DUTIES OWED BY APPOINTED COUNSEL TO MDL LITIGANTS WHOM THEY DO NOT FORMALLY REPRESENT

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I. INTRODUCTION

Courts routinely appoint Lead Counsel, Liaison Counsel, and Plaintiffs' Executive or Steering Committees to perform certain functions on behalf of all plaintiffs in multidistrict litigation (MDL) and other complex, coordinated, or consolidated

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proceedings. Questions frequently arise in such cases regarding the existence, nature, and scope of duties that may be owed by such appointed counsel to plaintiffs in the litigation. Some have posited that lawyers in leadership positions have an unqualified "fiduciary" duty to each and all litigants. At the opposite end of the spectrum, others have argued that appointed counsel's duties of loyalty remain with those individual plaintiffs whom they personally represent, to the exclusion, and potential prejudice, of other litigants with cases pending in the MDL or other similar proceedings.

This Article will look to the common law, Rules of Professional Conduct, class action jurisprudence, and other analogous frameworks, such as the Employee Retirement Income Security Act (ERISA), to explore the duties, if any, owed by appointed counsel in leadership positions to their own clients, to other plaintiffs, and to the privately retained counsel who represent other plaintiffs in the litigation.

Part II of this Article provides an overview of multidistrict litigation. Part III identifies the source of appointed counsel's authority and responsibility in MDL proceedings. Part IV explains why there is no "fiduciary" responsibility to each MDL litigant in the traditional sense of the word. Part V places into context the controversy that erupted when two leading experts submitted competing affidavits in the *GM Ignition Switch Litigation*. Part VI discusses Lead Counsel's responsibility to communicate with MDL litigants. Finally, Part VII explores some of the challenges that often arise in settlement negotiations.

In sum, this Article argues that the ethical and fiduciary rules developed for single-plaintiff lawsuits cannot be mechanically applied in such a way that MDL plaintiffs are deprived of the most knowledgeable and experienced counsel or as to otherwise undermine the judicial economy sought by MDL transfer and Lead Counsel appointment in the first place. Lead Counsel, rather, should be thought of as trustees, with a general responsibility to maximize the collective interests of the MDL plaintiffs as a whole.

II. OVERVIEW OF MULTIDISTRICT LITIGATION

In 1968, Congress established a procedure within the federal court system for the transfer of multiple civil actions involving common questions of fact to a single district for coordinated

pretrial proceedings.[1] The Judicial Panel on Multidistrict Litigation (JPML),[2] a panel of federal judges from around the country, convenes every six weeks to decide whether to establish a coordinated multidistrict litigation proceeding, and if established, which particular U.S. district court (and generally which specific transferee judge) to transfer such related actions.[3] Thereafter, the parties are required to notify the JPML of similar "tag-along" cases, which will be conditionally transferred to the MDL; in the event of any objection, the JPML may be called upon to further expand or refine the scope of actions subject to transfer.[4]

Upon establishment of the coordinated action in the transferee court, the management of the proceedings is left largely to the presiding MDL judge. While one of the main objectives is to promote justice and efficiency through economies of scale and the opportunity for global settlement,[5] the U.S. Supreme Court has made it clear that an MDL transferee judge's authority over actions originating in other judicial districts extends only to *pre*-trial proceedings, with such actions subject to remand "to the district from which it was transferred unless it shall have been previously terminated."[6]

To prevent the pleadings, motions, hearings, and discovery efforts from becoming too wasteful, duplicative, or unwieldly, the MDL transferee judge will typically appoint one or more lawyers (Lead Counsel)[7] to "act on behalf of other counsel and their clients

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1. 28 U.S.C. § 1407(a) (2012).

2. Specifically, 28 U.S.C. § 1407(d) establishes that the JPML "shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit," and that the "concurrence of four members shall be necessary to any action by the panel." 28 U.S.C. § 1407(d) (2012).

3. *See generally* 28 U.S.C. § 1407 (2012).

4. RULES OF PROCEDURE OF THE U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, r. 7.1 (rev. Oct. 4, 2016).

5. *See, e.g.*, FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004) ("One of the values of multidistrict proceedings is that they . . . afford a unique opportunity for the negotiation of a global settlement.").

6. 28 U.S.C. § 1407(a) (2012); *see* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) (stating that a federal district court conducting pretrial proceedings pursuant to the multidistrict litigation statute has no authority to invoke the change-of-venue statute to assign a transferred case to itself for trial).

7. The term "Lead Counsel" is used generically as a shorthand for any lawyer or lawyers appointed by the court to act for plaintiffs in the litigation, whether designated "Lead Counsel," "Liaison Counsel," a "Plaintiff Steering Committee" member, a "Plaintiffs' Executive Committee" member, etc. At some point, in some

with respect to certain aspects of the litigation."[8] In this regard, it is important to make a distinction between MDLs involving "true class actions" and MDLs involving an "aggregation" of cases.[9] A true class action is a case that will either proceed as a formally certified class action, or it will not proceed at all. Generally, it is a "negative value" suit, which would not be economically viable to prosecute on an individual basis; hence, the proponents of a true class action need to bring additional unnamed parties within the jurisdiction of the court to make the pursuit of the case worthwhile.[10] From both the parties' and court's perspective, this type of litigation, despite the presence of multiple proposed class representatives, can essentially be treated as a single case. The true class action will generally proceed under one set of operative pleadings, with one accounting of case costs, one common body of proof, and a judgment or settlement distribution model that is typically mechanical and formulaic. The Lead Counsel appointed by the court will effectively assume full responsibility for the litigation on behalf of all named and absent putative class members. As a practical

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MDLs or other similar proceedings, a formal class may be certified for litigation or settlement purposes, and these same or other counsel may be appointed to serve as "Class Counsel." While many of the same principles at least arguably apply in a formal class action, Class Counsel's obligations vis-à-vis absent class members may differ from Lead Counsel's duties to plaintiffs in the non-class setting.

8. MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at § 10.22.

9. In common parlance, practitioners often draw a distinction between "class actions" and "mass torts" or between "class actions" and "MDLs." I personally do not find these distinctions to be technically accurate or particularly helpful, since almost all MDLs include at least some actions seeking class treatment (and, indeed, there are some MDLs in which virtually all of the coordinated lawsuits are putative class actions) and because mass torts are sometimes certified as class actions (both within MDL proceedings and otherwise), particularly for settlement purposes. Therefore, I prefer to use "true class actions" and "aggregation" of cases to distinguish these two fundamentally different types of proceedings.

10. *See, e.g.*, *In re* Monumental Life Ins. Co., 365 F.3d 408, 411 (5th Cir. 2004) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions may also permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.")). *See, e.g.*, Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338–39 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device."). There are, of course, other reasons which might prevent individuals from bringing their own separate cases—e.g., where the putative class members are employees who might fear retaliation, or where they are the victims of fraud or concealment and do not even realize that they have grievances to be vindicated.

matter, there are few, if any, other individual cases.

In an "aggregation" situation, by contrast, the individually-filed cases are generally viable in their own right. While the class action procedure may be utilized for judicial economy or settlement purposes, the individually filed cases will not rise or fall on the class certification determination, assuming one even occurs. Pleadings, discovery materials, and client-specific costs must generally be maintained for each suing plaintiff, and even where many or all of the claims might be litigated or settled on a class-wide basis, each class member will likely be called upon at some point to provide his or her own evidence of case-specific injury or damages. Most of these individual plaintiffs will be represented by their own attorneys, many of whom might not be among those appointed as Lead Counsel. Therefore, within the MDL, the representation is effectively "split" between the Lead Counsel and the attorneys who may have been individually retained by the plaintiff.

