Rethinking the Selection and Compensation of Lead Lawyers in Multidistrict Litigation

Elizabeth Chamblee Burch
Charles H. Kirbo Chair in Law
University of Georgia School of Law

This short paper summarizes and challenges the status quo for selecting and compensating lead lawyers in multidistrict litigation. I’ve excerpted my comments from several of my prior works. As such, those seeking further information about my data and conclusions can find it by reading Repeat Players in Multidistrict Litigation: The Social Network, CORNELL L. REV. (forthcoming 2017) (with Margaret S. Williams); Monopolies in Multidistrict Litigation, 70 VAND. L. REV. 67 (2017); and Judging Multidistrict Litigation, 90 N.Y.U. L. REV. 71 (2015).

Busy judges seeking quick guidance on these matters may find the appendix to the Monopolies in Multidistrict Litigation paper useful. It contains a Pocket Guide for Leadership Appointment and Compensation, a Leadership Application Form, a Leadership Applicant Scoring Sheet, and sample orders for suggesting remand and replacing leaders.

I. Selecting Lead Plaintiffs’ Lawyers

1. What criteria do transferee judges use in selecting lead plaintiffs’ lawyers and why should that criteria change?

When judges consider applicants for leadership positions, they focus on experience, cooperative tendencies, and an ability to finance the litigation—factors that favor repeat players. In the abstract, repeat players’ experience and cooperation seem like positive attributes. And experience in building the relevant infrastructure to litigate claims is critical.

But emphasizing cooperation can lead to three negative effects that may dampen the advantage that experience confers. First, it may foster a need for attorneys to curry favor with one another to secure lucrative positions in future leadership hierarchies. Second, it deters dissent by implicitly labeling it as something that should not be rewarded. Discontent can be particularly important during settlement when plaintiffs’ interests may differ. Third, the lack of dissent raises concerns about inadequate representation. Because multidistrict litigation’s authorizing statute requires that cases share only a single common question of fact, plaintiffs’ best interests are not likely to be uniform, making adequate representation through dissent crucial.

Unlike class actions, where the defendant might raise conflicting interests when battling class certification, the controlling stakeholders in nonclass multidistrict litigation—plaintiffs’ lead lawyers, defendants, and their attorneys—have little economic motive to identify conflicts. Lead plaintiffs’ lawyers have two income sources: contingent fees from their own clients and court-ordered common-benefit fees from plaintiffs (and their individual counsel) who benefit from leaders’ efforts. Attorneys profit from representing as many people as possible—not from recognizing divisive interests. And defendants’ closure hinges not on the preclusive effect of a class-wide settlement that demands adequate representation, but on convincing plaintiffs enter into a settlement program. Consequently, judicial pressure toward cooperation and consensus may erode dissent and the adequate representation that follows from it.
2. Do repeat players exist and, if so, what’s the harm in selecting them for leadership roles?

A highly concentrated plaintiff and defense bar is nothing new, nor is the disquiet about where that concentration may lead. As scholars like Professor Coffee have long recognized, repeat play tends to regress our adversarial system from its confrontational roots toward a state of cooperation. In the criminal context, for example, prosecutors and public defenders routinely work together through plea bargaining, leading them toward mutual accommodation; incumbents form a primary community of interest, whereas clients present secondary challenges and contingencies. As such, adversary features are often overshadowed by regulars’ quid pro quo needs. As Professor Jerome Skolnick has explained, those working group relationships that develop become a social control problem only once they reach a “tipping point where cooperation may shade off into collusion, thereby subverting the ethical basis of the system.”

In *Repeat Players in Multidistrict Litigation: The Social Network*, my co-author Margaret Williams and I offer the first comprehensive empirical investigation of private attorneys’ efforts in multidistrict leadership on both the plaintiff and defense side. We found that transferee judges regularly appoint the same lead attorneys.

