

# Louisiana Law Review

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Volume 75 | Number 2

*The Rest of the Story:*

*Resolving the Cases Remanded by the MDL*

*A Symposium of the Louisiana Law Review*

*Winter 2014*

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## Symposium Panelist Transcripts

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### Repository Citation

*Symposium Panelist Transcripts*, 75 La. L. Rev. (2014)

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THE REST OF THE STORY: RESOLVING THE CASES  
REMANDED BY THE MDL

A SYMPOSIUM OF THE *LOUISIANA LAW REVIEW*

MARCH 7, 2014

On March 7, 2014, the *Louisiana Law Review* hosted a Symposium entitled “The Rest of the Story: Resolving the Cases Remanded by the MDL.” Federal multidistrict litigation has become increasingly prevalent, especially as fewer class actions survive in federal court. As multidistrict litigation has increased, however, concerns about the correct roles of discovery and remand in multidistrict litigation have increased as well. The Symposium thus featured various panels that discussed these current pressing issues.

Edited and excerpted transcripts from three of these panels are included within this Issue. The first panel was entitled “*Collaboration of Judges and Attorneys in MDL Case Management*,” and was comprised of Professor Francis McGovern, Judge Eldon Fallon, Richard Arsenault, and James Irwin. The second panel was entitled “*Effectively Planning for Disaggregating Discovery*,” and was comprised of Judge Lee Rosenthal, Professor Edward Sherman, Mark Lanier, and James Irwin. The third panel was entitled “*Integrating Aggregated and Disaggregated Discovery Issues*,” and was comprised of Mark Lanier, Judge Lee Rosenthal, Professor Francis McGovern, Richard Arsenault, and David Jones.

The *Louisiana Law Review* would like to thank all the speakers for their participation.

*J. Benjamin Aguiñaga*

COLLABORATION OF JUDGES AND ATTORNEYS IN MDL CASE  
MANAGEMENT

Professor Francis McGovern, Moderator  
Judge Eldon Fallon  
Richard Arsenault  
James Irwin

*Professor McGovern:*

I thought it might be helpful to put this program in a little bit larger context. When we look at litigation—for those of you who love litigation, who love trying cases in front of juries, who love being in front of judges, who love being judges, who love writing briefs for litigation—there are a lot of variables that come into play in the American litigation system. Certainly the judge is a variable; it makes a difference who the judge is. The types of lawyers on one side or the other, the narrative, and the story that we tell—oftentimes we view litigation as competing stories—those are variables.

One of the variables that we are focusing on today is procedure—procedure as a variable—specifically, the way in which the procedure of the case “proceeds.” Normally procedure is pretty constant, but in complex litigation, procedure becomes an independent variable. Now, what do I mean by that?

If you have the normal run-of-the-mill case—one plaintiff, one defendant—look at the local rules. There’s a complaint. There’s an answer. There’s a motion to dismiss. There’s a motion for summary judgment. There’s a pre-trial hearing. There’s a trial. It’s pretty standard; it’s a constant. We know, pretty much, what the procedure is going to be in any ordinary type of case.

What’s different about complex cases—in general—and MDL cases—in particular—is that, all of a sudden, procedure becomes an independent variable. The original *Manual for Complex Litigation*, which was written by Judge Bill Becker, had waves of discovery. It was like the Federal Rules of Civil Procedure—wave number one you did this, wave number two you do that, and wave number three you do that. It was an absolute constant. We knew how these cases were going to be managed from a procedural perspective.

When the *Manual for Complex Litigation (Second)* was written by Judge Sam Pointer, he decided that there should be a different approach—that complex cases really deserve to have a procedure tailored to the unique aspects of that complex case.

The *Manual for Complex Litigation* is basically a menu of procedural options, tools, and techniques for judges to use, so all of the procedure that occurs in MDL and in complex litigation is variable. It depends on who the MDL judge is. It depends on the nature of the case. Now, in securities cases, it's pretty constant. The facts of securities cases, although at the detail level are very different, generally are pretty much the same. So, we handle securities cases pretty much the same way. We handle antitrust cases pretty much the same way. But, when it comes to mass tort cases, for example, it depends upon the judge. Judge Fallon is going to handle *Vioxx* differently from the way Judge Pointer handled the *Silicone Gel Breast Implant* cases. It's a variable.

Compounding the fact that we don't know exactly in advance what the procedural moves are going to be is the fact that we now have an MDL bar, a number of whom are represented here—lawyers who concentrate on MDL cases. They have expectations about how a judge is to handle the selection of the plaintiffs' steering committee, the way in which a common benefit fund is put together, and *Daubert* hearings. But, because the Judicial Panel on Multidistrict Litigation has decided that it wants to spread out cases demographically and geographically, we oftentimes have judges trying their first MDL. But, it isn't the lawyers' first rodeo. They are accustomed to a procedure that follows in a certain pattern, but not necessarily the judge.

So, this conference is part of a series of conferences to study—both in the literature and for those of you who are lucky enough to be here—what these variables are. What are the procedural variables and what are the benefits and the defects of these procedural variables? The chancellor and the law school have been kind enough to have this program as a series so that we can concentrate on different variables, examine them in detail, and hopefully develop some literature and some best practices out of this that will assist the MDL bar and the judges in managing complex and MDL litigation better. That's sort of the goal.

The topic that we're talking about today is cutting edge—disaggregation. We've talked a lot about aggregation in any number of contexts. Now we're talking about, okay, there's another alternative. There is the possibility that you don't keep everything together forever; that you do disaggregate certain activities.

So, the focus of the whole program at LSU is to concentrate on these procedural variables that are independent, put together materials about each one, drill a well—as it were—on each one, and make it available to judges and to lawyers. The general topic that we have for today has to do with disaggregation.

We're going to start with the fundamental concept, and that is collaboration. How do we get the attorneys and the judges in the management process to collaborate sufficiently so that it's easier for them to make the decisions about these independent variables of procedure?

If I may, Judge Fallon, you've handled any number of the MDL cases. When you think about appointing the plaintiffs' steering committee, what goes through your mind as to how to set the case in a management perspective so that it can move smoothly?

*Judge Fallon:*

Well, first of all, I appreciate being here and participating with all of these great judges and great lawyers. I sort of feel like the Missouri mule at the Kentucky Derby—nobody expected him to win anything, but they knew he'd learn a lot from the association. So, I hope to learn a lot from this conference.

These cases pose a number of challenges. One challenge is the organizational challenge. You're dealing with large numbers of cases, and you're dealing with large numbers of attorneys. In *Vioxx*, I had 50,000 claims. I had 26 states involved. There were 1,000 lawyers in the case. In the *Chinese Drywall* cases, I have 1,000 defendants. Twenty-sixty thousand claims. I have 1,400 lawyers in that case.

You can't run a case with 1,400 lawyers and everybody wanting to participate. It has to be done in some organized way, and it has to be done by committees. One of the challenges that I face as a transferee judge is appointing the committees. More often than not, the defendant committees are set. They are sort of arranged because a defendant hires a certain number of lawyers, and those lawyers organize themselves into committees. Not always, but usually the defendant committees are organized outside of the judicial sphere. Although, the judge generally appoints a liaison counsel for the defendants—generally someone closer to home.

The plaintiff's committee poses the biggest challenge. You need to have on the plaintiff's committee lawyers who have some experience and lawyers who have some resources. That's the fact of the matter.

In *Vioxx*, the plaintiff's committee had to come out of pocket with \$41 million in order to handle that case. That's what they came out of pocket with. In each of those cases, it cost the plaintiffs' \$1 million per case, and it cost the defendants \$2 million per case. Just to handle those cases, and to put on those experts.

Now, there were bellwether cases. So they pulled out all the bells and whistles. After I picked a jury, I looked into the audience, and I found seven people who mimicked the jury on the plaintiff's side, and seven people on the defendant's side who mimicked the jury. The jury consultants would meet with those shadow juries every day, debrief them as to what their impression was of the witnesses, and feed that into the trial lawyers.

*Professor McGovern:*

Judge, let me throw you a curve ball. If it costs that much money, not every plaintiff's lawyer has the kind of money to be able to fund that kind of litigation. There are mechanisms for bringing in lawyers who haven't necessarily been MDL lawyers before, but their financing may be a little opaque. Should the judge look behind where that financing is coming from? Or is that something that's uniquely related to each lawyer and his or her own business?

*Judge Fallon:*

It can present a problem for the judge, because oftentimes some lawyer who did not make the cut on the committee wants to have input on the committee. So that lawyer can approach a lawyer who's on the committee and say, "Look, I'll finance your share. I just want to be consulted. I won't interfere. I just want to be consulted and give you some input." That's a problem.

Back to what I was saying, you need experience, and you need some people with resources. But, it troubles me that that pool is somewhat limited. What do you do if you're a young lawyer? What do you do if you're a sole practitioner and you want to participate and you have something to give? I think there should be room for that individual.

It presents a problem because if that individual is on the committee, that individual then has to put up his or her share. To put up his or her share, that individual either has to go to the bank or go to some lawyer who is not on the committee and then become the ventriloquist dummy on the committee, which presents a problem.

So, I appoint the committee of plaintiff's lawyers who have some experience and who have some resources, and I try to get a diverse group. But, I limit it to seven to nine, sometimes 12, people. I figure if 12 apostles were enough, it's probably enough for a plaintiff's committee, so I don't go over that number. But, I then meet with the committee and I say, "Look, you're on the committee. You're obliged to steer this litigation, to organize the litigation. But I

want you to create subcommittees, and on the subcommittees, I want people who are not on this committee. On the subcommittees, I'd like new people. I'd like to see diversity in age. I'd like to see diversity in sex. I'd like to see diversity in ethnic background and so forth." I push that every day, every time I go out in the meetings, and I have a lot of meetings over the period. I ask whether there is anybody interested in working on a case from the plaintiff's standpoint. If you're interested, there's a subcommittee position that you can occupy.

But, it creates its own problems, and it also presents some problem at the end of the day for me because I have to decide the common benefit fee. I'm not only then deciding eight or nine individuals, I'm deciding sometimes 100, 150 individuals that put in for the fee.

*Professor McGovern:*

Judge, what you're doing, in effect, is creating a brand new law firm. Some judges say, "Hey, lawyers, get together and see if you can work out a group, and then come to me," rather than your more active approach in terms of the appointment. Why do you think it's better for the judge to take a more active role rather than just acquiescing to the desires of a group of lawyers who've gotten together the night before?

*Judge Fallon:*

Well, that presents a problem in my view. There is a select group, in my opinion, of maybe 30 to 40 people in the United States who show up in almost every MDL case, and sometimes those folks have arrangements. "If I get on the committee, I'll reach down and put you on the committee." Or, "If you agree with the fee that I'm going to get on this committee, I'll make it up in another case that we're going to be on."

So, you have some of these side deals that you may not know about, and they're not in writing. They're just with a wink and nod. But, there are some side deals that present some problems that get people on the committees that should not be on the committees. They're on the committees simply to pay off past debts between and among the lawyers, and while they may be skilled in certain areas, they're not skilled for this particular case, but they're on the committee because the last time they didn't get treated fairly, so this time it's an opportunity to treat them fairly.

*Professor McGovern:*

Do you feel that it's okay for the transferee judge to call other judges? If you're going to be active in selecting who should be on the committee and having the diversity you're talking about, is it okay to ask other transferee judges how people have done or for recommendations or how they go about the decision-making process?

*Judge Fallon:*

I think you do. I know I have gotten a lot of calls over the years simply because I did some of this work before I became a judge 20 years ago. So, I practiced with some of these folks, and I also practiced with their parents in the old days. I know them for the most part nationwide. So, I do get a lot of calls from a lot of judges asking me about cases. I make the calls too if I don't know the person, if I haven't heard of them, if I haven't seen a case that they're involved in, or if I have and I want to get some input. I will call a judge in that area and say, "Tell me about this person." I said that they need to have some experience on the committee, and I talked about the resources, but they need to have another quality. These are very, very good lawyers. In fact, in my opinion, the reason these cases are able to be handled is because of the talent of the lawyers that are on these committees and on these cases—both plaintiff and defendant. That's the reason. And if the judge recognizes that talent and steps out of the way a little bit and lets them do their thing in an organized fashion and keeps them focused, it works out very well.