While perhaps atypical in several respects, the *Deepwater Horizon* MDL offers a perfect example of this dynamic. In *Deepwater Horizon*,[11] thousands of plaintiffs were individually represented by attorneys who, for all practical purposes, had no power or authority to take depositions, argue motions, question witnesses, or perform other functions an attorney would typically be expected to undertake in a conventional suit for damages. Instead, the MDL transferee judge appointed a steering committee of nineteen lawyers from around the country to: (1) initiate, coordinate, and conduct all pretrial discovery on behalf of plaintiffs; (2) examine witnesses and introduce evidence at hearings; (3) coordinate the trial team's selection, management, and presentation of any common issue, "bellwether" or "test case" trial; (4) submit, argue, and oppose motions; and (5) explore, develop, and pursue settlement opportunities.[12]

While the steering committee is generally viewed as having been successful in undertaking these efforts,[13] some MDL

11. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179 (E.D. La.) (Barbier, J., presiding).

12. Pretrial Order No. 8, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, Doc. No. 506, pp. 3–4 (E.D. La. Oct. 8, 2010) (Barbier, J., presiding).

13. *See, e.g.*, Order and Reasons, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, Doc. No. 21849 (E.D. La. Oct. 25, 2016) (Barbier, J., presiding).

plaintiffs, or their individually retained attorneys, would frequently question or challenge Lead Counsel's actions and decisions. This is typical of the push and pull that frequently occurs between and among plaintiffs' counsel in MDLs that involve the aggregation of hundreds or thousands of separately viable cases.

MDL proceedings encompass an estimated 36% of the entire federal civil docket[14] and as much as 45.6% when excluding social security and prisoner cases.[15] Additionally, at least twelve states have enacted analogues to the federal MDL mechanism.[16] Therefore, the question of Lead Counsel's responsibilities to litigants whom they do not formally represent in these types of proceedings has broad implications for our civil justice system.

III. SOURCE OF APPOINTED COUNSEL'S PROFESSIONAL RESPONSIBILITIES

It is important to recognize that Lead Counsel's authority in an MDL proceeding emanates from the court.[17] This is distinguished from the typical attorney-client relationship in which the lawyer's authority arises from a formal retainer agreement between the attorney and the plaintiff.[18] In the

14. *MDL Standards and Best Practices*, DUKE LAW CTR. FOR JUDICIAL STUDES i, x (rev. 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf; *2015 Year-End Report*, JUDICIAL PANEL ON MULTIDISTRICT LITIG. 1, 1 (2015).

15. *MDL Standards and Best Practices*, *supra* note 14, at x–xi.

16. *See* CAL. CIV. PROC. CODE §§ 404–404.9 (West, Westlaw through Ch. 2 of 2018 Reg. Sess.); CONN. GEN. STAT. ANN. § 51-347b (West, Westlaw through enactments of the 2017 Jan. Reg. Sess. and the 2017 June Special Sess.); ILL. S. CT. R. 384 (Westlaw through 2/1/18); MD. RULES 2-327(d) (West, Westlaw through Feb. 1, 2018); MASS. TRIAL CT. R. XII (Westlaw through Feb. 1, 2018); N.J. SUPER. TAX & SURROGATE'S CT. CIV. R. 4:38-1, 4:60-1 (Westlaw through Feb. 15, 2018); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.69 (West, Westlaw through Feb. 14, 2018); OKLA. STAT. tit. xx, § 81 (Westlaw through the legislation of the First Reg. Sess., the First Extraordinary Sess., and through Chapter 7 of the Second Extraordinary Sess. of the 56th Legis., and current with emergency effective provisions through Chapter 2 of the Second Reg. Sess. of the 56th Legis. (2018)); PA. R. CIV. P. No. 213.1 (West, Westlaw through Feb. 1, 2018); TEX. R. JUD. ADMIN. r. 13.1 (eff. Mar. 22, 2016); VA. CODE ANN. §§ 8.01-267–267.9 (West, Westlaw the End of 2017 Reg. Sess. and 2018 Reg. Sess. cc. 1, 2, 10, 14, 15 & 45); W. VA. CODE § 56.9-1 (Westlaw through the legislation of the 2018 Reg. Sess. effective through Feb. 9, 2018 except for HB 414).

17. MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at § 10.22.

18. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14(1) (AM. LAW INST. 2000); MODEL RULE OF PROF'L CONDUCT: PREAMBLE & SCOPE, para. 17 (AM. BAR ASS'N 2015) ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render

traditional attorney-client relationship, the scope of the lawyer's responsibility may be reasonably limited by express agreement between the attorney and the plaintiff,[19] but it is generally presumed that the lawyer will undertake any and all actions reasonably necessary to achieve the desired objectives and results of the litigation.[20] When counsel is appointed, by contrast, Lead Counsel's authority and concomitant responsibility is generally defined by the procedural steps that must be undertaken from the court's perspective, rather than the ultimate goals sought by plaintiffs; those responsibilities are generally set forth in an order of appointment which describes the services that Lead Counsel is asked and directed to perform.[21] While such appointment generally advances and protects the interests of each plaintiff, its primary purpose is to further the interests of judicial efficiency and economy for the collective benefit of all plaintiffs, defendants, any affected third parties, and the court.[22]

To the extent that each plaintiff has his or her own particular facts, circumstances, and interests (which may be common in some respects, unique in other respects, and in some ways perhaps even divergent or potentially adverse to those of other plaintiffs), it is assumed that such plaintiffs are simultaneously represented and protected by privately retained counsel.[23] Therefore, to the extent that Lead Counsel can be said

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legal services and the lawyer has agreed to do so."); *see also, e.g.*, MODEL RULE OF PROF'L CONDUCT r. 1.5(b)–(c) (AM. BAR ASS'N 2015); LA. RULES OF PROF'L CONDUCT r. 1.5(b)–(c) (LA. SUP. CT. 2004).

19. *See, e.g.*, MODEL RULE OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2015); LA. RULES OF PROF'L CONDUCT r. 1.2(c) (LA. SUP. CT. 2004).

20. *See generally* MODEL RULE OF PROF'L CONDUCT r. 1.2(a), 1.4(a)(2) (AM. BAR ASS'N 2015); LA. RULES OF PROF'L CONDUCT r. 1.2(a), 1.4(a)(2) (LA. SUP. CT. 2004).

21. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at § 10.222 ("The functions of lead, liaison and trial counsel, and of each committee, should be stated in either a court order or separate document drafted by counsel for judicial review and approval.").

22. *See, e.g.*, *id.* ("Traditional procedures in which all papers and documents are served on all attorneys, and each files motions, presents arguments, and examines witnesses, may *waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily*.") (emphasis added).

