# MDL for the People

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*ABSTRACT: By the terms of its own statute and the limits of its constitutional authority, multidistrict litigation ("MDL") is designed to transfer and coordinate individual lawsuits then return plaintiffs back to their chosen fora for case-specific discovery and trial. Because each plaintiff is present and has her own lawyer, there is no need for the judge to police conflicts of interest or attorney loyalty as in the MDL's kin, the class action.*

*But these assumptions do not match the empirical reality. Remand is rare. MDL judges resolve ninety-nine percent of the cases before them. And to some attorneys, the people of MDL are just numbers on a spreadsheet, not clients with their own agency. In conducting this first-ever study of MDL plaintiffs, we explore their experience. By moving their cases far from home, courts and attorneys seem to say "trust us." But knowledge is essential to trust, and study participants knew little about the status of their case, their judge, or even the identity of their attorney.*

*Three things were clear to participants. First, they were aware of how little they recovered. Second, from their perspective, justice had not been done. Only 1.8 percent felt their lawsuit accomplished what they hoped it would. And finally, participants wanted to be informed and involved.*

*To salvage MDLs, courts must empower plaintiffs through technology and transparency. Technology can open access to courts, bring plaintiffs into the process, and give them a voice without sacrificing MDL's efficiencies. Creating online forums can cut through the layers of lawyers and allow plaintiffs to*

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*communicate directly with lead attorneys and each other. Armed with information and opportunity, plaintiffs can also hold attorneys accountable by evaluating them. Placing leadership performance reviews on court dockets and using them as a factor in awarding leaders' common-benefit fees can give them weight while bringing organizational theory to bear on future leadership selections. Finally, disciplining and sanctioning individual lawyers for unethical conduct can disrupt neglect and improve the public's faith in the system.*

## INTRODUCTION

*"We have not served the people as well as we should have."*
—MDL Judge Jack B. Weinstein[1]

Hall-of-famer Leo Durocher once said, "Baseball is like church. Many attend. Few understand."[2] The same is true of products-liability multidistrict litigation ("MDL"). In 2020, *one out of every two* filed federal civil cases were in an MDL proceeding, and ninety-seven percent of those were products-liability cases, the focus of this Article.[3] Collectively, MDL cases account for over *three times* the federal criminal caseload.[4] But there is no popular *Law and Order* equivalent for MDL. It's esoteric, technical, and insular—all of which keep it out of the public dialog on court reform.

That does not mean that the tens of thousands of people swept into MDLs see no need for change. In conducting the first-ever study of MDL plaintiffs, we found that personal-injury plaintiffs are caught up in a system that affects them deeply but that they know little about and have little control.

Paradoxically, the foundation of MDL is the individual suit and the notions of agency and client control that undergird it. Procedural law and practice assume that plaintiffs are autonomous beings who hire their own lawyers,

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1. Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1, 19. As we explore in Part IV, Judge Weinstein truly cared about the many people who appeared before him in mass torts and went out of his way to view each as a person. We are deeply saddened by his recent death and hope that MDL judges will take his words and actions to heart, as we do.

2. Cheryl Lavin, *"Baseball Is like Church. Many Attend. Few . . .* , CHI. TRIB. (Aug. 31, 1997, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1997-08-31-9708310360-story.html [https://perma.cc/NF9C-B733].

3. *MDL Statistics Report - Docket Type Summary*, U.S. CTS. (Dec. 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-December-15-2020.pdf [https://perma.cc/FV3A-P73N] (listing fifty of 178 pending MDLs as products liability proceedings); *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, U.S. CTS. (Dec. 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-December-15-2020.pdf [https://perma.cc/23GY-XELC] (adding the total actions in the fifty-nine pending MDLs equals 322,443 cases out of a total of 330,816 cases pending on the MDL docket).

4. Federal courts' criminal caseload pales in comparison to the MDL load: In 2020, parties filed 68,696 criminal cases, whereas civil courts saw 495,086 newly filed cases—231,495 of which were MDL cases. *Judicial Caseload Indicators*, U.S. CTS., https://www.uscourts.gov/file/30699/download [https://perma.cc/T9M9-CWQB]; *Judicial Panel on Multidistrict Litigation—Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2020 [https://perma.cc/U6YZ-YJYH] (listing 4,210 cases transferred and "227,285 initiated in the transferee districts" for 231,495 cases filed in 2020).

choose their venue, navigate coordinated discovery and pretrial practice through MDL transfer, and then return to their chosen fora for specific discovery and trial. What makes the MDL judge's exercise of power constitutional is the idea that the original court has personal jurisdiction over plaintiffs and the assumption that these cases are being transferred only temporarily for pretrial work. In fact, fewer than one percent of MDL cases ever return to their original jurisdiction.[5] Yet the myth of individual representation also justifies judges' unwillingness to afford plaintiffs class-action safeguards like considering conflicting interests when appointing lead attorneys or ensuring that settlements are fair, reasonable, and adequate.[6]

In reality, plaintiffs are caught in a procedural limbo. Technically, they hire their own lawyers, but lawyers represent them in bulk. Bulk representation allows plaintiffs access to the courts, but not to individual counseling, communication, knowledge, or client control. Nor can lawyers be trusted to put each client's best interests first. The terms of aggregate settlements often demand lawyers treat clients like a group: If attorneys settle their "inventory"—despite clients' diverse injuries, state laws, insurance coverage, etc.—then lawyers will be rewarded handsomely.[7] The result is that plaintiffs cannot look out for themselves, and no one may be looking out for them.

The plaintiffs in our study call into question the assumptions about control and individual representation. Less than fifty percent could identify their attorney's name, fifty-nine percent disagreed that their attorneys kept them updated on their case's status, and only 16.6 percent ever even spoke with their lawyer on the phone. Court knowledge was no greater: Less than fifty percent of respondents knew which court their case was in, and 69.1 percent had no idea who their judge was. Of those who settled after suing, only 16.3 percent felt like the judge explained rulings and opinions to them. Fewer still—a mere three people—ever attended a court hearing. And across all participants, a trifling 1.8 percent felt like their lawsuit accomplished what they hoped it would.

We spent two years in the field getting to know hundreds of MDL plaintiffs. Our results stem from 217 participants from forty-two different states, who were represented by 295 different attorneys from 145 distinct law firms, whose cases originated in thirty-two different state and federal courts, and who had diverse education levels, backgrounds, and races. In addition to

5. *See generally* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407: FISCAL YEAR 2020 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf [https://perma.cc/GSG8-JP8S] (listing 414,479 total terminate cases, 4,188 of which were remanded).

