



MM REPORTER

THE REVIEW OF
MEDICAL INFORMATION MANAGEMENT
FOR LITIGATION



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WHAT'S NEW AT LMI

- LMI congratulates interns Megan Katz and Brendan Sala on their acceptance into law school. This fall, both Megan and Brendan will be attending the Cleveland Marshall School of Law. LMI continues to be committed to providing internship opportunities to local students and we are delighted to support our employees and interns as they progress through their educational and career journeys.
Congratulations, Megan and Brendan!
- LMI is pleased to announce another year of participation in the **Cleveland Corporate Challenge 2017**. The event is a corporate athletic competition, designed to promote company camaraderie, employee wellness and business networking while supporting local charities. LMI has been participating in the Challenge since 2009.
- LMI employee Megan Pizor, Esq., participated in a panel discussion at the Defense Research Institute (DRI) 2017 Toxic Tort & Environmental Law Seminar, entitled "TECH Talks: Three Fast-Paced Presentations on How Technology Can Help You Develop and Present Your Case." Megan specifically presented on the use of online plaintiff fact sheets and innovative discovery exchange platforms to efficiently and cost

effectively manage discovery in complex litigation. For more information, visit www.dri.org.

- LMI employee Kai Jones was recently appointed as Secretary of the Board for Coach Sam's Inner Circle Foundation, a nonprofit dedicated to providing elementary students with tools and opportunities to develop the necessary skills to succeed in school and beyond. For more information, visit innercirclefoundation.org
- LMI is delighted to announce the launch of sister company, Advance Talent, LLC. For organizations requiring temporary, project-based, or permanent staff positions in the legal and/or non-clinical medical support fields, Advance Talent provides trained, experienced workforce solutions to meet human capital needs. Advance Talent's workforce solutions are an excellent complement to LMI. According to LMI Founder Elizabeth B. Juliano, "Advance Talent is able to place highly trained and skilled staff with those clients who require resources for specific matters or projects, but do not require the full support or broader spectrum of services that LMI typically provides." For more information, visit advancetalent.com.



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MAKING FACT SHEETS, DISCOVERY & DOCUMENT MANAGEMENT WORK FOR YOU

Plaintiff Fact Sheets and Coordinated Discovery

In complex litigation, one of the key benefits of consolidation – in federal or state court – is the ability to coordinate discovery efforts across multiple individuals and parties, saving countless time and expense.¹

Plaintiff Fact Sheets (PFSs) are standardized forms frequently used in multi-district litigation (or other coordinated discovery proceedings) to obtain general information about plaintiffs' claims.² They are typically court-approved and created through party collaboration and agreement. PFSs replace or simplify certain aspects of fact discovery (primarily interrogatories) and are tailored to provide both plaintiffs and defendants with information critical to claims or defenses, as well as ultimately enable counsel and judges to narrow down the pool of cases for further discovery and initial bellwether trial selections.³

Along with the completion of a PFS, plaintiffs are also frequently required to produce information verifying their basic factual allegations, such as a limited number of medical records, witness statements, damages receipts, etc.⁴ This documentation can help allay concerns that multi-district litigation (MDL) or other coordinated proceedings "invite the filing of claims without adequate investigation."⁵

The PFS form and process require something of a balanced approach to support streamlined, cost-effective discovery while simultaneously allowing for sufficient early case assessment without duplication of efforts later in the process, should a full case workup become necessary.

Early Case Assessment, Bellwether Selection and Matter Resolution

Increasingly, courts in complex or multi-party cases are utilizing a bellwether approach to trial selection and, ultimately, matter resolution. This approach has been used in many cases, including claims involving antitrust, product liability, employment practices, intellectual property and other practice areas. The bellwether process allows the parties and the court to "test" a few cases very early in the process, leading to a better understanding of the global plaintiff population. This is done by selecting a group of plaintiffs to represent the whole; these representative cases go forth to trial and the results act as the "bellwether" to predict other, similarly situated plaintiff trial outcomes. In other words, the verdicts from this grouping are extrapolated to the remaining cases, ultimately leading to information regarding liability and damage ranges for a majority of the cases.⁶ With increasing frequency, this process is being done with the goal of moving towards global settlement, with the bellwether results being utilized for valuing grouping of claims into settlements pools.⁷

There are a variety of ways to select the representative plaintiffs to serve as the bellwethers. In the *In Re: Benicar (Olmesartan) Products Liability Litigation*, the judge used a random selection process to choose thirty cases for full pretrial development.⁸ This "random selection" approach



led to a large number of chosen cases being dismissed with prejudice by plaintiffs' counsel, as many of the cases were ones that should arguably never have been filed.⁹

Another approach is to allow counsel for each side to choose their own cases, usually resulting in the selection of claims that are the most severe (for plaintiffs) and the most defective (for the defense).¹⁰ This can result in distorted or inaccurate data, as the largest volume of cases often falls somewhere in between; thus, the counsel selections are not necessarily representative of the population as a whole and may not result in valid data to encourage early case resolution.¹¹

