

Discovery in Multidistrict Litigation Drafting Team Outline

The Sedona Conference

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THE SEDONA CONFERENCE WORKING GROUP 1

DISCOVERY IN MULTIDISTRICT LITIGATION: RESOURCES FOR TRANSFEREE COURTS AND LITIGANTS

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OUTLINE

I. Introduction

In the 2022 Midyear Meeting, a panel led a discussion of unique eDiscovery challenges in multidistrict litigation. Following the meeting the Steering Committee chose to form a Brainstorming Group. Members of that group, joined by the Hon. Cynthia Rufe and the Hon. Michael Baylson, discussed their work and recommendations at the 2022 Annual Meeting.

There was consensus at and following that meeting that a Sedona Conference publication focused on MDL discovery could serve as a resource for practitioners and the judiciary and, in particular, new transferee judges. The Steering Committee formed the MDL Drafting Team and approved a charter for the Team's work (appended to this outline).

The MDL Drafting Team was tasked with developing Sedona Conference resources for transferee courts and litigants in multidistrict/multi-party actions to prompt early attention by the parties and court to processes and procedures designed to: (a) promote more efficient discovery, (b) advance resolution of substantive questions, and (c) avert later, more burdensome, discovery processes and disputes.

The Team's Charter suggested consideration of:

1. involvement of eDiscovery specialists in early planning and discovery stages—including centralized attorney leadership, discovery liaisons, vendors, and, where appropriate, special masters skilled in eDiscovery;
2. procedural planning and disclosure considerations that, if the subject of early attention, will promote efficiency and reduce future burdens and disputes, including initial/amended discovery plans, preservation discussions and planning, discovery and privilege protocols, dispute resolution processes, and coordination of discovery with other tribunals; and
3. identification of early opportunities for direct and decisive involvement of the court on discovery issues that, left unresolved, might misdirect resources from substantive matters that will advance the litigation.

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While the team's work was underway, the MDL Subcommittee of the Advisory Committee on Civil Rules proposed a new Rule 16.1 for Multidistrict Litigation. Proposed Rule 16.1—which has already been the subject of substantial public comment—includes multiple topics related to the work of the Drafting Team.

Following the Public Comment period, which ended in February 2024, the MDL Subcommittee revised and reorganized the draft Rule for further consideration by the Advisory Committee for Civil Rules. On April 9, 2024, the Advisory Committee voted unanimously to approve and advance Rule 16.1, sending it next to the Committee on Rules of Practice and Procedure—which is more commonly referred to as the “Standing Committee.” The Standing Committee next meets in June 2024. Any amendment or new Rule ultimately approved by the Standing Committee will then proceed to the Judicial Conference, the Supreme Court, and Congress—a process that is currently scheduled to extend to December 2025.

The Drafting Team is seeking input from the membership regarding proceeding with work on an MDL resource even as the work of the Rules Committee progresses and in light of the comments provided to the Advisory Committee during Rule 16.1's public comment period. Specifically, to consider whether the mandate of the charter will benefit from fuller exploration of the techniques referenced in Rule 16.1—and others not excluded by Rule 16.1—that will assist Bench and Bar in addressing the unique discovery challenges that arise in MDL practice.

II. The rationale for and challenges of focus on early-stage MDL practice

- A. More than 50 percent of the federal civil docket is comprised of multidistrict litigation.
- B. No MDL is the same, but a consensus collection of resources may help bench and bar develop a list of considerations when developing a discovery plan for orderly pretrial activity.
- C. Transferee courts have a wealth of information stemming from experience in a variety of MDLs, but adoption of successful practices, and avoidance of unsuccessful practices, often depends on word-of-mouth.
- D. The impact of breakdowns in MDL discovery can have an impact on a large number of parties and undermine the promise of multidistrict litigation.

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III. Proposed Federal Rule 16.1.

Among other things, the most recent draft of Rule 16.1:

- Suggests that an MDL transferee court “should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.”
- Suggests that the MDL transferee court “should order the parties to meet and to submit a report before the conference.”
- Requires parties to address “any matter the court designates” in the report, further requiring that, “unless the court orders otherwise,” the parties provide their “views” and “initial views” on various matters. This includes the parties’ initial views on “discovery, including any difficult issues that may arise” and “whether any matters should be referred to a magistrate judge or a master.”