6. FED. R. CIV. P. 23(a), (e); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 67–71 (2021).

7. *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 94–101 (2017); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 982 (2010). Similar issues derailed class actions in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627–28 (1997); and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 850–53 (1999).

demographic and geographic diversity, their responses varied substantially, all of which suggest they form a representative sample. Nevertheless, this study is the first of its kind, and no database of MDL plaintiffs exists for comparison purposes. Because the study was not mandatory for all litigants, it is possible that those who felt strongly about their experiences might have been more likely to participate.[8] We recognize the limitations of a non-probability sample of 217 respondents to our survey, yet we offer these findings in hope that future researchers will continue to ask MDL litigants about their experiences to allow for more robust comparisons.

Critics will prefer to ignore our results and maintain the status quo because we cannot compare our participants to a population of MDL plaintiffs, but our participants' experiences are a valuable contribution in and of themselves. We should be concerned that *anyone* spends years in court to redress harm only to walk away frustrated because the process sidelined them. We hope others will continue the work we begin and encourage the courts to study litigants' MDL experience.[9] Social science research should be replicated. And if courts follow our proposals to increase access, communication, and transparency, it will eliminate some of the challenges that we faced in conducting this study.

Using plaintiffs' words[10] to describe their experiences, we focus on how MDL's procedural suppositions impact justice in the real world. What happens to the people *in* MDLs occurs in the shadows: from phone calls with lead generators and case managers, to pleading with their attorneys for updates, to talking with one another on and offline. It is in these moments that we begin to understand how law works. Or doesn't.

If we want to appreciate why tort law's first-order goals—be they corrective justice, utility maximization, information production, deterrence, or something else entirely—fall short, then we must look past doctrinal suppositions. In

8. Ideally, to test for response bias, we would compare the characteristics of the obtained sample with those of the known characteristics of the population. Nir Menachemi, *Assessing Response Bias in a Web Survey at a University Faculty*, 24 EVALUATION & RSCH. EDUC. 5, 6–7 (2011); Thomas G. Reio, Jr., *Survey Nonresponse Bias in Social Science Research*, 21 NEW HORIZONS ADULT EDUC. & HUM. RES. DEV. 48, 49–50 (2007). Little is known about the underlying plaintiff population, but we do provide data on broader demographic characteristics to allow for comparison to the general population. Our efforts to promote the study in the press, directly to attorneys, and via social media aimed to reach a diverse and representative group of participants, and we provided participants (and attorneys) with the principal investigator's contact information so they could raise any questions or concerns about legitimacy. These efforts yielded the 217 participants we have, and they represented the varied experiences of a demographically diverse group of people.

9. *See* Judith Resnik, *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts*, 15 L. & ETHICS OF HUM. RTS. 1, 2 (2021) ("The vivid inequalities *in* courts are problems *for* courts because such disparities undermine their ability to be places *of* justice.").

10. We provide participants' answers "as is" and did not correct grammatical errors unless edits were necessary for clarity or anonymity. *See* Anna-Maria Marshall & Scott Barclay, *In Their Own Words: How Ordinary People Construct the Legal World*, 28 L. & SOC. INQUIRY 617, 617 (2003) (decentering the law "and tak[ing] seriously the idea that ordinary people can be legal actors").

doing so, this Article makes three principal contributions. First, using qualitative and quantitative evidence, we demonstrate what scholars long suspected—that some MDL plaintiffs lack the information and power to control their own cases.[11] Second, our results indicate that sidelined plaintiffs *want* a more active role, thereby debunking what some scholars contended was a collective-action problem in MDLs. Participants were not the absentees of small-claims consumer class actions, but the victims of devastating product failures. Without information and updates, they were frustrated, confused, and ill-equipped to monitor their attorneys. Predictably, age-old attorney-client agency problems arose, tempting lawyers to act in their own self-interest. Finally, we propose several interventions that would enable plaintiffs to communicate with each other, participate in their lawsuits, and check their lawyers' power.

Section I.A begins with an insider's guide to the complicated world of MDL, a transfer device that aggregates similar cases nationwide before the same judge and makes some plaintiffs feel like "[j]ust a number on a spreadsheet."[12] Section I.B details our methodology and study design. Part II spotlights our qualitative and quantitative findings concerning what little plaintiffs knew about the basic aspects of their own lawsuit. Using respondents' comments as a guide, Part III identifies sources of information loss: MDL transfer, lead lawyers' appointment, and volume lawyering.

Part IV then explores the disconnect between judicial and procedural assumptions—that informed plaintiffs control their suit and monitor their lawyers—and reality. Plaintiffs cannot effectively monitor their suit or their lawyer, exacerbating longstanding principal-agent problems. Bulk representation may be economically rational behavior, but it can negatively affect client communication, ethics, courts' legitimacy, and systemic tort goals that depend on accurate inputs.[13]

Nor do typical market constraints like client referrals, lawyer referrals, and sliding-scale fees alleviate agency concerns. As we show with original data, most participants found their attorneys through internet or television advertising, not friends or attorneys. And some of their contingency agreements revealed provisions designed not to align attorney-client interests, but to allow lawyers to withdraw from representing clients whenever convenient, increase costs, and sometimes even recoup lead lawyers' fees from the clients—against judicial orders.

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11. *E.g.*, Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 298 (2011).

12. Participant 61.

13. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 195 (2001) (describing the role of private lawyers in supplementing government regulation).

The time is ripe for reform: The Federal Rules Advisory Committee is currently weighing MDL-specific rules.[14] Yet, they report that "MDL judges frequently argue against rules that might tie their hands" so they can innovate and tailor practices to particular proceedings.[15] With this debate in mind, Part V proposes reforms that do not require Federal Rules. The MDL statute already mandates party convenience and justice—judges have power aplenty to improve procedure.[16]

First, people need court access. It is not enough to get *cases* into court, access to justice requires getting *people* into court, engaging them in the process that deeply affects them. When courts move plaintiffs' cases from across town to cross country, access too must change. Here, the COVID-19 pandemic has paved the way by increasing the public's and the judiciary's familiarity with technology. From court-sponsored websites to livestreamed hearings, technological innovations dovetail with party convenience and efficiency, as well as the federal judiciary's strategic plan to use technology to enhance access to justice.[17]

Second, plaintiffs frequently turn to online and in-person groups for litigation news, medical advice, and community support. But misleading information can run rampant, and lawyers warn against participating for fear that defendants will use plaintiffs' words against them. Extending the common-interest doctrine to court or leader created forums could protect disclosures. Online groups could likewise provide an inexpensive and meaningful tool for lead lawyers to communicate directly with plaintiffs and for plaintiffs to pose questions to leaders.

Third, lead attorneys must be held accountable not just to courts, but to the plaintiffs they serve. Over half of our study participants were represented by lead lawyers or lead firms which suggests the problems we identify aren't the work of a few bad apples. Courts should solicit feedback from plaintiffs about leaders, place it in the public record, use it in assessing leaders' common-benefit fees, and consider those evaluations in appointing lawyers to future leadership roles. Finally, MDL judges (through their inherent sanctioning authority) and state bar associations should take clients' allegations of attorney neglect seriously and discipline lawyers accordingly.