23. *See, e.g.*, *id.* (assuming "numerous parties with common or similar interests but *separate counsel*") (emphasis added). This is an important source of potential distinction between a class action, on the one hand, and an MDL-like coordinated or consolidated proceeding, on the other. While, in some class actions, many or perhaps even all of the class members are individually represented by counsel, the class action device generally presumes that the absent class members will not have their own independent economically viable claims, and are therefore made parties to the litigation only by virtue of the class certification order, without individual

to have a "fiduciary" duty or other obligations to plaintiffs whom they do not formally represent, such duties are (1) limited to the specific actions that Lead Counsel is appointed and authorized to undertake and (2) owed not to any one individual plaintiff but to the common and collective interests of the plaintiffs as a whole.[24]

IV. LEAD COUNSEL DOES NOT HAVE A TRADITIONAL "FIDUCIARY" DUTY

While Lead Counsel clearly has a duty to perform the functions to which they have been appointed in a fair, honest, competent, reasonable, and responsible way,[25] it would be inappropriate to describe their obligations to other plaintiffs as "fiduciary" in the traditional sense of the word. As a legal matter, the origin and nature of the relationship between Lead Counsel and MDL plaintiffs differs significantly from the common law fiduciary relationships of agency and trust. As a practical matter, moreover, the imposition of strict fiduciary standards to Lead Counsel would be extremely burdensome for the attorneys and the court. This is, admittedly, somewhat circular logic. But the appointment of Lead Counsel, like the MDL procedure itself, is intended to enhance judicial economy.[26] It therefore seems

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representation. In that situation, the only attorneys representing their interests are Class Counsel. The considerations are different, and responsibilities arguably less, where the class action device is employed primarily as a settlement vehicle for existing cases, in which most or all of the absent class members are already represented by their own individually retained counsel.

24. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at § 21.12 ("[A]n attorney acting on behalf of a putative class must act in the best interests of the class as a whole"); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1989 (2011) ("By subordinating one client's interests to another's without informed consent, a lawyer would act disloyally. Other fiduciaries are allowed to make tradeoffs. Trustees are the exemplars of this group. A trustee may use entrusted assets to send one beneficiary to college even though less money will be available to help another beneficiary as a result. *When making tradeoffs among beneficiaries, trustees need only be reasonable and fair*. The Principles suggests that *lead attorneys resemble trustees more than lawyers or other agents. Their responsibility is to 'pursu[e] the good of all,'* which, if need be, they may do by making tradeoffs that are reasonably 'likely to *maximize the value of all claims in the group.*'") (emphasis added). *See*, *e.g.*, Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 964 (3rd Cir. 1983) ("Class counsel's duty to the class as a whole frequently diverges from the opinion of either the named plaintiff or other objectors.").

25. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at § 10.22 ("Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel.").

26. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at §§ 10.22, 10.222.

unlikely that the courts would knowingly establish a "fiduciary" role for attorneys who could not efficiently or effectively accomplish the appointed tasks while working within the strictures typically imposed upon a fiduciary.

Under the common law, the agency relationship is generally a consensual relationship under which the principal retains the right to direct and control the agent's actions, as well as the power to terminate the agency.[27] In the MDL context, however, these hallmarks of a traditional agency relationship are absent. With the exception of Lead Counsel's individually retained clients, there is no underlying offer and acceptance of power of attorney or agency between such appointed counsel and the plaintiffs.[28] (Indeed, as noted, it is generally the case that litigants will retain an attorney to protect and advance his or her own particular interests.) Lead Counsel, however, generally

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27. *See* RESTATEMENT (THIRD) OF AGENCY, § 1.01 (AM. LAW INST. 2018) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); *id.* at § 1.01 cmt. (c) ("A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts. . . . A principal's right to control the agent is a constant across relationships of agency. . . . The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority"); *id.* at § 1.01 cmt. (d) ("Under the common-law definition, agency is a consensual relationship."); *id.* at § 1.01 cmt. (f)(1) ("An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 14(1) (AM. LAW INST. 2000) ("A relationship of client and lawyer arises when a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person.").

28. While § 14(2) of the *Restatement of the Law Governing Lawyers* and comments (c) and (d) to § 1.01 of the *Restatement of Agency* indicate that a fiduciary relationship can also be established when the court appoints a lawyer, this seems to contemplate the situation where a criminal lawyer is appointed to represent an indigent defendant or, perhaps, where a guardian *ad litem* or other attorney is appointed to represent a minor, incompetent, or absentee. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 27, at § 14 cmt. (f) (addressing class actions as an exception to § 14(1), as opposed to an example of § 14(2)). *See also* RESTATEMENT (THIRD) OF AGENCY, *supra* note 27, at § 1.01 cmt. (f) ("A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor. Thus, if a person is appointed by a court to act as a receiver, the receiver is not the agent of the person whose affairs the receiver manages because the appointing court retains the power to control the receiver.").

maintains the discretion to carry out appointed tasks and are not subject to the instruction or control of one or more of the plaintiffs.[29] Neither one plaintiff independently, nor the plaintiffs collectively, have the power to terminate Lead Counsel's authority to act, as it can only be altered or rescinded by the court.

Unlike privately retained counsel who frequently assume a fiduciary relationship of trust with respect to deposits, advances, or the receipt and distribution of settlement proceeds,[30] Lead Counsel in the typical MDL situation are rarely in possession or control of plaintiffs' funds or other property. There exists, in this regard, a common misconception relative to the expenditure by Lead Counsel of litigation costs and expenses. When Lead Counsel advances or incurs expenses for the common benefit of plaintiffs, they, at that point, are simply spending their own money. A claim is not made against plaintiff funds until Lead Counsel seeks reimbursement out of a successful judgment or settlement—a claim that is almost always subject to court approval.[31] Moreover, as distinguished from the typical case in which judgment or settlement proceeds are deposited into an

29. In some cases, the court's appointment of Lead Counsel will, at the same time, expressly limit Lead Counsel's ability to bind the plaintiffs. In the *Deepwater Horizon* MDL, for example, the court's Order appointing the Plaintiff Steering Committee provided: "All stipulations entered into by the PSC, except for strictly administrative details such as scheduling, must be submitted for Court approval and will not be binding until the Court has ratified the stipulation. Any attorney not in agreement with a non-administrative stipulation shall file with the Court a written objection thereto within five (5) days after he/she knows or should have reasonably become aware of the stipulation." Pretrial Order No. 8, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2167, Doc. No. 506, p. 4 (E.D. La. Oct. 4, 2010) (Barbier, J., presiding).

30. *See, e.g.*, Charles E. Rounds Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles That Regulate the Lawyer-Client Fiduciary Relationship*, 60 BAYLOR L. REV. 771, 813 (2008).

31. Even where so-called "shared expenses" are reimbursed to a Lead Counsel firm in advance of a judgment or settlement, such reimbursement is not made from *plaintiff* funds, but from a pool of money put up by the Lead Counsel firms themselves. In the event that a judgment or settlement is reached, such collective expenses may ultimately be reimbursed out of plaintiff funds, but generally subject to interim or final court approval. In some cases, the defendant, as part of a "global" or other settlement, will agree to reimburse litigation expenses, over and above the corpus of settlement proceeds made available to the plaintiffs. While, at least in the class action setting, the court must be mindful of the possibility of "structural collusion" during the class settlement approval process, from a fiduciary standpoint, Lead Counsel are never even making a claim for common benefit expenses against *plaintiff* funds.

attorney's trust account for subsequent accounting and distribution, settlement funds obtained in MDL proceedings are generally placed into a Qualified Settlement Fund with an independent Escrow Agent, and require court approval for any disbursement, reimbursement, payment, or withdrawal.