Yet another, perhaps slightly more sophisticated, approach to bellwether selection is to select cases by criteria that are both meaningful and representative of the population as a whole.¹² The criteria should correspond to foreseeable issues in the case, such as type or severity of injury, time of injury, or location of the claimant.¹³ In order to do this, however, it is critical to have an early understanding of what is representative of the population as a whole, as well as to have sufficient information on each claimant to allow measurement of whatever meaningful criteria are identified for the particular bellwether selections.¹⁴

Plaintiff Fact Sheets: Historical to Modern Approach

The standard process for completing a PFS is fairly simple: plaintiff completes the PFS, plaintiff counsel reviews the response and finalizes the PFS before serving on the defendant(s). Defense counsel will then review for any deficiencies. Critical deficiencies, such as failure to provide sufficient claim information, are denoted and notice is provided to the plaintiff's attorney, summarizing the identified deficiencies and the deadline for curing such deficiencies to avoid dismissal of the claim. (This process, including what information is considered to be critical, as well as timeframes for curing deficiencies in order to avoid dismissal, is generally agreed to by the parties and/or clearly mandated within a Case Management Order.)

The PFS process has historically been managed via mail, fax, email or, more recently, secure file transfer software. However, this process (completing the fact sheets, reviewing the fact sheets, sending to opposing counsel, and opposing counsel review) can be time-consuming and arduous; client data must be manually entered into each party's case/document management system in order to analyze information and assess the pool of litigants.

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Recent innovations at the intersection of law and technology have produced e-discovery, technology-assisted document review, and other necessities in order to keep up with the ever-increasing volume of data associated with claims and litigation, across all practice areas. Similarly, in multi-party matters, the use of online portals to complete, manage and exchange discovery is innovating the PFS process.

The PFS – and supporting documents, such as photographs, medical records, authorizations, etc. – can be completed, reviewed and served upon opposing counsel through a central, secure, online portal. Advanced programming can allow the technology to determine which questions are applicable to each individual claimant based on responses as they are entered. There is a greatly reduced potential for deficiencies, as the system can “force” certain questions to be answered before the data can be saved, as well as recognize potential errors (e.g., exposure dates that occur after a specified event, etc.).

Once data is entered, the responses can be tracked, reviewed and approved by plaintiffs’

counsel prior to submission; once approved, the document is automatically sent to opposing counsel. As information is entered, it can be tracked, sorted and analyzed by parties, insurers, judges, or mediators – all of whom can have customized views created to allow access only to that data which is relevant and/or approved for their use by party agreement or court order. All data is stored in one central, secure location, where users can generate custom reports with case-specific inquiries in sortable spreadsheets.

Work queues and document generation capabilities provide the ability for counsel to conduct more efficient deficiency reviews, automatically generate deficiency notices to opposing counsel, and track claim submission status and associated deadlines. Should a global settlement ultimately be reached, online discovery exchange platforms can also be used for submission and review of settlement enrollment packages.

Online Discovery Exchange: Benefits and Case Studies

There are a number of benefits to utilizing online discovery exchange platforms. The centralization of PFSs and supporting discovery documents makes handling large case inventories more seamless and efficient. It allows for early access to claimant and/or population data and analytics, thus encouraging early settlement negotiations or bellwether selections through timely assessment of claims, injuries and demographics.

In March of 2017, Litigation Management, Inc. (LMI) conducted a market survey regarding the use of online PFS and document exchange platforms,

including interview of various parties currently using this technology. Because the majority of the interviews involve matters that remain active at the time of this paper's intended publication, all sources have requested confidentiality due to active litigation pending. What follows is a summary of the information gleaned from LMI's market research and interviews.

Attorneys

In general, attorneys – both plaintiff and defense – using online discovery exchange platforms report three main categories of benefits: better use of firm/attorney resources; reduced fees and expenses through better insight into necessary discovery; and more timely – and cost effective – matter resolution, through mediation, settlement or trial.

I. Resource Allocation

Attorneys using online systems consistently report a more organized manner of accessing and storing data, resulting in improved efficiencies and better utilization of firm resources, primarily at the paralegal and associate levels. Attorneys and paralegals alike are spending less time managing details, such as deadlines and deficiency reviews and are able to re-dedicate more time – between 15-20% on average – to higher-value activities, as well as take on increased caseloads.

II. Fees & Expenses

Fewer deficiencies also means a reduced need for re-keying of data, as well as access to more comprehensive information earlier in the process. Early understanding of the plaintiff population

results in improved decision-making regarding what additional records – medical, etc. – should be collected, if at all, and for which plaintiffs. This results in fewer record requests, as well as reduced duplication of efforts if additional records need to be collected later in the process. Average results are about 20-35% cost savings on record collection fees and expenses.