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14. ADVISORY COMM. ON CIV. RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES: APRIL 23, 2021, at 159–71 (2021), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-civil-rules-april-2021 [https://perma.cc/89BS-XVQG].

15. ADVISORY COMM. ON CIV. RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES: OCTOBER 29, 2019, at 106 (2019), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-october-2019 [https://perma.cc/2JRN-QX2S].

16. 28 U.S.C. § 1407(a) (2018).

17. JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 19–26 (2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf [https://perma.cc/77ZA-CC3C].

## I. WE THE MDL

Initially designed to coordinate electrical-equipment antitrust cases with sophisticated plaintiffs who exercised ample attorney oversight and control,[18] MDLs have since become a popular way to centralize personal-injury suits like those over talc, military earplugs, and pelvic and hernia mesh.[19] In the idealized law school hypothetical, these plaintiffs take command like their electrical-equipment forebearers. They, alongside their engaged attorneys, determine who and where to sue, which claims to bring, and when it's advantageous to team up with others or go solo.[20]

But today this kind of attorney-client relationship is hard to find in everything from criminal and family law to auto accidents, class actions, and mass torts.[21] From 2005 to 2020, lawyer-less plaintiffs accounted for a substantial minority of all federal civil cases.[22] And even when represented, communication between lawyers and clients may be thin, as we suggest in Part II.

In some respects then, the problems we raise in this Article are symptomatic of widespread challenges in the justice system. In others, however, MDL's circumstances create a perfect storm: Formal rules assume litigant control and close lawyer-client relationships, while the qualitative and quantitative evidence we introduce reveals the breakdown of attorney-client communication, the rise of agency problems, and plaintiffs who feel sidelined and manipulated.

### *A. SUPPOSITIONS VS. REALITIES: MDL FUNDAMENTALS*

MDLs begin when lawyers argue before the Judicial Panel on Multidistrict Litigation ("the Panel") to transfer nationwide cases that share at least one factual question to the same judge for coordinated pretrial handling.[23] The Panel holds a hearing and, in a scene unlike any courtroom procedurals found in popular culture, insider attorneys argue over whether to centralize

18. CHARLES A. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 73–83 (1973); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 713–14 (1991).

19. *See* 28 U.S.C. § 1407.

20. Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Rule in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 825 (1989).

21. *E.g.,* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 13–16 (1974) (finding that clients exerted little control over the litigation process); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1514 (2009); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 90–95.

22. Judith Resnik, *Presidential Commission on the Supreme Court of the United States: Statement for the Record for the Public Hearing* 14 (June 30, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3886566 [https://perma.cc/4Y78-KGAQ].

23. 28 U.S.C. § 1407(c).

and where the Panel should send the cases.[24] Lawyers flood jurisdictions they favor with cases in hopes of influencing the Panel's decision.[25]

Transfer uproots plaintiffs from their chosen federal courts and centralizes them before a single judge.[26] MDL judges may be a few hours away or across the country; either can make a big difference to plaintiffs disabled by their injuries. Even state-court plaintiffs who manage to stay put will be hard pressed to escape the MDL's long shadow, which can affect everything from settlement to attorneys' fees.[27]

Technically, the transfer to another court is temporary. This assumption allows a federal court, which would ordinarily lack personal jurisdiction over a plaintiff, to preside over her case. So long as the transferor court has jurisdiction and the plaintiff would return for trial, no constitutional violation occurs.[28] Yet MDLs can take many years to resolve, some plaintiffs unsuccessfully request remand multiple times,[29] and some must make long-distance journeys for in-person mediations.[30]

Once in the MDL, the judge selects a handful of plaintiffs' lawyers to represent the group.[31] Judges may relegate plaintiffs' individual attorneys to lesser roles, or they may play no part whatsoever. Lead lawyers deny owing fiduciary duties to nonclient plaintiffs.[32] Yet some appointment orders forbid

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24. *See, e.g.*, Transcript of Proceedings at 8–14, *In re* Gen. Motors Ignition Switch Litig., No. 14-md-2543 (J.P.M.L. 2014), ECF No. 288.

25. *See, e.g.*, *id.* at 42 (noting that ninety-one cases were on the MDL docket and that "there is a big group in California"); *see also* Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 447–48 (2013) (noting that a district supported by a mixed group of plaintiffs and defendants can weigh heavily in favor of transfer to that district).

26. 28 U.S.C. § 1407(b).

27. Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1471–87 (2017).

28. *See In re* Delta Dental Antitrust Litig., 509 F. Supp. 3d 1377, 1380 (J.P.M.L. 2020) ("Jurisdiction in any federal civil action *must* exist in the district where it is filed."); *In re* FMC Corp. Pat. Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue. A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes." (citations omitted)).

29. *E.g.*, Request for Ruling on Motion for Suggestion of Remand, *In re* Zimmer Durom Hip Cup Prods. Liab. Litig., No. 09-cv-04414 (D.N.J. Feb. 1, 2016), ECF No. 824; Plaintiffs' Motion for Remand, *In re Zimmer*, No. 09-cv-04414 (D.N.J. Feb. 20, 2018); Motion for Suggestion of Remand, *In re Zimmer*, No. 09-cv-04414 (D.N.J. June 24, 2017); Order, *In re Zimmer*, No. 09-cv-04414 (D.N.J. Sept. 5, 2017); Order, *In re Zimmer*, No. 09-cv-04414 (D.N.J. May 1, 2018), ECF No. 976.

30. *E.g.*, Request for Ruling on Motion for Suggestion of Remand at 2, *In re Zimmer*, No. 09-cv-04414 (D.N.J. Feb. 1, 2016), ECF No. 824.

31. *E.g.*, Pretrial Order #1 at 8–9, *In re* Bos. Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig., No. 12-md-2326 (S.D. W. Va. Feb. 29, 2012).

32. *E.g.*, Lead and Liaison Counsel Defendants' Memorandum in Support of their Motion for Judgment on the Pleadings at 1, Casey v. Denton, No. 17-cv-00521 (S.D. Ill. Sept. 29, 2017), ECF No. 82 ("Plainly stated, lead and liaison counsel in federal multidistrict litigation do not owe

attorneys whose clients' positions diverge from leaders' positions from advocating on their client's behalf without court permission.[33] Plaintiffs' attorneys have complained that MDLs are "based more on judicial and administrative convenience than on a fair consideration of liability or compensation to victims" and that MDLs "vest [control] in a . . . steering committee that may lack incentive to always pursue any individual plaintiff's best interests."[34]

Nevertheless, the idea that all lawyers are similarly dedicated to their clients seems to release MDL judges from demanding the same kind of protections that due process requires in class actions—namely, that counsel protect all plaintiffs' interests equally and, where conflicting interests make that impossible, appoint separate counsel.[35] Conflicts can proliferate in MDLs where lead attorneys cannot be attuned to the nuances of every case and transfer requires only one common factual question—not that common questions *predominate* as under Rule 23(b)(3).[36] Because plaintiffs have "individual" counsel, most judges do not consider adequate representation in appointing MDL leaders.[37] Instead, they consider lawyers' experience and expertise, their ability to fund the proceeding, and whether they "play well

individual fiduciary duties to plaintiffs who (a) did not retain lead and liaison counsel to represent them, and (b) are represented by individual counsel they have chosen.").

