

KLINE & SPECTER PC
ATTORNEYS AT LAW
1525 LOCUST STREET
PHILADELPHIA, PENNSYLVANIA 19102
WWW.KLINESPECTER.COM

SHANIN SPECTER

SHANIN.SPECTER@KLINESPECTER.COM

215-772-1000
FAX: 215-772-1359

December 18, 2020

VIA EMAIL: RulesCommittee_Secretary@ao.uscourts.gov

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

**Re: Proposed Amendments to the Federal Rules of Civil Procedure
on Multidistrict Litigation**

Dear Judge Dow and Members of the MDL Subcommittee:

I am writing to propose amendments to the Federal Rules of Civil Procedure relating to multidistrict litigation. These suggestions arise from my experience as a plaintiff's attorney¹ in mass tort litigation, including in the Vioxx and transvaginal mesh multidistrict litigations, as a law professor² teaching torts, evidence and trial related courses and as a co-author of a relevant law review article and American Law Institute panelist on these issues.³

¹ Founding Partner, Kline & Specter, P.C.

² Professor of Practice, UC Hastings College of the Law; Lecturer in Law, UC Berkeley School of Law; Irving R. Segal Adjunct Professor of Law, University of Pennsylvania Carey Law School; Lecturer in Law, Stanford Law School

³ Charles L. Becker, Shanin Specter, and Thomas R. Kline, "How Not to Manage a Common Benefit Fund: Allocating Attorneys' Fees in Vioxx Litigation," 9 Drexel L. Rev. 1 (2016). See also, "MDLs Go Mainstream: Mass Torts Today," *THE AMERICAN LAW INSTITUTE*.
<https://www.ali.org/news/podcast/episode/mdls-go-mainstream-mass-torts-today/>.

A. Proposed Amendments

1. Attorneys involved in mass tort litigation should not represent more clients than they can adequately handle.

The obligation of plaintiffs' attorneys in personal injury actions is to zealously advocate for full monetary damages for their clients. Current practice permits a plaintiff's attorney to amass more cases and clients than they can adequately represent in pursuit of the lawyer's personal, financial gain. No rule of procedure or ethics directly prohibits such conduct. The incentive to amass as many cases as possible is significant --- many cases means a lot of money for the plaintiff's attorney in the event of a mass settlement.

The incentive to amass as many cases as possible directly conflicts with an attorney's obligation to advocate vigorously for their clients. A plaintiff's attorney cannot realistically discover or try all of his cases if he amasses more than he can adequately handle. In that circumstance, the attorney is under pressure to settle, even when the amount of a proposed settlement is woefully inadequate when considering the proper value of each case.

Defense attorneys recognize when a plaintiff's attorney takes on more cases than can realistically be worked-up and tried. Defense counsel leverage that reality to drive a hard bargain with the plaintiff's attorney as it relates to settlement. In that circumstance, the amount offered and accepted approximates the lowest amount the

plaintiff will likely accept — not the highest amount the defendant would likely offer. This practice directly contravenes plaintiffs' lawyers' duty.

It may seem contradictory for a plaintiff's attorney to accept a low settlement amount for a case that could potentially garner a far higher amount. However, when settling thousands of cases, the lawyer's financial gain quickly adds up, even when the settlement for each client is relatively small. An extremely large number of cases multiplied by a relatively small fee per case equals a very large gross fee recovery for a plaintiff's lawyer. In this situation, the plaintiff's attorney wins and the individual clients lose.

I witnessed this during the transvaginal mesh litigation, where several attorneys represented in excess of 5,000 clients. They were unable to discover — much less try — all of these cases. This circumstance caused them to recommend and obtain inadequate settlements for their clients, which was confirmed to me in conversations with these plaintiffs' counsel and with defense counsel.

The average settlement was reported to be “less than \$60,000;”⁴ from what I observed, average settlements were in the \$40,000 - \$50,000 range. When applying for several hundred million dollars in common benefit fees, lead counsel did not

⁴ Matthew Goldstein, “As Pelvic Mesh Settlements Near \$8 Billion, Women Question Lawyers' Fees,” New York Times, (February 1, 2019); <https://nyti.ms/2UwepEP>

disclose the average settlement amount or other data from which this could be deduced. A motion to compel this information was denied, even though the average settlement amount is a key indicator of the success of the common benefit work.