III. Matter Resolution

The ability to access metrics, reports and analytics very early in the process helps set the stage for initial strategy decision-making. Since all parties are accessing the same pool of data – albeit through different views, with slight variations to which parties are accessing certain types of data – there is an improved level of communication and less back-and-forth amongst and across parties. Although there are a number of variables, such as matter type and number of plaintiffs, parties using these systems have been fairly consistent in reporting 30-65% reduction in overall matter resolution time.

In addition to the foregoing, attorneys appreciate the option to host data offsite in a secure manner, thereby reducing the need to dedicate firm information technology bandwidth and staffing resources. This is especially helpful for discovery matters involving large files, such as audio or video files.

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Judges & Mediators

As previously mentioned, there are a number of ways to go about bellwether selection. However, several recent federal MDL Case Management Orders (CMOs) have been pointing towards a trend of selecting bellwether cases using criteria that are both meaningful and representative of the population as a whole.¹⁵ The criteria should correspond to foreseeable issues in the case, such as type or severity of injury, location of claimant, etc.¹⁶ In order to do this, however, it is critical to have an early understanding of what is representative of the population as a whole – which requires sufficient information on each claimant to allow some form of measurement.

Online data entry makes this a much more simplified process – and judges are embracing this. In one particular case, the judge even went so far as to “suggest” the use of a third party data analytics firm and associated online fact sheet and discovery management platform.¹⁷ There are at least three coordinated proceedings currently pending in federal court that are using these types of tools – with the judge’s approval.¹⁸ There may also be unfiled cases using a version of an online fact sheet

and discovery exchange platform for mediation purposes. The mediators and judges likely find it attractive that they, too, are able to access to certain fields of data with real-time updates.

Insurers & Experts

Insurance carriers underwriting commercial general and other corporate liability policies may be involved in various aspects of complex litigation, especially when it comes to setting appropriate claim reserves. Early access to organized data regarding the plaintiff population can be especially helpful in providing foundational information for the setting and tracking of such reserves. Insurers may also be able to add their own comments or utilize automated workflow capabilities to track the status of various claims.

Likewise, experts that have been retained for certain aspects of the matter may also be able to make their own notes regarding certain plaintiffs or documents. Additionally, calendar features and deadline tracking allow experts (and other users) to monitor scheduled hearings, depositions or trial dates.

Considerations and Best Practices

There are a number of factors to consider when determining whether to utilize online PFS and discovery exchange platforms in a specific matter. The size of the claimant/plaintiff population is perhaps the key consideration, as smaller cases – typically involving fewer than fifty plaintiffs – may not achieve sufficient benefits to justify the associated costs. Similarly, the type of plaintiffs involved may also impact the benefits of online discovery exchange. Some plaintiff populations pose unique challenges to the adoption of online PFS data entry, such as those with a significant number of



individuals who are unlikely to have easy access to internet resources. In such cases, online data exchange may not be ideal; alternately, it may simply make sense to have a backup plan for those plaintiffs that may need to submit their fact sheets in traditional hard-copy format.

The type of files or documents to be exchanged is also an important factor. Discovery involving large files, or private data (e.g., protected health information), may impact the decision of whether to use a hosted, third-party platform for the exchange of documents. Parties should consider their own information technology capabilities as compared to those of the service provider when determining how best to manage factors such as bandwidth and data security.

Another consideration is the overall ability of the parties to communicate and gain agreement on foundational discovery processes. All parties should have a clear understanding of who will have access to what data and at what time. A trusted service provider is critical to making sure all parties are comfortable with a centralized location for storing and exchanging data. The service provider should be able to fully verify the credibility of their staff, processes, technology, and security protocols, as well as their practices for ensuring that parties are only able to access authorized data. Demonstrations of the technology are essential – not only to showcase how the work will be performed, but also to underscore the true value and benefits associated with online fact sheets and discovery exchanges. As one attorney commented, “It is very different to talk about the benefits versus actually seeing the clean, organized columns of data, the reports and metrics, etc.”



Lastly, it is important to consider who will ultimately be responsible for the costs associated with the discovery exchange platform. Parties should be able to gain agreement on how fees will be invoiced and paid, including potential cost-sharing arrangements.

CONCLUSION

Online PFS and discovery exchange platforms can prove invaluable in the efficient management of complex litigation. Users can gain multiple advantages, such as at-a-glance visibility into discovery filing status and reduced costs through efficient data sharing. Analytics and dashboards can provide real-time insight into case and claim trends, bellwether selections, and potential progress towards matter resolution. As technology continues to progress, these tools will almost inevitably become yet another standard component of an attorney's toolkit for successful resolution of complex matters – for all parties involved.



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⁹ *Id.*

¹⁰ Loren H. Brown et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, *Akron Law Review*: Vol. 47 : Iss. 3, Article 2 (2014).

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¹² *Rheingold, supra*, note 6.

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¹⁶ *Id.*

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