To then uncover what the naked eye cannot see, we employed a social-network analysis to reveal repeat actors’ connections to one another. No matter what measure of centrality we used, a key group of plaintiffs’ attorneys maintained their elite position within the network. In fact, a small group of the same five high-level repeat players (Richard Arsenault, Daniel Beene, Dianne Nast, Jerrold Parker, and Christopher Seeger) consistently occupied the most powerful positions, and seemed to have far more impact on settlement design than did the total number of involved repeat players. This matters considerably, for lead lawyers control the proceeding and negotiate settlements. They can bargain for what may matter to them most: defendants want to end lawsuits, and plaintiffs’ lawyers want to recover for their clients and receive high fee awards along the way.

---

5 On the plaintiffs’ side, repeat players (attorneys who held more than one leadership position within our dataset) held 767 out of 1,221 available leadership roles, or 62.8 percent. Fifty attorneys were named as lead lawyers in five or more multidistrict litigations and those 50 attorneys occupied 30 percent of all plaintiff-side leadership positions. Repeat play among plaintiffs’ law firms was even more evident. Again, even though only 40.7 percent of law firms were repeat players (i.e., had more than one lawyer from that firm appointed to a leadership position within the dataset), lawyers from those 70 firms occupied 78 percent of all available leadership positions. Seventy law firms had attorneys who were named to five or more leadership roles, and attorneys from those firms were appointed to well over half of all lead-lawyer positions.

On the defense side, repeat players held 73 of 414 leadership positions, or 17.6 percent. Of course, defense lawyers are rarely judicially appointed to leadership positions; the defendant hires the law firm directly and different partners may spearhead distinct matters. So, evidence of repeat play by those attorneys’ law firms was more indicative for defendants: of the 414 available leadership positions, attorneys from repeat-player defense firms occupied 341, or 82.3 percent, of those leadership roles. The 19 defense firms whose attorneys occupied five or more leadership positions claimed 41.5 percent of those roles.
By identifying settlement provisions that one might argue principally benefit the repeat players, we examined the publicly available nonclass settlements these elite lawyers designed. Over a 22-year span, we were unable to find any deal that didn’t feature at least one closure provision for defendants, and likewise found that nearly all settlements contained some provision that increased lead plaintiffs’ lawyers’ common-benefit fees.

Bargaining for attorneys’ fees with one’s opponent is a stark departure from traditional contingent-fee principles, which are designed to tie lawyers’ fees to their clients’ outcome. Based on the evidence available to us, we found reason to be concerned that when repeat players influence the practices and norms that govern multidistrict proceedings—when they “play for rules,” so to speak—the rules they develop may principally benefit them at the expense of one-shot plaintiffs.

Although it was difficult to obtain claims-filing data, one illustration may help. Propulsid was the earliest available nonclass settlement within the data and is, to our knowledge, the first of its kind to propose and implement nonclass closure mechanisms. Propulsid’s Steering Committee characterized its accomplishment as follows:

Never before in the history of multidistrict litigation, have counsel achieved a global resolution of this proportion in the unique manner by which this Settlement Program resolves the litigation without resort to complex joinder devices or Class Certification. This remarkable approach to resolution of ‘mass tort’ litigation promises to become the template for similar resolution of future litigations of this kind.7

This statement proved prophetic, for, as we demonstrated, settlement designers replicated some aspect of Propulsid in every subsequent deal within the data.

In Propulsid, 6,012 plaintiffs traded their lawsuit for the settlement program. But only 37 of them (0.6 percent) recovered any money through the rigorous physician-controlled settlement process and collectively they received little more than $6.5 million. Yet, the court awarded lead lawyers over $27 million in common-benefit fees based on an $87 million-dollar fund, the bulk of which reverted back to the defendant. This vividly illustrates the worry that a defendant might negotiate higher fees in exchange for less relief to claimants.

