

The Sedona Conference WG1 Unique eDiscovery Challenges in Multidistrict Litigation Brainstorming Group Outline

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The Sedona Conference Working Group 1 Annual Meeting 2022

Brainstorming Group Report: Unique eDiscovery Challenges in Multidistrict Litigation

Dialogue Outline

1. This BG recommends pursuing publication of a checklist or handbook to provide the judiciary feedback from litigators' perspectives, from both sides of the v., proposing helpful procedures in MDLs.
 - a. There is existing guidance for courts and practitioners, but there is a need for comprehensive and practical guidance focused on discovery practice.
 - b. The brainstorming group recommends a publication like the "Jumpstart Outline," "Resources for the Judiciary," or a hybrid of the two. A piece that identifies topics that bench and bar should be thinking about is most likely to gain consensus. Consensus may be possible on a commentary, although less likely. Based on internal BG discussions, there are issues upon which consensus seems less likely (identified below).
 - c. The intent of the publication would be to trigger discussions early in the life of MDL on processes that will promote more efficient discovery, reduce cost, and involve the court in the early phases of discovery in a manner designed to reduce later, more significant, discovery disputes.
 - d. Given the large numbers of participants in MDL, and the potential life span and changing interests of the participants over that life span, we recommend focusing on identification and organization of specialists, centralization of roles, and succession planning. Although past Sedona Conference guidance on specialization has not extended to discovery masters, we recommend considering factors MDL courts may want to consider with respect to the use of special masters or specialized special masters. We also recommend including topics relating to procedural planning and transparency. While consensus may be more challenging, we also suggest including topics the court may consider regarding early disclosure of case specific information.
3. **Request For Membership Feedback:**
 - a. Does the membership agree that a publication identifying issues and procedures to be addressed in early MDL proceedings would be helpful? If so:
 - i. As a checklist?
 - ii. As something more robust?

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- b. What issues should be identified and included? Ideas laid out below.

2. Potential consensus topics.

- a. Early consideration of the use of specialists in MDL proceedings, both class actions and mass proceedings.
- i. The Sedona Conference has long recognized the important role of specialized discovery counsel, consultants and vendors. (See, e.g., Comment 6.e to Sedona Principle 6).
 - ii. Given the large number of parties and counsel, identification and organization of discovery specialists—including attorney leadership, discovery liaisons, and vendors—in the transferee court is both more important and more difficult.
 - iii. The players in MDL are also more likely to change over time. Over the lifespan of an MDL, parties may withdraw, settle or go through bankruptcy. The identification and organization of specialists should also consider succession planning.
 - iv. Transferee courts often ask or direct the parties to consider or engage special masters. Although past Sedona Conference guidance on specialization has not extended to discovery masters, we recommend considering factors MDL courts may want to consider with respect to the use of special masters or specialized special masters. Group members had both positive and negative experience with discovery masters. And there was a strong view that, even where discovery masters are involved, some discovery issues in MDL require early, direct and decisive involvement of the transferee court. There was consensus that more guidance is needed concerning whether and when to involve discovery masters and the how to better define the scope of their assignments.
 - v. In some MDL, subspecialties within the eDiscovery space may be necessary. The use of ESI liaisons can be very helpful as well as teams focusing on search terms and custodians; specialists in TAR; specialists in data preservation and collection from large volumes of individual plaintiffs; specialists in data retention and database management in matters involving “big data”; etc.
 - vi. We also recommend that guidance consider the importance of centralized management of the discovery process to better harness the skills of

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specialists.

b. Procedural planning and transparency.

- i. MDLs highlight the potential for tension between Sedona Principle 3 (“As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.”), and Sedona Principle 6 (“Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”).
- ii. This topic would focus on outlining discussion topics for bench and bar focused on the enhanced importance, early in the life of the MDL, on the discovery process, initial and amended discovery plans, preservation discussions and planning, discovery protocols, dispute resolution practices that may be particularly useful in the MDL.

c. Initial/Early Disclosure of Case-Specific information in the transferee court.

- i. The group had focused discussion concerning whether reciprocal, early exchange of certain information—beyond the requirements of Fed. R. Civ. P. 26(a)(1)—might advance an MDL (including when that exchange might occur), assist with vetting of claims and cases, lead to more focused discovery and motions practice, and inform the selection of bellwether plaintiffs and claims (where applicable).

This topic of the use of fact sheets and registries as some of the tools deployed to vet claims/cases and during the bellwether process was one of the more challenging topics in our assessment of whether consensus is possible. Group members largely split based on affinity group on the practical value of these tools.

1. Plaintiff and Defendant Fact Sheets. Group members differed on the value of Fact Sheets. Plaintiffs’ counsel view fact sheets as useful depending on the case, when disclosure of information is required and by whom, and in conjunction with a reciprocal defense case-specific fact sheet and implementing order. Defense side practitioners felt that, in practice, many PFS are too barebones and come too late to be useful in better understanding and vetting claims and claimants. As a result PFS often do not fulfill the promise of more focused discovery or advancement of the MDL. This may be an area where consensus cannot be achieved.

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2. Registries. There was a difference of views between affinity groups as to whether registries—involving plaintiff-specific evidence of product identification and injury—should be the subject of WG1 attention. The discussion covered the types of information to be disclosed in registries, the timing of disclosure, and whether registry data is fairly considered part of the discovery process and early claims vetting process, or the claims resolution process. Plaintiff counsel generally felt that registries are an administrative rather than discovery tool, and involve unfiled/unvetted cases, as such discovery at this point in litigation was improper, whereas defense counsel's view is that should a court order use of a registry, fundamental proof of use and injury records should be produced in order to enable the court and parties to conduct early vetting, evaluate the scope of litigation, and inform case management decisions. There may also need to be discussion about whether they should be used in MDL. This may be an area where consensus cannot be achieved.
- ii. Coordination with other matters. Group guidance on whether, when and how to leverage and re-use information disclosed or produced in other matters (like regulatory investigations or related litigation) could be beneficial and is not the subject of extensive existing guidance. It also worth considering guidance on formal or informal coordination between transferee courts and tribunals with related actions (i.e., state courts).