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## Case Time and Cost Management for Plaintiffs in Multidistrict Litigation

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Multiple civil actions involving one or more common questions of fact pending in several different United States federal district courts may be transferred by the Judicial Panel on Multidistrict Litigation (JPML) to a single United States federal district court (the transferee court) for coordinated or consolidated pretrial proceedings, upon the JPML's determination that transfer will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.<sup>1</sup> Every action transferred by the JPML, unless previously terminated, is to be remanded by the JPML at or before the conclusion of the pretrial proceedings.<sup>2</sup> Each action is transferred back to the district court from which the action originated and was transferred (the transferor court), unless the JPML separates any claim, cross-claim, counterclaim, or third-party claim and remands any such claims before the remainder of the action is remanded.<sup>3</sup> The judge to whom the actions are assigned by the JPML (the transferee judge) conducts the coordinated or consolidated pretrial proceedings.<sup>4</sup>

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1. 28 U.S.C. § 1407(a) (2006) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.").

2. *Id.*

3. *Id.*

4. *Id.* § 1407(b) ("Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned

After the JPML transfers a matter, the transferee judge exercises the judicial powers of the transferor court in the transferee district, as well as the powers of a district judge in any district for the purpose of conducting pretrial depositions in the coordinated or consolidated pretrial proceedings.<sup>5</sup> The JPML has no authority to direct the transferee judge in the exercise of their powers and discretion in supervising the multidistrict proceedings in the case (MDL).<sup>6</sup> The transferee judge has no jurisdiction to conduct a trial in the MDL because the MDL is created solely for pretrial proceedings, but the transferee judge may terminate any action by ruling on motions to dismiss, for summary judgment, or pursuant to settlement and may enter consent decrees.<sup>7</sup>

The transferee judge typically, at an early state of the MDL, establishes a management plan for the litigation.<sup>8</sup> Ordinarily, tag-

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temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.”)

5. See, e.g., *In re Korean Air Lines Co., Ltd.*, Antitrust Litig., 642 F.3d 685, 699 (9th Cir. 2011) (“A district judge exercising authority over cases transferred for pretrial proceedings ‘inherits the entire pretrial jurisdiction that the transferor district judge would have exercised if the transfer had not occurred.’” (quoting 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3866 (3d ed. 2010))). Such authority is broad and encompasses the power to decide dispositive pretrial motions. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006) (stating that a transferee judge’s power “includes authority to decide all pretrial motions, including dispositive motions such as motions to dismiss, motions for summary judgment, motions for involuntary dismissal under Rule 41(b), motions to strike an affirmative defense, and motions for judgment pursuant to a settlement”). See *In re Patenaude*, 210 F.3d 135, 144 (3d Cir. 2000).

6. § 1407(b); MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004). See, e.g., *In re Sundstrand Data Control, Inc. Patent Litig.*, 443 F. Supp. 1019, 1021–22 (J.P.M.L. 1978) (“[T]he Panel has neither the power nor the inclination to dictate in any way the manner in which the coordinated or consolidated pretrial proceedings are to be conducted by the transferee judge. The scope of those proceedings, including the extent to which discovery is permitted, is a matter exclusively within the control of the transferee judge.”).

7. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 20.132. See, e.g., *In re Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig.*, 7 F.3d 357, 367–68 (3d Cir. 1993).

8. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 22.6. See, e.g., *Solis v. Lincoln Elec. Co.*, No. 1:04-CV-17363, 2006 WL 266530, at \*1 (N.D. Ohio

along actions automatically become part of the centralized MDL proceedings upon transfer to, or filing in, the transferee court.<sup>9</sup> Rulings on common issues in MDLs are deemed made to all tag-along actions, and discovery is made available and useable in all tag-along cases.<sup>10</sup> This is referred to as “common discovery.”<sup>11</sup> This

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Feb. 1, 2006) (“After substantial discussion with the parties, the Court entered an initial Case Management Order (“CMO”) on December 9, 2003, which addressed issues such as attorney organization, pleading and filing issues, discovery, and so on.”).

9. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 20.132. “‘Tag-along action’ refers to a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407.” 19A Fed. Prac. & Proc. Juris. App. J.P.M.L. R 1.1(h) (2013 ed.). *See, e.g., In re Payless Shoesource, Inc., Cal. Song–Beverly Credit Card Act Litig., No. MDL 2022, 609 F. Supp. 2d 1372 (J.P.M.L. 2009)* (explaining that where actions involved “common questions of fact,” centralization would “serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation” and “eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary”); *cf. In re Best Buy Co., Inc., Cal. Song–Beverly Credit Card Act Litig., MDL No. 2256, 804 F. Supp. 2d 1376, 1378–79 (J.P.M.L. 2011)* (noting that cases that “seem to be relatively straightforward . . . can proceed just as efficiently without centralization” such that “centralization under Section 1407 should be the last solution after considered review of all other options,” such as § 1404 transfer or “seeking to dismiss or stay duplicative actions under the first-to-file doctrine . . . to avoid duplication of efforts”).

10. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 20.132. *See, e.g., In re Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d 256, 273 (E.D.N.Y. 2006)* (“The orders of the transferee court are binding on all cases pending before it, and those which may be transferred to it as tag-along matters, notwithstanding that those cases may ultimately be adjudicated in the federal and state courts in which they originated.”); *In re Dow Chem. Co. “Sarabond” Prods. Liab. Litig., 650 F. Supp. 187, 188–89 (J.P.M.L. 1986)* (granting a motion to centralize actions including “recently filed related actions” treated as potential tag-alongs, reasoning that “transfer under Section 1407 will have the salutary effect of placing fourteen actions presently pending in eight districts before a single judge who can formulate a pretrial program that: 1) enables appropriate discovery already completed in earlier actions to be made applicable to actions that are later filed; 2) if appropriate, allows discovery with respect to any unique issues to proceed concurrently with discovery on common issues; and 3) ensures that pretrial proceedings will be conducted in a manner leading to the just, efficient and expeditious resolution of all actions, either in the transferee district or, upon the completion of common discovery, in the transferor districts to which the actions will be remanded” (citations omitted)); *In re Aircraft Accident at Barrow, Alaska, on Oct. 13, 1978, 474 F. Supp. 996, 999 (J.P.M.L. 1979)* (finding that centralization under § 1407 was necessary, noting “any future question of whether that action should be included in the coordinated or consolidated pretrial proceedings, and if so to what extent, is properly left to the discretion of the

process enables the MDL transferee court to reduce duplicative discovery activity and promote consistency in rulings.<sup>12</sup> The value of MDL is that it brings before a single judge all the federal cases, parties, and counsel that comprise the litigation and affords a unique opportunity for efficiency and potential resolution in the form of a global settlement.<sup>13</sup> History reveals that most MDL cases are settled in the transferee court and relatively few cases are remanded.<sup>14</sup>

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transferee judge. We note that the transferee judge has the authority to invoke procedures whereby discovery already completed in the [pending] action [in the transferee district] can be made applicable to the other actions.” (citations omitted)).

11. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 20.132. See *In re Dow Chem. Co.*, 650 F. Supp. at 188–89.

12. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 20.132. See, e.g., *In re Aircraft Accident at Barrow, Alaska*, 474 F. Supp. at 999 (“All four actions arise from the same accident and factual questions concerning the cause or causes of the accident will be common to each action. The presence of different legal theories in some of the actions with regard to the alleged liability of each defendant does not negate the existence of common questions of fact regarding the cause or causes of the [accident] and the attendant circumstances. Because the factual questions in each action focus on what caused the accident, it is likely that [defendant–manufacturers] will be involved with discovery in each action either as parties or non-parties. Transfer under Section 1407 is thus necessary in order to avoid duplicative discovery conducted by [plaintiff] and others, prevent inconsistent pretrial rulings, conserve judicial resources and ensure the cooperation of all parties and counsel.” (citations omitted)).

13. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 20.132. See *In re Dow Chem. Co.*, 650 F. Supp. at 188–89; *In re Zyprexa*, 467 F. Supp. 2d at 261–63 (reaching settlement following “discovery and negotiations overseen by a court-appointed special discovery master and four special settlement masters,” covering “some 8,000 individual plaintiffs;” and noting success of MDL proceeding, whereby “many thousands of cases” were resolved, including “virtually all cases pending in the MDL at that time, along with many state cases and some claims not yet filed” (citing *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596, 2005 WL 3117302 (E.D.N.Y. Nov. 22, 2005))).

14. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 20.132. Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 583 n.62 (1978). As of 1977, “slightly less than five percent of the actions transferred by the Panel have been remanded. Most actions are terminated either in the transferee district (often by settlement) or are transferred by the transferee judge to the transferee district or to another district for trial pursuant to Sections 1404(a) or 1406.” *Id.* at 583. Specifically, since the 1968 creation of the Judicial Panel:

over 5,500 civil actions, including 3,075 actions transferred by the Panel and 2,498 actions originally filed in transferee districts have been centralized for pretrial proceedings pursuant to Section 1407(a). As of June 30, 1977, over 3,200 of those actions had been terminated in the Transferee Courts or transferred by the transferee judges to other districts

Many MDLs involve a number of individual cases filed in jurisdictions throughout the country.<sup>15</sup> This results in a substantial number of attorneys being involved.<sup>16</sup> Because there are common issues, counsel are expected to work together on these common issues to promote efficiency for the benefit of all litigants.<sup>17</sup>

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for trial. In contrast, only 152 actions have been remanded by the Panel to their transferor districts.

*Id.* at 583 n.62 (citing September 1977 Report of the Judicial Panel on Multidistrict Litigation at 1 and Appendix, Summary of Multidistrict Litigation).

15. *See, e.g., In re C.H. Robinson Worldwide, Inc., Overtime Pay Litig.*, 502 F. Supp. 2d 1347, 1349–53 (J.P.M.L. 2007) (ordering transfer and centralization of 100 actions pending in the following districts: Northern District of Alabama, Eastern District of Arkansas, Central District of California, Eastern District of California, Northern District of California, Southern District of California, District of Colorado, Middle District of Florida, Southern District of Florida, Northern District of Georgia, Central District of Illinois, Northern District of Illinois, Southern District of Indiana, Southern District of Iowa, District of Kansas, Eastern District of Louisiana, Western District of Louisiana, District of Massachusetts, Eastern District of Michigan, Western District of Michigan, District of Minnesota, Eastern District of Missouri, Western District of Missouri, District of Montana, District of Nebraska, District of New Jersey, District of New Mexico, District of Nevada, Northern District of New York, Western District of New York, Western District of North Carolina, Northern District of Ohio, Western District of Oklahoma, District of Oregon, Eastern District of Pennsylvania, Western District of Pennsylvania, District of South Carolina, District of South Dakota, Eastern District of Tennessee, Middle District of Tennessee, Western District of Tennessee, Eastern District of Texas, Northern District of Texas, Western District of Texas, District of Utah, Eastern District of Virginia, Eastern District of Washington, Western District of Washington, and Eastern District of Wisconsin).

16. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig.*, No. MDL 721, 1989 WL 168401, at \*2 (D.P.R. Dec. 2, 1988) (Pretrial Order No. 127: Amended Case Management Order) (“It is not yet known how many lawyers will eventually join this litigation, but we can assume it will be pretty close to legion.”).

17. *See, e.g., id.* at \*2–3 (“Before we all enter into the belly of the beast known as the San Juan Dupont Plaza Hotel Fire Litigation, the Court believes this is an appropriate time to bring to the attention of the attorneys a word concerning their expected conduct in the prosecution of this litigation. . . . As attorneys involved in a mass disaster litigation, you will probably be laboring together for several years, with the work progressively becoming more complicated and exacting. Since many of you are complete strangers to each other, with differing styles and personalities, your working relationship will occasionally be strained, communication hampered and mutual trust impeded. In addition, the monetary stakes involved here in and of themselves are sure to increase the anxieties of clients as well as counsel. The just and efficient resolution of this litigation will depend largely on the way you as attorneys comport yourselves and overcome the trepidations inherent in a case of this nature. Buried in MCL2d [MANUAL FOR COMPLEX LITIGATION (2d ed. 1985)] at Section 20.21 is a sentence that bears serious contemplation: ‘Cooperation, courtesy, and professionalism by counsel should be expected and required in all litigation; but they are particularly important in complex cases.’ There are two words there that should permeate the

Because the transferee court has the greatest understanding of the litigation, is actively involved in the discovery phase of the litigation, has the ability to facilitate a global settlement, and oversees or conducts bellwether trials, it is important for the transferee judge to effectuate administrative guidelines and procedures for time and expense recordkeeping. The records are necessary should a fee petition be made by plaintiffs. The records will provide the court with a basis to make an award of fees and reimbursement of costs.<sup>18</sup>

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proceedings from now until this litigation is concluded. They are: COURTESY and PROFESSIONALISM. By COURTESY, it is not expected that the attorneys treat each other with graciousness, affability or even deference. That would be too much to expect from seasoned warriors of a profession which is, by its very nature, adversarial. What the Court does expect, indeed will insist upon, is that starting today attorneys refrain from casting aspersions and innuendos disparaging one another and otherwise engaging in back-biting or derisory conduct. With respect to PROFESSIONALISM, the Court finds there is no need to subscribe to an *ad hoc* statement of principles. As responsible and mature professionals it is sufficient to refer counsel to their oath as attorneys, the American Bar Association's Model Rules of Professional Conduct which have been adopted by the Local Rules of this District, and this Order. All personality conflicts between counsel should be scrupulously avoided as well as personal or antagonistic colloquies, written or verbal. The Court record should never be the repository of ill-chosen words arising out of a sense of frustration over real or imagined causes. Such conduct is an unsuitable substitute for the utilization, when there are grounded reasons, of the appropriate rule or law to lodge any complaints. To those who stray from these tenets, either through negligence or indifference, be forewarned that sanctions will surely follow. Dean Roscoe Pound touched upon all of this when he said, referring to our misguided American sporting theory of justice, that 'the idea that procedure must of necessity be *wholly contentious* disfigures our judicial administration at every point.' Bear in mind always that we are engaged in a tediously complex exercise in search of the facts and the applicable law in order to ensure that justice will be done. Remember, also, as Dean Pound would have us constantly keep in mind, that this is not a football or hockey game.'').

18. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, §§ 20.132, 22.62. *See, e.g., In re N.Y. City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978) ("[T]he essential purpose of . . . enacting § 1407 was to permit the centralization in one district of all pretrial proceedings '(w)hen civil actions involving one or more common questions of facts are pending in different districts.' As said in the report of the House Judiciary Committee, '(t)he objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the just and efficient conduct of such actions' and '(t)o accomplish this objective the bill provides for the transfer of . . . an action for the limited purpose of conducting coordinated pretrial proceedings.'" (citing H.R. REP. NO. 90-1130, at 1899-1900 (1968))). One court noted:

What concerns me at this point is the question of the organization and management of plaintiffs' counsel. The reason for that concern is that if plaintiffs prevail, I will be asked to determine their reasonable attorneys'

Active case management by the presiding transferee judge is undertaken early in the MDL process.<sup>19</sup> Organization of cases and counsel and setting forth counsel's duties are often some of the first steps undertaken by the presiding transferee judge.<sup>20</sup> One of the initial case management orders issued by a transferee judge may involve the appointment of liaison counsel, lead counsel, an executive committee, and a steering committee of counsel to coordinate discovery and other pretrial matters.<sup>21</sup> The court may

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fees. At the present time, there are more lawyers on the plaintiffs' side of the case than I or anyone else could possibly keep track of . . . . [T]he judge to whom this case was initially assigned entered an order consolidating the cases and appointing three of the law firms as "lead counsel" in the consolidated case. Two of the lead firms were also designated "liaison counsel". [sic] The order authorized lead counsel to perform specified kinds of work "either personally or through counsel whom they designate," and in addition, to "perform such other duties as they deem necessary."

*In re Cont'l Ill. Sec. Litig.*, 572 F. Supp. 931, 932 (N.D. Ill. 1983) (setting forth guidelines for evaluating future requests for court approval of fees and expenses in consolidated derivative action, which included individual responsibility, rates of compensation, legal research, document review, communication with attorneys for class members, expenses, and keeping of time records). *See also In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, No. 01-MD-01407-ORD, 2004 WL 1784348 (W.D. Wash. Aug. 2, 2004) (Case Management Order No. 20) (clarifying previously set forth "record keeping requirements for time and expenses and preliminary guidance with regard to the requirements of compensable Common Benefit Fees and Costs" and supplementing earlier CMO to establish Common Benefit Fee Committee and other related issues).

19. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 11.21. *See, e.g., In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482, 487 (E.D. Mich. 1979) ("It is the duty of the transferee court to control pretrial procedures in the consolidated cases in such a way as to avoid the pretrial chaos which could exist as a result of conflicting prior rulings."), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

20. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, §§ 11.211, 10.22, 14.21, 20.132. *See, e.g., Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 773-75 (9th Cir. 1977) ("With this advent of complex multiparty litigation have come serious administrative problems, and the federal courts have found it necessary to develop innovative procedures to meet the problems.") Such procedures, widely recognized as within the district courts' authority, include appointment of liaison counsel, lead counsel, committees of lead counsel, and establishing duties of appointed counsel. *Id.*

21. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, §§ 10.22, 14.21. *See Vincent*, 557 F.2d at 773-75; *see also In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 549 F.2d 1006, 1014 (5th Cir. 1977) ("It is not open to serious question that a federal court in a complex, consolidated case may designate one attorney or set of attorneys to handle pre-trial activity on aspects of the case where the interests of all co-parties coincide."); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 27, 2009) (Pretrial Order No. 7), available at <http://www.laed.uscourts.gov/drywall/orders/orders.htm> (follow



seek opportunities to monitor the activities of counsel and to implement certain guidelines.<sup>22</sup> One method is to issue an order that sets forth standards and procedures to be utilized by any counsel who seeks reimbursement for common benefit costs and common benefit fees for the performance of authorized functions.<sup>23</sup>

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“Pretrial Order 7” hyperlink) (appointing members of Defendants’ Steering Committee (DSC)); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 27, 2009) (Pretrial Order No. 8), available at <http://www.laed.uscourts.gov/drywall/orders/orders.htm> (follow “Pretrial Order 8” hyperlink) (appointing members of Plaintiffs’ Steering Committee (PSC)); *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2005 WL 850963 (E.D. La. Apr. 8, 2005) (Pretrial Order # 6) (appointing PSC members and Plaintiffs’ Executive Committee (PEC) comprised of Plaintiffs’ Liaison Counsel (PLC) and Co-Lead Counsel); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 8), available at <http://www.laed.uscourts.gov/oilspill/orders/orders.htm> (follow “Pretrial Order #8” hyperlink) (appointing members of PSC and PEC); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (E.D. La. Dec. 26, 2009) (Pretrial Order No. 3), available at <http://propulsid.laed.uscourts.gov/orders.htm> (follow “Pretrial Order No. 3” hyperlink) (appointing members of PSC).

22. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, §§ 10.22, 14.21. See *In re Cont’l Ill. Sec. Litig.*, 572 F. Supp. 931, 932 (N.D. Ill. 1983); *In re Phenylpropanolamine*, 2004 WL 1784348; see also *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2010 WL 2998848, at \*2 (E.D. La. July 28, 2010) (addressing control of attorneys’ fees and stating that “[t]he Court shall to the maximum extent allowed under the law control the fees and expenses that may be ultimately awarded in these proceedings. The Court will discharge its obligation and insure that the parties to the litigation will be treated fairly and justly. In order to assist the Court in discharging this obligation, all counsel shall keep a daily record of the time spent and expenses incurred in connection with this litigation, indicating with specificity the hours, the location and particular activity.”).

23. MANUAL FOR COMPLEX LITIGATION, *supra* note 6, §§ 10.22, 14.21. See *In re Cont’l Ill. Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983); *In re Phenylpropanolamine*, 2004 WL 1784348; see also *In re Vioxx*, 2005 WL 850963, at \*2–9 (appointing PSC members and setting forth duties and responsibilities, including, *inter alia*, time and expense submission standards and guidelines; subsequently amended, supplemented, clarified, and otherwise developed in Pretrial Orders 6A (May 3, 2007, outlining CPA firm’s functions and duties), 6B (Feb. 1, 2008, confirming functions, duties, and responsibilities of PSC, PLC, and PEC), 6C (Apr. 10, 2008, setting forth time and expense reporting procedure for submissions by negotiating Plaintiffs’ Counsel and relating to state court matters), 6D (Sept. 15, 2008, setting forth settlement Allocation Committee fee allocation guidelines), and 6E (Oct. 31, 2008, clarifying effect of fee allocation guidelines submissions)); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow “Pretrial Order 9” hyperlink) (setting forth standards and procedures for plaintiffs’ counsel’s time and expense submissions relating to matters common to all claimants) (attached as Exhibit “A.”); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. Mar. 16, 2012) (Pretrial Order No. 9A), available at <http://www>

The transferee court may issue pretrial orders that set forth duties and responsibilities of liaison counsel, lead counsel, the executive committee, and the steering committee.<sup>24</sup> These responsibilities typically include handling, developing, scheduling, coordinating, conducting, and preparing all pretrial discovery and motions on behalf of plaintiffs in all actions that are consolidated in the MDL, as well as issuing subpoenas for witnesses and documents.<sup>25</sup> Further responsibilities may include: appearing at

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.laed.uscourts.gov/Drywall/Orders/Orders.htm(follow “Pretrial Order 9A” hyperlink) (supplementing Pretrial Order No. 9 regarding time and expense submissions in state court Chinese Drywall Litigation matters); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow “Pretrial Order #9” hyperlink) (establishing standards and procedures to be utilized by plaintiffs’ counsel seeking fees and/or expense reimbursement).