Additionally, it would be impossible to impose a strict traditional common law duty of loyalty upon Lead Counsel as a practical matter, and as a policy matter, it would be unwise.[32] First, it would require an endless series of inquiry and dispute over the extent to which a potential or actual "conflict" might exist between and among MDL litigants. This would largely undermine, if not eliminate entirely, the judicial efficiencies and economies sought to be gained through MDL proceedings. Second, by depriving plaintiffs of the attorneys who are most knowledgeable about the issues and litigation strategies, it would often work to the detriment of the very litigants whom such rules are ostensibly designed to protect.[33] Third, it would risk "Balkanizing" the plaintiffs into so many sub-groups that cooperative and effective progress would be impeded.[34]

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32. It has been widely recognized, in this regard, that the traditional conflict-of-interest proscriptions embodied in Professional Rules of Conduct 1.7 and 1.9 cannot and should not be mechanically applied to Class Counsel with respect to each and all class members. *See, e.g.*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588–91 (3rd Cir. 1999); White v. Nat'l Football League, 822 F. Supp. 1389, 1405 (D. Minn. 1993), *aff'd,* 41 F.3d 402, 408 (8th Cir. 1995), *cert. denied,* 515 U.S. 1137 (1995); *In re* Agent Orange, 800 F.2d 14, 18–19 (2nd Cir. 1986); *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157, 162–65 (3rd Cir. 1984) (Adams, J., concurring). As discussed in MANUAL FOR COMPLEX LITIGATION, *supra* note 5*,* there is even a less compelling basis to impose professional and fiduciary rules upon Lead Counsel than Class Counsel, as MDL plaintiffs are generally represented by their own privately retained counsel to advance and protect their own particular interests, in addition to the Lead Counsel attorneys appointed to represent the common interests of plaintiffs collectively.

33. *See, e.g.*, *Lazy Oil Co.*, 166 F.3d at 590 (quoting *Agent Orange*, 800 F.2d at 18–19) ("[W]hen an action has continued over the course of many years, the prospect of having those most familiar with its course and status be automatically disqualified whenever class members have conflicting interests would substantially diminish the efficacy of class actions as a method of dispute resolution.")); *White*, 822 F. Supp. at 1405 ("Several objectors contend, however, that class counsel's loyalty to the class has been compromised as a result of counsel's representation of the NFLPA, as well as individual players, in various other lawsuits . . . . [R]ather than creating conflict, the experience gained thereby was likely a prerequisite to the parties' ultimate agreement to settle.").

34. *See, e.g.*, *In re*: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex. on April 20, 2010, 910 F. Supp. 2d 891, 920 (E.D. La. 2012) ("[T]he use of a multitude of subclasses—each with separate class representatives and counsel—would have greatly complicated both the settlement negotiations and the overall administration of the litigation.") (citing *In re* Ins. Brokerage Antitrust Litig., 579

At most, it would seem appropriate to think of a privately retained counsel as analogous to a "named fiduciary" under ERISA,[35] whereas Lead Counsel would be more analogous to a "functional fiduciary" who is only a fiduciary to the extent that the appointed counsel actually exercises control over the plaintiffs' funds or undertakes some action or decision with respect to their substantive rights and interests in the litigation.[36]

V. A FALSE CONTROVERSY: THE GM IGNITION SWITCH LITIGATION

The existence and extent of Lead Counsel's responsibilities in an MDL proceeding was recently considered by a transferee judge in the Southern District of New York presiding over thousands of lawsuits arising from a series of recalls related to faulty ignition switches in millions of GM automobiles.[37] At the

F.3d 241, 271 (3rd Cir. 2009) ("Subclassing can create a 'Balkanization' of the class action and present a huge obstacle to settlement if each subclass has an incentive to hold out for more money.") (quoting *In re* Cendant Corp. Sec. Litig., 404 F.3d 173, 202 (3rd Cir. 2005)), *aff'd, In re* Deepwater Horizon, 739 F.3d 790, 813 (5th Cir. 2014) ("[T]here is no need to create subclasses to accommodate every instance of 'differently weighted interests.'"), *cert. denied,* 135 S. Ct. 754 (2014). An overzealous sub-grouping or balkanization of the MDL Lead Counsel structure and responsibilities in the non-class setting would create similar impediments, both in terms of judicial efficiency and in terms of advancing the common and collective interests of the plaintiffs as a whole.

35. *See* 29 U.S.C. § 1102(a) (1974) (requiring "named fiduciaries" who "jointly or severally shall have authority to control and manage the operation and administration of the plan").

36. *See, e.g.*, Pegram v. Herdrich, 530 U.S. 211, 225–26 (2000) (stating that an administrator is a fiduciary "only 'to the extent' that he acts in such a capacity in relation to a plan") (quoting 29 U.S.C. § 1002(21)(A) (2008) ("[A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice . . . , or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.")) (emphasis added); *see also, e.g.*, Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (stating that the statute "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan"). In addition, ERISA is also a useful analogy in that it draws a distinction between the obligations that are owed to an individual plan participant or beneficiary and the fiduciary duties that are owed, not to any particular plan participant or beneficiary, but to the plan as a whole. *See, e.g.*, Mass. Mut. Life Ins. Co. v. Russell, 437 U.S. 134, 140–42 (1985) ("It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan," but any recovery under § 409(a) of ERISA, entitled Liability for Breach of Fiduciary Duty, "inures to the benefit of the plan as a whole.").

37. Opinion and Order, *In re*: General Motors Ignition Switch Litig., 14-MC-2543

outset, the MDL court had appointed a thirteen-member steering committee, including two co-lead counsel to focus on economic claims and a third co-lead counsel to focus on the injury and death claims.[38] Two years into the proceedings, a group of plaintiffs' attorneys sought to remove the co-lead counsel in charge of injury and death claims after it was discovered that he had negotiated confidential settlements on behalf of his own "inventory" of cases.[39] This attorney was also criticized for favoring his own clients in the bellwether trial selection process to the prejudice of other stronger cases.[40] The motion to remove gained a lot of attention in the legal community, with a particular focus on competing affidavits submitted by noted academics in the complex litigation arena.[41]

University of Texas Law School Professor Charles M. Silver and NYU School of Law Professor Geoffrey P. Miller are frequent writers and collaborators in the fields of complex litigation and professional responsibility. They both participated in the drafting of the American Law Institute's (ALI) Principles of the Law of Aggregate Litigation[42] and co-authored at least one law review article on multidistrict litigation.[43] In addition, they are frequently retained by attorneys to provide opinion testimony in complex cases.[44]

(JMF), 2016 WL 3920353, at *5–6 (S.D.N.Y. July 15, 2016).

38. *See generally* Opinion and Order, *In re*: General Motors Ignition Switch Litig., 14-MC-2543 (JMF), 2016 WL 3920353 (S.D.N.Y. July 15, 2016).

39. *See generally id.*

40. *See generally id.*

41. *See, e.g.*, Alison Frankel, *Attack on Lead Counsel in GM Switch Case Critiques MDL System*, REUTERS (Jan. 27, 2016), http://blogs.reuters.com/alison-frankel/2016/01/27/attack-on-lead-counsel-in-gm-switch-case-critiques-mdl-system/; Kathryn Higgins, *Judge Blocks Attempt to Oust GM Lead Counsel*, GLOBAL LEGAL POST (Feb. 11, 2016), http://www.globallegalpost.com/big-stories/judge-blocks-attempt-to-oust-gm-lead-counsel-51080474/?utm_source=page-popup.