33. *E.g.*, Case Management Order at 9, *In re* Monat Hair Care Prods. Mktg., Sales Pracs., & Prods. Liab. Litig., No. 18-md-02841 (S.D. Fla. Aug. 17, 2018), ECF No. 59 ("All communications from Plaintiffs with the Court should be made through Plaintiffs' Lead and Liason [sic] Counsel. . . . Counsel for Plaintiffs who disagree with Lead and Liason [sic] Counsel, or who have individual or divergent positions, may not act separately on behalf of their clients without prior authorization of this Court.").

34. Gary Wilson, Vincent Moccio & Daniel O. Fallon, *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 104 (2000).

35. Hansberry v. Lee, 311 U.S. 32, 43–45 (1940) (analyzing adequacy of representation in class actions as a matter of constitutional due process for absent class members); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) (emphasizing that there must be an alignment of interests between named plaintiffs and the class members they purport to represent).

36. *Compare* 28 U.S.C. § 1407 (covering "civil actions involving one or more common questions of fact"), *with* FED. R. CIV. P. 23(b) (requiring "that the questions of law or fact common to class members predominate"). *See also* Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding Over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 477 (2012) ("[T]he court is the only participant to the proceedings that is truly neutral, and only the court can ensure that conflicts arising in the representation do not unfairly harm plaintiffs, give rise to invidious distinctions among plaintiffs, or unduly advantage defendants." (footnote omitted)); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1048–50 (1993) (describing conflicts).

37. Stephen R. Bough & Elizabeth Chamblee Burch, *Collected Wisdom on Selecting Leaders and Managing MDLs*, 106 JUDICATURE 69, 70–71 (2022).

[together] in the sandbox,"[38] all of which tend to produce leadership slates of close-knit, socially networked repeat players.[39]

Repeat players can craft practices and norms that serve their own interests as well as promote courts' efficiency aims by scaling procedure to bulk representation.[40] Direct-filing orders, master and short-form complaints, fact sheets, tolling agreements, and inactive dockets are a few such examples. But each has a downside for one-shot plaintiffs.

Rather than sue locally and wait for MDL transfer via the Panel, direct-filing orders allow plaintiffs to sue in the MDL.[41] By circumventing Panel transfer from a forum with personal jurisdiction and venue over both the plaintiff and defendant, direct-filing orders raise personal-jurisdiction questions.[42] They also have a catch: On the slim chance that the MDL judge remands a plaintiff's case, that remand must now occur under Section 1404, not Section 1407, giving the judge and the defendant a say in where the case goes rather than simply returning the plaintiff to her original forum.[43]

Master complaints and short-form complaints then substitute generic allegations for the unique circumstances that might otherwise appear in a complaint.[44] Ideally, complaints spotlight plaintiffs, giving them a chance to place their story into the public record,[45] bend judicial sympathies, and publicize their narrative. Those opening salvos anchor the scope of discovery

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38. Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 392–93 (2014); *see also* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1702 (2017) ("As one [judge] noted, 'I have heard the concerns about the elite group of lawyers but every judge wants to have someone with expertise.'").

39. S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 405–06 (2013); Burch & Williams, *supra* note 27, at 1471–88; ADVISORY COMM. ON CIV. RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES: APRIL 10, 2018, at 202 (2018), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2018 [https://perma.cc/7KRR-LGLA] (including remarks from Judge Sarah S. Vance).

40. Burch & Williams, *supra* note 27, at 1488–514.

41. *E.g.*, Pretrial Order #15 at 1–8, *In re* Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 12-md-2327 (S.D. W. Va. Sept. 26, 2012).

42. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1171–72 (2018); Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 794–95 (2012) [hereinafter Bradt, *Shortest Distance*].

43. Joseph R. Goodwin, *Remand: The Final Step in the MDL Process—Sooner Rather than Later*, 89 UMKC L. REV. 991, 992–93 (2021). Home districts are routinely collected in fact sheets and, as others have pointed out, it would make sense to remand the case there. Margaret S. Williams & Jason A. Cantone, *An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation*, 55 GA. L. REV. 221, 263 (2020) (listing personal identifying information including addresses as regularly collected in fact sheets); Bradt, *Shortest Distance*, *supra* note 42, at 816 (proposing that plaintiffs declare a home venue in the complaint).

44. *E.g.*, Pretrial Order #15, *supra* note 41, at 1–2.

45. For examples of where this has occurred even in mass torts, see *infra* notes 364–69 and accompanying text.

and elicit competing accounts. But short-form complaints shoehorn a personalized litany of injustices into a six-page, fill-in-the-blank exercise that permits little narrative exposition.[46] And the routinized nature of stock complaints prompts some plaintiffs' attorneys to refuse to sue individual defendants like doctors and hospitals,[47] leaving plaintiffs frustrated that those most culpable are escaping justice.[48]

If complaints are where stories begin, discovery is usually where they blossom.[49] But ad hoc discovery devices like plaintiff profile forms, census orders, and fact sheets give little narrative context.[50] As names like profile forms and fact sheets imply, the information sought is formulaic, seeking lot numbers, implant dates, medical facilities, and check-the-box outcomes that require plaintiffs to select from a menu of options like pain, erosion, extrusion, infection, fistulae, bleeding, and organ perforation.[51]

Other plaintiffs exist solely on lists. Tolling agreements between plaintiff and defense counsel pause statutes of limitations and allow cases to be "on

46. For an example of this form, see generally Short Form Complaint, *In re Ethicon*, Inc., No. 12-md-2327 (S.D.W. Va.), https://www.wvsd.uscourts.gov/MDL/ethicon/pdfs/EthiconShortFormComplaint.pdf [https://perma.cc/QD9W-Y52T].

47. *E.g.,* Lee Murphy L. Firm, G.P. & Clark, Love & Hutson, G.P., Vaginal Mesh or Sling Implant/Attorney Employment Contract § 2 (on file with author) [hereinafter CLH Retainer]; Blasingame, Burch, Garrard & Ashley, P.C. & Dan Chapman & Associates, LLC, Contingent Fee Legal Services Agreement § 1 (2011) (on file with author) [hereinafter Blasingame & Chapman Retainer]; Aylstock, Witkin, Kreis & Overholtz P.L.L.C. & Ennis & Ennis, P.A., Transvaginal Mesh Litigation: Attorneys Contingent Fee & Cost Employment Agreement § 1 (on file with author) [hereinafter Aylstock Retainer].

48. Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900527 [https://perma.cc/NX7W-JV5H] ("My goal originally was to call out the doctor; he botched the [surgery], but he's not a defendant. He admitted he got it too tight.").

49. To be sure, depositions can be very difficult for plaintiffs. Some (perhaps most) do not sue because of the humiliation involved—depositions risk posing embarrassing questions about their sex life, STDs, and extramarital partners. *See generally* Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501 (2020) (discussing the requirement that plaintiffs divulge sensitive personal information during litigation).

50. Williams & Cantone, *supra* note 43, at 241–43; *e.g.,* Pretrial Order #17 at 1–6, *In re Ethicon*, No. 12-md-2327 (S.D.W. Va. Oct. 4, 2012).

51. For an example of one such form, see generally Plaintiff Profile Form, *In re Ethicon*, No. 12-md-2327, https://www.wvsd.uscourts.gov/MDL/ethicon/pdfs/EthiconPlaintiffProfileForm.pdf [https://perma.cc/Q73D-Y62K].

file" but never actually filed.[52] Inactive dockets put cases on hold while parties discuss settlement. Meanwhile plaintiffs wait, unable to threaten trial.[53]

Most plaintiffs will settle.[54] But once again, MDL affects their choice. With repeat-player attorneys on both the plaintiffs' and defense side, corporate defendants have found ways to flip the script on the old adage about "strength in numbers."[55] To turn plaintiffs' largesse against them and encourage consent, defendants negotiate "settlements" with plaintiffs' lawyers rather than plaintiffs themselves.[56] The deals often contain ethically dubious provisions requiring plaintiffs' attorneys to uniformly recommend that all their clients settle and to withdraw from representing clients who refuse to do so.[57] They likewise include plaintiff participation thresholds, which range from eighty-five to one hundred percent.[58] If too few plaintiffs agree to settle, then the defendant can walk away and pay no one—plaintiffs' lawyers included—thereby creating incentives to encourage clients to say yes.[59]

As these circumstances suggest, MDL affects attorneys' fees and loyalty, too. Generally, contingency fees help align plaintiffs' lawyers' interests with those of their clients, for the better clients' fare, the better lawyers fare.[60] But two factors affect that straightforward calculus in mass representation. First, lead attorneys get paid not just from retained clients' recoveries but through

52. *E.g.*, Affidavit of Herbert M. Kritzer at 18, *In re* Vioxx Prods. Liab. Litig., No. 05-md-1657 (E.D. La. Mar. 31, 2009) (citing Joint Report No. 30 of Plaintiffs' and Defendants' Liaison Counsel at 8, *In re* Vioxx Prods. Liab. Litig., No. 05-md-1657 (E.D. La. Dec. 12, 2007)) (noting that "14,100 claimants had entered into Tolling Agreements with Merck"); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 156 (2012); PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 6.35 (2022).

53. J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. TORT L. 3, 23 n.81 (2012) (quoting Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 ADVOC. 80, 81 (2007)); James S. Lloyd, Comment, *Administering a Cure-All or Selling Snake Oil?: Implementing an Inactive Docket for Asbestos Litigation in Texas*, 43 HOUS. L. REV. 159, 163–64 (2006); *e.g.*, Inactive Docket Order, *In re* Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig., No. 12-cv-2326 (S.D. W. Va. Mar. 28, 2018).

54. Gluck & Burch, *supra* note 6, at 5.

55. Burch & Williams, *supra* note 27, at 1475, 1495–508.

56. D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2177 (2017).

57. Erichson & Zipursky, *supra* note 11, at 267–68, 283–84; Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233, 3236 (2013); *see also* Hellerstein, *supra* note 36, at 477 (recognizing the conflicts that aggregate settlements create and appointing a legal ethics expert to monitor communications between attorneys and their clients).

58. Burch, *supra* note 7, at 92.

59. Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014).

60. There are, of course, well documented exceptions to this. For a discussion, see HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 253–70 (2004).

common-benefit fees, which reward them for work performed on all plaintiffs' behalf.[61] For leaders with only a handful of clients, common-benefit fees position them to gain a far greater award from plaintiffs as a whole (pelvic-mesh leaders received over $366 million in common-benefit fees alone[62]), including—controversially—state-court plaintiffs over which the federal court has no jurisdiction.[63] If they have fewer clients, leaders may be less attuned to diverse plaintiffs' needs and goals.[64] Second, when an attorney represents many plaintiffs in the same proceeding, the lawyer's stake is far greater than any one client's.[65] That can drive further wedges between individual clients' best interests and lawyers' desire to settle.

### *B. A Qualitative and Quantitative Study of MDL Plaintiffs*

To get a better sense as to how plaintiffs feel about MDL and their lawyers, we asked them. We aimed to reach plaintiffs involved in twenty-six MDLs and related state proceedings,[66] received Institutional Review Board

61. When plaintiffs' cases settle, MDL judges often award lead lawyers some percentage of the individual plaintiffs' attorneys' contingent fee. Percentages vary from four percent to nineteen percent of plaintiffs' gross settlement amounts, with attorneys' fees coming out of the individually retained attorneys' fees and costs sometimes coming from the plaintiffs' remaining portion. ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 238–44 (2019).

62. Pretrial Order #201 at 6, *In re* Bos. Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig., No. 13-cv-2326 (S.D. W. Va. Jan. 30, 2019) (noting that the sum of plaintiffs' resolutions totaled $7.25 billion and awarding leaders five percent).

63. Some leaders include common-benefit fees within global settlements so that if a state-court plaintiff consents to settle, she also consents to those fees; other times MDL judges require non-lead lawyers to sign participation agreements to access discovery materials, and the agreements cover the attorney's entire inventory of cases. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–32 (2010). These practices have recently come under judicial scrutiny. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 962–64 (N.D. Cal. 2021).

64. *See, e.g.*, Motion of Class Counsel The Locks Law Firm for Appointment of Administrative Class Counsel at 8, *In re* Nat'l Football League Players' Concussion Injury Litig., No. 12-md-2323 (E.D. Pa. Mar. 20, 2018), ECF No. 9786 (noting that class counsel "has registered only a few clients and filed almost no claims" and, as such "has not developed the expertise . . . to combat the NFL's scorched-earth strategy").

65. Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 435 (1998); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 527 (1994).