The judge has to know who they're going to appoint because in addition to those talents, they have to work together as a team, and that's very, very difficult for plaintiff's lawyers. I know—I walked in those shoes for 33 years before I became a judge. I know the problems with plaintiff's lawyers. They don't hunt well in packs. They just don't.

They're individual people, and they focus very alone. So, you need people who are able to work together as a team. Even if they're very, very qualified, they need to work well in packs. That's one of the things that I ask my colleagues if I'm not aware or not certain about this particular person.

*Professor McGovern:*

Let me throw Jim a curveball. What role, if any, should the defense have? You've heard what Judge Fallon is going to do. Do



you sit back on your hands and say, “Okay, the judge is going to do what the judge is going to do?” I know when the arguments are made before the MDL panel as to whether or not a case should be consolidated and where it should be transferred, the defendants often have an opinion. When it comes to the appointment of the plaintiffs’ steering committee, do you think the defendants have any role or should have any role?

*James Irwin:*

You know, I was thinking about that on the drive up here today. It’s a bonafide concern, because I cannot think of a single case where we, on the defense side, have had any input at all on that. I think it goes to this word “collaboration.” I agree with the judge that it’s so important to have good lawyers on both sides. Good lawyers usually realize that there’s a point you want to get to at the end of the day. And the best way to get to that point is to be credible, truthful, and honest with each other and with the judge.

My experience with Judge Fallon, which has been a lot and good, is that he appoints the kinds of lawyers that fit that description—and good lawyers. When they tell you something, you can rely on their word, so that has not been a concern. Now, if it ever were a concern, would there be a mechanism for somebody like me to go to a judge and say to the judge, “I’m a little worried about this particular suggestion?” I just don’t know. If it were a judge like Judge Fallon who I have worked with over the years and who knows me, perhaps I could do that. If it were a judge in most cases, you don’t know the MDL judge very well. It’s a new experience. Would I approach a judge that I don’t know very well and express some concerns about that judge’s putative appointment of a PSC member? I kind of doubt it.

*Judge Fallon:*

Just to mention one thing: The appointments that I make, and I have changed over the years, but I don’t make these appointments for life. I appoint for one year. I tell the person, you’re appointed for one year. Re-up, reapply for next year. When you reapply, please tell me what you’ve done in the past year and how you’ve done—that sort of thing. There’s no term limits, but I want to know. So, I keep an eye on the situation, and if I find that the lawyers that I have appointed just are not getting along at all, I take a close look at that when I decide whether or not to reappoint that individual or those individuals for the following year.

So, I think that the judge can do something about bringing both sides together. I have a lot of meetings.

*Professor McGovern:*

Richard, before we get to the “collaboration,” you’ve been appointed, you’ve not been appointed, you’ve tried to be appointed—sometimes successfully. You’ve done it in groups. You’ve been appointed out of the blue. In fact, if you look at the list of lawyers who’ve been in MDLs, Richard Arsenault’s name is at the top of the list.

Judge Fallon has indicated the approach that he takes from the plaintiff’s perspective. Do you think that filing an application, having the judge call other judges, and deciding how to put together, in effect, a brand new law firm—that’s what it is—is the best way to go from your perspective?

*Richard Arsenault:*

On the one side you’ve got this concept called “private ordering,” and the Manual speaks to that. It doesn’t compel judges to employ private ordering, but it says that you might want to at the end of the day.

*Professor McGovern:*

When you say private ordering, you mean that the lawyers get together the night before and come to the judge and say, “Here’s a slate that we think would work just fine.”

*Richard Arsenault:*

Exactly—and not necessarily the night before. This is on our radar screen for months, and you get a sense that eventually it’s going to end up somewhere. The unknown when you’re beginning to organize a case is where is it going to land, who is that judge, and who are the local people that that judge respects.

If you step back for a second and consider the process, on the one hand you have defendants that are represented by firms like Jim’s that are well-financed, that are well-organized, and that are a cohesive unit. Whereas on the plaintiff’s side, they are typically small firms, and not necessarily any one of them or any small group of them can readily come up with \$40 million and the kind of infrastructure that was required.

So, it's David and Goliath—it seems to me—on steroids. Not just small bands of plaintiff's firms, but firms that at the end of the day compete against each other and that have residual hard feelings from the last fee split or the last PSC appointment. And, then the different skill sets—there are just such different skill sets amongst the groups.

*Professor McGovern:*

Pushing the skill set, and Judge Fallon, because you're creating this law firm, do you feel that you should select one person who would be very good at settlement, another person that would be very good at electronic discovery, and another person that would be very good as a trial lawyer? Do you look at that or do you allow the lawyers themselves to sort of organize themselves? I'm moving to the next topic, which is the organization of the plaintiffs' steering committee.

*Judge Fallon:*

I consider all of that. The lawyers have the ultimate say as to who does what, but I do consider whether somebody's going to be the trial lawyer. I do consider the fact that I know somebody on that committee can do a lot of technology and that this is the type of case that's going to require it. I do consider all of those things, but the lawyers are going to decide whether or not that particular person can handle the trial or that particular case. I don't say that nobody else can do it but this individual, but I do try to balance the committee with a skill set.

*Professor McGovern:*

Richard, there are lots of ways to organize a law firm. Some law firms have someone at the top who's authoritarian that sort of runs the show privately by themselves. Others work by consensus, just like any law firm. What do you think the best organization of the plaintiff's steering committee should be? One of the problems that those of us from the outside look at involves members sort of running up hours because they know, at the end of the day, when Judge Fallon is going to divide up the common benefit fund, the number of hours you spend on the case is going to be relevant, at least in one form or another. What do you think is the best way to organize that brand new law firm called the plaintiff's steering committee?

*Richard Arsenault:*

Well, again, this is one of the reasons that I favor private ordering. At the end of the day, I think the lawyers are in the best position. We know each other. We know the gene pool. We know who the best trial lawyers are. We know who the best brief writers are. We know who the best electronically stored information people are—the privilege log people, the spoliation people, the science people. Not only do we know who they are, we know who's available at this point in time.

So, it's knowing who the best people are—all of the characteristics and qualities that Judge Fallon has spoken about—who's available at that time, who has the resources. Those are fungible. They change with tremendous regularity. I think the lawyers are in the best position to call those balls and strikes.

Getting to your question about the defendants having a dog in that fight, that really frightens me.

*Professor McGovern:*

Okay, let me move to that. It's really two subjects.

*Richard Arsenault:*

I'm wondering if Jim would want us to decide who would represent his client in the next case.

*Professor McGovern:*

Well, let's think about that. This is not a trivial question—the organization of the defense committee, and then the next topic is the relationship between the defense committee and the plaintiffs' steering committee.

Let's start with the organization of the defense committee. Judge Fallon just mentioned *Chinese Drywall*. Play out a little bit, Judge, what you ended up having to do because there were 1,000 defendants.

*Judge Fallon:*

Well, in that particular case, because of the number of defendants, I felt that they needed some coordination. I didn't pick the lawyers in those cases, but I picked liaison counsel in those cases. I selected liaison counsel who, in addition to their chores as representing a particular client, served as liaison counsel for that

group of insurers if they all had common interests. So, I have two or three liaison counsel who are organizing that group of individuals, and I have taxed that group of individuals to pay liaison counsel of that group a certain fee. So, I organize the 1,000 defendants into groups and have liaison counsel in each of those groups.

*Professor McGovern:*

Jim, when I was a special master in *Silicone Gel Breast Implants*, most of the defendants had at least two teams, maybe five. There was a settlement team for each of the defendants. There was a trial team for each of the defendants. There was a discovery team. Are you finding now that the organization on the defense side is getting a little more complicated than three lead lawyers standing up and saying, “Don’t worry about it judge, we’ll take care of it?”

*James Irwin:*

Yes. It’s getting much more distributed. The term that we hear is the “virtual law firm.” The so-called virtual law firm is a law firm where you have, at the top, what’s called the lead counsel—the defendants’ lead counsel. I would love to hear from Judge Fallon and Richard about the criteria that go into the selection of plaintiffs’ lead counsel, because it seems to us that that’s very important.

*Professor McGovern:*

Normally, if you think you’re going to be lead counsel on the defense side, you’re in the last row in the back of the court room, because if you’re lead counsel, that means there’s a giant target on you financially.

*James Irwin:*

Yes, with a big dollar sign. But, this virtual law firm will be comprised of lead counsel, usually national counsel, that represents the pharmaceutical company or the Chinese drywall firm. Then it will be broken down into parts that will consist of issues such as e-discovery, which is becoming more and more complicated, with spoliation orders and what have you. There will be a settlement firm—probably a completely separate firm. It’s very common to have a law firm that specializes in expert witnesses. I know Mark’s

familiar with that, and there are many law firms that market themselves in that area. You may also find a firm or a series of firms that are pointed to trial teams. We've done a lot of that—national trial teams.

Of course, it begins to sound familiar, doesn't it, Richard? You do have competition. You have issues about turf. It gets complicated sometimes. There was no such thing back, at least in 1994, with virtual law firms of this kind. You had to manage on your own.

But, that is now the model, and it's become more difficult. It's almost made necessary by the resources of Goliath over here, because they're not David anymore. They have plenty of resources and lots of skills. I don't know that there are any defense firms anywhere, even the biggest firms, that can match the resources and skills of the kind of plaintiffs' steering committee that Judge Fallon's talking about.

*Professor McGovern:*

Judge Fallon and I gave a talk at the MDL conference, and he did sort of an evolution of the plaintiff's bar. Judge, as I remember, where you had solo practitioners that were competing against each other, one of the incredible externalities of MDL has been to force plaintiff's lawyers to work with each other in a way that you never really saw before, even though they're competing. Are you saying, Jim, now that actually there are new business models for defense firms? I know, for example, Bartlit Beck, the split off of Kirkland & Ellis, is a boutique trial firm, and they bill accordingly. That is, it's not an hourly billing; they have a completely different business model from the traditional Kirkland & Ellis. Are we finding new business models both for the plaintiffs and for the defendants?

*James Irwin:*

We most definitely are. I'm not going to mention any names except our firm. Our firm specializes in trial work around the country. But there are firms, big firms, that specialize in e-discovery, which has become so challenging. It's so difficult. We could talk about the problems with e-discovery on the defense side for another whole day. It is such a dangerous area for us and almost a no win situation, but I'll move on from that.

It's a real challenging area—hold notices and e-discovery.

*Judge Fallon:*

I'm finding exactly what Jim is saying from the defense bar. In the old days, you used to have one defense group that did it all. Now, in these large cases, I'm seeing five or six firms, and they have different responsibilities. One thing that I do want to mention is that the concern I have is that we're talking about, like plaintiff's firms, sort of the eagles that fly into these areas. What about the average lawyer who's been in a community all his or her life, who's been handling successions and wills and estates and some tort work all their lives, and then all of a sudden an MDL happens in their backyard? They're shut out of this. It's a lot of money, and how about the average person who is in the community? What do they do? I mean they look around and this is an opportunity for them to at least do some work, help the community, and also get paid. Are they shut out? That's what I'm trying to deal with in this subcommittee thing. To get those individuals some play, some opportunity to make some contribution to their community and to also be compensated, and that to me is important.

*Professor McGovern:*

Richard, I gave a talk to a group of plaintiff's lawyers that had to have won at least a single case of \$20 million or something like that, and they find MDL worse than LSU finds Alabama. I mean, MDL is the worst thing that can happen to them—they avoid the MDL like the plague—and I've got three or four different cases like that. Is there any choice on the part of these lawyers to avoid MDL? How does the plaintiff's bar view the point that Judge Fallon was making that you need to be more inclusive?

*Richard Arsenault:*

I think it's a case specific question based on whether there is a plan B. If plan A is an MDL, are there available state court options? So, is there even a plan B? If there is a plan B, then there's the dichotomy of whether you want to be in federal court versus state court? In federal court, there's the unanimous jury, and there's a view by a lot of plaintiff's lawyers that it's just, you know, tougher sledding there.