Propulsid’s dealmakers engineered three closure provisions—walkaway provisions, settlement bonuses, and a hybrid recommendation-withdrawal provision. First, 85 percent of death claims and 75 percent of injury claims had to enroll for the settlement to take effect. Second, if 100 percent of non-death plaintiffs enrolled, defendant Johnson & Johnson would add a $4 million “bonus” to the available settlement funds. Third, an “opt-out” form accompanied the agreement even though all claimants had to affirmatively “opt in.” Designed for non-settling claimants, this form authorized counsel to withdraw from representing the client (meaning that claimants effectively opted out of

---

6 We obtained and analyzed the all publicly available, private nonclass settlements that occurred within our dataset (ten multidistrict litigations, three of which produced two settlements each, for a total of thirteen settlements). Those settlements collectively covered 64,107 actions. In examining those settlements, we looked for four types of provisions: (1) those that generate closure (attorney-recommendation, attorney-withdrawal, walkway, and case-census provisions), (2) those where lead lawyers negotiate some aspect of their fees with a defendant either directly or through the settlement, (3) those that reduced awards to latecomers, and (4) those that allowed the money remaining in the settlement fund to revert to defendants. Closure, latecomer, and reversion provisions benefit defendants, while common-benefit fee provisions reward lead plaintiffs’ lawyers. When courts and the parties made the claims-filing data public, which was rare, we considered that information as well.

7 Memorandum in Support of Plaintiffs’ Steering Committees Motion for Award of Attorney’s Fees and Reimbursement of Costs, In re Propulsid Prod. Liab. Litig., No. 00-md-1355 (E.D. La. May 3, 2005).
representation), and later became the template for more sophisticated attorney recommendation and withdrawal provisions.

Propulsid’s lead lawyers asked the court to ratify the fees they negotiated directly with the defendant by citing common benefit as a supporting rationale. Unjust enrichment lies at the heart of common-benefit awards. As such, fees must come out of that benefit (the fund), not directly from the defendant. And, the work must benefit the claimants. When only 37 of 6,012 plaintiffs recover no more than $6.5 million and the strict claims process extinguishes the rest, how can leaders justify receiving over $27 million in “common-benefit” fees?

As I have explored elsewhere, the overarching danger for plaintiffs is inadequate representation. Profiting at claimants’ expense can disserve all settling plaintiffs equally, but since multidistrict proceedings require only a common question of fact, litigants can also be uniquely disadvantaged vis-à-vis one another. In class actions, due process requires separate representation when structural conflicts of interest exist. Structural conflicts “present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.”

Multidistrict litigation should demand no less when it empowers a select few to negotiate global settlements and designate bellwether trials on the group’s behalf.

3. What method should transferee judges use in selecting lead plaintiffs’ lawyers?

Although it is more time intensive, judges need to employ a competitive process to select lead lawyers—not rely on consensus slates or processes that resemble popularity contests. Lawyers have little incentive to consider adequate representation when brokering a consensus because representing more people (even with conflicting interests) leads to higher fees and a greater willingness to invest in the suit. Relying on self-selection methods can encourage undisclosed fee-sharing arrangements that may adversely affect settlement incentives, tit-for-tat reciprocity among repeat players, and unrepresentative committees.

4. What criteria should transferee judges use in selecting lead plaintiffs’ lawyers?

Judges must consider adequate representation when appointing lead plaintiffs’ lawyers. They should seek cognitively diverse members with varied expertise and perspectives who will disclose privately held information and dissent over matters that are relevant to the leadership’s substantive tasks—not contrarians.

Leadership application forms should solicit information not only about past experience, but also about:

- how the plaintiffs in those past proceedings fared,
- the common-benefit fees the attorney received,
- the structural conflicts that exist or are likely to arise during the current proceeding, and
- how the attorney or firm plans to finance the lawsuit (and should disclose—perhaps in camera—any and all financial arrangements that have been made or will be made to fund the suit).

A sample leadership form is available at 70 Vand. L. Rev. 69, 162, and a scoring sheet for evaluating those forms can be found on page 164.