66. In federal court alone, the twenty-six proceedings included in this study involved 220,903 actions, mostly filed by women about the harm they suffered. We included seven pelvic mesh MDLs (American Medical Systems, Boston Scientific Corp., C.R. Bard, Coloplast, Cook Medical, Ethicon, and Neomedic), Johnson & Johnson talcum powder, Mentor ObTape, Yasmin/Yaz, Mirena IUD (and Mirena IUS Levonorgestrel), NuvaRing, Silicone Gel Breast Implants, Ortho Evra, Norplant, Fen-Phen diet drugs, Dalkon Shield, Power Morcellator, Ephedra, Fosamax, Monat Hair Care, Rio Hair Naturalizer, Prempro, Protegen Sling, and Zoloft. We did not have participants from all of the included proceedings.

approval to gather plaintiffs' confidential responses through a weblink,[67] and used Qualtrics software to pose a mix of questions about plaintiffs' interaction with the courts and their attorneys.[68]

We focused on proceedings in which the defendant targeted its product toward women[69] for three reasons: (1) research demonstrates that most products-liability MDLs include the same repeat-player attorneys, settlement provisions, and judicial techniques, which allowed us to keep the sample size manageable without sacrificing generalizability[70]; (2) harm from drugs and medical devices disproportionately affects females[71]; and (3) because of this, women's health MDLs comprise a substantial subset of all product-liability MDLs.[72]

Over the course of two years, we aimed to reach a representative sample of plaintiffs through a variety of means. Our study was widely circulated in the

67. Human Subjects Office at the University of Georgia, Exempt Determination 1 (Nov. 16, 2018) (on file with author) (noting the IRB ID as STUDY00006718). Only one of us (Burch) was privy to participants' names and other identifying information.

68. More information about our research design and procedural-justice findings is available in a companion piece, see generally Burch & Williams, *supra* note 48.

69. Though sex and gender are distinct categories, for simplicity, we use the terms woman or women to encompass everyone with a biologically female body.

70. BURCH, *supra* note 61, at 99–128; Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2152–66, 2171–82 (2020) [hereinafter Burch & Williams, *Judicial Adjuncts*]; Burch & Williams, *supra* note 27, at 1445, 1469–516; Nora Freeman Engstrom & Amos Espeland, Essay, Lone Pine *Orders: A Critical Examination and Empirical Analysis*, 168 U. PA. L. REV. ONLINE 91, 104 (2020); Williams & Cantone, *supra* note 43, at 249–62.

71. CAROLINE CRIADO PEREZ, INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN 209 (2019) (observing sex-neutral devices like hip implants and pace makers disproportionately fail in women); Marina Walker Guevara, *We Used AI to Identify the Sex of 340,000 People Harmed by Medical Devices*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 25, 2019), https://www.icij.org/investigations/implant-files/we-used-ai-to-identify-the-sex-of-340000-people-harmed-by-medical-devices [https://perma.cc/GTA4-2VF6] (noting that women account for sixty-seven percent of the FDA's medical device adverse-event reports); Maria C.S. Inacio et al., *Sex and Risk of Hip Implant Failure: Assessing Total Hip Arthroplasty Outcomes in the United States*, 173 JAMA INTERN. MED. 435, 440 (2013) (finding women were almost thirty percent more likely than men to need a repeat hip replacement surgery within the first three years); Letter from Janet Heinrich, Director, Health Care—Pub. Health Issues, Gov't Accountability Off., to Senator Harkin, Senator Snowe, Senator Mikulski, and Representative Waxman (Jan. 19, 2001), in GAO-01-286R: Drugs Withdrawn from Market, https://www.gao.gov/assets/100/90642.pdf [https://perma.cc/CN5E-7U4X] (noting that from 1997 to 2000, eight of the ten drugs pulled from the market posed greater risks to women).

72. In 2018, when we began our study, thirty-two percent of all MDLs involved products that exclusively or primarily injured women as compared with 6.4 percent that primarily affected men. Alexandra D. Lahav, *Medicine Is Made for Men*, N.Y. REV. (Feb. 11, 2021), https://www.nybooks.com/articles/2021/02/11/medicine-is-made-for-men [https://perma.cc/C8LP-TNC7].

press, including *The New York Times*,[73] *Reuters*,[74] *Law.com*,[75] *The Daily Report*,[76] *Mesh News Desk*,[77] and plaintiff-run *Mesh Awareness Newsletter* and *Mesh Angels* site—all places in which plaintiffs (and their lawyers) might find it.[78] We created an explanatory website,[79] posted on social media like Twitter, and joined public and private Facebook support groups dedicated to mesh, medical devices, osteoporosis, ovarian cancer, talc, breast implants, NuvaRing, and Mirena, each with thousands of members who might also be litigants in related MDLs (e.g., talc plaintiffs allege ovarian cancer and users of osteoporosis drug Fosamax allege a range of serious side effects).[80] Finally, we contacted forty-two plaintiffs' attorneys, several from each proceeding that included a mix of lead and non-lead lawyers, and asked for their assistance in distributing the survey to current and former clients.

Our efforts resulted in 293 total responses. Using court and public records, we verified 217 responses, which form our core dataset.[81] Our survey was in the field between November 2018 and January 2021, and though we

73. Matthew Goldstein, *Women Who Sued Makers of Pelvic Mesh Are Suing Their Own Lawyers, Too*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/business/pelvic-mesh-surgery-litigation.html.

74. Tina Bellon, *Q&A: Georgia University's Elizabeth Burch on New Women's Health MDL Research Project,* REUTERS (Dec. 13, 2018, 4:34 PM), https://www.reuters.com/article/products-mdl/qa-georgia-universitys-elizabeth-burch-on-new-womens-health-mdl-research-project-idUSL1N1YI2E3 [https://perma.cc/MRR8-8C49].

75. Max Mitchell, *Study Aims to Gauge Litigant Satisfaction in Women's Health MDLs*, LAW.COM (Dec. 17, 2018, 2:39 PM), https://www.law.com/2018/12/17/study-aims-to-gauge-litigant-satisfaction-in-womens-health-mdls [https://perma.cc/3MBN-NX69].

76. Max Mitchell, *Georgia Law Prof Launches Study on Litigant Satisfaction in Women's Health MDLs*, DAILY REP. (Dec. 17, 2018, 2:39 PM), https://www.law.com/dailyreportonline/2018/12/17/study-aims-to-gauge-litigant-satisfaction-in-womens-health-mdls-404-23884 [https://perma.cc/2CAS-769Q].

77. Jane Akre, *Fed Up? Want to Talk to the MDL Panel? Here's How!*, MESH NEWS DESK (Dec. 4, 2018), https://www.meshmedicaldevicenewsdesk.com/articles/fed-up-want-to-talk-to-mdl-panel-heres-how [https://perma.cc/AN2D-9T6W]; Jane Akre, *Still Time to Participate in MDL Satisfaction Survey for Pelvic Mesh Plaintiffs*, MESH NEWS DESK (Apr. 4, 2019), https://www.meshmedicaldevicenewsdesk.com/articles/17472-2 [https://perma.cc/KLZ7-8N5E]; Beth Chamblee Burch, *U of GA Study Closing Soon—Has Your Voice Been Heard?*, MESH NEWS DESK (Dec. 1, 2020), https://www.meshmedicaldevicenewsdesk.com/articles/u-of-ga-study-closing-soon-has-your-voice-been-heard [https://perma.cc/WXB8-7N92].