But, I've seen a radical change in the landscape. You're right, ten years ago, 15 years ago, I don't think Mark Lanier wanted to or would play in the MDL. The MDL lawyers were not really viewed as trial lawyers. A lot of them came from the antitrust bar, from

non-personal injury bars, that really didn't try a lot of cases. They really didn't have the respect of the trial lawyers.

Now, as we speak today, there are probably four or five trials going on in major MDLs. The MDL landscape and the lawyers involved in MDLs today are trial lawyers, and I see people like Mark Lanier not only engaging in MDLs but leading the MDLs and trying those cases because those cases now get tried. That's the norm; there are going to be trials in these MDLs.

*Professor McGovern:*

My experience has been that the most difficult folks to deal with are actually trial lawyers. What can a judge do or what would you like to see happen to try to promote collaboration if there happens to be some conflict? For example, there's one case that I know of right now that's in the middle of trial, and there's one plaintiff's lawyer who's very difficult to deal with. The judge is trying to help the lawyers collaborate, both plaintiffs and defendants. Is there anything that the defendants can do when you've got a difficult situation to try to pull the collaboration together?

*James Irwin:*

So much of that environment is created by the judge—truly. Some judges create an environment of, I think, premeditated chaos. They do that for a reason, and it has results in many ways. Other judges, like Judge Fallon, do not do that.

*Professor McGovern:*

Let me underscore that point. Having been a special master roughly 100 times, there's some judges who put heat in a case. There are other judges who take heat out of a case. I think you're absolutely correct.

*James Irwin:*

That's what Judge Fallon does. One of the things he does is that he requires regular communication between the lead plaintiff's lawyers and the lead defense lawyers. He builds a system that requires it through monthly status conferences and through meetings with lead counsel before the status conference.



*Professor McGovern:*

Tell us, Judge, about that—what you do in the meetings before the meetings, and how you conduct those without antagonizing the lawyers that are not at the meeting before the meeting.

*Judge Fallon:*

Well, I am a firm believer, because I've been there, done that sort of thing, that you get more accomplished as a lawyer if you work with dignity and responsibility to your colleagues on the other side. That doesn't mean you agree with them. It means that you can do it in an appropriate way because a good trial lawyer recognizes that he or she meets many juries along the way. The first jury that you meet is your client. If you can't convince that jury that you're the right lawyer, you lose the case. You just lose the case.

The next jury you meet, oftentimes, is your opponent. If you confront that person as a juror and persuade that individual, whoever it is, that you have a case, you may win that case at that level of the jury. Another jury is the judge and another jury is, of course, the jury.

So, I focus the lawyers on that concept, and I have meetings before the general meeting in a smaller room so that they are together as opposed to being in a courtroom where they stand up and talk to each other or talk about each other. I don't do that. I get them in a small room, and we talk about issues that we're going to talk about in 45 minutes outside, and I focus them on things. If they bring a problem to me I say, "Have you talked to your opponent about this particular problem? Don't talk to me first. Talk to your opponent. If you've got five issues, if you can resolve three, talk to me about the two."

I promote this, and I see it over the period of the litigation. I see a coming together of these two sides. They're working very diligently on their client's behalf, but they're pulling this wagon together. They're getting this case over with in a proper way. I see these folks over the period of time establishing real close relationships. Not relationships that would interfere with their professional duties, but they come to respect each other, and that's good to me. It works, and it works the case better.

So I promote it; I don't kick them. As Jim reminds me, my concept of life and living is that each of us have a good dog and a bad dog within us. The one that comes out the most is the one that's fed the most. When I see a bad dog coming out of a lawyer, I feed the good dog. I don't kick the bad dog, because if you kick the

bad dog, that bad dog bites the other lawyer, and then his bad dog comes out. Then I've got two bad dogs in front of me. I don't want that. So, I focus on that concept, and I encourage lawyers to do likewise. If one of them gets angry with the other one I say, "Wait just a minute. This individual is an officer of the court. If you attack him, you're attacking me, and I'm not going to put up with that."

*Professor McGovern:*

Now, on the plaintiff's side of the coin, Judge Fallon, you had a very layered process for insuring that there was transparency in the way in which the common benefit fees were distributed. I'm more interested right now in how you set the percentage for the common benefit fees, because as I understand it in a fairly recent case, it was set at 1% and 3%. Then it went from 1%, Richard, to 5%. How do you determine what the percentage should be with state judges, state lawyers, and other lawyers involved in the MDL? First of all, how do you determine what the calculation should be for the pot? Then, how do you make sure there's transparency in the way in which it's divided up?

*Judge Fallon:*

Well, it's a process, and that's the important thing to focus on. I just don't grab it out of the air. I may be able to grab it out of the air and come up with the same figure that I came up with after the process, but I don't know about that. I do a process. At the very outset, after I appoint the committees to handle the case, I appoint a CPA, and I make that CPA a 706 expert for the court. I put in place pretrial orders that require anybody doing common benefit work to log time. Not just to log time, but to tell me what they're doing with the time. I don't need 15 hours. I just need to know what you're doing during those 15 hours. If 5 of them or 10 of them or 12 of them are reading emails and 1 of them is looking at discovery, to me 1 is more important than the 15 spent reading emails for the most part.

So, I require that contemporaneously, every month, they report to the CPA and give that person an accounting of what they've done and how they've done it, meaning not only the hours but what they've done during those hours. I've got four or five categories that they put their numbers in and whether or not they put up any money and how much money.

I meet with the CPA every month, and I look over the material that the CPA gives me. He tracks who put up the most, who put in

the most hours, and what they've done and so forth and so on. If something jumps out at me at that meeting, I call liaison counsel and I say, "I'm concerned about this individual who's putting in this time. It's totally out of order. I haven't seen the person. He or she says they put in 1,000 hours. Everybody else that I know is in court has put in 200 hours. There's a problem here. Talk to that individual." I go that route the whole time. At the end of the day, I get that information from that CPA in a summary. That's one aspect of what I consider.

Another aspect is I appoint a fee allocation committee composed of people on the committee as well as people in the state court that have done the work, and those individuals then meet with anybody who makes an application. I get 100 to 150 applications. That committee meets with those individuals with a court reporter and says, "Tell me why you feel you're entitled to a common benefit fee. How much time you've put in, how much economics, whatever it is."

They get that information. They give me their suggestions as to who should get what out of the common benefit—the percentages, the amount. I might back off and say that I determine the pot first, and the way I determine the pot is, and I've written articles on this, it depends upon how much the claimants have gotten, because this is a contingent fee. So, if they've gotten nothing, then the common benefit fee is nothing. But if they have gotten something, then the question is what's the right portion of that amount that the common benefit fee should be? There are articles written on it.

*Professor McGovern:*

How do you do it on the defense side?

*Judge Fallon:*

I don't do it on the defense side.

*Professor McGovern:*

But if there is a common—

*Judge Fallon:*

If there is, I really haven't determined whether or not the defendant is going to get anything in this particular case. They have expressed an interest in the common benefit fee. Usually you don't have that problem because you have one defendant.

*Professor McGovern:*

Or, they do it among themselves. I mean, you have joint defense groups and you jointly hire an expert. I mean, you do it informally all the time among yourselves.

*Judge Fallon:*

The difference in the Chinese drywall is that there's some defendants that say, "Look, we've sued this person. This company too. The manufacturer. We were the installers. We sued the manufacturer just as the plaintiff sued the manufacturer. We focused our guns on that manufacturer. That manufacturer now has settled for \$1 billion. Sure, the plaintiffs are entitled to it because they did a lot of the work, but we did some work too. So, should we get a common benefit fee?" That's the argument. I'm listening to it, but I haven't made any decision yet.

Let me just finish up very quickly. After the fee allocation committee comes up with their recommendations, I then appoint an outsider—a special master to go through the process and tell me how much that special master feels these individuals should split up. At that point, I have the CPA's report, I have the fee allocation committee's report—the insider view—I have the outsider view in the special master. I look at those documents, and I bring to bear what I know about the case, because I've lived with it now and spent more time with it than I've spent with my family over that period of time. So, I know who did what and why and what's the result. Then I come up with the allocation of the common benefit fee.

I put all of this on my website. When I get it from the CPA, that goes on the website. When I get it from the fee allocation committee, that goes on the website. When I get it from the special master, that goes on the website. I hear from people, and I listen to it, and I go over it. But then I make the decision, and that's it generally.

*Professor McGovern:*

Do you provide a flak jacket for the special master just in case?

*Judge Fallon:*

I haven't had any problems really. I haven't had an appeal from fee allocations, but I expect an appeal. That's just one way of doing it. The thing that I recommend, and I tell my colleagues who talk to me about this, is that it's important to have a process, and it's important that the process be transparent so that the people can

see it and understand it. They may disagree with it, but it's a process. If the appellate court then wants to step in and say it's wrong, then let them come up with a process and do what I've been doing.

*Professor McGovern:*

Richard, you've seen different MDL judges allocate common benefit fees in many different ways. Any preferences? Any thoughts? Any comments as to what seems to make the most sense from the perspective of the plaintiff's bar?

*Richard Arsenault:*

Well, certainly I think a "process" is a good idea. The process that Judge Fallon has employed is a good one. The conundrum at the tail end goes back to what happens at the beginning. There's a competition for critical mass right at the front end. Are people going to federal court, or are they going to state court? You see over and over again, the plaintiff's bar, early on, go to the court and say we want an assessment. That assessment, in part, is designed to show that this is going to be a cap. We'll charge no more than this. It's to encourage people to file cases there. It strikes me as a little delusional at the embryonic stage of litigation to decide what that assessment for fees and costs will be when you don't know what the load star is and you don't know what the settlement is. Other than that, you're really prepared to decide what the assessment percentage should be, right?

So, early on they say it's going to be a 3% fee and 1% cost. Case gets settled. Only kidding—it's a 5% fee and 1% cost. The difference between 3% and 5% is a big deal. We had some of that in *Vioxx*. We've had it in many of the cases. Quite frankly, in the MDL's, if I've got any say in it, we'd keep our powder dry until the end. If you've got fair judges, at the end of the day they're not going to give away the farm, and the assessment is going to be based on the load star and the recovery.

*Professor McGovern:*

My good dog is now going to come out. We have ended the panel discussion. I've been the bad dog interrupting federal judges and excellent lawyers along the way. I hope this has been educational for you. Thank you very much.

## EFFECTIVELY PLANNING FOR DISAGGREGATING DISCOVERY

Judge Lee Rosenthal, Moderator  
Professor Edward Sherman  
Mark Lanier  
James Irwin

*Judge Rosenthal:*

Thank you. It was a real pleasure listening to the last panel. And, in part, I think you all got a wonderful glimpse into why people of such obvious talent, energy, and good fortune choose to spend their lives doing what they do. In the case of Judge Fallon, unlike perhaps some of the others, it's not because he anticipates great wealth in his day job. It's because, as you listen to the description, what I kept thinking is "that sounds like fun. That is so interesting." And, Eldon's work in particular, he's half shrink, half judge, half accountant. Well, let's call it financial analyst. He is at the cutting edge of most of the important developments in our civil justice system. He's on the ground in the cutting edge; he's not 30,000 feet above. It's a rich life, but it's a challenging life.

Part of the challenge that you heard described, in part, is what you do with what you've created. You've launched this airplane, but this airplane is designed not to be able to land. You need other people to bring it down. That's the way the system is currently designed.

Now, perhaps if we were about to design the system itself from scratch, we might pick a different way to achieve the end. But, that's not what we have to operate with. We have an airplane with an infinite amount of fuel—no, a finite amount of fuel—up in the air. And, in lots of ways, we need to figure out, before it ever leaves the ground, how to bring it down—safely, cost effectively, fairly, and within our joint lifetimes. That's not easy in itself, and it is often not thought about.

So, our job in this panel is to think about a piece of that—just one piece. That piece is that as these cases become more and more about discovery—and the complexities and expenses and challenges and professional risks of discovery—how do you draw the line intelligently between the discovery work that needs to be done within the MDL itself and the discovery work that either can or should wait until the cases are remanded back to the transferor judges?

Increasingly, we're told, these issues arise, and they matter. But, there is relatively little guidance available on them. So, we have a panel that is here to try to unpack some of the issues that these questions present. And, our panel is one of those that, as is

often said but not often meant, needs no introduction. This time it's really true.