24. See, e.g., *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, No. MDL 2179, 2011 WL 1464908, at \*1–5 (E.D. La. Apr. 15, 2011) (“Since being assigned to handle MDL 2179, this Court has issued a series of Pretrial and Case Management Orders for the orderly and efficient conduct of extensive pretrial discovery and the handling of pretrial proceedings in this complex and massive multidistrict litigation. As part of its case management efforts, the Court has appointed Plaintiff and Defense steering committees, Liaison Counsel, and Coordinating Counsel for the state and federal governments. . . . Many of the pretrial orders and case management orders issued by this Court have put in place special procedures and requirements that would not be necessary in the ordinary, non-MDL case setting.”); see also *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 27, 2009) (Pretrial Order No. 7), available at <http://www.laed.uscourts.gov/drywall/orders/orders.htm> (follow “Pretrial Order 7” hyperlink) (appointing DSC members); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 27, 2009) (Pretrial Order No. 8), available at <http://www.laed.uscourts.gov/drywall/orders/orders.htm> (follow “Pretrial Order 8” hyperlink) (appointing PSC members); *In re Vioxx*, 2005 WL 850963 (appointing PSC members and PEC comprised of PLC and Co-Lead Counsel); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 8), available at <http://www.laed.uscourts.gov/oilspill/orders/orders.htm> (follow “Pretrial Order #8” hyperlink) (appointing PSC and PEC members); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (E.D. La. Dec. 26, 2009) (Pretrial Order No. 3), available at <http://propulsid.laed.uscourts.gov/orders.htm> (follow “Pretrial Order No. 3” hyperlink) (appointing PSC members).

25. See, e.g., *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, MDL No. 1674, 2011 WL 4382942, at \*5 (W.D. Pa. Sept. 20, 2011) (issuing a Multidistrict Case Management Order appointing interim Co-Lead Counsel with specific responsibilities for “coordinating the activities of all plaintiffs during pretrial proceedings,” “act[ing] cooperatively and ensur[ing] that communication among the parties is as open and frequent as possible,” and “consider[ing] the interests of all parties in all planning and pretrial matters”).

hearings; examining witnesses; introducing evidence; conducting and appearing at status conferences and meetings; submitting and arguing motions, as well as preparing oppositions; negotiating stipulations; exploring and pursuing settlement options; maintaining files; and establishing a document and exhibit depository.<sup>26</sup> The court may also address trial counsel.<sup>27</sup>

In a number of MDL proceedings, early orders have been issued that require any lawyer who seeks reimbursement for costs and/or fees for services for performing common benefit functions to submit information pursuant to established standards and procedures.<sup>28</sup> This

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26. See *In re Cmty. Bank of N. Va.*, 2011 WL 4382942, at \*5 (stating that specific duties included “consultation with other members of plaintiffs’ counsel as may be appropriate” to “present (in briefs oral argument, or such other fashion as may be appropriate, personally or by a designee) to the court and to opposing parties the position of the plaintiffs on all matters arising during pretrial proceedings; . . . initiation and conduct of discovery, including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in deposition, on behalf of plaintiffs; . . . conduct settlement negotiations on behalf of plaintiffs, but . . . not enter into binding agreements except to the extent expressly authorized; . . . [d]elegate specific tasks to other counsel in a manner to ensure that pretrial preparation for the plaintiffs is conducted effectively, efficiently, and economically; . . . [e]nter into stipulations with opposing counsel as necessary for the conduct of the litigation; . . . [p]repare and distribute periodic status reports to the parties; . . . [m]aintain adequate time and disbursement records covering services as interim co-lead counsel; . . . [m]onitor the activities of co-counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; and . . . [p]erform such other duties as may be incidental to proper coordination of plaintiffs’ pretrial activities or authorized by further order of court”); see also *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d at 1015 (addressing appointment of counsel recommendations of *Manual for Complex Litigation*, *supra* note 6, such as “lead counsel and steering committee whose pre-trial duties for groups of parties having a common interest are more substantive briefing and arguing motions, writing interrogatories, arranging for and conducting depositions,” and steering committee “to provide leadership for large groups of parties and to exercise coordination”).

27. See, e.g., *In re Air Crash Disaster at Detroit Metro. Airport* on Aug. 16, 1987, 737 F. Supp. 391 (E.D. Mich. 1989) (ordering consolidation of cases for trial on joint liability issues, bifurcation of liability and damage issues, § 1404 transfer of MDL cases for trial in transferee district, and appointing PSC to serve as trial counsel for joint liability trial); see also *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 8), available at <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow “Pretrial Order #8” hyperlink) (appointing members and setting forth responsibilities of PSC and PEC, including, *inter alia*, to “coordinate trial team(s)’s selection, management and presentation of any common issue, ‘bellwether’ and/or ‘test’ case trial(s)”).

28. See *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (E.D. La. Dec. 26, 2009) (Pretrial Order No. 16), available at <http://propulsid.laed.uscourts.gov/orders.htm> (follow “Pretrial Order No. 16” hyperlink) (establishing plaintiffs’ litigation expense fund to compensate and reimburse attorneys for services

information helps form the basis for the transferee court to formulate a method for allocation of common benefit fees and costs.<sup>29</sup> The methodology for determining any fee allocation must be based on some reasonable analysis.<sup>30</sup> Courts utilize different methods of

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performed and expenses incurred for common benefit); *supra* note 23 and pretrial orders cited therein.

29. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 647 (E.D. La. 2010) (“[U]nder the ‘American Rule,’ the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser. Likewise, the attorney for the prevailing litigant must generally look to his or her own client for payment of attorneys’ fees. Since the nineteenth century, however, the Supreme Court has recognized an equitable exception to this rule, known as the common fund or common benefit doctrine, that permits the creation of a common fund in order to pay reasonable attorneys’ fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries. This equitable common fund doctrine was originally, and perhaps still is, most commonly applied to awards of attorneys’ fees in class actions . . . . As class actions morph into multidistrict litigation, as is the modern trend, the common benefit concept has migrated into the latter area.” (citations omitted) (internal quotations omitted). *See, e.g., In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), *available at* <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow “Pretrial Order 9” hyperlink) (“Plaintiffs’ Liaison Counsel may establish forms and procedures to implement and carry out the time and expense submissions required by the Court and necessary to compile and maintain the records.”); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, (E.D. La. Oct. 8, 2010) (Pretrial Order No. 9), *available at* <http://www.laed.uscourts.gov/oilspill/orders/orders.htm> (follow “Pretrial Order #9” hyperlink) (“Reimbursement for costs and/or fees for services of all plaintiffs’ counsel performing functions in accordance with this order will be set at a time and in a manner established by the Court after due notice to all counsel and after a hearing. The following standards and procedures are to be utilized by any counsel seeking fees and/or expense reimbursement.”); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (E.D. La. Dec. 26, 2009) (Pretrial Order No. 16), *available at* <http://propulsid.laed.uscourts.gov/orders.htm> (follow “Pretrial Order No. 16” hyperlink) (“Upon order of the Court, payments may be made from the [plaintiffs’ litigation expense] fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients. . . . All time and expenses are subject to proper and timely submission (each month) of contemporaneous records certified to have been timely received by Wegmann Dazet & Company in accord with this Court’s prior orders.”); *In re Vioxx*, 2005 WL 850963, at \*2 (“Reimbursement for costs and/or fees for services of all plaintiffs’ counsel performing functions in accordance with this order will be set at a time and in a manner established by the Court after due notice to all counsel and after a hearing. The following standards and procedures are to be utilized by any counsel seeking fees and/or expense reimbursement.”).

30. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. Civ.A. 99-20593, MDL 1203, 2003 WL 21641958, at \*6 (E.D. Pa. May 15, 2003) (“As a general principle . . . fees are to be allocated in a manner that reflects the relative contribution of the individual firms and attorneys to the

analysis.<sup>31</sup> One of the methods may involve a review of common benefit time and costs.<sup>32</sup>

Time and expenses submitted must be incurred only for common benefit work authorized by the court, the appointed leadership, or members of a committee.<sup>33</sup> If the transferee court is

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overall outcome of the litigation. As we acknowledged in establishing the [Fee and Cost Allocation] Committee . . . counsel who have been intimately involved in the litigation are ‘better able to decide the weight and merit of each other’s contributions’ than is the court. Although the ultimate decision with respect to the award and allocation of counsel fees is reserved for the court, we will give substantial deference to the recommendations of the Committee as long as we conclude that the recommendations are fair and reasonable.” (footnote omitted) (citations omitted)).

31. *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 586 F. Supp. 2d 732, 745–46 (S.D. Tex. 2008) (“The two traditional methods employed by courts for determining an attorneys’ fees award in common fund class action cases are (1) the percentage of the settlement fund (or contingent fee) method and/or (2) the lodestar method (multiplying the number of hours reasonably expended by a reasonable hourly rate and then, in its discretion, in the Fifth Circuit the Court can adjust the lodestar up or down by applying the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)). As will be discussed, there are hybrid versions of the two.” (footnote omitted) (citations omitted)). *See also In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 650 (E.D. La. 2010) (“Over the years courts have employed various methods to determine the reasonableness of an award of attorneys’ fees. These methods include the ‘lodestar’ method, which entails multiplying the reasonable hours expended on the litigation by an adjusted reasonable hourly rate; the percentage method, in which the Court compensates attorneys who recovered some identifiable sum by awarding them a fraction of that sum; or, more recently, a combination of both methods in which a percentage is awarded and checked for reasonableness by use of the lodestar method.” (citations omitted)).

32. *See In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 9), *available at* <http://www.laed.uscourts.gov/oilspill/orders/orders.htm> (follow “Pretrial Order #9” hyperlink); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9 at 1–2), *available at* <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow “Pretrial Order 9” hyperlink); *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 762–63 (E.D. La. 2011); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*13 (D. Minn. Mar. 7, 2008); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2005 WL 3541041, at \*1–2 (E.D. La. Nov. 28, 2005); MANUAL FOR COMPLEX LITIGATION, *supra* note 6, § 14.214. *See generally* ALAN HIRSCH & DIANE SHEEHY, FED. JUDICIAL CTR., AWARDING ATTORNEYS’ FEES AND MANAGING FEE LITIGATION (2d ed. 2005).

33. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973) (“[F]ew would dispute the basic proposition that one whose labors produce a favorable result deserves adequate recompense.”). *See also In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 266 (E.D.N.Y. 2006) (“Any lawyer who has worked for the common benefit of all federal Zyprexa plaintiffs . . . may apply for compensation from the common benefit account. Compensation will only be

working in coordination with state courts, it is also beneficial for the transferee judge to coordinate with state courts so that counsel in state courts can keep track of time and expenses in coordination with the MDL.<sup>34</sup> The court may involve or appoint a CPA to provide

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granted upon a showing that the attorney has provided significant assistance to all plaintiffs.”); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (E.D. La. Dec. 26, 2001) (Pretrial Order No. 16), available at <http://propulsid.laed.uscourts.gov/orders.htm> (follow “Pretrial Order No. 16” hyperlink) (establishing plaintiffs’ litigation expense fund to compensate and reimburse attorneys for services performed and expenses incurred for common benefit, to be paid pursuant to court order “or such other mechanism as the Court may order”); *In re Vioxx*, 2005 WL 850963, at \*2–9 (appointing PSC members; setting forth duties and responsibilities, including, *inter alia*, time and expense submission standards and guidelines and stating that “[a]ll time and expenses submitted must be incurred only for work authorized by the Plaintiffs’ Steering Committee,” the guidelines for which “are intended for all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL 1657”); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow “Pretrial Order 9” hyperlink) (setting forth standards and procedures for plaintiffs’ counsel’s time and expense submissions and stating that “[a]ll time and expenses submitted must be incurred only for work authorized in advance by the Plaintiffs’ Steering Committee,” the guidelines for which “are intended for all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL 2047”); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow “Pretrial Order #9” hyperlink) (establishing standards and procedures to be utilized by plaintiffs’ counsel seeking fees and/or expense reimbursement and stating that “[a]ll time and expenses submitted must be incurred only for work authorized in advance by the Plaintiffs’ Steering Committee (“PSC”), through the Plaintiffs’ Liaison Counsel or Executive Committee. Prior to the formation of the PSC, such work may only be authorized by Plaintiffs’ Liaison Counsel or the Court . . . . These Time and Expense Guidelines are intended for all activities performed and expenses incurred by counsel that relate to matters common to all claimants in MDL 2179.”).

34. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2006 WL 898105, at \*1 (E.D.N.Y. Apr. 6, 2006) (“Coordination and cooperation between state and federal courts has been encouraged.”); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. Mar. 16, 2012) (Pretrial Order No. 9A), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow “Pretrial Order 9A” hyperlink) (supplementing Pretrial Order No. 9 regarding time and expense submissions in state court Chinese Drywall Litigation matters); *In re Baycol Prods. Liab. Litig.*, MDL No. 1431, 2002 WL 32155266 (D. Minn. June 14, 2002) (establishing State-Federal Coordination procedure, including, *inter alia*, “securing an equitable allocation of counsel fees and costs for common benefit work and contribute to MDL 1431 cases transferred to this court from United States District Courts in accordance with 28 U.S.C. § 1407 or otherwise”); see also *In re Diet Drugs*, 2003 WL 21641958, at \*13–14 (denying non-affiliated state class action attorneys’ requests for attorneys’ fees higher than

accounting services, including compiling submissions and providing reports to the court on a regular basis.<sup>35</sup> Reports may be prepared monthly and include both time and expenses summarized monthly with backup detail and summaries of the submissions of all firms.<sup>36</sup> The court maintains this information under seal and on a confidential basis.<sup>37</sup> To ensure the court has current and accurate information for both time and expenses, counsel performing common benefit duties should timely submit their time and expenses on a monthly basis.<sup>38</sup> Each submitting law firm should attest to the accuracy and correctness of each submission.<sup>39</sup>

#### A. Time Reporting

Time entries for common benefit matters are to be kept accurately and contemporaneously by any lawyer submitting time.<sup>40</sup> The court may establish guidelines, such as those established by the American Bar Association adhering to Litigation Code Definitions<sup>41</sup>

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substantiated by sufficient time submissions and stating that it agreed with the petitioners that the non-affiliated state class action attorneys' "failure to abide by the requirements of Pretrial Order No. 2224 [was] problematic. Specifically, the lack of detail in their time entries and the fact that these records were not kept contemporaneously [made] it difficult to determine the amount of work, *if any*, that actually was performed by the [non-affiliated state class action attorneys]. . . . [T]he court [did] recognize the importance of maintaining accurate time records to substantiate claims that counsel performed significant work for which they should be compensated. During the fee hearing, the [non-affiliated state class action attorneys] conceded that entries in their time records [were] in fact unsubstantiated. . . . Thus, the award recommended for the [non-affiliated state class action attorneys was] decreased due to these deficiencies." (quoting Pretrial Order No. 2622 at 34–35 (emphasis added))).

35. See *supra* note 23 and pretrial orders cited therein.

36. See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow "Pretrial Order 9" hyperlink); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow "Pretrial Order #9" hyperlink); *In re Vioxx*, 2005 WL 850963.

37. See *supra* note 36 and pretrial orders cited therein.

38. See *supra* note 36 and pretrial orders cited therein.

39. See *supra* note 36 and pretrial orders cited therein.

40. See, e.g., *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. Civ.A. 99-20593, MDL 1203, 2003 WL 21641958 (E.D. Pa. May 15, 2003).

41. See AM. BAR ASS'N, UNIFORM TASK-BASED MANAGEMENT SYSTEM 8, available at <http://www.americanbar.org/content/dam/aba/migrated/litigation/utbms/utbms.authcheckdam.pdf> (providing litigation code definitions).

or some other definitions.<sup>42</sup> The definitions should provide that a lawyer details time for activities such as:

Monitoring—this includes review of emails, correspondence, pleadings, and motions to remain informed of issues and matters in the case.

Administration—this includes administration and strategic analysis of work accomplished by the appointed committees and chairmen of committees.

Discovery—this includes writing, editing, or arguing motions, as well as work involved with pleadings and matters before the court by timekeepers who are responsible for input.

Depositions—this includes preparation and participation in the taking of depositions.

Court appearances—this includes all court appearances other than for hearings and trial.

Trial and hearings—this includes time at trial, for trial preparation, and for appearances at hearings and preparation by those specifically assigned.

Appeal—this includes the drafting of arguments in the appeal process.

Settlement—this includes participation in settlement conferences and documentation.

Each lawyer must submit timekeeping entries with specific hourly increments, an outline of the activity, and a description of the work performed.<sup>43</sup>

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42. See, e.g., *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Exhibit A to Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow “Pretrial Order 9” hyperlink); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Exhibit A to Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow “Pretrial Order #9” hyperlink); *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2005 WL 850963 (E.D. La. Apr. 8, 2005) (Exhibit A to Pretrial Order # 6).

43. See *supra* note 36 and pretrial orders cited therein; see also *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL No. 1785, C/A No. 2:06-



*B. Expense Reporting*

Expense reporting is essential so that the court can monitor expenses incurred in the litigation and, at the appropriate time, address reimbursement to counsel.<sup>44</sup> The guidelines may delineate between shared costs and held costs.<sup>45</sup>

Shared costs include costs incurred for the common benefit of litigants as a whole.<sup>46</sup> No individual client-related cost should be considered as shared costs.<sup>47</sup> Reasonable costs of the litigation are common costs shared by all counsel who make contributions to a common cost fund.<sup>48</sup> The following categories are frequently considered shared costs:

- court, filing, and service costs;
- deposition and court reporter costs;

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MN-7777-DCN, 2008 WL 2330571, at \*5 (D.S.C. May 21, 2008) (“All counsel shall keep a daily record of their time spent in connection with common benefit work on this litigation, indicating with specificity the hours stated in tenth-of-an-hour increments, location and particular activity (e.g., ‘conducted deposition of John Doe’). Time entries that are not sufficiently detailed may not be considered for common benefit payments.”).

44. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig.*, No. MDL 721, 1989 WL 168401, at \*18 (D.P.R. Dec. 2, 1988) (Pretrial Order No. 127) (addressing, *inter alia*, reimbursement of defendants’ representatives in the Discovery Committee, including the consequences of failure to submit timely expense reports by stating that, “only one joint expense report has been tendered by the Discovery Committee. It is therefore ORDERED that unless all reports currently due are submitted, in the appropriate form, on or before November 14, 1988, counsel will be deemed to have waived any claim for reimbursement for the periods covered by the overdue reports.”).

45. *See, e.g., In re Bausch & Lomb*, 2008 WL 2330571, at \*5–6 (“Shared Costs are costs that will be paid out of the PSC Fund administered by Plaintiffs’ Personal Injury Lead Counsel. Each PSC member shall contribute to the PSC Fund at times and in amounts sufficient to cover plaintiffs’ expenses for the administration of the MDL. . . . Shared Costs are costs incurred for the common benefit of the MDL as a whole. No client-related costs, other than common benefit costs relating to the bellwether cases, shall be considered Shared Costs, unless exceptional circumstances exist and are approved by later order of this Court. All Shared Costs must be approved by Plaintiffs’ Personal Injury Lead Counsel prior to payment. . . . Held Costs are those that will be carried by each attorney in the MDL and reimbursed as and when determined by the PSC. . . . Held Costs are costs incurred for the global benefit of the MDL. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general. No client specific costs can be considered Held Costs, other than common benefit costs relating to the bellwether cases.”).

46. *Id.*

47. *Id.*

48. *Id.*

- document creation, operation, staffing, equipment, and administration costs;
- Plaintiffs' Liaison Counsel administrative costs (e.g., expenses for equipment, technology, courier services, long-distance calls, conference calls, telecopier services, electronic services, postage, meetings, travel, photocopying, printing, and temporary secretarial staff);
- court-appointed committee group administration expenses (e.g., meetings and conference calls);
- legal and accounting fees;
- expert witness and consultant fees;
- printing, copying, coding, shipping, scanning expenses (both in- and out-of-house or extraordinary firm cost);
- research fees for outside third-party vendors, consultants, or attorneys;
- common witnesses' expenses, including travel;
- translation costs;
- bank or financial institution charges;
- investigative services fees;
- claims administrator charges; and
- Special Master charges.<sup>49</sup>

Held costs include costs incurred for the global benefit of litigants that do not fall into shared-cost categories but are incurred for the benefit of all plaintiffs or defendants in general,<sup>50</sup> no specific client-related cost should be considered a held cost.<sup>51</sup> Held costs are typically subject to future reimbursement as approved by the court toward the end of the litigation. Held costs include:

- telefax charges;
- postage, shipping, courier, and certified mail charges;
- in-house printing and photocopying expenses;
- computerized research expenses (e.g., Lexis or Westlaw);
- telephone charges (actual charges for long-distance calls only); and

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49. *Id.*; *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), *available at* <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow "Pretrial Order 9" hyperlink) (shared costs included Claims Administrator charges and Special Master charges).