---

8 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (AM. LAW INST. 2010).
5. What tools do (or should) transferee judges have to police self-dealing or mis-dealing by lead lawyers?

While monitoring by clients and judges promises to alleviate some agency concerns, both groups face the same principle hurdle: information barriers. Judges might want to appoint leaders who collectively represent plaintiffs’ diverse make-up, but, without the adversarial airing of potential conflicts, they lack the knowledge to do so. Plaintiffs might push for self-governance, but they need sophisticated legal advice to understand why their best interests may not align.

Enter competition. By drawing on the vibrant rivalries within the plaintiffs’ bar, judges can use market solutions to remap the existing regulatory landscape without rule amendments or legislation. Educating judges and encouraging them to implement four key innovations can incentivize those with the greatest access to information—other plaintiffs’ lawyers—to police the lead lawyers when they threaten to wield their power in self-serving ways.

First, judges should reject consensus slates for leadership positions and use a competitive-selection process where attorneys openly jockey to hold the leadership’s monopoly power. Competing for the market, that is, competing to become the monopoly, may produce some of the same benefits of open market competition, particularly if attorneys can confidentially air objections about one another to a special master.

Second, issuing an order that presumptively adds (or replaces) lead lawyers with challengers who successfully demonstrate the presence of unaddressed structural conflicts of interest incentivizes those selected to remedy inadequate-representation concerns quickly. It likewise maximizes the payoff for outside challengers, making it more profitable to compete and discipline leaders than to play the long game in hopes of receiving common-benefit work or future leadership roles.

While the first two proposals infuse competition into leadership selection, the latter two revamp compensation methods and external safeguards. Thus, the third proposal urges judges to compensate lead lawyers based on a percentage of the benefit they actually confer on claimants—not a set percentage of the fund. This promotes fidelity by realigning common-benefit fees with basic contingent-fee principles: the better claimants fare, the better leadership fares. Quantum meruit principles can also invigorate state-court competition over claims that are not exclusively federal by replacing flat fees with tailored pricing packages for state litigants who need access to some (but not all) common-benefit work, and rewarding state lawyers whose efforts benefit all plaintiffs.

Finally, issuing a standing order automatically recommending that the Panel remand non-settling cases to their courts of origin after a global settlement can harness market forces to check the leadership’s monopoly power. Automatic remands pressure lead lawyers to design a deal that caters to multiple injury types by threatening to destabilize their consolidated power and weakening the settlement vortex, which currently gives plaintiffs only two choices: settle or risk dismissal. Remanding puts trials back on the table, returning one of plaintiffs’ most valuable bargaining chips. When combined, these proposals tap into the robust rivalries within the plaintiffs’ bar, inciting those who possess the most relevant information and have the most at stake to police conflicts and hold lead lawyers accountable.

II. Compensating Lead Plaintiffs’ Lawyers

---

9 Structural conflicts of interest present a high bar. Infra Part III.A.3.
10 The Panel can likewise accomplish this unilaterally by amending its own rule 10.1(b).
11 Although this Article focuses on multidistrict litigation, many of these proposals apply equally to all mass, non-class settlements. Such settlements can occur in federal courts without multidistrict litigation (toxic torts, for example) or in state courts.
1. When and how should lead counsel fees be determined in settled cases?

Common-benefit fees should be awarded after plaintiffs have received their settlement awards, and should be paid on a quantum meruit basis. Without tying fees to benefits, the danger exists that leadership might negotiate high settlement amounts, use that inflated price to justify their fees, but then capitulate to a defendant’s demands for stringent claims-resolution criteria, reversionary clauses, or both.

By their nature, quantum-meruit awards typically entail evaluating the results obtained and the objective benefit to the client. As such, while judges might issue an initial order holding back a portion of settlement funds and award interim payments to finance the litigation, before they award final common-benefit fees, they should require parties to submit an accounting. This final accounting should describe the benefits leadership conferred on plaintiffs, how the settlement funds were allocated, the number of plaintiffs who submitted claims, how many plaintiffs recovered in each category or tier, and the average recovery amount in each category or tier. Common-benefit fee awards should then be a percentage of plaintiffs’ actual recovery, not the fund itself.