The apparent average settlement numbers in the mesh litigation suggest a wholesale failure of representation. Pelvic mesh injuries are often severe, with lifelong consequences. As in all mass torts, some cases were difficult for plaintiffs due to such issues as causation, damages issues, or statutes of limitations. But many cases were highly meritorious. The various mesh products were repetitively found to be defective by juries — 35 cases were tried to verdict with the plaintiffs winning 28 and losing only seven. Nearly all mesh manufacturers had adequate assets to pay for settlements. The total verdict amounts were \$546 million, which equates to nearly \$20 million per case. The yawning gap between success in the courtroom and failure at the settlement table is deeply troubling, especially in light of the representations of many thousands of plaintiffs by attorneys unable to discover or try all their cases.

The Federal Rules of Civil Procedure should be amended to reflect the following: (1) lawyers should not be allowed to acquire or handle more clients and/or cases than they can adequately represent; and (2) judges should ask pertinent questions and prevent such practices from occurring. A lawyer who has too many

cases may associate with other counsel or refer cases to other counsel, so an appropriate remedy may be readily fashioned.

Although the problem is clear and the solution is apparent, the regulation of plaintiffs' counsel by the Federal Courts is problematic. Potential for abuse in many directions is significant. The power to order a lawyer to obtain assistance for his clients should be utilized only in the most extreme circumstance, such as where a sole practitioner with limited experience and resources purports to represent thousands of injured persons.⁵

2. Mass settlements should be the subject of court approval.

Because of the potential and reality of inadequate mass settlements, the Federal Rules of Civil Procedure should require lawyers settling cases en masse in multidistrict litigation to submit petitions for court approval to determine whether those settlements are fair and reasonable.⁶

Plaintiffs' counsel, defense counsel, and judges may oppose a rule that requires settlement approval by judges or any additional judicial involvement in multidistrict litigation settlements. Plaintiffs' counsel may oppose such oversight as

⁵ Comparison to FRCP 23(g) and the practice relating to appoint of class counsel may be appropriate.

⁶ This subcommittee's October 2020 meeting included discussion of judicial oversight of mass settlements in the MDL setting. It was noted "some have wondered whether the growth of 'mass' MDL practice is in part due to a desire to avoid the greater judicial authority over and scrutiny of class actions and the settlement process under Rule 23." Advisory Comm. on Civil Rules, Multidistrict Litigation Subcommittee Meeting Minutes, Oct. 16, 2020 at 161. It was further noted, as it relates to judicial involvement in MDL settlements, that "the subcommittee has not, to date, been presented with arguments from experienced counsel in favor of proceeding along this line." *Id.* at 164. As an experienced counsel, I write this letter, in part, to present arguments in favor of greater judicial involvement in MDL settlements.

it would prevent the nefarious conduct described above. Defense counsel may oppose such oversight because its absence allows them to settle their clients' cases for amounts significantly lower than what is fair to the plaintiffs. Some judges may oppose such oversight in a misguided effort to ease settlement ---- even settlement that contravenes notions of justice and fairness ---- or to avoid the additional work involved in assessing the reasonability of those settlements. All those reasons are bad.

A disciplined process with reasonable oversight is necessary to correct current abuses and to serve the integrity of the judicial system and its tenets of fairness to all parties.

3. A plaintiff whose case has been transferred to a multidistrict litigation should have the right to remove her case from the multidistrict litigation after one year.

The Federal Rules of Civil Procedure should allow a plaintiff whose case has been transferred to an MDL to remove her case to its original federal district court for case specific discovery and trial within a reasonable period of time. About a year and a half should be sufficient for completion of the generic discovery and *Daubert* motion practice typical for the MDL process.

Under MDL procedures, thousands of cases are transferred to the MDL ---- a faraway court plaintiffs neither chose nor desired. These cases usually remain in the

MDL for many years. No effective mechanism exists for timely remand of the case back to its home district for trial, as judges often do not want to send cases back, hoping for a mass resolution. Such remand motions are routinely denied. This has delayed justice for thousands of injured persons.

For example, in the transvaginal mesh litigation, the MDL as to *Johnson & Johnson* was opened on November 28, 2011. Cases began to be transferred to the MDL on February 7, 2012. A significant number of cases were not transferred back to their home districts until more than seven years later, on April 17, 2019. The relevant dates and delays as to the MDLs for other mesh manufacturers are similar. Remand motions filed during this multi-year period were denied.