42. Professor Silver was one of the Reporters, while Professor Miller served on the Advisory Committee. Sam Issacharoff et al., *The American Law Institute's New Principles of Aggregate Litigation*, 8 J. L. ECON. & POL'Y 183 (2011).

43. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigation: Problems and a Proposal*, 63 VAND. L. REV. 107, 161 (2010).

44. *See, e.g.*, *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1347 (S.D. Fla. 2011) (Silver); *In re* Enron Corp. Sec., Derivative & ERISA Litig., 586 F. Supp. 732, 749 (S.D. Tex. 2008) (Silver); Conley v. Sears, Roebuck and Co., 222 B.R. 181, 188 (D. Mass. 1998) (Silver); Hooker v. Sirius XM Radio, Inc., No. 13-03, 2017 WL 4484258 (E.D. Va. May 11, 2017) (Miller); Elkins v. Equitable Life Ins. of Iowa, No. 96-296, 1998 WL 133741 (M.D. Fla. Jan. 27, 1998) (Miller); Declaration of Geoffrey P. Miller, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of

In the *GM Ignition Switch Litigation,* Professor Silver filed a declaration in support of plaintiffs' attorneys who argued that the co-lead counsel for injury and death claims owed and had breached his fiduciary duties to plaintiffs in the MDL, relying, in part, on the ALI's Principles of the Law of Aggregate Litigation.[45] Professor Miller, on the other hand, explained that the quoted language was not formally adopted by ALI but is contained within a Reporter's Note and simply expresses the opinion of one of the reporters.[46] While many outside observers in the legal community saw this as a significant divergence on the fiduciary question, the import of these dueling declarations is diminished upon closer inspection.

First, it is important to recognize that the opinions regarding "fiduciary duty" were not advanced in a vacuum but within a specific factual and procedural context. The issue was raised in a Motion to Remove Lead Counsel, in which the movants cited to the Principles' comment, among other things.[47] Professor Miller's declaration was submitted in opposition to that motion.[48]

Mex., on April 20, 2010, MDL No. 2179, Doc. No. 7114-16, pp. 37–40 (E.D. La. Aug. 13, 2012) (Barbier, J., presiding) (listing cases in which Miller had provided expert testimony over the previous five years).

45. Motion to Remove the Co-Leads and Reconsider Bellwether Schedule, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2182, p. 4 n.2 (S.D.N.Y. Jan. 25, 2016) (citing PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 1.04 cmt. (a) (Mar. 2018) (stating that "[c]lass counsel is a [ ] fiduciary to a client[, the named plaintiff,] who is also a fiduciary [to other class members]," and that "[a] similar relationship obtains between lead attorneys and other lawyers in a multidistrict litigation"); *see also* Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2 (S.D.N.Y. Feb. 5, 2016) (Exhibit 2) [Part 3]. In his 2011 law review article, which is quoted in the declaration, Professor Silver noted that there was a "dearth" of admittedly "scarce" "solid authority" for the proposition that Lead Counsel are "fiduciaries." *See* Silver, *supra* note 24, at 1987–89. Notably, Professor Silver starts from the proposition that Lead Counsel, like Class Counsel, resemble trustees, as fiduciaries, more than lawyer-agents, *see id.* at 1987, 1989, but, in making the argument that Lead Counsel should be considered "fiduciaries," relies primarily on the lawyer-agency model: "lead attorneys displace disabled lawyers" and thereby "assume disabled lawyers' duties." *Id.* at 1989.

46. *See* Declaration of Geoffrey P. Miller, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2200-1, p. 5 para. 16 (S.D.N.Y. Feb. 1, 2016). Professor Miller further distinguishes a Restatement, which is intended to reflect the current state of existing law, from Principles, which contain recommendations. *See id.* at p. 5 para. 15.

47. *See* Plaintiffs' Motion to Remove the Co-Leads and Reconsider the Bellwether Trial Schedule, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2179, pp. 5–6, nn.7–8 (S.D.N.Y. Jan. 25, 2016).

48. *See* Declaration of Geoffrey P. Miller, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2200-1 (S.D.N.Y. Feb. 1, 2016) attached as Exhibit 1

Professor Silver's declaration was submitted, in turn, as a response to Professor Miller.[49] The precise question before the court was not the extent to which Lead Counsel owed, or had breached, a fiduciary duty to plaintiffs in the litigation, but instead whether Lead Counsel should continue to serve in that capacity to other plaintiffs in the MDL.[50]

More fundamentally, the disagreement between the two professors is largely semantic. Professor Silver's Declaration does not suggest that Lead Counsel owes a fiduciary duty to each and all MDL plaintiffs in the traditional context, but that Lead Counsel must put the common and collective interests of all plaintiffs first.[51] Professor Miller does not appear to disagree.[52]

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to General Motors LLC's Combined Response to Motion to Remove Co-Leads and to Reconsider the Bellwether Trial Schedule, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2200 (S.D.N.Y. Feb. 1, 2016).

49. See Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2 (S.D.N.Y. Feb. 5, 2016), attached as Exhibit 2 to Plaintiffs' Reply Brief in Response to Co-Lead Counsel's Memorandum in Opposition to Lance Cooper's Motion to Remove Co-Lead Counsel False . . . and General Motors LLC's Combined Response to Motion to Remove Co-Leads and to Reconsider the Bellwether Trial Schedule, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243 (S.D.N.Y. Feb. 5, 2016).

50. *See* Order No. 95, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2263 (S.D.N.Y. Feb. 10, 2016) (denying the Motion to Remove Co-Lead Counsel (and an associated Motion to Reconsider the Establishment of a Qualified Settlement Fund), while noting that the moving plaintiffs "do not even come close to providing a legal basis for the drastic step of removing Lead Counsel in the middle of MDL proceedings that, all things considered, have proceeded remarkably smoothly and swiftly to date").

51. Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2, p. 13 para. 21 (S.D.N.Y. Feb. 5, 2016) (Exhibit 2) (Part 3) ("[A]n attorney who serves as lead counsel in an MDL is a fiduciary *to the following extent*: the attorney must manage the common benefit workload in a manner that is calculated to maximize the gains for all plaintiffs.") (emphasis added); *see also* Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2, p. 13 para. 22 (S.D.N.Y. Feb. 5, 2016) (Exhibit 2) (Part 3) (quoting Silver, *supra* note 24, at 1989–90 ("*To the extent that* lead attorneys displace [other] lawyers [by controlling common benefit work], they assume [other] lawyers' duties, including the fiduciary duty to refrain from exploiting clients.")) (emphasis added). *See also id.* at 1989 (stating that Lead Counsel's responsibility is to "pursue the good of all" and, in so doing, may make trade-offs, so long as they are reasonably likely to "maximize the value of all claims") (citing PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 1.05 cmt. (f) (Mar. 2018); MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at § 21.12).