You have heard Mark Lanier talked about at length in our last panel. Mark is a renowned lawyer whose focus is on the plaintiff's side in these kinds of cases—MDL cases—that do have life after remand.

Dean Sherman is from Tulane Law School. He is a dean in lots of ways. He's the ex-dean of Tulane, but he's also in many ways the intellectual dean of complex litigation. He wrote a lot of the books. He has given us a lot of the frameworks for thinking about these issues, and those frameworks have endured. He has really been important to our profession.

And then we have Jim Irwin, who you were privileged to hear in the last panel. Jim works on the defense side, and the work that he has done is setting a standard.

So, you are in good hands—we are in good hands—to discuss these issues.

But, my first question to the panel, and I'm going to start with you, Jim, if I may, is whether you've seen a change in the amount of discovery, the complexity of discovery, and which discovery ought to be MDL discovery and which ought to be individual case discovery, and whether the issues seem to be gaining in importance.

*James Irwin:*

Yes, Your Honor. The pendulum comes to mind. Twenty years or so ago, I think, the common practice was to discover every plaintiff. To take every plaintiff's deposition. To take every doctor's deposition—soup to nuts discovery—very expensive, but comprehensive. It produced a lot of value to the defendant in the sense that we got to see some of Mark's bad cases, and that would help us devalue the litigation.

On the other hand, we did have a couple of remands. When those remands went back to the trial judges—back to the transferor courts—the idea was that they're supposed to go back packaged up ready to try. They were not. Uniformly, they were not ready to try, because oftentimes you had to have case specific expert reports, which started that whole discovery process back up again at the transferor courts. You may have taken the plaintiff's deposition three or four years ago, so you needed an updated plaintiff's deposition. So, it really felt like when you got back that, in some ways, the discovery—the comprehensive discovery at the MDL level—had failed.

The pendulum moved away from that, and the smart guys like Mark Lanier and Richard Arsenault and others figured it out—“You know we didn’t get the best shake in that deal taking all that plaintiff discovery. Let’s just see if we can engineer putting up our marquee people in front and hold back filing all these other ones. Maybe get short form joinders or tolling agreements or something like that.” We went through that stage. I think, largely, we’re still in it, and it’s a lot less expensive. I can tell you our clients, in a lot of ways, appreciate it.

What we find is that when we get to the bellwether stage and it comes time to pick cases for trial—which is so important, and it’s so important that the judge try to give some balance to both sides in picking cases for bellwether selection—the defense is really at a disadvantage because we haven’t seen as many of the bad cases that we’d like to push up in the bellwether process. So, I think there’s a need, both for bellwether purposes and for remand purposes, to try to strike a balance between those two extremes. Maybe it’s moving in that direction.

*Judge Rosenthal:*

Can I ask you to do two things quickly? Because we have law students in the audience, will you, within in one minute or less, explain both *Lexecon*<sup>1</sup> and bellwether.

*James Irwin:*

*Lexecon* is a Supreme Court case that says, for example, that Judge Fallon and Judge Rosenthal, as transferee MDL judges, cannot try a case that was not filed in their own state or their own district. They would have to get agreements from MDL liaison counsel to try an out-of-state case.

Bellwether is this: Imagine you’ve got 15,000 cases in an MDL. You try to pick a representative case—one that may be representative of a large population of cases—that will go to trial and give some measurement of liability and value to the plaintiffs, the defendants, and the judge. The judge usually allows the plaintiff to pick first, and we’re pretty much accepting of that on the defense side. We always hope that the judge will then allow us to pick the second one and that there’s some balance.

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1. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).



*Judge Rosenthal:*

Mark, do you agree with the analysis of why these issues are gathering in importance?

*Mark Lanier:*

Yeah, I think that's right. I tend to look at things as a pragmatist and what works. Because ultimately, if this microphone is "resolution," that's really what everybody gathers around. So, the plaintiff's lawyers, they want a very full resolution. They want lots of money. They're pulling the microphone over here. The defense lawyers, they don't want any money to be paid. They're pulling resolution over here.

The judge—he's neutral or she's neutral—exists up here. They also want resolution, and their goal is to try and pull all of the various parties to wherever they need to be. Now, resolution may need to be over this way, or it may need to be over that way. But the judge is neutral—the judge focuses on resolution.

So, in the early going it was just, "Hey, it's a lawsuit, what do you do?" You depose the plaintiff. Well, there are 3,000 plaintiffs. Well, then you better hurry up and get started. And, then efficiency was the name of the game behind the MDL. So you've got judges—Judge Fallon on the cutting edge, Judge Rosenthal—Dean Sherman who writes this stuff up—and they say, "Wait a minute; there must be a better way. So, we're going to set up these bellwethers; we're going to set up these trials."

Then the issue becomes, well, the plaintiffs have an obvious advantage. Plaintiffs' attorneys get to pick out of our smorgasbord buffet of cases, and we can go straight to the dessert. Whereas the defendants must guess whether they're getting dry lettuce or just horseradish, and they don't know. So, the court said instead of taking all these plaintiffs' depositions, why don't we find something else? Why don't we do a plaintiffs' fact sheet so that there's a certain amount of information that goes to the defendants so they can make an intelligent choice as well?

I think what we're seeing in the transition stages are innovative judges and innovative lawyers who are saying, "We've got the rules out there, but we're discussing a creature that's beyond the rules. We're going to use those rules to create new mechanisms to try to get us where we need to be at the end of the day so that the lawyers play nice in the sandbox and everybody reaches resolution if possible."

*Judge Rosenthal:*

We could stop talking right now, except it's apparently not that simple, because the point that you made about "outside the rules," I think, applies here more than usual. There's very little guidance or information out there about where or how to draw the line.

Ed, are you seeing, from the academic perspective, more attention being paid to the issues that arise on disaggregation and where, during the aggregation phase, you divide the work and know what you don't have to do or shouldn't do within the aggregation phase because you intend to do it later?

*Professor Sherman:*

Well, I'm encouraged by Jim's comment that there has been a reduction in taking the deposition of every class member or every plaintiff and the doctors. Of course, depositions are a very expensive form of discovery, and Lone Pine orders that are now fairly routine require the plaintiff or the class representative to file detailed medical reports, examples of exposure to the product, and so on. An awful lot of information can be transferred much more cheaply than by deposition, and as Jim says, depositions get out of date after a while if they're taken at the MDL stage.

So, I think it makes a lot of sense for both sides to consider efficiency. Obviously, in certain kinds of cases, there may be a reason to depose them where it was believed there was considerable fraud. For example, large numbers of people claiming exposure to silicosis when, in fact, it turned out that they weren't exposed. That's appropriate for either depositions or some other kind of discovery at the MDL stage, because most of those cases were thrown out at the MDL stage.

But, in many other cases, there's important information that can only come out upon remand—often dealing with individual causation and damages. Somewhere there has to be a line drawn between those two.

*Judge Rosenthal:*

That's a good point to move to Mark and ask, from the plaintiff's perspective, where do you see a divide in the types of cases where we could perhaps generalize and identify categories of cases in which more discovery within the MDL, at least on certain issues, is appropriate—speaking generally—as opposed to those cases or issues that are better handled post remand?

*Mark Lanier:*

It's an interesting concept. If the purpose of the MDL is efficiency, so that you don't have 3,000 plaintiffs saying, "I want to depose the president of Merck," and then the president of Merck having to give 3,000 depositions. If that's what we're trying to avoid, then somewhere down the line we're no longer taking the depositions of all of the plaintiffs. Somewhere down the line, you've got one of two things that are going to happen to get to that resolution. Either through the federal proceeding itself and the bellwether process you get there or the judge has an ultimate hammer. The judge can say, "I'm going to remand these cases." And, that's a huge hammer. It's a hammer that hits both sides. It hits both sides differently, but it's a big lever.

I think, from the plaintiff's side, what I would always advocate is that the court save those specific discovery issues that are outside the world of the bellwethers for remand. For example, Judge Katz has the *ASR Hip Implant Litigation* right now, and there's a settlement that's in place, or in the process of being put into place. If I have a hip case that I think should be outside that settlement, why should Judge Katz be doing all of the plaintiff-specific discovery if he's ultimately going to remand that case? Now, maybe he's not going to. But, if he's going to, the plaintiff-specific discovery, in my mind, can be done more efficiently once the case is remanded in a personal injury situation.

If you've got something like Judge Selna, though, who had the *Toyota MDL*, he carved it up into personal injury and economic loss. If you've got something that's an economic loss, a stock fraud, or something where your discovery is going to be more efficient—even for the case specific remands, it's going to be more efficient within the context of the MDL—it ought to be done there, in the MDL.

My mind is that the North Star that guides in principle here is just one of efficiency and what's going to be most efficient within the ambit of still trying to get that resolution while you're in the MDL process.

*Judge Rosenthal:*

Jim, do you agree?

*James Irwin:*

I do. Yes. I do definitely agree with the notion that if you have an economic MDL, a securities case, or a fraud case, then the

discovery can and should be wider and broader and will be more efficient. What makes it complicated in a personal injury case is the very fact that these are personal injuries. They are personal. Your Honor, I would think one of the ways to try to consider a balance here and move that pendulum back a little bit in the other direction would be to very early on try to figure out how cases among the MDL population can be classified. Whether they're classified by injury, or perhaps by locality, there would be a number of ways to do it. Injury comes to mind most naturally.

If you were to classify them by injury, then you could set up a discovery program that would allow some sample discovery of each category—the death cases, the pill takers, and the people in between. That way, we on the defense side would get a shot at some of Mark's groceries besides his dessert, and I think it would create a more efficient bellwether process. I do believe that the whole idea of sending a packaged case fully completed with a bow around it back to the transferor judge is a fiction really. It's just not going to happen.

So, I believe, and I agree with Mark, that wholesale plaintiff discovery at the MDL level in personal injury cases is probably not very efficient.

*Judge Rosenthal:*

Ed, any thoughts on that?

*Professor Sherman:*

Well, Mark said that an objective of MDLs is efficiency, which of course it is. But, a primary objective of the MDL is also settlement. In fact, that may be the one issue that every MDL judge has on his or her mind. And, therefore, what kind of discovery is done in the MDL may very much depend on whether that would assist a settlement at the MDL level. It has been pointed out that, even after *Lexecon*, so few cases are remanded. Therefore, discovery—for example, relating to damages—might be conducive to working out a global settlement for the entire class without ever having to deal with all those individual damages. It might be very useful to do that at the MDL stage.

*Judge Rosenthal:*

So, is that an incentive pushing for more discovery within the MDL itself, rather than disaggregating it for individual plaintiff discovery after remand?

*Professor Sherman:*

Yes, settlement-oriented discovery.

*Judge Rosenthal:*

And, how do you know in the MDL that you're in a case that will be served better by drawing the line more expansively, or on the other hand, that you're in a situation in which it's a lot more efficient to wait for post-remand individual discovery? What do you look for?

*Professor Sherman:*

I think the judge has to make a determination as to what the likely parameters of a settlement at the MDL level are and what kind of discovery and information might be helpful in achieving that. Of course, this also is an estimate, I suppose, of how likely it is that settlement can be achieved in the MDL. Of course, that requires an awful lot of guess work.

*Judge Rosenthal:*

From the judge's perspective, what we're describing is an effort to make that kind of assessment when I have less experience with the case than anybody else in the room, less knowledge about what it involves, who it involves, what incentives are influencing the choices that they are making, their own internal financing structures. I don't have any insight into that. So, you're suggesting that I make this decision without Eldon to help me and with very little information—less information than anybody else. How do I do that accurately and well, and how do the lawyers help the judge do that?

*Professor Sherman:*

A lot of communication between the court and the lawyers. I don't think that, at the first status conference, the judge is capable of saying, "Well, this is the road map for discovery for the entire MDL." There might be some points that could be raised, but the discovery schedule always has to be flexible. As it goes forward and the judge learns more about it through a lot of communication with what's going on with the plaintiff and defense committees, it seems to me the judge then develops that expertise.

*Judge Rosenthal:*

Mark, do you have any insight into how this process is working?