2. Who should have standing to object to common-benefit fee awards and what procedures should judges follow?

Leadership has the burden of demonstrating that their efforts benefitted claimants, making them more profitable than they would have been without them. As such, where available, leaders should include information about settlement values and verdicts obtained outside the multidistrict process as a comparative baseline. The accounting should then be available to the plaintiffs and their individual attorneys such that they can respond and object.

This information allows judges to fine tune fee awards according to plaintiffs’ actual benefits, and discourages attorneys from padding their billable hours. Some circumstances should prompt judges to consider raising or lowering the percentage awarded for common-benefit fees. For example, meritorious objections from a particular tier of claimants might prompt judges to lower the common-benefit percentage awarded from that tier to better reflect the benefits conferred, and higher settlements outside the multidistrict process might prompt judges to lower the common-benefit percentage across the board. This change incentivizes leaders to: (1) streamline and simplify the claims process; (2) expedite payouts; and (3) maximize the amounts (or equitable relief) paid to plaintiffs. Put simply, leadership has to actually benefit plaintiffs to be paid.

3. What tools are or should be available to the transferee judge to police self-dealing by counsel when negotiating fee agreements? Should the issue of fees be completely separated from any negotiation over the terms of the settlement itself?

Anytime lead lawyers negotiate aspects of their fees with the defendant, they raise concerns about self-dealing. Contingent fees are designed to increase proportionally alongside a plaintiff’s recovery—to tie the fates of lawyer and client. When leaders take things one-step further and bargain for the

12 Though contingent fees from their own clients will still incentivize leaders to maximize payouts in particular tiers, ensuring adequate representing by appointing lawyers who represent claimants across the spectrum should help mitigate those disadvantages.

13 Of course, there are many variables here. For example, some cases will inevitably have stronger causation evidence and may not be representative of others, or state lawyers may have relied on the multidistrict litigation’s common work product to produce the results. The point, however, is that higher settlements outside the consolidated litigation should trigger closer judicial scrutiny.
defendant to pay their common-benefit fees directly (or to raise their fees by taxing state-court plaintiffs via settlement), they sever that tie. As a result, the attorneys’ financial self-interest may no longer be linked to their clients’ outcome, but to the defendant’s wishes.

As Professors Silver and Miller have pointed out, “[t]he defendant is happy to offer [lead attorneys] ‘red-carpet treatment on fees’—higher common benefit fees cost the defendant nothing—in return for other things, such as a smaller settlement fund, a later funding date, or a higher participation threshold.”14 Accepting payment from the defendant violates basic agency law, for side payments negotiated without client consent should be given directly to clients.15

Allowing lead lawyers to compensate themselves via settlement suggests collusion, and should be judicially reprimanded as self-dealing because it violates lead lawyers’ fiduciary obligation to their principals. If judges are compensating leaders on a quantum meruit theory, then they can also implement a relatively novel theory of common detriment. Common detriment allows judges to subtract money from a firm’s common-benefit fee if its attorneys engage in self-dealing, or disrupt and delay the process without benefitting claimants.

4. Should transferee judges cap the contingency fees of non-lead counsel?

Judges should have some exceptional reason before interfering with private fee contracts when plaintiffs are mentally fit. Although aggregating plaintiffs’ claims and appointing lead lawyers streamlines certain aspects of the cases, litigating may not be as economical as judges presume. And, while judges’ experience with collusive settlements in the class-action context may justifiably prompt concern over contingent fees, their involvement must have predictable limits and quantifiable metrics. Reducing contingent fees should be the exception, not the rule. If such a cap is warranted, then it should be justified on an individual basis.


15 RESTATEMENT (THIRD) OF AGENCY §§ 8.02, 8.03 (AM. LAW INST. 2006).