often arises where a single attorney represents both the insurance company and insured party as codefendants, as well as in numerous other contexts where the "[r]epresentation of conflicting interests . . . disqualif[ies] [the] attorney from acting in a civil case." W.R. Habeeb, *Representation of Conflicting Interests as Disqualifying Attorney from Acting in a Civil Case*, 31 A.L.R.3d 715, § 13[a] (1970).

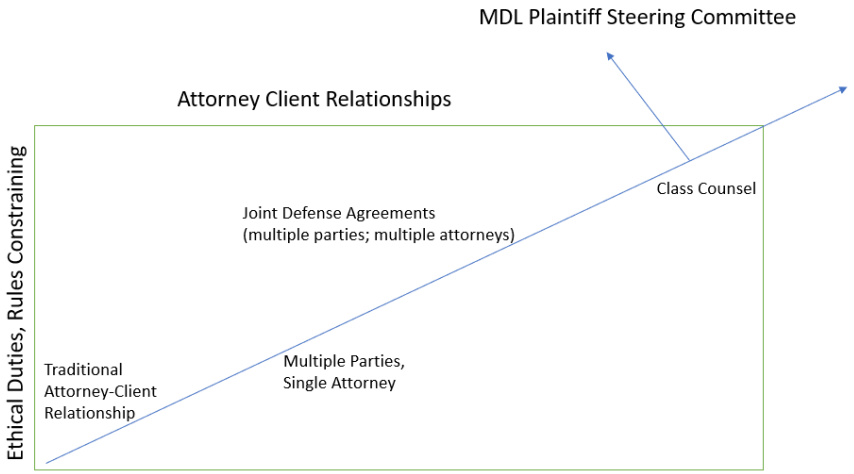
56. There are examples of conflicts and disclosure issues raising ethical concerns in joint defense agreements as well. *See, e.g.*, Todd M. Sahner, *Running the Ethical Obstacle Course: Joint Defense Agreements*, 28 STETSON L. REV. 339, 344 (1998).

57. The distinctions between representation and client power are discussed in Mindi Guttmann, *Absent Class Members: Are They Really Absent? The Relationship Between Absent Class Members and Class Counsel with Regards to the Attorney-Client and Work Product Privileges*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 493, 507–08 (2009) ("One reason for this is that 'the relationship formed between class counsel and absent class members is one of court creation upon certification of the class, rather than a relationship of contractual nature like the traditional attorney-client relationship found in the Code of Professional Responsibility.' Additionally, as 'the attorney-client relationship traditionally has been conceived as one between individuals,' many difficulties arise when applying 'rules, conceived in terms of individual clients,' to groups. As noted by one commentary on this issue, 'the attempt to graft aggregate litigation into the framework of traditional single-party litigation has often resulted in the unsuccessful forcing of a square peg into a round hole.'").

still important and unwaivable ethical obligations constraining the attorney's representation of the class and each of its members.[58]

The distance between the typical attorney-client relationship and concomitant ethical obligations of the attorney to their client(s) and the relationship of the PSC to the average individual MDL plaintiff is so great as to make the idea of an "attorney-client relationship," in the words of Jack Weinstein, "ludicrous."[59] The distance between these two relationships is illustrated below.

FIGURE 2: TRADITIONAL ATTORNEY-CLIENT RELATIONSHIPS VERSUS MDL PSC-PLAINTIFF RELATIONSHIPS



The boundary shown above surrounding the various types of relationships represents the ethical duties and rules that constrain attorney-client relationships (and can lead to ethical liability for the attorney if ignored).[60] The MDL PSC's

58. In Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, the author suggests that treating classes like entity clients (somewhat akin to a public corporation) and relying on court oversight to ensure adequate representation allows for the most ethical outcome even where the Model Rules do not address or work in the class action setting. *See id.* at 1504 ("[E]laborating the circumstances under which these conflicts should be tolerated is best done not by ethics code drafters, but rather by courts interpreting and applying the adequacy of representation requirement of FRCP Rule 23. In doing so, courts should consider the underlying principles and concepts of the ethics rules. They should do so, however, not as a matter of bending the ethics rules, but rather of elaborating the necessary details of class action law—a law upon which ethics codes can then draw in giving further advice to class action lawyers.").