*Mark Lanier:*

Well, I will say this: I believe that the plaintiff's lawyer has the most incredibly difficult chore of trying to get the microphone over to his side or her side, but the defense lawyer also has this incredibly difficult chore. Having said all of that, the hardest job in any MDL is the judge's job. You see, the goal of the plaintiff's lawyer is single focused. My goal is to get as much money as I can—I mean, that's it. That, to me, is justice. Jim's goal is very simple. It's to pay as little money as he has to so that his client is smiling. We both just want our clients to smile. The judge has to not only make sure that the judge does a good job in terms of the federal courts—the Fifth Circuit or whichever circuit it may be—in terms of the camaraderie of the bar, the bench, all of that. The judge has taken an oath for justice, and so the judge can't simply force a settlement at the expense of justice. The judge has to figure out how to make the microphone move in a way that brings resolution, but brings it not at the expense of justice.

Frankly, I think it's the most difficult job out of everything. It gives a responsibility and a heavy burden to a judge who takes it seriously, to try and accomplish an end result where everybody's got one pull going a different direction or another. The judge has this global focus under a paramount concept of justice. I don't know how you guys do it. I admire you for doing it. I'll fight you vociferously to try and get the microphone as close to me as I can.

Yet, when all is said and done, we need to all argue for better pay raises for our judges, and we need to all give them respect and honor due to their job. It's one of the highest callings you could ever have in the bar. It's something to work toward. I don't know how you do it other than exactly weigh all of these different things. When I'm in there fighting, I want you to go with me, but Jim wants you to go with him. I don't know how you do it other than weigh these things.

*Judge Rosenthal:*

Well, without detracting from too much of what you said, I think you've added to our list of goals of the MDL an important third point. So, we have efficiency. We have identifying and efficiently and effectively pursuing settlement when, early on, it

makes sense to do that explicitly. Then we have this third goal, which is to achieve fairness and justice. In this context, putting flesh on that bone can be challenging, but it is, in part, treating like cases like—consistency of application of the law.

*Mark Lanier:*

I don't mean to interrupt, especially you, Your Honor, but I was talking to Judge Fallon this morning, and he was contrasting the system in China with the system in the United States. I mean this is the beauty of our system.

*Judge Rosenthal:*

I'm not disagreeing. Like I said, I'm not detracting from too much of what you said. It is beautiful. But, we now have three goals, and we're trying to structure the process from the outset to achieve the combination of goals that fits best for this case.

From the defense perspective, Jim, how can the defense side help the judge understand early—early enough to be productive in making these choices, helpful in making these choices—where it makes sense to draw the line, to carve at the joint in the discovery that has to be organized?

*James Irwin:*

I remember what Professor McGovern said in the beginning, and the word that comes to mind is “process.” In some ways, we all have to be patient with the MDL process. There is a grind that we almost all have to go through, especially the new judge who knows less about the case than Mark or Jim does. And, I completely agree with Professor Sherman that the idea of settlement needs to be advanced earlier—treatment of settlement needs to be advanced earlier in the MDL setting. I've got some thoughts about that, but I do think we have to go through this grind together.

I know that the plaintiffs will say, “Your Honor, we really can't talk settlement yet until I get all of Jim's documents.” That takes a long time with rolling document productions now and millions and millions of e-discovery pages. Judges are patient with us now, thankfully, about that.

Some of the things that can be done, I think, earlier to start focusing on settlement once you start this grind, is to think about whether there are ways to put the plaintiffs and the defendants together to settle individual cases.

*Judge Rosenthal:*

Early, and how do you do that if you haven't taken individual discovery?

*James Irwin:*

You might have had some cases that came in from transferor courts that have some discovery in them—usually that's the case. There is an interest on the defense side, sometimes, to get rid of some of the more dangerous cases up front. The plaintiffs may or may not be interested in doing that, but there have been opportunities for a judge to appoint a special settlement master. While the grind is going on there may be some settlements that can be accomplished in the meantime. That has been done.

Another thing is the end game committee, which I know Your Honor does, and Judge Fallon does—appointing an end game committee for the plaintiffs and effectively appointing an end game committee for the defendant. I don't think you can do that at the first practice and procedure conference, but you can probably do it before the end of the first year. So, I do believe that there are ways to try to advance that notion earlier, but we still have to do the grind a little bit.

*Judge Rosenthal:*

Of course, one of the major criticisms of the whole MDL process is the amount of time it takes. The black-hole aura surrounding the MDL is that you send your cases off to the MDL and they are never seen or heard from again. There is just such a huge amount of time taken, and what you're describing in a way is inconsistent with efforts to reduce that time—the grind.

*James Irwin:*

Yes, but think what it would be like if these 10,000 cases were scattered among hundreds and hundreds of federal courts around the country. Is that the alternative? I just don't know how you can really get to any meaningful global settlement without the document production, and that's going to take a year.

*Professor Sherman:*

If there are discrete categories of cases, we need not think that the only acceptable form of settlement is the global settlement. It



has been done amazingly by Judge Fallon in *Vioxx* and in the *BP Oil Spill Litigation*. There are certainly categories of cases that, along the way, might be settled. It seems to me that identifying, early on, how the entire case load divides up and what kind of settlement-specific discovery you can take regarding certain categories may allow that whole group of cases to be settled off.

*Judge Rosenthal:*

We talked about dividing the cases into—even more generally than you’re talking about, I think—cases that present formulaic, generalizable issues, like economic cases where you’re looking at the theory of economic harm, the damages that are susceptible to common treatment, and then plaintiff-specific issues, such as individual causation or individual damages. But, what do you do when you’re trying to achieve the kind of packaging that Dean Sherman has described so that you can start dividing lines and allocating discovery to different stages of the litigation pre- and post-remand? What do you do when you have cases that involve elements of both, within the same plaintiff perhaps? You have general causation issues. You have specific causation issues. You have economic harm aspects. You have personal injury aspects. What do you do when you have that kind of intertwined set of issues? Because the world is really not, in my experience, nearly as neat as what you’ve described.

*Mark Lanier:*

Well, I think sometimes you’re able to divide it up. Judge Selna in *Toyota*, as I referenced earlier, said everybody that owned a Toyota had an economic loss claim. Whether it’s valid, he does not decide. But, he carved those out from those individuals who also had a personal injury claim from the unintended acceleration of their vehicle.

So, you’ve got that set, but beyond that, you’re going to have a mixed bag. I think, for me, that guiding star is still efficiency. So, if you have a general causation question: Can *Vioxx* cause increased cardiovascular events? Can it cause a stroke? Can it cause a heart attack? Can it cause a pulmonary embolism? Judge Fallon—or whomever the judge might be—is in the best position to make those general causation decisions that should apply across all of the litigation.

*Judge Rosenthal:*

This is very reminiscent of the kinds of issues, no pun intended, that we see argued on the issues-class line of cases. When you start carving at that joint, you run the risk of taking out for general resolution an issue that cannot fairly—we're back to something other than efficiency—cannot fairly be resolved outside of the context of the individual specific issues. This is why you don't have issues classes of general causation in some of the personal injury mass torts, and why you don't treat them on a class basis at all.

How do you square those concerns with your suggestion that you can, in this context, divide it up along just those lines and have general causation determined, or at least discovered, in the MDL? Is that because your goal is settlement and not trial?

*Mark Lanier:*

I think that it depends on what your goal is in that regard. I think the paramount goal that trumps everything is justice, but it's achievable justice. That's why I say the judge has the hardest job of anybody in the litigation. The judge is the one whose charge it is to see that achievable justice is done within her or his court.

*Judge Rosenthal:*

Jim, from the defense perspective, the defendants have historically been on the side of resisting the resolution of general causation issues on a global basis. Here, you have an MDL in which you may be subjected to conflicting incentives. Within this MDL—particularly the earlier stages of the MDL—how do you identify when it's in your client's interest to get as much information as you can through formal discovery, even about general causation issues that, if somebody were to propose class certification for that issue, you would be resisting mightily?

*James Irwin:*

Well, I think in many ways it's a question that begs the scientific answer. *Daubert* does come to mind on general causation. It's not the Justice Potter Stewart test of "I know it when I see it." General causation—at the MDL level—is generally treated at the *Daubert* stage, which is usually pretty close to the end. So, how you advance that determination earlier is a very, very challenging question. It may, again, invite trying to classify these

groups in ways that you could look at a group and see if you could treat a particular group early on that way rather than full blown *Daubert*.

One of the things that comes to mind is the *BP Oil Spill Litigation*, which I think covers almost every base that everybody will talk about here today. I know that Judge Barbier, along with interests from both the plaintiffs' steering committee and BP, have advanced earlier consideration of certain groups, like the economic loss groups, which was easier to treat earlier, and then later, the personal injury groups and deaths, which I believe did settle.

There may be some answers to some of these questions. The idea that we could work early towards picking a group of cases or a classification of cases and a personal injury MDL and treating them earlier in the *Daubert* stage I think is a worthy thing to consider. I don't know that I have the answer to it now, but there are good people here in this room that may be able to collaborate on that.

*Judge Rosenthal:*

Ed, do you have any thoughts about how we could move towards this kind of structure or institutionalized set of incentives for judges and for lawyers to make this kind of categorization of types of claims—or defenses—that might be handled through aggregated discovery and those that can be deferred and delayed until remand?

*Professor Sherman:*

Well, again, I would use the possibility of settlement as a good guide. The end game in the perfect system is that you do only class-wide discovery and then you remand and get into the specific discovery and those issues. But, that's not the real end game that goes on because such a tiny percentage of MDL cases ever get remanded.

*Judge Rosenthal:*

Is that true so much anymore? I'm seeing a bunch of cases getting remanded that I didn't used to see, not just asbestos.

*Professor Sherman:*

Asbestos is a good example of how the philosophy of the MDL judge changed from trying to achieve a global settlement at the

MDL stage to going ahead and remanding and trying to decide them. You may be right; maybe that is changing in that respect.

But, it does seem to me that targeted discovery, rather than wholesale discovery, is very much a possibility at the MDL stage. Obviously, if the judge is using bellwether trials, then it's appropriate to do discovery regarding them or, if they're remanded back to discovery, for them. Apart from a small number of bellwether trials, you could have targeted discovery along certain issues, which would give, for example, specific causation or actual damages and injury. You could pick a handful of cases, maybe selected at random, so that each side gets a sense of what would be accomplished if there was wholesale class-wide discovery. Going ahead and doing specific discovery as to those cases may provide the parties and their attorneys with a lot of information that would permit them to do that.

We were talking about this earlier, Jim, in a lot of pharma cases, the ultimate settlement often skirts individual causation. There is a matrix. Maybe you could describe that.

*James Irwin:*

Well, what we were talking about, again, was BP and the Fifth Circuit's decision recently saying that the requirement that there be no proof of causation for the business economic loss claims did not violate the case and controversy provisions of the Constitution. That is because BP and the plaintiffs' steering committee agreed that it was not necessary to establish direct causation that your business losses were associated with the BP Oil Spill.

Well, we do that all of the time in pharma, and this is what Professor Sherman and I were talking about. We don't do it every time, but we do it often. For example, the *Fen-Phen Litigation* was settled with a grid. If you had a heart attack, you were put in a certain slot. If you had a stroke, you were put into another slot. There was no requirement that you prove causation other than that you took a pill. Now we know that plenty of people who were put into that slot probably had a heart attack or a stroke from life and not from that pill, but that was the settlement.

*Professor Sherman:*

And, therefore, removing specific causation, which is very individualized and an expensive process of doing it. Plus, you have to have a defendant who's willing to go ahead and pay some people who cannot prove that their heart attack was actually caused by the defendant's medication. Nonetheless, it's more efficient for

both sides to remove that in the settlement. You couldn't do that without a settlement, but in a settlement, you can.

*Judge Rosenthal:*

Let's move the question back to planning earlier in the litigation for the kind of end game strategy that looks like it's going to be the most appropriate and the most successful. One of the ways we've heard about that fairly recently is to take this concept of staging some of the cases—categories of cases—and dealing with them sooner to provide information that might guide decisions on how to deal with the larger body of cases. One approach has been staged remand. That is, early in the case, you pick one or more—a group of cases, bellwethers—and you remand them. Tell me about that process and how that fits into early planning for later disaggregation within the MDL.