The public comment process for Rule 16.1 ended on February 16, 2024, and resulted in hundreds of pages of comments and testimony addressing the proposed rule. Given some overlap of Rule 16.1 and topics that are the subject of the Drafting Team’s work, the Drafting Team is studying the work of the Rules Committee and the public’s input to that work, including whether consensus would be possible.

IV. Review of existing literature on discovery management in MDLs

- A. Existing Sedona Conference publications with foundational principles and tools for participants in MDL practice. (Highlight specific portions of each publication with specific relevance to multidistrict/multi-party practice).
- B. Techniques utilized in a representative selection of MDLs.
- C. Federal Judicial Center, *Manual for Complex Litigation* (4th Ed.) (including a discussion of ongoing work to produce a new edition of this 20-year-old resource).
- D. Hon. David G. Campbell & Jeffrey A. Kilmark, *Advice to a New MDL Judge on Discovery Management*, 89 UMKC L. Rev. 889 (2021)
- E. Federal Judicial Center, *Coordinating Multidistrict Litigation: A Pocket Guide for Judges* (2013)

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- F. Adam K. Levin & Kyle M. Druding, *Against MDL Discovery Exceptionalism: A Defense Practitioner's View of Managing Discovery in Large-Scale Consolidated Proceedings*, 89 UMKC L. Rev. 907 (2021).
- G. Hon. Jane R. Roth, Coordination of Litigation in State and Federal Courts, in *Business Commercial Litigation in Federal Court* 147 (Robert L. Haig, ed., 3d ed. 2011).
- H. Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges* (Federal Judicial Center & Judicial Panel on Multidistrict Litigation, 2011).
- I. *Guidelines and Best Practices for Large and Mass-Tort MDLs* (Bolch Judicial Institute, Duke Law School, 2d Ed.)
- J. Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 102 Colum. L. Rev. No. 8 (2020)
- K. Robert H. Klonoff, *Federal Multidistrict Litigation: in a nutshell* (2020)
- L. Civil Rules Committee (proposals/analysis/comments).

V. The stages of discovery in multidistrict litigation

- A. Variability in structures/discussion of stages of an MDL
- B. Timing of MDL formation and the possibility of pre-formation discovery
- C. Discovery and MDL structure.

VI. General recommendations for attention to discovery early in the lifecycle of an MDL

This portion will build on the prior sections and depend on drafting committee and membership consensus.

- A. Pre-leadership, interim leadership, and impacts on the discovery process.
- B. Procedural planning and transparency.
- C. Specialists/adjuncts (discovery liaisons, discovery masters, technical consultants, and vendors).

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- D. Creating and revisiting discovery plans.
- E. Managing MDL discovery disputes.
- F. Federal/state coordination.

THE SEDONA CONFERENCE WG 1 – MDL DRAFTING TEAM

CHARTER MANDATE

The drafting team is tasked with developing Sedona Conference resources¹ for courts and litigants in multidistrict/multi-party² actions to prompt early attention by the parties and court to processes and procedures designed to promote more efficient discovery, advance resolution of substantive questions, and avert later, more burdensome, discovery processes and disputes. The drafting team should consider: (i) the involvement of eDiscovery specialists³ in early planning and discovery stages—including centralized attorney leadership, discovery liaisons, vendors, and, where appropriate, special masters skilled in eDiscovery⁴; (ii) procedural planning and disclosure considerations that, if the subject of early attention, will promote efficiency and reduce future burdens and disputes, including initial/amended discovery plans, preservation discussions and planning, discovery and privilege protocols, dispute resolution processes, and coordination of discovery with other tribunals; and (iii) identification of early opportunities for direct and decisive involvement of the court on discovery issues that, left unresolved, might misdirect resources from substantive matters that will advance the litigation.

¹ Although all MDLs are different, and some may have more significant management challenges than others, the resources should identify and consider discovery management topics that, if considered by courts and parties, will advance the proceedings.

² The Brainstorming Group received feedback at the 2022 Annual Meeting that the proposed resources might benefit participants in other complex litigation. This charter is drafted to account for that comment. This is in line with the ongoing work of the Federal Rules Advisory Committee, which noted that its ongoing work on an MDL rule might also benefit courts and parties in other multi-party actions that were not created by an MDL transfer order.

³ Depending on the matter, subspecialists may be beneficial.

⁴ The Brainstorming Group also identified attorney leadership succession planning as an important organizational question.

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