52. *See* Declaration of Geoffrey P. Miller, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2200-1, p. 6 para. 17 (S.D.N.Y. Feb. 1, 2016) (Despite the insinuations of counsel for the moving plaintiffs, "the quotation on which [Silver] relies is consistent with the principles that [Miller sets forth]. The quoted language indicates that attorneys performing common benefit work should act fairly,

The central argument did not revolve around the existence of a general duty to plaintiffs with cases pending in the MDL, but whether Lead Counsel had compromised the common interests of plaintiffs collectively, while protecting or enhancing his own clients' interests in the bellwether or settlement process,[53] and whether attorneys who also serve as Lead Counsel should be retained in that position after settling their own individual cases.[54]

VI. LEAD COUNSEL'S DUTY TO PROVIDE INFORMATION TO MDL PLAINTIFFS

Both traditional fiduciary responsibility and the Professional Rules of Conduct impose affirmative obligations to inform clients about significant developments or decisions affecting their interests, as well as a general duty of full disclosure regarding

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efficiently and economically in the interests of all plaintiffs – hardly a controversial proposition.").

53. Professor Silver emphasizes that (with one possible exception), he is not saying Lead Counsel did anything that was knowingly or intentionally "improper;" but only that a "serious" and untenable "conflict of interest" exists when Lead Counsel negotiate a side-settlement of his or her own firm's inventory of cases while retaining a leadership position in the MDL. *See* Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2, p. 6, paras. 8–9 (S.D.N.Y. Feb. 5, 2016) (Exhibit 2) (Part 3); *see also* Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2, p. 6 para. 10–20 (S.D.N.Y. Feb. 5, 2016) (Exhibit 2) (Part 3). Whether this is correct, either as a legal proposition or as a matter of policy, is discussed *infra.* But the risk that Professor Silver identifies is a risk that the interests of other MDL plaintiffs will be compromised during the settlement negotiations; the resignation by Lead Counsel "who wants to negotiate a side-settlement" contemplated by Professor Silver would occur before the negotiations begin. And, since the inventory settlement at issue in the *GM Litigation* had already occurred by the time the motion was being considered, it would only justify removal if there was an actual concern of a collusive agreement to compromise the MDL plaintiffs' interests in some way on a going forward basis.

54. Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2, pp. 15–16 para. 26 (S.D.N.Y. Feb. 5, 2016) (Exhibit 2) (Part 3) (questioning "the wisdom of allowing lawyers with few cases to control MDLs") (citing Silver & Miller, *supra* note 43). To the extent Professor Silver or Professor Miller suggest that MDLs should be controlled by those with the largest or most valuable inventory of cases, I strongly disagree, as a matter of practice and policy. While there are, of course, potential benefits to the inclusion of such attorneys within the leadership structure, as well as potential risks in assigning Lead Counsel positions to attorneys with few or no cases, the successful management of complex multi-plaintiff litigation requires a unique skill set of knowledge, experience, strategic vision, resources, the ability to work well with others, and both the capacity and the willingness to ascertain and advance the common and collective interests of all plaintiffs—placing them before Lead Counsel's own interests, and, perhaps, at times, even the interests of his or her own individually retained clients. Some lawyers with large inventories have these skill sets. But many do not or will not.

any and all facts and circumstances regarding the representation when asked.[55] However, as with the duty of loyalty, it would be both impractical and unwise to require Lead Counsel to reveal sensitive strategic issues, confidential settlement negotiations, and other information provided to Lead Counsel under a condition of confidentiality to all plaintiffs in the litigation. The *Complex Manual* explicitly admonishes Lead Counsel to "use their judgment" in advising MDL plaintiffs and their attorneys of the progress of the litigation, as "too much communication may defeat the objectives of efficiency and economy."[56]

Taking the existence, nature, scope, and particulars of confidential settlement discussions as a recurring example, individual MDL plaintiffs (or more often, their privately retained counsel) frequently take the position that they are entitled to updates and other disclosures. At the same time, however, defendants are frequently only willing to engage in such discussions under a veil of confidentiality and will discontinue the negotiations in the event of a breach.[57] To be sure, a proposed settlement negotiated by Lead Counsel must be structured in such a way that neither a privately retained client nor any other plaintiff is bound to its terms until *after* there has been full and transparent notice or other disclosure.[58] Prior to the point of decision, however, the value of the information to the plaintiffs is

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55. *See, e.g.*, Rounds, *supra* note 30, at 791 ("[T]he lawyer-agent has an ongoing affirmative duty to furnish the client-principal with all material information that is in the lawyer-agent's possession and relevant to the agency, whether or not the client-principal asks for the information."); RESTATEMENT (THIRD) OF AGENCY, *supra* note 27, at § 8.11 ("An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when . . . subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal"); MODEL RULE OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2015) (requiring a lawyer to promptly inform the client of any decision or circumstance requiring his or her informed consent; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; and promptly comply with reasonable requests for information); LA. RULES OF PROF'L CONDUCT r. 1.4 (LA. SUP. CT. 2004).

56. MANUAL FOR COMPLEX LITIGATION, *supra* note 5, at § 10.222.

57. Particularly when dealing with publicly-traded companies, it is frequently essential that discussions remain confidential in light of SEC or other regulatory issues and requirements, and the potential for undesirable market fluctuations in the stock or corporate bond prices due to speculative trading.

58. *See generally* MODEL RULE OF PROF'L CONDUCT r. 1.2(a), 1.8(g) (AM. BAR ASS'N 2015); LA. RULES OF PROF'L CONDUCT r. 1.2(a) (LA. SUP. CT. 2006); LA. RULES OF PROF'L CONDUCT r. 1.8(g) (LA. SUP. CT. 2006); FED. R. CIV. P. 23(e).

of limited utility, whereas the risks and consequences of disclosure are considerable and potentially severe.

From a legal or fiduciary standpoint, complex multi-plaintiff litigation is subtly, yet fundamentally, distinct from single-party litigation in at least two respects. The first distinction concerns the source of the information. In the typical case, an attorney is retained to act as the agent of the principal. Whatever information the attorney acquires in the course of the representation generally "belongs" to the client.[59] In the MDL situation, on the other hand, Lead Counsel acquires information, not as agents of a particular plaintiff, but because they have been authorized or directed to undertake a certain function by the court.

Another difference between traditional litigation and complex multi-party litigation relates to the security of the information. In a typical case, the plaintiffs generally have no interest or incentive to reveal privileged or confidential information relayed to them by their attorneys, and plaintiffs who divulge such confidences are generally only hurting themselves. In an MDL situation, by contrast, there are often individual litigants—and privately retained counsel—who, whether acting in good or bad faith, will perceive some advantage in disseminating the information more broadly.[60]

When such confidences are compromised, whether inadvertently or intentionally, the consequences affect not only the plaintiff or lawyer who divulges the information, but also

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59. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015), https://www.americanbar.org/content/dam/aba/images/abanews/CPR_Formal Opinion471.pdf; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 18, at § 46 ("On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse."); LA. RULES OF PROF'L CONDUCT r. 1.16(d) (LA. SUP. CT. 2004) ("Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter.").

60. A lawyer attempting to solicit new clients, for example, may want to appear privy to "inside information" not shared by his or her colleagues. Some lawyers, and even litigants, also sometimes perceive that they can gain leverage for their own settlement prospects by encouraging other plaintiffs to join with them in opting out of, or objecting to, settlement proposals with threshold participation requirements; these lawyers or litigants may often be motivated to disseminate confidential information, whether intentionally or unintentionally, and whether acting in good or bad faith.

other plaintiffs with cases pending in the litigation.[61] While different circumstances will call for different levels of disclosure to the plaintiffs and their privately retained counsel, so that they can appropriately protect their interests or make material decisions when a decision is to be made,[62] it seems absurd that Lead Counsel would be "required" to disseminate sensitive information on an unlimited and ongoing basis to lawyers (or litigants) who will predictably prejudice the collective interests of the plaintiffs.