50. *See, e.g., In re Bextra & Celebex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, MDL 1699, 2006 WL 471782, at \*6 (N.D. Cal. Feb. 28, 2006) ("Held Costs are costs incurred for the global benefit of the MDL. Held Costs are those that do not fall into the above Shared Costs categories but are incurred for the benefit of all plaintiffs in general.")

51. *E.g., id.*

- travel expenses pursuant to travel limitations that may be established by the court<sup>52</sup> and may include travel expenses (e.g., airfare, reasonable ground transportation, hotel, reasonable meals and entertainment, parking, car rentals or cabs) for attorneys to attend depositions, court, or legislative matters.<sup>53</sup>

The submission of time records and expense records with supporting documents enables the court to verify common benefit time and expenses.<sup>54</sup> Some courts have appointed an accounting firm to assist with this function.<sup>55</sup> The accounting firm:

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52. *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2005 WL 850963, at \*4–5 (E.D. La. Apr. 8, 2005) (“Except in extraordinary circumstances approved by Plaintiffs’ Liaison Counsel or the PSC, all travel reimbursements are subject to the following limitations: (1) *Airfare*. Only the lowest-priced available coach airfare at time of booking . . . for a reasonable itinerary will be reimbursed. Notwithstanding the foregoing, first class airfare shall be allowed for cross-country flights that are in excess of four hours non-stop flight time or international flights. (2) *Hotel*. Hotel room charges will be reimbursed up to the greater of (a) \$250 per night excluding taxes, or (b) the average available room rate of [certain specified] hotels in that city. (3) *Meals*. Meal expenses must be reasonable. (4) *Cash Expenses*. Miscellaneous cash expenses for which receipts generally are not available (tips, luggage handling, pay telephone, etc.) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized. (5) *Rental Automobiles*. Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles were available. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form, and only the non-luxury rate may be claimed. (6) *Mileage*. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the member’s firm. The maximum allowable rate will be the maximum rate allowed by the IRS . . .”).

53. *See, e.g., In re Bextra & Celebrex*, 2006 WL 471782, at \*6 (“All costs of a substantial nature that meet these requirements and fall under the following categories shall be considered Held Costs and qualify to be submitted for consideration by the PSC and the Court for future reimbursement.”); *In re Vioxx*, 2005 WL 850963, at \*4–5.

54. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2010 WL 145278 (D. Minn. Jan. 8, 2010) (addressing individual firms’ cost and fee requests for common benefit reimbursements). The court began by enumerating the issues that arise with insufficient, disorganized, and otherwise inappropriate documentation submissions. *Id.*

The Court conducted a thorough examination of all submissions [pertinent to the subject order]. This was an enormous undertaking. The Court reviewed thousands of pages of receipts and submissions. Firms did not submit their receipts and summaries in a uniform manner. Even when expense summaries were submitted, the summaries often did not reflect receipts that were included in the submissions. And for a great majority of firms, receipts were submitted out of chronological (or any other) order and, as a result, the Court was forced to organize and categorize the voluminous receipts before it could cross-check the firms’

- receives attorney time and cost submissions;
- reviews time and cost submissions to ensure they meet court-ordered guidelines;
- communicates with law firms about the acceptance or rejection of their submissions; and
- generates monthly reports for the court-appointed committee and the court.<sup>56</sup>

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submissions for accuracy. Many firms reported time and expenses that were not related to their designated committee, the common benefit, or common costs. Some firms submitted receipts for expenses that were specifically delineated as expenses for *other* MDLs. Needless to say, the firms' lack of organization in collecting and recording their expenses resulted in the Court taking a great deal longer to rule on these matters than the Court would have had the firms been organized. Any delay that has occurred in the Court reaching a determination can be attributed to the firms.

*Id.*

55. *In re Vioxx*, 2005 WL 850963, at \*3; *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow "Pretrial Order 9" hyperlink) (appointing CPA firm and requiring monthly time and expense submissions to the CPA firm "electronically at the website set up to handle time/billing submissions 'GarrettCo-CCMS.com'"); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow "Pretrial Order #9" hyperlink) (appointing CPA firm and requiring monthly time and expense submissions to CPA firm "electronically at the website set up to handle time/billing submissions 'www.GarrettCo-CCMS.com/bp/'"). See, e.g., *In re Bextra & Celebrex*, 2006 WL 471782 (establishing common benefit fund; setting forth, *inter alia*, standards and procedures for time and expense reimbursement; and approving of "the retention of . . . the accounting firm . . . to assist and provide accounting services to Plaintiffs' Liaison Counsel and the Plaintiffs' Steering Committee"); *In re Diet Drugs (Phentermine/Fenfluramine /Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, No. 99-20593, 2010 WL 3292787 (E.D. Pa. Aug. 19, 2010) (discussing background of MDL relevant to common benefit attorneys' petition for reimbursement of fees and expenses and stating that "[t]he [Plaintiff's Management Committee] and Common Benefit Attorneys are required to file periodically reports setting forth the amount of time they spent on common benefit activities, as well as the hourly value of that time. . . . [A] C.P.A. was appointed by the court to audit these time and expense reports.").

56. See, e.g., *In re Bextra & Celebrex*, 2006 WL 471782 (establishing common benefit fund; setting forth, *inter alia*, standards and procedures for time and expense reimbursement; and stating that the accounting firm "will assist in compiling submissions and will provide reports to Plaintiff's Liaison Counsel who shall retain them. These reports will include both time and expenses and will summarize, with back-up detail, the submissions of all firms. . . . Time and expense submissions must be submitted timely to Plaintiffs' Liaison Counsel so they can be compiled and submitted to [the accounting firm]. It is therefore

The process of submitting time and cost information can be accomplished by email, regular mail, or hand delivery.<sup>57</sup> Once received, the independent CPA has the information in a common system that integrates the submissions so that the data can be managed and consolidated into reports.<sup>58</sup> In the *Vioxx, Chinese-Manufactured Drywall*, and *Deepwater Horizon* MDLs, the court appointed the CPA firm of Philip A. Garrett, and the Case Cost Management System (CCMS), a web-based system, was utilized.<sup>59</sup>

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essential that each firm timely submit its records for the preceding month.”); *In re Diet Drugs*, 2010 WL 3292787 (“Pursuant to PTO No. 7763A, on or before March 15 of every year, [the court-appointed CPA] must file a report on the time and expenses submitted for examination, [sic] Each ‘Audit Report’ concerns the professional time spent and expenses incurred during the immediately preceding calendar year. No more than once per calendar year and within thirty days of the filing of the Audit Report, Class Counsel, Plaintiffs’ Liaison Counsel and any Eligible Fee Applicant who expended professional time or incurred expenses pursuant to the written request and direction of Class Counsel or Plaintiffs’ Liaison Counsel, which are included in each such Audit Report, may file a petition for an award of attorneys’ fees. These fees will be paid from the Reserve Funds for the period covered by the Audit Report. They may also seek reimbursement of expenses from the Settlement Fund and/or the MDL 1203 Fee and Cost Account.”).