*Mark Lanier:*

I think remand is one of the most powerful tools a judge has, and I like the idea of an early process like that. There is an MDL that I'm aware of where the defendants were going around the country trumpeting that it was a fallacious lawsuit and shouldn't exist. This should be a no pay. We shouldn't just be assuming that just because there's been an MDL and plaintiffs have filed cases that money is owed. So, the plaintiffs in the case turned around and said, "You know, we're so convinced that you're so wrong that we think what the judge ought to do is remand all of the cases. If there's nothing worth winning then why don't we get them all remanded and we'll go toe to toe? If you're never going to pay anything to settle, why should we be in an MDL at all?" At which point the defense lawyers, when they realized the plaintiffs might actually be serious said, "Oh, we weren't serious when we said we weren't going to pay anything. I mean, we'll pay something. We were posturing." And the judges have an incredible lever in saying, "I'm going to remand."

If at the beginning of the case you say, "Okay, look, here are different categories. Here are categories of cases that clearly belong in state court." As an MDL judge you don't want to lose control over the litigation, so you can't remand them too quick. But, the judge can very easily say, "You know, I'm going to set up these trials, and if these trials do not work, then I'm going to begin a staged remand process. Let's start now so that you know that I'm serious—classify for me those cases that are proper for remand. Those where there's an alleged improper joinder of a defendant

just to defeat diversity, let's classify those in groups. Are they sales reps? Are they doctors? Are they testing facilities? Classify them into groups because we're going to put together a staged remand process that will begin as soon as I've figured out that my bellwethers were not successful." That's a huge lever.

*Judge Rosenthal:*

In what kind of case is staged remand appropriately deployed?

*Mark Lanier:*

I think it's appropriately deployed in any case where the judge needs it to bring resolution. I'd set it up at the outset of every case. I'd say, "Hey, I'm an MDL judge. We're going to get through this efficiently. We're going to give you a chance to settle your case. If you kids don't want to settle your case, that's fine. We'll send you out to have your fights where you want to have them."

*Judge Rosenthal:*

Jim, do you agree with his choice of playground?

*James Irwin:*

No. I also think that there are many people sitting in Your Honor's chair and in Judge Fallon's chair who feel that remand in some ways is a failure, because these cases have been consolidated before Your Honor to take a load off of your brethren, and your job is resolution. We can talk about another kind of remand. Plenty of cases are removed to the federal district courts and then transferred to the MDL on fraudulent joinder grounds. I've seen lots of transferee judges delay ruling on motions to remand on lack of diversity. For that reason, it seems to me that perhaps, by hanging on to this, we can get to the global resolution stage, which I think the transferee judge thinks is his or her first priority.

I don't have a lot of experience with remands recently until end-game time when it is, again, a very powerful lever for the judge. Well, if you don't want to talk end game I'm going to send everything back. And everybody kind of says, "Well, that's fine"—until the plaintiff calls his hand and knows that it's a bluff. When remands do occur, my experience is that they're occurring near the end when settlement is underway—that remands might push the settlement over the top—and the idea of remanding things early I just don't think is the conventional wisdom in this process.

*Judge Rosenthal:*

It's not conventional. I'll agree with that. Ed, any thoughts on this?

*Professor Sherman:*

Well, certainly on one extreme would be the asbestos cases when they were MDLs back in 1980s in federal court in Philadelphia. That's the famous black hole, and any lawyer anywhere in the country found that his asbestos cases went into the black hole and never moved.

*Mark Lanier:*

From the plaintiff's side, each one of your mesothelioma victims has a six to eight month life left. And then the case is gone and they get no money for 20 years. Go ahead.

*Professor Sherman:*

Exactly. One result was plaintiff's lawyers stopped filing in federal court so they didn't have to go into a federal MDL. And, the philosophy of the MDL judge who did that was to get a global settlement. Of course they did get a couple of global settlements that were struck down by the Supreme Court. At the end of a dozen years, nothing had happened. Now a new philosophy of the MDL judge is to remand these things. And then, I think too tight a remand schedule, you know to say at the beginning of the MDL, "I'm going to remand in six months," would be unduly specific. But, certainly a recognized use that remand at an appropriate stage is a real possibility in every MDL.

*Judge Rosenthal:*

I think the next panel's going to continue a lot of the discussion on some of these issues. Because now we know that (a) it is really hard; (b) we have to be efficient and just; and (c) we have to work in a timely manner. Because our jobs—all of our jobs—are difficult beyond description, magnified by the fact that there are so many parties and so much money and so many serious consequences involved, we need at least another hour.

INTEGRATING AGGREGATED AND DISAGGREGATED DISCOVERY  
ISSUES

Mark Lanier, Moderator  
Judge Lee Rosenthal  
Professor Francis McGovern  
Richard Arsenault  
David Jones

*Mark Lanier:*

On June 1 of 1984, I was a recent graduate of law school. I started my job at what was then called Fulbright & Jaworski in Houston, Texas. I was so excited, because I was going to try lawsuits. I was going to get paid to argue, and ever since I was an argumentative little kid, I thought there could be no better job in the world than people paying you to argue. I just knew I was going to go in there and be trying 20 cases a week, and it was going to be just the most thrilling part of my life.

When I got there, Rufus Wallingford walked into my office and said, "Hey, I need you tomorrow to go up to Garden City, New York, and you're going to be involved in a document production in this commercial case." And I said, "That sounds great." For the next six months, I was in Garden City, New York, in a dusty warehouse opening box after box, reading page after page, trying to decide whether it was relevant and should be produced. If it was relevant, did it have any privileged matters that should be redacted? If it was not relevant, why should it not be produced? There was a cadre of ten of us new lawyers, none of whom understood what the case was about. We just knew we were getting to bill eight, nine hours a day to go through these boxes making these arbitrary decisions that might one day have something to do with a piece of litigation.

It was an interesting part of discovery, but it has changed, by and large, with the advent of e-discovery. I've got an assembled panel of some phenomenal minds, and my job is to ask them questions and to prod them to give us the benefit of their minds. To my right is Richard Arsenault. Richard's not only a very dear personal friend, but I think Richard is probably the most effective, organized, and structured MDL plaintiff's lawyer, or lawyer of any kind, that I know.

To his right is Judge Lee Rosenthal. I've had the honor of being in her court a number of times, but not as often as I would like. She is one of our outstanding jurists in the Southern District of Texas, and she is a graduate of the University of Chicago Law School. Anybody who ever practices in front of her will tell you



what a magnificent intellect she has, how she brings fairness to play, and how she's always trying to figure out how to best see that things move along as they should. It's an honor to have her on this panel.

To her right is David Jones of Beck Redden. David is an outstanding lawyer, generally on the defense side, but not always on the defense side.

*David Jones:*

We dabble on the other side.

*Mark Lanier:*

That's exactly right. And, he works for David Beck who is, in my opinion, one of the most outstanding trial lawyers in the country—a mentor to me—and someone that I routinely go to if I ever need any help.

To his right is Francis McGovern. Francis has some Houston roots. He started out at Vinson & Elkins and eventually moved into the academic side, but he still stays with one foot firmly entrenched in the practical aspects of what we do. I think in some ways he is Mr. MDL if there is such a title to be had.

So, if you read what the panel is about, it says we will discuss various kinds of discovery and the strategic and case management challenges that each method presents. Richard has been kind enough, as Mr. Organization, to send around a list of bullet points that everybody needs to be prepared to talk about. So, here's where I want to start: I want to start with a really hot issue to me. The issue is "spoliation," and I'm going to start with Richard Arsenault to set up a definition of spoliation in a practical way. Then I want to go to Judge Rosenthal who has written one of the seminal opinions on it, and then we're going to talk to David and Francis to see what they have to add to that discussion. So, Richard: Spoliation.

*Richard Arsenault:*

So, very quickly, one of the members of this law school just wrote a law review article unbeknownst to me on spoliation and it's in my materials.<sup>1</sup> I can't wait to read that. Part of my reason for living for the last six months has been working on a spoliation

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1. See Danielle "Dani" Borel, *The Land of Oz: Spoliation of Evidence in Louisiana*, 74 LA. L. REV. 507 (2014).

issue. Long story short, at some point in time, if you anticipate litigation, you are supposed to put a litigation hold in place. It's not when you get sued. It's not after you get sued. It's when you anticipate litigation. So therein lies the gray area, right?

After the litigation hold is in place, if you destroy documents or make them otherwise inaccessible, there's spoliation, and it comes with consequences. Consequences can include anything from default, striking defenses, costs, Rule 37 sanctions—there's a smorgasbord of options available, and the more intentional the conduct, the more draconian the remedy.

*Mark Lanier:*

So, Judge, you've got a seminal opinion on this. Tell us—spoliation from the bench.

*Judge Rosenthal:*

Spoliation from the bench is currently one of the most challenging issues in discovery, in part because it is the perfect marriage between two unlikely partners. Neither of which the judge—often a judge like myself, who quit doing discovery when it looked like the discovery that Mark described, rummaging through warehouses and boxes and old file cabinets, when your biggest fear was getting bitten by a spider—is familiar with. Discovery is no longer done with these tools. But, that's the discovery I remember because I've been on the bench for so long. Many of us have.

For us, it's the marriage of technology and traditional discovery concepts. How do you bring those two together? When it comes in the context of an MDL—a big case—those issues are magnified in complexity and in importance because the stakes are so much higher. And, there are challenges when you're dealing with massive data producers, generating huge amounts of information, dispersed across continents and decades, in forms that may or may not be readily accessible, may or may not even be identifiable. Common law, statutory, and regulatory duties kick in for different kinds of information at different times and, by the way, nobody is going to agree on when the trigger got pulled. Then, the question of spoliation and the sanction that's appropriate in our circuit turns on the degree of spoliation, which requires not only the destruction or deletion or alteration or making it difficult to access information, but also when there was a duty not to do those things. Our circuit adds to that with a culpable intent

standard to justify the imposition of severe sanctions—a culpable intent of keeping it from the other side in discovery.

So, it is a challenging set of issues, and in some circuits the legal standards are different. In some circuits the legal standard of culpability required for severe sanctions is negligence, which leads—we are told—to a drive towards over-preservation. So, then the question is, how do you balance the fact that there is seemingly endless amounts of information that somebody has to review for relevance, responsiveness, and privilege in some cost effective and efficient fashion? And, how do you also deal with the fact that these are human beings running imperfect machines? Not all of the information is going to be there, and hindsight is a marvelous thing. The very piece of information you don't have is no doubt the smoking gun—or so you're told.

So, as the judge, dealing with these issues is challenging. You heard Richard say that this has been his life for the last six months. I suspect that by the time the judge ruled on it, a significant amount of time had passed because they're tough issues, and I know she got right on it and did it as fast as she could.

The litigation was about discovery; it wasn't about the merits; it wasn't about the strength or weaknesses of the claims or defenses. You were trying spoliation. That's all you were doing, correct?

*Richard Arsenault:*

Absolutely.

*Judge Rosenthal:*

That is not what litigation was set up to do; that is not the purpose of the system. So, how do you prevent the case from getting derailed? How do you prevent all these institutional dislocations and inefficiencies? I don't have a good answer, but these questions have to be resolved better than we're resolving them. Because, in a case like you've just described, it does threaten the ability of the MDL system and the courts that are asked to get these cases resolved fairly, efficiently, and in a cost effective way. I think it's a very serious threat.

*Mark Lanier:*

So, David, I throw it to you as someone who's been involved in the meat of document production and electronic document production. You come at it as someone who often represents

corporate America—companies that are going to have these billions of documents that Judge Rosenthal referred to. How do you go about it as a lawyer doing your due diligence in regards to these issues so that the discovery is done correctly? And then my thorny question's going to be, if you find out your client did spoil, do you say anything? Where's your ethical line there?

*David Jones:*

Well, the answer to the first question is that corporate America is often the target of complex litigation. They're the ones that have the documents. They're the ones that have this mass of information. Being the lawyer for those parties, it's—simply stated—terrifying. When you face a large corporation—regardless of the size—you immediately have to identify who has relevant information—the bigger the problem, the more people that have relevant information. You need to convey to them immediately that you need to save that information and that there are legal hold notices. You can spend days talking about what should go into a legal hold notice, but at the bottom it is identifying all the people who have the information and getting the word out to those people immediately and telling them what to save.