The more difficult question is the level of disclosure owed to Lead Counsel's own individually-retained clients. Both traditional fiduciary standards and the Professional Rules of Conduct recognize exceptions to the general duties of disclosure where such revelations would violate a superior duty owed to another.[63] The question of which duty is "superior" is naturally subjective and will largely depend on the particular facts and circumstances. However, Lead Counsel should not be obligated to share—and should generally refrain from sharing—confidential and sensitive information gained in their capacity as Lead Counsel with even their own privately-retained clients, absent some compelling reason to do so. Lead Counsel is not privy to the information as the representative of their own clients, but rather, because the court has placed them into that role. The court, in making such appointment, is not attempting to advance the

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61. This could also potentially affect other would-be plaintiffs, putative class members, the defendants, parties with similar cases pending in other jurisdictions, or third parties.

62. In *Ethical Questions Raised by the BP Oil Spill Litigation,* I suggested that the extent—and, particularly, the timing—of the obligation to disclose likely depends on the circumstances of whether, when and how an individual plaintiff or his or her counsel could be expected to utilize the information: "For example, at this time [October 18, 2013], for claims that fall outside either the Medical or Economic Settlements, there are, to my knowledge, no individualized, 'inventory' or other settlement negotiations taking place; and every trial/appeal on the horizon is either a common issue or a test trial, which will be prepared and prosecuted by the Steering Committee; so (at least arguably) why does anyone need any information at this point in time? What would they do with it? There are few, if any, material litigation or settlement choices to be made." Stephen J. Herman, *Ethical Questions Raised by the BP Oil Spill Litigation*, GRAVIER HOUSE PRESS 1, 6–7 (Nov. 11, 2016), http://gravierhouse.com/ethical-questions-raised-by-the-bp-oil-spill-litigation1/.

63. RESTATEMENT (THIRD) OF AGENCY, *supra* note 27, at § 8.11(2); *see also, e.g.*, ABA Comm. on Ethics & Prof'l Responsiblity *supra* note 59, at 3 ("Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 18, at § 16 cmt. (e) (stating that "a lawyer's duty of confidentiality to another client may prohibit some disclosure").

interests of Lead Counsel's clients in particular, but rather seeks to advance the interests of all parties by asking Lead Counsel to prosecute and protect the common and collective interests of plaintiffs as a whole.

VII. LEAD COUNSEL'S DUTY AT THE NEGOTIATING TABLE

One of the primary difficulties in successfully navigating the ethical or fiduciary landscape surrounding settlement stems from the fact that resolution efforts are largely driven and defined by defendants, while the ethical or fiduciary implications fall largely, if not exclusively, on counsel for the plaintiffs.[64] As a practical matter, neither Lead Counsel nor any individual plaintiff's counsel can compel the defendant to negotiate "globally" with respect to similarly-situated or all of the plaintiffs on a uniform or transparent basis or prevent a defendant from making favorable "inventory" settlement offers to some, but not all, firms. They also cannot discourage defendants from making offers to bellwether or test plaintiffs whose cases are set for trial. On the other hand, when faced with certain types of offers, it is the plaintiffs' counsel who are generally placed in a potential "conflict" or otherwise subject to fiduciary standards and ethical proscriptions or limitations.

To the extent, therefore, that the goal is to prevent certain types of aggregate settlements, potentially harmful secrecy agreements, restrictions on the right to practice, or other types of settlement arrangements that might pose some risk or harm to the settling or non-settling parties or to public health and safety, the legal and ethical restrictions must also apply to defense counsel, as it is generally the offer that creates the conflict—after the offer is made, it is often too late.[65]

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64. *See, e.g.*, MODEL RULE OF PROF'L CONDUCT r. 1.7, 1.8(g), 1.15(e) (AM. BAR ASS'N 2015); LA. RULES OF PROF'L CONDUCT r. 1.7 (LA. SUP. CT. 2004); LA. RULES OF PROF'L CONDUCT r. 1.8(g) (LA. SUP. CT. 2006); LA. RULES OF PROF'L CONDUCT r. 1.15(e) (LA. SUP. CT. 2010).

65. Notably, the rules that govern restrictions on the right to practice make it unethical to "participate in *offering* or making" such a settlement, as contrasted with the rules on aggregate settlements, which only make it unethical for a "lawyer who represents two or more clients" to "participate in *making* an aggregate settlement" without adhering to certain requirements on disclosure and consent. *Contrast* MODEL RULE OF PROF'L CONDUCT r. 5.6(b) (AM. BAR ASS'N 2015) *and* LA. RULES OF PROF'L CONDUCT r. 5.6(b) (LA. SUP. CT. 2004) (emphasis added), *with* MODEL RULE OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2015) *and* LA. RULES OF PROF'L CONDUCT r. 1.8(g) (LA. SUP. CT. 2006) (emphasis added).

The question then arises: When Lead Counsel negotiates either a limited settlement for their own clients or a multi-plaintiff proposed settlement on behalf of their own clients and other litigants in the MDL, what duties are owed to the Lead Counsel's own privately retained clients vis-à-vis other plaintiffs in the litigation? To be sure, a proposed settlement negotiated by Lead Counsel must, like any other settlement, be structured in such a way that neither a privately retained client nor any other plaintiff is bound to its terms absent either affirmative and fully informed consent from each participating plaintiff or a transparent class proceeding wherein the settlement agreement is filed into the public record and absent parties are protected, generally by notice and the right to opt out, and in all cases by approval of the court.[66] Yet questions are frequently raised with respect to Lead Counsel's role in negotiating both inventory settlements on behalf of their own clients that may disfavor other plaintiffs and global settlements that disfavor their own clients.

The question of how Lead Counsel should act in these situations is largely dictated by the defendant, depends on the particular facts and circumstances of each case, and is likely to be somewhat subjective. Nevertheless, some bright-line type approaches have been suggested.

Professor Silver, for example, suggests in the GM Ignition Switch Litigation that, before engaging in "inventory" settlement negotiations, Lead Counsel should resign.[67] Having been appointed to faithfully carry out certain functions and responsibilities on behalf of all plaintiffs, Lead Counsel cannot consciously trade off the interests of other plaintiffs in an attempt to secure an advantage for their own clients.[68] But prophylactic

66. *See generally* MODEL RULE OF PROF'L CONDUCT r. 1.2(a), 1.8(g) (AM. BAR ASS'N 2015); LA. RULES OF PROF'L CONDUCT r. 1.2(a) (LA. SUP. CT. 2004); LA. RULES OF PROF'L CONDUCT r. 1.8(g) (LA. SUP. CT. 2006); FED. R. CIV. P. 23(e)(1) (requiring notice of the proposed class settlement); *see also* FED. R. CIV. P. 23(c)(2)(B)(v), (e)(4) (allowing class members to opt out of at least settlements involving claims for damages), (e)(2) (requiring court approval of any class release).