57. See, e.g., *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 1873 (E.D. La. Mar. 24, 2008), available at <http://www.laed.uscourts.gov/FEMA07md1873/Orders/Orders.htm> (follow “Rec. Doc. 115” hyperlink) (setting forth, *inter alia*, standards for time and expense submissions, including that “[a]ll submissions shall be transmitted electronically utilizing Microsoft Excel templates substantially in the form set forth in Exhibit A to this Order for time submissions and Exhibit B to this Order for expense submissions. Any hard copy documentation supportive of a firm’s time and expense submission should be sent by email to [court-appointed CPA’s email] or via first class mail to [court-appointed CPA’s office.]”); *In re Vioxx*, 2005 WL 850963, at \*3 (setting forth, *inter alia*, general standards for plaintiffs’ counsel’s time and expense submissions, including that “[a]ll submissions shall be transmitted electronically or in hard copy to Plaintiffs’ Liaison Counsel. If hard copy submissions are made, an original and one duplicate copy must be provided.”).

58. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 479 (E.D. Pa. 2008) (discussing the value of the reports by the CPA appointed by the court to audit all applications for reimbursement of fees and expenses). In Pretrial Order No. 16, this court set forth various procedures governing the recording and reimbursement of fees and expenses. *Id.* “Our analysis of the eligible time devoted to this case by the Joint Fee Applicants is made possible by the reports of . . . the court-appointed auditor. [The court-appointed auditor] has now filed three reports with this court.” *Id.*

59. *In re Vioxx*, 2005 WL 850963, at \*3; *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow “Pretrial Order 9” hyperlink) (appointing CPA firm and requiring monthly time and expense submissions to the CPA firm “electronically at the

The CCMS allowed attorneys, administrators, and the court to access data from anywhere in the world. The entire process was handled electronically without utilizing paper or hard-copy documentation. Participating common benefit counsel's information was entered electronically through a portal, date stamped, and preserved electronically throughout the litigation. The submitted data remained confidential, and only a user with a unique login identifier could access certain secure information.<sup>60</sup> After receipt of time and expense submissions, the CPA firm reviewed the submissions and registered the accepted data in the system. The common portal for the CCMS allowed attorneys to log in and view whether their submissions were accepted, rejected, or withdrawn, as well as the CPA firm's reasons for its decision and the work papers on which the CPA firm relied.<sup>61</sup>

Once reviewed, time and expense submissions are divided into three major categories: held costs, shared costs, and time.<sup>62</sup> On a monthly basis, the court and lead counsel, or a court-appointed executive committee, receive reports that detail and provide financial statements, which include full descriptions of all time submissions, held costs, and shared costs. All supporting receipts, cancelled checks, and invoices are collected in PDF files and tied directly to the submission for which the cost was approved. This information can be accessed online through the CCMS portal.

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website set up to handle time/billing submissions 'GarrettCo-CCMS.com'); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow "Pretrial Order #9" hyperlink) (appointing CPA firm and requiring monthly time and expense submissions to CPA firm "electronically at the website set up to handle time/billing submissions 'www.GarrettCo-CCMS.com/bp/").

60. See *Case Cost Management System Login for MDL-1657: Vioxx Products Liability Litigation*, GARRETT & CO., <https://www.garrettco-ccms.com/vioxx/> (last visited Sept. 4, 2013); *Case Cost Management System Login for MDL-2047: Chinese Manufactured Drywall Products Liability Litigation*, GARRETT & CO., <https://www.garrettco-ccms.com> (last visited Sept. 4, 2013); *Case Cost Management System Login for MDL-2179: BP (Deepwater Horizon)*, GARRETT & CO., <https://www.garrettco-ccms.com/bp/> (last visited Sept. 4, 2013). All CCMS access required the CPA firm to issue a username and password to log in to the portal.

61. See *supra* note 60.

62. See, e.g., *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (E.D. La. July 28, 2009) (Pretrial Order No. 9), available at <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow "Pretrial Order 9" hyperlink) (setting forth time and expense reporting guidelines, including, *inter alia*, designation as time, held costs, and shared costs).

Finally, the CPA firm receives and reviews time submissions, tracked by hours expended and tasks. Time entries generate reports that assist the court-appointed committee and the court in monitoring the attorneys' work. The CPA firm reviews time submissions for the reasonableness of the hours spent per day, whether the work benefitted individual clients only or all plaintiffs, and whether there are any unusual entries. Once accepted, reports that reflect information, such as which individuals have the most hours, which firms have the most hours, which tasks required the most hours, and the different categories of shared and held expenditures, can be generated.

The CCMS also generates a report for attorneys in months that their firms have submitted entries. In addition, the system sends out an email alerting each user of missing submissions. This procedure, along with each firm's ability to view its status on all submissions, fends off later allegations that the firm was unaware of its accumulated hours or costs or of any missing submissions. In addition to these routine reports, special reports can be requested by the court or the court-appointed committees at any time.

The time and cost reports provide three major benefits that traditional spreadsheet software does not offer:

- A lodestar report—This report considers the value of the time accepted. It is produced at the end of the litigation to assist in the fee-allocation process. This report is key to the court-appointed committee's (or fee committee if one has been appointed) analysis of the effectiveness of an individual's and a firm's efforts. Concurrent time reporting, as well as the ability to isolate the actual description of a person's time, is extremely valuable in MDL.
- The cost of specific bellwether trials—Should the court consider an award of fees and costs for a specific trial, the information can be easily produced and verified. Without such a system in place, counsel and the court may not record and track trial-specific tasks, and counsel may need to scramble to gather the necessary information, which is less reliable.
- Management of those assigned to perform common benefit tasks—The court or a court-appointed committee may assign specific projects or appoint subcommittees for certain projects. It is the court-appointed committee and the committee chairperson's responsibility to monitor these projects to completion. The time reports reflect the hours of work performed on these specific efforts.

In short, the major benefits of using the CCMS in a MDL case are:

- confidentiality;
- adherence to court guidelines;
- reliability;
- timeliness;
- transparency;
- versatility (web-based);
- ease of use and accessibility in monthly reporting;
- adherence to IRS guidelines; and
- adherence to banking regulations.

The cost to the MDL for the use of a system, such as CCMS, and an accounting firm's assistance in compiling time and expense records varies with the size of the case. A system to account for time and costs has been used for very small cases with less than 100 timekeepers and for much larger cases with more than 1,000 timekeepers. Because the system automatically sorts the information, the only cost incurred is for the CPA firm's time spent reviewing submissions. Because the CCMS is searchable, secure, and more efficient than a manual system or a spreadsheet, the CCMS is the most cost-effective way to manage the time and expense reporting and reimbursement process in an MDL.