But, quickly, you start getting calls. You start finding out that, “Well, wait a minute, does that mean I actually have to save voicemails on my cell phone?” Yes, you do. “Well, there's a memory chip in the copy machine at the end of the hall. This is where we do all our copying. Do we need to save that?” Maybe, or maybe not.

So it quickly starts escalating, and you realize that, well, it's not simply the individuals we need to talk to. It's the organization as a whole, because you have servers placed all throughout the world that may have bits and pieces of all the data that may be relevant to the case. So, getting your hands on this data, working with IT (Information Technology)—closely with IT—is a tremendous task.

This process goes on and on—unlike the old days when you used to go to your client and say, “I need all your documents,” and the boxes would show up or you would go to some dark warehouse. I had a great experience of weeks at a landfill, so I sympathize with Mark. But, you can't do that anymore. You can't just say, “Well, my client told me this is where everything is and this is what they gave me.” The lawyers now have a responsibility to actually go secure that information, to send people out and actually conduct interviews. When you sit down face-to-face with the vice president of marketing and you say, “What do you have?”

And, he tells you, “I’ve got documents here.” You have to push; you have to prod. You have to get this information to do everything you can so that, at the end day, if something is gone you can stand in front of the judge and you can say, “I did this. We organized this. I brought in this support. We imaged this hard drive.” You can explain why that data is not there at the end of the day.

This then leads to the next question—If you find out that it’s gone, my view, my recommendation to the client would always be that you have to get it out there, and you have to get it out there immediately. Watching the spoliation issues play out in real time during the *BP Oil Spill Litigation* was every lawyer’s nightmare to actually have to discuss it in open court with witnesses on the stand. But, it’s what you have to do, because the cover-up is always worse than the crime. So, if there’s one piece of advice from defense counsel, get it out there.

*Mark Lanier:*

Judge Rosenthal, were you going to add something to that?

*Judge Rosenthal:*

Yes. I was just going to give the group a heads up and early announcement to be on the lookout for a possible change to Rule 37. You were talking about the e-discovery rules that were put in place in 2006. Those rules were designed to be the first step because we knew that there was a whole lot that we didn’t know about e-discovery. We had to put a preliminary framework in the rules to accommodate the issues, but we understood fully that this was not the end of the story. One of the pushes for continued reform has been criticism that Rule 37 needs to be clearer, more helpful, and—in particular—needs to resolve the conflict in the circuits about the degree of culpability required to justify case altering sanctions, as opposed to lesser curative measures, if there is, indeed, discovery unavailable for different reasons.

This has proven to be enormously difficult. Lots of people will say, “Well, why don’t you just address it in the Rules?” Well, that’s enormously difficult to do when the Rules themselves don’t give rise to the preservation obligation. That’s done in the common law or by statute or regulation, and it’s often substantive law. Rules can’t touch that. Spoliation deals with conduct that occurs before the litigation, which is not generally the area in which the civil rules speak, and it is enormously difficult to capture—in one rule—all of the variables that affect how you judge a spoliation

accusation when it can deal with physical evidence or e-discovery—it can deal with lots of different circumstances that explain what happened. But, they are working on a revision.

So, go to the website. Look at what's proposed. The comment period for the first post publication has now closed, but obviously it's a long Rules Enabling Act process. The debate, you will see, bears on these issues, and it's fascinating. For those of you who are litigants, you'll get great arguments on both sides. For those of you who are on the bench or students of the jurisprudence in the area, you'll get some really interesting insights into the different viewpoints.

*Mark Lanier:*

I'm going to go down to Professor McGovern. I want you to summarize all of this and tell us what you see from your perspective.

*Professor McGovern:*

Putting on an academic hat, I tend to live at about 100,000 feet. Looking back, Mark, when we were baby lawyers, spoliation just really wasn't a big deal. It's really e-discovery that has generated the problems. Judges don't like collateral litigation. Judges don't like satellite litigation. So, I think at 100,000 feet, we are in a transitional phase right now. I don't think it's going to last too long. Pretty soon you'll know the rules of the game; I would say in what, maybe five years, Judge Rosenthal?

*Judge Rosenthal:*

It'll get better.

*Professor McGovern:*

I just think this is a transitional process. Looking at it from a professorial perspective at 100,000 feet, I just don't think it's going to have that long of a duration because judges aren't going to tolerate it.

*Judge Rosenthal:*

But, Francis, that's like telling the parent of a 13 year old girl, "Don't worry, adolescence will someday be over." Except for this 13 year old girl, in an MDL, that adolescence could be a long one.

*Professor McGovern:*

Oh, five days on the stand I suspect is considered fairly long by the associate general counsel of whoever it was. But, just in the larger scheme of things, I think that its duration will be limited.

*Judge Rosenthal:*

I think you're right with one, maybe two, caveats. One caveat is that we keep fighting the last battle. We always have. It's part of the problem of the way we approach things. We are driven by precedent, which inherently focuses us on what happened last time. The technology here, which didn't create the problems but certainly amplified them and changed them, is not static. One of the problems that judges are having is that just when they think it's safe to go back in the water—lawyers and litigants too—just when they thought they understood how to deal with certain categories of information created by certain kinds of technology, we got instant messaging. We got texting. We got different applications. We got whole new technologies. We got the cloud. These are new. I cannot imagine what it's going to look like in five years. Nobody else in the room can either.

I think you're right except that the sands are going to continue to shift in ways that are going to make this a profoundly dynamic set of problems—more dynamic than our system is used to dealing with—because the pace of change is different.

*Mark Lanier:*

Okay. Next subject. In MDL land, one of the things that lawyers typically do when they have cases is they will request an opportunity to present the panel with a venue choice that each lawyer seems to think would be most suitable for the case. We lawyers are generally allocated, I don't know, two minutes to make our arguments. The lawyers all get together and barter: You give me 30 seconds of your time, and if I get on a committee, I'll appoint you as my left hand. So, people wind up with interests, "Your Honor, I have 1 minute and 45 seconds. I've ceded 15 seconds to Richard Arsenault." It's a fascinating subject.

But, in the process, arguments are made as to why this case belongs wherever it belongs. One of the arguments that I've heard many times is, "Well, please put it in Chicago or please put it in Houston or please put it in New Orleans, because these are central locations where people can easily come from either coast. Or,

please put it in New York or Philadelphia or something because many of the witnesses are there.”

So, with those arguments, one of the things that’s always been perplexing is the ability to compel the availability of witnesses should there be bellwether processes, because the Federal Rules allow you to compel 100 miles from the courthouse. That ballgame is changing radically, and it will change where we can place cases and why we can place them there. Richard, you know what I’m talking about. Would you set up the change that you have put in place? Then, Judge, I would like your thoughts about it as another judge. I’d like your thoughts, David, as generally a defense lawyer, and Professor McGovern, I’d like your thoughts as an academic. Richard, explain please.

*Richard Arsenault:*

So, the challenge at the end of the day is to—when you’re bringing a claim against a corporation—have someone speak for the corporation. You would think that a corporation would bring some individual that can speak to issues. There’s so much risk for the defendant fraught with that process that you never see a warm body. For at least some of the cases in *Vioxx* there weren’t, in our view, the requisite number of warm bodies there for the defendant. At some point Judge Fallon wrestled with that, and the rules subsequently changed. So, there was some question with regard to whether we could continue to rely on that jurisprudence based on some changes in the Federal Rules.

It dawned on me that probably 30 years ago there was this litigation—and really, I think, one of the first for Louisiana becoming involved in some of the mass tort litigation—the *MGM Grand* litigation in Las Vegas in which there were Louisiana people who were involved in that hotel fire, and it happened that Louisiana lawyers got involved and met a variety of mass tort lawyers and therein began the love fest.

The next case after that was this huge fire in a hotel in Puerto Rico, and satellite transmission was used in that case for some of the witnesses. As we wrestled with Judge Fallon’s decisions and the change to the Federal Rules, it dawned on me that decades ago—decades ago literally—we had employed this technology. Certainly the technology now is exponentially better. Why can’t we go back to that? Do the Federal Rules allow for it? Can we have a trial, and especially early on in the case, Judge Dougherty in the *Actos* MDL said, “You know, to the extent possible, and maybe I can’t force this, but to the extent possible I’d like to see live



human beings here at trial. Your witnesses, your experts. It's just the way to do things."

So with that invitation, we embarked on a process—Mark and I—to try to get an order to compel the appearance of some 28 witnesses. We issued subpoenas, we engaged in motion practice, and the judge granted our motion. We subpoenaed about 28 witnesses to appear in the federal courthouses closest to where they worked or lived. We were going to take their live testimony through the satellite transmission process. The defendant pretty quickly agreed to produce about half of them live. So, we didn't have to do the satellite process. We have taken, thus far, one witness that Mark took through the satellite process. It worked, in my view, flawlessly. Quite frankly, I think the jury was more engaged and more interested in that process than in some of the live witnesses, and certainly exponentially more engaged than in any of the video depositions.

So, we'll see. We've got another four weeks or so of trial. We'll probably have several others, but the technology is here. You can have split screens. Mark's on the document camera (ELMO) in trial. They can see that. We can see them. It works very, very nicely. We have a very polite judge. We have a very polite magistrate who's been very interested in this and has reached out to these judges. And, so as to not inconvenience them, there have been some issues with regard to exactly when we must start every day. So we have to start early in the morning so as to not inconvenience those other courts. That's a little troubling for us when suddenly we're out of witnesses one afternoon and we need to kind of work that in. It's an imposition on other judges and other courthouses around the country. I suspect with time, and this is our first at bat, and if I was going to do any tweaking or suggest any tweaking to the protocol, I don't know that we necessarily need to use courthouses. But that whole aura of legitimacy, the aura of the courtroom, I think, brings something to the process. Again, the key is not to provide too much inconvenience to the other judges. And, I think you'll see with time that it doesn't need to be at a courthouse, but there needs to be some checks and balances. There's a court reporter in the remote location to assure that no one's giving hand signals or smoke signals to the witness and that the integrity of the process is maintained.

But, it has worked very well, and I think we're going to continue to see it. It's made for an extraordinarily engaging process in trial with real people being asked real questions and giving real answers.

*Mark Lanier:*

At which point it can be done anywhere in the country. So, Judge Rosenthal, have you seen this? Or, have you thought about this?

*Judge Rosenthal:*

Yes. I have thought about this a lot, because this is a practical result. I want the law students to understand that you're hearing a conversation—one of the very first of its kind—a report from the trenches on the effect of a rule change that took effect last December 1. So, you are hearing from the front lines of the battlefield of information about innovations in response to a change in the Federal Rules that is a privilege to hear. The rule change took place because Rule 45 of the Federal Rules of Civil Procedure governing subpoenas for various purposes had turned into a mess.

So, the Rules Committees worked very hard over the years to clarify it. One of the clarifications was to make clearer what had been so unclear in the Rules and lead to inconsistency in the case law. Judge Fallon had taken one approach in *Vioxx*. Another judge in his same court, the Eastern District of Louisiana, read the rule differently. So, there was a fair amount of confusion, understandably, in the bar over what the right approach was, and the rule changed that.

The result of the rule is that Richard cannot haul the warm bodies he wants to haul from New York to Houston or Chicago or New Orleans to testify at trial. He can't get them. So, what's he going to do? You've heard the result. It's a wonderful example of lawyers using technology in new innovative ways, and it ties right in to what we were talking about before. Technology is going to help make trials better, trials that otherwise would, because of technology, be more difficult.

For example, I think this is a great step. We're going to see more of it. The technology is now so good, and the studies of how jurors process information are reassuring because they show that the generation that is now out there in number, is really used to seeing stuff on a screen. They're fine with that. The romance of you must have the witness in front of you, you must see the whites of their eyes in order to see if they're lying or not, is gone. Jurors are quite confident in their ability to make judgments; not only to absorb information but to make credibility judgments based on what they see on a screen. They are fine with that.

So, I think we're going to see more and more use of satellite, Skype, and all sorts of applications that will make this increasingly easier and better to do.