59. Weinstein, *supra* note 33, at 494.

60. *Id.* at 530 ("The clients serve as moral anchors in the litigation and, in this respect, traditional notions of obligations to individual clients can be useful. If the attorney in charge does not act properly, a malpractice suit by the client is theoretically possible, as are disciplinary actions.").

ethical duties to their non-personal client, MDL plaintiff currently fall outside of that boundary.

As to the MDL PSC, however, there is no relationship and no application of any attorney-client ethical duties or responsibilities. Occasionally, courts may use terms to suggest that the PSC is acting as a fiduciary for the general group of MDL plaintiffs, but such language appears not to have been thoughtful about the term.[61] Instead, as the Bolch Institute "Best Practices" has concluded:

> Lead counsel has a duty to perform functions affecting all plaintiffs in an MDL in a fair, honest, competent, reasonable, and responsible way. Lead counsel has a duty to perform appointed functions in a fair, honest, competent, reasonable, and responsible way, *but there is no "fiduciary" relationship with all plaintiffs in the traditional sense*. The origin and nature of the relationship between lead counsel and MDL plaintiffs is judicially created, and thus differs in significant respects from common-law fiduciary relationships of agency or trust. Imposition of strict fiduciary standards to an entire MDL would be extremely burdensome for lead counsel and the court to adhere to and enforce.[62]

Despite some outlier cases suggesting otherwise, MDL PSCs currently owe no ethical duties to the plaintiffs whose cases are also subject to the decisions and leadership of the PSC.[63]

Is this appropriate? It is incongruent with the system of attorney-client relationships otherwise employed within the judicial system and does not necessarily ensure zealous representation of injured plaintiffs in an MDL, particularly those with marginal issues of injury, timing, knowledge, and so forth. If the judicial system wants to explore alternatives, there is a wide range of possible "fixes," each with its own drawbacks.

For example, the class counsel relationship appears most apt; while much of the class counsel's representation does not quite fit within the relationship envisioned by the Model Rules of Professional Conduct, proposals to reform the Rules have largely failed. Instead, authority over class-representation ethics has

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61. *See, e.g.*, *In re* San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 220, 234 (1st Cir. 1997).

62. BOLCH JUD. INST., *supra* note 31, at 52–53 ("Lead counsel should not disclose information provided under a condition of confidentiality, including settlement discussions subject to confidentiality conditions, to plaintiffs or their retained counsel. As with the duty of loyalty, it would be impractical and unwise to require lead counsel to reveal sensitive strategic concerns, confidential settlement negotiations, and other information provided under a condition of confidentiality to all plaintiffs in the litigation (or their counsel). [Guideline 7 of t]he Manual for Complex Litigation explicitly recommends that lead counsel 'use their judgment' in advising MDL plaintiffs and their attorneys of progress of the litigation, as 'too much communication [of confidential information] may defeat the objectives of efficiency and economy.' Nevertheless, lead counsel has an obligation to regularly communicate with non-lead counsel as to developments in the MDL so that non-lead counsel are properly informed and can effectively represent their respective clients.").

63. Weinstein, *supra* note 33, at 534–35 ("The traditional ethical rules, I believe, are inadequate due to their reliance on the single-litigant, single-lawyer model. The mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation. This diffuse relationship inevitably will yield some level of client dissatisfaction and, because of compromises the attorney must make to formulate strategy for the group as a whole, may result in less-than-zealous advocacy for the positions of particular clients.").

been moved from the state bars to the individual judges overseeing the class action.[64] Still, there is a Federal Rule of Civil Procedure requiring adequacy of representation that empowers those individual judges to revisit and ensure the ethical representation of the class by its appointed counsel, and there is no such parallel rule for MDLs.[65] Authority for treating PSCs like class counsel, and thus subjecting them to court scrutiny and possible liability for failing to ensure adequate representation of all plaintiffs' interests, would instead have to be drawn from inherent judicial authority to manage the courtroom.