67. *See* Declaration of Charles Silver, *In re*: General Motors Ignition Switch Litig., MDL No. 2543, Doc. No. 2243-2, pp. 6–13 paras. 8–20 (S.D.N.Y. Feb. 5, 2016) (Exhibit 2) (Part 3).

68. While declining, for lack of jurisdiction, to address the duties owed by Lead Counsel to other MDL plaintiffs and their attorneys generally, the Seventh Circuit once noted that "a side-agreement is not of itself intrinsically improper, though . . . parties, like those in the case before us, with dual and potentially conflicting loyalties, like Smith [the MDL Lead Counsel] toward both the Fentress [a State Court client] and MDL-907 plaintiffs, *see* [FED. JUD. CTR., MANUAL FOR COMPLEX

disqualification goes too far. The potential that Lead Counsel may be susceptible to conscious or even only "structural" collusion must be weighed against plaintiffs' loss of Lead Counsel's knowledge, skill, experience, and insight, both generally and as uniquely gained in that particular litigation. Indeed, such automatic disqualification would likely encourage defendants to try to successively "buy off" Lead Counsel in order to deprive the rest of the plaintiffs of the attorneys best suited to lead the litigation—precisely the type of conduct sought to be avoided.

Where Lead Counsel is negotiating a "global" settlement for all or a majority of the plaintiffs, some have taken the position that attorneys who serve as Lead Counsel, while attempting to achieve the best possible settlement for plaintiffs, continue to owe an undivided duty of loyalty to their own clients and must, within that framework, seek to maximize their own clients' recovery, even if that might arguably work to the prejudice of other plaintiffs. In my view, it should be incumbent upon Lead Counsel to clearly define the nature and scope of the discussions and their concomitant role at the outset of the negotiation. Where the defendant desires to explore a proposed settlement of claims beyond the firm's own clients, then attorneys who serve as Lead Counsel are participating in those negotiations not by virtue of their own clients' cases but because the court appointed them to explore settlement on behalf of all plaintiffs. While Lead Counsel, in such negotiations, would certainly be expected to draw upon the knowledge and perspectives gained from the representation of their own clients, Lead Counsel is obligated, in that capacity, to maximize the common and collective interests of the plaintiffs as a whole.[69]

LITIGATION (SECOND) § 20.222 (2nd ed. 1985)], might be well advised in crafting any side-agreement to proceed in such a manner that all interested parties, including the court, could rely on their good faith and integrity." Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1205 (7th Cir. 1996).

69. While such Lead Counsel should, of course, be mindful of the interests of other attorneys who are representing plaintiffs in the MDL under individual retainer agreements, the notion that some "fiduciary duty" extends to such individually retained counsel, in my view, goes too far. As noted by the Louisiana Supreme Court, albeit in a different context: "It would be inconsistent with an attorney's duty to exercise independent professional judgment on behalf of his client to impose upon him a fiduciary obligation to take into account the interests of co-counsel in recovering any prospective fee." Scheffler v. Adams and Reese, LLP, 2006-1774, pp. 14–16 (La. 2/22/2007); 950 So. 2d 641, 652–53 (stating that, as a matter of public policy, no cause of action will exist between co-counsel based on the theory that co-counsel has a fiduciary duty to protect one another's interests in a potential fee). Where it has been suggested that Lead Counsel have duties or responsibilities

From an overall policy standpoint, the goal is to allow Lead Counsel's own clients to obtain the full benefit of such representation (including any potential premium that might be warranted, in the defendant's eyes, based on Lead Counsel's knowledge, skill, experience, commitment, and reputation) without conferring an undue advantage arising solely and directly from their attorney's appointment as Lead Counsel—particularly in the event that such premium will come at the expense of other plaintiffs in the litigation. The best way for Lead Counsel and the court to achieve that balance in any particular situation will be constrained somewhat by the defendant's approach to settlement and will depend on the facts and circumstances of each case.

VIII. CONCLUSION

The MDL and other aggregation mechanisms have become

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directly to other MDL attorneys (e.g., within the context of a court-appointed Fee Committee), the fact that Lead Counsel's interests may be, to some extent, in "conflict" with the interests of some or all other plaintiffs' counsel, such inherent structural conflict does not lead to disqualification but is simply a factor to be considered when reviewing the recommendation. *See, e.g.*, Order and Reasons, *In re* Chinese Drywall Litig., MDL No. 2047, 2017 WL 2290198, Doc. No. 20789, at *5–6 (E.D. La. May 25, 2017) (denying objecting counsel's Motion to Disqualify Lead Counsel and the Fee Committee, while noting that the objecting attorneys "misunderstand the role of the Fee Committee's recommendation in the overall process. . . . At the core of this misunderstanding seems to be contract counsel's belief that the Court will view the Fee Committee's recommendation as more significant, or accord it more weight, than the position of contract counsel during the final determination of the fee award. . . . In formulating its ruling on the fee allocation issue, the Court will consider all the evidence anew, including the Fee Committee recommendation, the objections of the contract attorneys, the recommendation of the Special Master, and the evidence of time submissions gathered and reviewed by [the Court-appointed CPA]. Only after considering all this evidence will the Court be prepared to issue a ruling on the fee allocation issue.") (citing *In re* High Sulfur Gasoline Prods. Liab. Litig., 517 F.3d 220 (5th Cir. 2008) (stating that the Fifth Circuit acknowledged the court's authority to appoint a committee of plaintiffs' counsel to recommend how to divide up an aggregate fee award (although disagreeing with the process employed by the district court in that particular case), so long as the court takes those attorneys' interests into account in its independent review of the record, including the recommendation). In this respect, ERISA again provides a helpful analogy: courts allow a plan administrator to make fiduciary decisions regarding a beneficiary's right to plan benefits while acting under an inherent conflict of interest, but take such conflict into account when deciding what level of deference should be accorded the decision in question. *See, e.g.*, Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008) (stating that a reviewing court should consider the conflict of interest arising from the dual role of an entity as an ERISA plan administrator and payer of plan benefits as a factor in determining whether the plan administrator has abused its discretion in denying benefits, with the significance of the factor depending upon the circumstances of the particular case).

increasingly central to our civil justice system. The Lead Counsel who are appointed to manage the proceedings are asked to navigate a complex landscape of competing interests, agendas, and philosophies. In setting priorities, communicating with individually retained counsel, and exploring settlement opportunities, Lead Counsel must have the willingness and the ability to put aside their own interests and act in the common and collective interests of plaintiffs as a whole. In setting professional and ethical obligations, the courts and all plaintiffs have the right to expect Lead Counsel to carry out their appointed tasks in a fair, honest, competent, reasonable, and responsible way. Both the MDL Court and Lead Counsel, while focusing on the common issues, should strive to ensure that the unique interests of individual litigants are not sacrificed. At the same time, however, the common and collective interests of plaintiffs cannot be held hostage by the plights of a few outliers or the attempts of an unruly objector to gain leverage in bad faith. The ethical and fiduciary rules developed for single-plaintiff lawsuits should not be applied mechanically in such a way that the MDL plaintiffs are deprived of the most knowledgeable and experienced counsel, or in a way that undermines the judicial economy sought by MDL transfer and Lead Counsel appointment. Rather, Lead Counsel should be treated like ERISA fiduciaries, within the scope of their appointed functions, for the benefit and protection of the MDL plaintiffs as a whole.