78. *Mesh Angels*, FACEBOOK, https://www.facebook.com/meshangelnetwork [https://perma.cc/96QW-VKQ9].

79. *Are You a Plaintiff in a Women's Health MDL?*, ELIZABETH CHAMBLEE BURCH, https://www.elizabethchambleeburch.com/womens-mdls [https://perma.cc/B6W6-UG8N].

80. *E.g.*, *Mesh*, FACEBOOK, https://www.facebook.com/groups/641561235885800 [https://perma.cc/H553-KFYJ]; Elizabeth Chamblee Burch (@elizabethcburtch), TWITTER (Dec. 3, 2020, 1:01 PM), https://twitter.com/elizabethcburch/status/1334558482733932544 [https://perma.cc/TPY9-5SHF].

81. Of those, we determined that thirty-six participants took the survey multiple times (forty-six extra responses), and we measured the last complete response for each. We excluded twenty-seven responses that did not leave enough information for us to be able to verify their identity as well as two participants suing abroad and one lawyer.

included women's MDL proceedings from 1975 to 2018, most litigated recently. The length of time between suing and completing the survey meant most cases ended, as Tables 1 and 2 show, but most were not so distant that participants would have forgotten key details. Table 1 demonstrates that most cases began in the early 2010s.[82] Based on the dockets, 148 respondents saw their cases end, as Table 2 illustrates. Keeping the survey in the field during that timeframe allowed us to capture most participants' experiences and memories as their cases concluded in real time, with seventy-four percent ending during the survey period. Finally, Table 3 shows how many participants we had from each proceeding, grouped by the federal proceeding name.

*Table 1. Years in Which Participants Filed Their Complaint*

| Year of Case Filing | Respondents | Percentage |
|---|---|---|
| 1996 | 1 | 0.5% |
| 1997 | 1 | 0.5% |
| 2002 | 1 | 0.5% |
| 2004 | 1 | 0.5% |
| 2010 | 1 | 0.5% |
| 2011 | 7 | 3.7% |
| 2012 | 34 | 18.1% |
| 2013 | 61 | 32.4% |
| 2014 | 36 | 19.1% |
| 2015 | 13 | 6.9% |
| 2016 | 14 | 7.4% |
| 2017 | 5 | 2.7% |
| 2018 | 11 | 5.9% |
| 2019 | 1 | 0.5% |
| 2020 | 1 | 0.5% |
| **Total** | **188** | **86.6%** |

*Table 2. Years in Which Participants' Cases Ended*

| Year of Case Termination | Respondents | Percentage |
|---|---|---|
| 2003 | 1 | 0.7% |
| 2005 | 2 | 1.4% |
| 2014 | 1 | 0.7% |
| 2015 | 7 | 4.7% |
| 2016 | 16 | 10.8% |
| 2017 | 9 | 6.1% |
| 2018 | 36 | 24.3% |
| 2019 | 65 | 43.9% |
| 2020 | 11 | 7.4% |
| 2021 | 1 | 0.7% |
| **Total** | **148** | **81%** |

82. As the 188 reflects, we could not obtain filing dates for twenty-nine participants. Some settled before filing a lawsuit and electronic records were not available for the older proceedings.

*Table 3. Participants by MDL Proceeding*[83]

| Proceeding | MDL Master Docket No. | Respondents | Percentage |
|---|---|---|---|
| Ethicon, Inc., Pelvic Repair System | 2:12-md-2327 | 92 | 42.4% |
| Boston Scientific Corp. Pelvic Repair System | 2:12-md-2325 | 37 | 17.1% |
| American Medical Systems, Inc. Pelvic Repair Systems (including related Caldera class action) | 2:12-md-2325<br>2:15-cv-00393 | 29 | 13.4% |
| C.R. Bard, Inc. Pelvic Repair System | 2:10-md-2187 | 27 | 12.4% |
| Silicone Gel Breast Implants | cv-92-p-10000 | 11 | 5.1% |
| Coloplast Corp. Pelvic Support Systems | 2:12-md-2187 | 8 | 3.7% |
| Monat Hair Care Products | 1:18-md-02841 | 5 | 2.3% |
| NuvaRing | 4:08-md-01964 | 3 | 1.4% |
| Johnson & Johnson Talcum Powder | 3:16-md-2738 | 2 | 0.9% |
| Mentor Corp. ObTape Transobturator Sling | 4:08-md-02004 | 2 | 0.9% |
| Prempro | 4:03-cv-01507 | 1 | 0.5% |

Our 217 participants resided in forty-two different states as well as two other countries (two international participants were injured in and had counsel in the United States). Participants' education and employment status varied significantly, as Tables 4 and 5 show. Most graduated from high school, and 35.4 percent received higher education, including several with advanced degrees. This seems to distinguish our participants from those described as clients in personal-injury settlement mills.[84]

*Table 4. Participants' Education Levels*

| Education | Number of Respondents | Percentage (N=217) |
|---|---|---|
| Less than high school degree | 6 | 2.8% |
| High school graduate (high school diploma or equivalent including GED) | 87 | 40.1% |
| Bachelor's degree in college | 56 | 25.8% |
| Master's degree | 17 | 7.8% |
| Doctoral degree (JD, MD, PhD) | 4 | 1.8% |
| No Answer | 47 | 21.6% |

83. Participants also came from related state court lawsuits, but we exclude those case numbers to preserve participants' anonymity.

84. Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1083, 1091 (2011) (quoting settlement-mill attorneys as describing their clients as uneducated).

*Table 5. Participants' Employment Status*

| Occupation | Number of Respondents | Percentage (N=217) |
|---|---|---|
| Homemaker | 6 | 2.8% |
| Not working (disabled) | 60 | 27.6% |
| Not working (looking for work) | 2 | 0.9% |
| Not working (other) | 29 | 13.4% |
| Not working (retired) | 21 | 9.7% |
| Working full time | 37 | 17.1% |
| Working part time | 17 | 7.8% |
| No Answer | 45 | 20.7% |

As Table 6 below shows, most of our participants were women, which we expected given the study's focus on women's health MDLs. But partners and children sued too, mostly for loss of consortium.[85] Of the 217 respondents, seven people sued on behalf of someone harmed, and 210 discussed their own experiences.[86] Finally, racial demographics varied as well, as Table 7 demonstrates.