Alternatively, special ethical rules could be developed in response to the massive growth of the MDL practice and docket, as well as the ubiquitous presence (and power) of the PSC. A new MDL-specific ethics system could lead to imposing some form of ethical obligation on PSC members. Of course, this could lead to an explosion of ethics complaints and motion practice solely between the PSC and individual MDL plaintiffs (and their attorneys), creating a "sideshow" that could eliminate the purpose of the streamlined MDL process overall. But if evaluating options primarily from the perspective of elimination of the ethics gap, creating and enforcing ethical rules and standards for PSC practice could help eliminate that area of the case where the PSC is making decisions outside of the boundaries of ethical rules.

A more radical idea—likely unworkable in practice but interesting to consider as a starting point—is to simply remove attorneys from the PSC. There are third-party financiers that lend money to plaintiffs' attorneys, including PSC members, when the MDL itself appears to be a reasonable investment.[66] One could imagine sufficiently well-versed financiers that fund and direct the pretrial litigation machine (of document review, fact sheet management, expert retention, and so forth) in order to assure the best return on their investments, while retaining or consulting with lawyer consultants as needed.[67] A nonattorney

64. Moore, *supra* note 58, at 1478–79.

65. FED. R. CIV. P. 23.

66. While controversial, there is always discussion about the role and powers of nonattorneys in the practice of law. For example, in 2020, "the Arizona Supreme Court approved sweeping changes to rules governing legal services in Arizona, becoming the first state to eliminate the ban on non-lawyers having ownership interest in law firms and the prohibition on sharing legal fees with non-lawyers." Keith Givens, *Alternative Business Structures for Law Firms: Non-Lawyers Owning Law Firms & Sharing Legal Fees Part 1*, TRIAL LAW., Fall 2021, at 15–17 ("Private equity funds, hedge funds and other non-lawyer capital has been relegated to sneaking through 'backdoors' to find its way into the legal market space. . . . [S]uffice it to say Rule 5.4 has not eliminated non-lawyer capital making its way into the legal marketplace.").

67. Third-party funding of litigation (sometimes called alternative litigation finance ("ALF")) is well established:

> Specialized ALF suppliers or commercial lenders step in and provide capital to support law firms' litigation via a broad range of contractual transactions. ALF suppliers essentially act as venture capitalists, essentially purchasing the law firms' assets – from fixtures and furniture to client portfolios – as collateral for the funding. This means the funders recover their loan/investment plus a portion of the law firm's contingent share of judgment or settlement.
>
> In 2019, Westfleet Advisors identified 41 private litigation funders with $9.5 billion in assets under management.

PSC would of course have no attorney-like relationships or obligations, and thus the ethical gap between the PSC and MDL plaintiffs would disappear. Only the individual attorney-client relationship would exist. But another ethical gap would open in its absence: a nonattorney PSC would have no obligation to the court itself or to opposing counsel to adhere to the general rules and obligations imposed on members of the judicial system.[68] And in any event, third-party financiers would understandably seek to maximize potential returns at the expense of lower value and more marginal claims, again leaving those claims inadequately represented within the MDL.

Another idea—one that is actually assigned to the PSC on occasion by judges and commentators—is to formally treat the PSC as the fiduciary of the MDL plaintiff body.[69] What precisely this may mean is unclear, but it appears to involve imposing duties of care and loyalty.[70] This could be imposed through language in the court's appointment order; Burch has suggested language along these lines: "Plaintiffs' leadership owes a fiduciary duty to all plaintiffs in this proceeding."[71] The Bolch Institute, however, finds this an untenable suggestion, apparently based on difficulty in monitoring and enforcement.[72] This is easy to see; products liability MDLs can have tens of thousands of individual plaintiffs, and loosely defined standards would be extremely difficult to monitor and enforce. So how does one ensure that a motion, perhaps on the learned

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> A June 2021 statement from the American Property Casualty Insurance Association reported that third-party litigation financing is gushing into the nation's judicial system with U.S. capital investments of over $13 billion. . . . When an ALF invests in a lawsuit, their number-one concern as a business is to protect their investment. This driving factor can prompt situations in which the funder tries to control the decisions a plaintiff's lawyer makes. This could include the funder influencing the attorney's professional judgment regarding whether to settle a case and the amount they should consider settling for, a decision that would ultimately be based on the investor's best interest.

Sara G. Stephens, *Wall Street Weighs In on the Scales of Justice*, TRIAL LAW., Fall 2021, at 46–49.