One prominent defendant was unwilling to fairly resolve cases in the MDL for many years — even after Lone Pine orders forced individual discovery in thousands of cases — until the cases against it were returned to their home districts and received dozens of trial listings across the country. In doing so, that defendant was exercising its right not to settle or to settle when they wanted to settle. But such a strong-willed defendant should not be able to block adjudication of cases for up to seven years, as here.

Importantly, removal to the home district should be done on the condition that the defendant is not subjected to additional generic discovery, which would preserve

a core purpose of the MDL. Instead, removal to the home district should be done for the purpose of case-specific discovery and trial.

Justice delayed is justice denied. A case is resolved either via settlement or trial and delaying either outcome for unreasonable amounts of time is wrong. The rules should protect a mass tort plaintiff's ability to obtain justice in a timely manner.

4. The necessity for common benefit fees should be evaluated.

It is likely unnecessary for common benefit fees to exist. Plaintiffs' counsel who work for the common benefit of all plaintiffs are already amply motivated by their obligations to — and individual fee agreements with — their individual clients. There is no shortage of plaintiffs' attorneys who will work for the common benefit, with or without the availability of common benefit fees. Common benefit fees are not the norm in state court litigation, yet when personal injury cases are consolidated for discovery purposes, attorneys work together to take generic discovery of defendants without additional fees.

In the federal context, mass tort litigation has been resolved without the necessity for common benefit fees. For example, in the *In re Amtrak 188 Train Derailment* MDL, 90 actions on behalf of hundreds of claimants were resolved in the federal district court without any application for common benefit fees. The plaintiffs' lawyers were amply motivated to do work for the common benefit without

the necessity for charging an additional fee. *See in re Amtrak Train Derailment in Philadelphia, Pennsylvania on May 12, 2015*, 268 F. Supp. 3d 739, 749-50 (E.D. Pa. 2017) (commending members of the Plaintiffs' Management Committee for their "fair-minded, public-spirited" efforts in order to achieve the "most expeditious and least expensive resolution of the MDL" and "to put as much money, as soon as practicable, into the hands of the injured victims of the derailment").

In addition, common benefit fees are a tax largely borne by the plaintiffs, as they customarily come off the top of the settlement before division of the remainder between the plaintiff and her attorney. Because these cases may be adequately prosecuted without the necessity for separate common benefit fees, it is preferable for the financial interest of the plaintiffs that they not exist.

5. Where common benefit fees are awarded, they should be determined by the judge without input from a fee allocation committee or a special master.

Typical practice in MDLs is for plaintiffs' lead counsel to suggest their own appointment as the fee allocation committee. They also recommend the appointment of a special master of their choosing to evaluate their work. This occurred in the transvaginal mesh MDL, as well. These practices place the proverbial wolf in charge of the chickens.

Plaintiffs' counsel should have no role in the allocation of fees. Instead, the allocation of MDL common benefit fees should be controlled by the MDL Judge. Special masters are unnecessary. Common benefit fee petitions should be evaluated and ruled upon by the MDL Judge with the assistance of the magistrate judge, where appropriate.

6. Attorneys who perform common benefit work should have a nonwaivable right to appeal their fee award.

The Federal Rules of Civil Procedure should permit a nonwaivable right to appeal a fee award for attorneys who perform common benefit work during the MDL. In the transvaginal mesh MDL, as a condition of receiving MDL work product, attorneys were required to waive their right to appeal their common benefit fee award. This was an unconscionable condition. First, it required attorneys to accept on unenforceable faith that they would be treated properly in the common benefit fee allocation process. Second, this posed a direct conflict between the client's interest and the attorney's interest, as the client needed their attorney to have access to the work product, but the lawyer needed enforceable assurance that they would be treated fairly. Third, armed with these waivers, the fee allocation committee was emboldened to mistreat attorneys in the fee allocation process with no appellate recourse for the aggrieved attorneys.

This condition directly contravened the interests of clients and allowed for widespread mistreatment of attorneys with no form of recourse. It will discourage good attorneys from doing common benefit work in the future. Such a condition only serves those in charge of fee allocation. It should be prevented.

B. Conclusion

Thank you for your consideration of the above-described proposals. I am available to assist as requested. Thank you for your efforts to improve the administration of justice.

Respectfully,



SHANIN SPECTER

SS/re