On the discovery front, you'll see computer assisted review technologies, which are being promoted now by vendors, but are meeting skepticism because they're untried—they're untested—and judges, many of whom don't really know much more than how to type or turn on a computer, are a little bit worried about replacing so much human review by computer review. But, you must do it if you've got these volumes that you're going to deal with in a cost effective and efficient way.

So, we are moving, and the technology that we complain about is really going to help.

*Mark Lanier:*

Predictive coding and those types of ESI issues are going to be our next subject to cover. But, before we get there, David, what do you think about the idea that now I've got an ability to subpoena any of your witnesses live to trial as long as they're within 100 miles of some federal courthouse, and they can either show up by satellite or they can go ahead and make the journey down? I think it's a game changer from my perspective.

*David Jones:*

It is a game changer. It is a major change to the way, particularly from the defense side, you handle discovery, the way you handle depositions, and the way you handle trial planning. In any big organization there are going to be good witnesses, there are going to be okay witnesses, and there are going to be train-wreck witnesses. We've all had circumstances where we present the train wrecks for deposition, and maybe the examiner wasn't as good as he could have been, or maybe he didn't ask the right question and the deposition ends. They've passed the witness around, and they say, "We're done for the day." That guy is never going to darken the door of the federal courthouse. In fact, there were many times in the *BP Oil Spill Litigation* when people would say, "That guy will never darken the door of the federal courthouse on Poydras Street." We all knew it was because they were just bad witnesses.

*Judge Rosenthal:*

No place to hide.

*David Jones:*

There's no place to hide. That's exactly right. So, then you have the choice of whether you bring this person and subject him to the lights and the theater of the courthouse. Or, do you leave him in some far off remote place where nobody looks good on video tape, where he looks worse than he may look in person? It really becomes a case-by-case, issue-by-issue, witness-by-witness determination of "Can I get this guy to a point where I can bring him live?" And, if not, can I get him to a point where he can at least survive some remote trial testimony?

*Judge Rosenthal:*

Can I ask David a question?

*Mark Lanier:*

Yes.

*Judge Rosenthal:*

David, can you think of a potential for abuse that would give you an argument and give a judge a basis to say, "I'm not going to allow this?"

*David Jones:*

Well, I think at some point there becomes a burdensome issue when the other side says, "I need these 15 people from your organization all over the world, to bring them down one by one and whip them for the same issues with the same documents over and over again." At some point I think the defense can say, "Time out. You did depose all these people. You do have their testimony on the issues that were material to you at the time you took their deposition. If you can come up with some compelling justification for why we need to go rehash this live, to cover some issue that you couldn't have covered in their deposition, okay." But just to bring witness after witness after witness in to flog them live in front of a jury, I think it should have limits.

*Judge Rosenthal:*

Okay. So you can flog them once, you can flog them twice, but then you must start drawing some lines.

*David Jones:*

That's right.

*Mark Lanier:*

We've got about 15 minutes left, and the third subject that I want to make sure we cover that, I think, is a hot subject as well is that of predictive coding.

*Richard Arsenault:*

So, this is technology that we're talking about. I really believe that technology is our friend. Technology has created some problems, but I really believe technology is going to solve many of these problems.

How do we go through millions and millions of documents? And, again, these numbers are expanding exponentially. *Vioxx* involved 30 million documents. We thought that was quite a bit. *ASR* involved 60 million documents. We have about 50 million documents in *Actos*, and it's just going to increase exponentially.

For quite some time, we would take this corpus of electronic material and search by words. So, you tell the computer, find—and let's say the case is about dogs—find every word that says dog, puppy, bark, canine. And, maybe you can give it more instructions: Find words in this order or within 30 words of each other or within five lines of each other. But, it's really kind of a mindless search just using words.

All of the empirical studies show that, on a good day, when you have the most robust search terms, you're going to get south of 25% of the relevant documents—south of 25% of the relevant documents—if you're hitting a home run. So, think of what we've been doing for decades and what we've been leaving on the table on both sides.

Okay, conversely, some use what's generally referred to as predictive coding. You don't need to understand every nuance about this, and you don't need to be frightened about it. I think you need to understand it just at this level so that you can explain it to the court. But, predictive coding—essentially, if some of you younger people are using Pandora and it starts to learn what music you like or your spam filter begins to learn what's good—it's concept searching.

Going back to the dog analogy in our dog case, this kind of methodology, looking for terms, will find the words I described, right? Puppy, canine, bark, dog. But, it wouldn't find "man's best

friend.” Predictive coding is concept searching, and with concept searching, you find up to 90% of the relevant documents. Judge Peck is a magistrate in New York who is one of the pioneers of this and approved it. Judge Dougherty approved it in our MDL in *Actos*. There was an article in *The Wall Street Journal* where the United States government, in connection with antitrust litigation, has allowed predictive coding. I think it’s on fire, and the good thing about it is that it’s more efficient and less expensive for both sides, so it’s not really that hard of a sell at the end of the day.

There’s been a lot of resistance to it, and I think understandably so. If I’m defending an entity and there’s an arsenal out there of software that’s going to allow someone to get 90% of the relevant documents, I don’t really care if I’m saving a few million dollars if that’s going to cost me billions of dollars at the end of the day because now I’m going to have to pony up 75% more relevant documents, and therein lies some of the concern. Some of the analysts that have looked at this or some of the academicians or even some of the judges say, well, I just don’t get it. I mean if they’re going to save money, why not go ahead and do this immediately?

So, there are issues, but we’re soon going to arrive at a point where there’s hundreds of millions of documents. We’re going to have to come up with some manageable way for defendants to do this inexpensively, efficiently, and without violating spoliation rules. At least for the moment, I think spoliation is here. It’s here to stay, and it’s something we should embrace.

*Mark Lanier:*

Judge?

*Judge Rosenthal:*

Three points quickly: Number one, MDL cases are the perfect laboratory for this because these are among the cases that have enough at stake to justify the expense of really developing and testing new technologies. This is where necessity and that mother of invention thing are really coming into play. In run-of-the-mill litigation, it’s like a Howitzer on a flea, here you need the Howitzer. So, this is critical stuff for MDLs.

Number two, the issue in these cases for judges is less approving it when the parties all agree, but the risks that are presented when there is fundamental resistance and you have to order it over serious objection. When it is relatively new and you are relying on vendors who have an obvious self-interest, you’re

relying on assessments by so-called discovery experts, who are relatively new on the scene themselves. So, the judge is looking for some structural assurances here—that this is reliable, that this is fair, and that this is not going to present risks of reversal. It's not just self-interest in avoiding reversal. You don't want this additional destabilizing-factor risk in the litigation.

So, that's a really important set of challenges. What do you do when you're compelling it as opposed to simply enforcing an agreement?

The third point is that one of the sources of resistance has been fear of waving privilege by producing stuff. We have fixed that with Rule 502(D) orders. You get the judge to enter an order that says production in this litigation does not wave privilege—period, you're done. There is no risk. You have inoculated yourself. That rule change in the Federal Rules of Evidence is a perfect dovetailing to support predictive coding and make it easier to use because it does remove that risk.

The fourth point—I said I'd do three, but I lied—briefly, is that in a way, I'm struck with how modest the application of predictive coding has been. Because if you use predictive coding for determinations of relevance and responsiveness, that's great. At the end of the day, before you produce what you produce, you have human eyes look at it. So, you're not taking the human beings out of it. But if you're that confident in the reliability of predictive coding as opposed to 100% exclusively human review, the computer predictive coding is really a whole lot better at doing this kind of stuff than are human beings. And, the results are better.

*Mark Lanier:*

David?

*David Jones:*

I will agree with Richard on both points. I think the cost factor of this—and the fact that it works—makes this the way it's going to work in the future. The cost, as practitioners know, of electronic discovery is astronomical. I grew up in a steel town in the Midwest in the 70s, and it was common knowledge that when the vice presidents from the mills would go out to their suppliers and vendors, they would drive their Crown Vics and their Ford LTDs, and it was just what you did when you went out.

Here, when the e-discovery vendors show up in the Alfa Romeos and the Porches, you know that this is profitable stuff. So,

my clients are all saying, “What can we do to make this much, much less expensive?” Predictive coding works that way.

The second issue is that it *does* work. In the cases that we’ve used it, when we’ve had issues with the other side coming up and saying, “Well, wait a minute, what about this document? This document wasn’t produced. What happened?” Almost every single time it was not an issue with the coding or the computer side of it. It was an issue on the human side—after the fact. Some associate clicked the wrong button on the review tool, and it didn’t get produced. So, it does work.

That being said, there are drawbacks and people need to understand it. It does not work very well with handwritten notes. So, the smoking gun handwritten notes that we’ve all had in cases are not generally going to get picked up. It doesn’t work with images very well—pictures and things of that sort. An email saying, “FYI,” forwarding some important picture won’t get picked up. If someone’s put a picture into an email, like a screenshot, that won’t get picked up. So, those are issues that need to be addressed and thought about.

To make it work, I think it really involves communication between the plaintiffs and the defendants. I mean, that’s the way you get acceptance—to say, this is what we are doing. These are the search terms that we are using originally to get the scope of what’s then going to go into predictive coding. And, I think as long as there is that communication, not everybody’s going to sign off on it, but that helps the process.

The last part of it, I think, has to do with going back and doing verification and checking, making sure that it is working, making sure that everybody agrees that the process is working and gets comfortable with it. It’s going to take time. We’ve talked about five years for some of these other e-discovery issues. I think that’s probably right. It’s going to take about that long.

*Mark Lanier:*

Professor McGovern?

*Professor McGovern:*

Again, trying to put this in a little bit larger context, predictive coding is a subset of something called “expert systems.” We’ve been using expert systems to evaluate damages in cases for years. Medicine has been using expert systems to diagnose various types of problems. An expert system really is an iterative process. It is a taking, picking the brain of an expert as to what the words, the



combination of words, the concepts should be, and putting it in a computerized format.

Those of us in the discovery world really aren't very familiar with the fact that expert systems like this have been used in other contexts for a very long period of time and are extremely sophisticated, which is why those people are driving the Alfas and the Porches.

*Mark Lanier:*

All right. Richard, would you bring this home for us?

*Richard Arsenault:*

So, two quick points. With predictive coding, it is a collaborative process. No question. I think it's garbage in, garbage out. And, for those of you that use Pandora with the music thing, you know you do the thumbs up or thumbs down. If you lie to Pandora, you're going to get bad music. It's a collaborative process.

I think the way we did it in *Actos* worked well. The plaintiffs and defendants got together, and we looked at this document—relevant or not relevant? And that's how you grade the paper. If I did it again, and I will do it again, I would ask the court to give us some adult supervision. I'd like a special master in the room to call balls and strikes. So, I would do that differently. And, you teach it, and it's a process that, I think, is going to work at the end of the day. So, point number one.

Last point: We are blessed, people that work in an MDL, to have the resources, to have big enough cases to be able to engage in this process. So, it's a litigation laboratory that's fun. It's exciting, it's interesting, and it gives us tremendous opportunity. What I worry about is the garden-variety case out there that's not in MDL land. I certainly can't afford to try a single products liability case that doesn't have punitive damages that's going to go on for six weeks where I'm going to have to spend \$500,000 to \$1,500,000 and recover on a good day a million dollars. That business model doesn't work. I can't afford in a single case to get an ESI vendor and spend a million dollars. So, at some point I'm hoping what we learn here through multidistrict litigation and complex litigation and mass torts is how we can translate that, because we think a little myopically. We think most of the cases are big cases and MDL cases. There's a lot of others, and those are big cases too. Someone's lost a limb, or been burned, a garden variety Jones Act case with an operated back. Who can afford to

do this on a single Jones Act case? I don't know how these people are trying cases or what they're doing. But if our goal is justice in this brave new world with billions and millions of documents, I'm hoping some of this laboratory effort here is going to translate into individual cases so that it can be more efficient and fairer for both parties at the end of the day. In a single Jones Act case where a defendant must spend \$2–3 million to defend a case for which, on any given day, he'd pay \$500,000; that's not fair either, right?

So, it's a fascinating process, and I'm glad everybody was here—just amazing talent, and I'm honored to be part of it.

*Mark Lanier:*

Thank you, guys, for your work on this panel. You were great. Thank you for listening.