68. Implicated here are all of the Model Rules of Professional Conduct addressing the attorney's role beyond their obligations to their client, particularly Rules 3.3 (candor toward the tribunal), 3.4 (fairness to opposing party and counsel), and 8.4 (misconduct). MODEL RULES OF PRO. CONDUCT r. 3.3–.4, r. 8.4 (AM. BAR ASS'N 2023).

69. *See In re* San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 220, 234 (1st Cir. 1997) ("Whether or not there is a direct or formal attorney-client relationship between plaintiffs and the PSC, the PSC and its IRPA members necessarily owed a fiduciary obligation to the plaintiffs."); MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 13, § 13.21 ("The judges can also remind lead counsel [during partial settlements] . . . that their fiduciary obligations may survive the dismissal of their own clients."). However, despite these examples, it is not settled that PSC members are fiduciaries for the larger plaintiff group, as the Bolch Institute suggests. *See* BOLCH JUD. INST., *supra* note 31, at 51; Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1987 (2011) ("Given that both lawyers who represent individual claimants and lawyers who handle class actions are fiduciaries, it would be surprising to discover that lead lawyers in MDLs were not. Yet, insofar as legal doctrine is concerned, the matter is uncertain.").

70. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 13, § 21.12 n.753. *See* Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 91 (3d Cir. 1985) ("The bounds of fiduciary duty are undoubtedly not easy to define . . . .").

71. Burch, *supra* note 23, at 165. Throughout her article, Burch assumes that the PSC is in fact acting in a fiduciary role. *See id.* at 105–06.

72. BOLCH JUD. INST., *supra* note 31, at 52.

intermediary doctrine, shows the same level of care and loyalty to plaintiffs from states with incompatible rules on the same doctrine? A PSC would not be able to. Though the ethical gap faced by individual plaintiffs (and their attorneys) would be minimized if the PSC is required to assume duties of care and loyalty for all plaintiffs, imposing vague fiduciary duties on the PSC to counteract the ethical gap in MDL representation seems to do both too little and too much.

Perhaps the most practical and immediately achievable option for ensuring that the representation of plaintiffs does not fall completely into the ethical gap is to simply ask the MDL judges to manage it as best as possible in the absence of MDL-specific rules and procedures. The MDL judge, in appointing both the PSC and liaison council, could adopt practices to ensure that there is adequate communication by the PSC to the liaisons, and by the liaisons to the plaintiffs' attorneys generally, including requiring regular reports or calls and imposing consequences for dereliction of those responsibilities. The MDL judge could also appoint an ombudsman, separate and apart from the liaison counsel to hear issues, concerns, or complaints from individual plaintiffs or their counsel about any issues with access, documentation, and so forth, pertaining to the PSC. This would not eliminate the inchoate ethics gap, but it could ensure that any *real* issues arising from the dual, incomplete layers of representation are addressed.

An ombudsman system will not prevent the PSC from pursuing certain means of maximizing recovery, deciding on injury profiles or exposure profiles to prioritize, or providing sets of documents gained in discovery to benefit individual plaintiffs. Regular communication about such decisions and, most importantly, how those decisions can affect, limit, or even effectively foreclose certain claims must be managed, with actual consequences available where a PSC may fall short in its representation of individual MDL plaintiffs.

Frankly, the easiest and most important thing for all MDL judges is to identify the PSC ethics gap for the MDL participants. An MDL judge should alert all-comers, perhaps in a standing order distributed to all entrants to the MDL, that the PSC's leadership role is for streamlining and efficiency purposes, but that the PSC's leadership appointment does not in any way reflect an ethical, fiduciary, or other representational relationship between the PSC and any other plaintiff-side party or attorney. The MDL judge should also inform all plaintiffs and their counsel that their zealous and ethical representation may be affected or limited by this nonrepresentational party. At that point, the issue is highlighted and can be revisited regularly. Unless ethical rules are modified to accommodate this type of nonrepresentational representation at the MDL leadership level, it is important at least that the court, the PSC itself, and individual plaintiff's attorneys understand and pay attention to the gap between an MDL lawyer's ethical obligations to their individual client and the responsibilities of the PSC to advance the case at large.

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