*Table 6. Participants' Gender Table*

| Gender | Number of Respondents | Percentage (N=217) |
|---|---|---|
| Female | 169 | 77.9% |
| Male | 3 | 1.4% |
| Other | 1 | 0.5% |
| No Answer | 44 | 20.3% |

*Table 7. Participants' Racial Demographics*

| Racial Category | Number of Respondents | Percentage (N=217) |
|---|---|---|
| White[87] | 159 | 73.3% |
| Black or African American | 5 | 2.3% |
| Multi-racial/multi-ethnic | 5 | 2.3% |
| American Indian or Alaska Native | 2 | 0.9% |
| Native Hawaiian or Pacific Islander | 1 | 0.5% |
| No Answer | 45 | 20.7% |

This study is the first to consider what plaintiffs in MDLs understood about their lawsuit, but far greater access to plaintiffs is needed to compare our results in products liability with other MDL areas like antitrust, sales

85. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 392 (2d ed. 2011) (explaining "[l]oss of consortium as a species of emotional harm").

86. Of the people litigating on behalf of someone else, four were children, two were spouses, and one was a sibling.

87. Three respondents listed their race as Hispanic/Latina, which federal policy defines as an ethnicity, despite some contrary trends and pushes. *E.g.*, Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is Being Hispanic a Matter of Race, Ethnicity or Both?*, PEW RSCH. CTR. (June 15, 2015), https://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both [https://perma.cc/JKS4-TCRX]. For reporting, we have incorporated those respondents into the white racial category.

practices, securities, employment, and intellectual property, as well as with other products-liability proceedings. Nevertheless, the prominence of women's health MDLs in products-liability proceedings and of products liability to the larger world of civil litigation suggests this is an appropriate starting place to examine whether and how MDL serves its constituents.[88] Moreover, as discussed both here and in other research, the commonalities of client recruitment procedures, mass tort case-management techniques, and settlement procedures driving recovery further highlight that the proceedings of our participants represent the larger world of MDL.[89]

Survey research provides an opportunity for plaintiffs in the midst of litigation to share their understanding of what is happening both to them and in their lawsuit. Unlike some public opinion surveys where participants are randomly selected and representative of the larger population, however, our survey relied on a convenience sample. We posted the weblink in places where we expected plaintiffs to find it, and we did not limit participation to a pre-selected group. Anyone participating in any of the covered MDLs could take the survey, but we know nothing about the underlying population from which respondents are drawn.[90] To be fair, no one does, as no study like this has ever been attempted. We thus encourage future research to determine the generalizability of our results.

## II. THE UNINFORMED PLAINTIFF

The first step in suing someone is typically finding a lawyer. Ideally, attorneys act as shepherds, guiding clients through the legal system and preventing missteps by educating and advising them at critical junctures. Of course, that picture is complicated in many areas of the law, mass torts included. In products-liability cases, the economics of taking on corporations typically mean that a single-shingle lawyer in the plaintiff's hometown will have to refer cases to others, many plaintiffs find their attorneys through television ads or internet searches,[91] and judges appoint lead attorneys to organize and control MDLs.

88. *Supra* notes 69–72 and accompanying text.

89. *E.g.*, Burch & Williams, *supra* note 27, at 1459–69; Burch & Williams, *Judicial Adjuncts*, *supra* note 70, at 2152–62; Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L. J. 2, 15–16 (2019).

90. In federal court alone, the twenty-six proceedings included in the study involved 220,903 actions, were mostly filed by women about the harm they suffered. *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2021, at 2 (2021), https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report%20Cumulative%20Terminated%20MDLs.pdf [https://perma.cc/9H5R-MMND]. Data on state court cases is incomplete, plus cases settle out of court and can be placed on hold via tolling agreements. Thus, it is not possible to get an accurate head count, much less identify the underlying demographic data.

91. *See infra* Table 14 and accompanying text.

These circumstances create "layers of lawyers" and separate clients from their counselors.[92] That separation may also lead to information losses that make it difficult for even the most diligent plaintiff to monitor her attorneys and control her own lawsuit. This Part discusses what plaintiffs knew and understood about their own lawsuits.

### *A. WHAT PLAINTIFFS KNEW ABOUT THEIR OWN LAWYERS*

Most of our participants indicated hiring counsel, yet less than half could provide their attorney's name. Slightly more could recall the name of their law firm.[93] And a small minority—only nineteen percent—were able to identify whether their attorney served in an MDL leadership position.[94]

Their comments revealed the commonplace nature of these information gaps. "[Y]ou know I can't remember it was in [a news article] that was one of my lawyers was mention there for airplane use and other things it was [name] it and something," remarked one.[95] "Big lawfirm in Nashville, TN," responded an Illinois participant.[96] Another respondent offered to "locate the name of the lady on [her] letter and get back with [us]," [97] whereas others simply said, "paralegals," [98] "not sure," [99] "I do not know the name of my lawyer," [100] and "I have no idea. Never spoke with attorney listed on the lawsuit." [101]

Through docket searches, we found that collectively, 295 different attorneys from 145 distinct law firms represented participants. We also determined that lawyers actually represented 94.4 percent of our 217 participants, not just the 168 who indicated hiring counsel.

Lead lawyers from the covered MDLs dominated the list of attorneys we identified: Whether knowingly or unwittingly, fifty-four percent of participants were represented by an attorney serving in a leadership role or from the same law firm as someone in a leadership position. That means that mainstream MDL insiders, not outliers, represented most respondents—an important point to keep in mind as we explore why participants remained in the dark, and later, how the system might remedy those knowledge deficits.

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92. Curtis & Resnik, *supra* note 65, at 431.

93. Again, seven participants appeared not to have attorneys at any point during the course of the proceedings (3.2 percent).

94. Of those who did respond, twelve said no (twenty-nine percent of those who answered, six percent of all respondents) while thirty said yes (seventy-one percent and fourteen percent respectively).

95. Participant 175.

96. Participant 213.

97. Participant 128.

98. Participant 180.

99. Participant 210; *see also* Participant 28 ("[u]nsure").

100. Participant 55.

101. Participant 98.

### *B. WHAT PLAINTIFFS KNEW ABOUT COURTS AND JUDGES*

For clients to have any command over their case as MDL practices assume, they must know who the judge is and where their case is proceeding. But 50.6 percent of our participants could not identify where their lawsuit was pending. When we asked which court was handling their case, they said things like: "Don't know!"[102] "Not sure!"[103] "I have no idea but it is part of an MDL."[104] "I do not have this information."[105] "[D]oesn't know. [A]ssumes she's in the MDL."[106] "Don't know, my case is still in limbo."[107] Some were more specific, "I think my case was filed with the MDL but it never went to court. There was NEVER a court date for my case."[108] And one participant disclosed, "[my] lawyer did not feel my case was court worthy," but a docket search revealed that her case was filed directly in the MDL.[109]

Respondents knew even less about the judges presiding over their suits than they did about courts. When we asked, "What is the name of the judge assigned to your case," 69.1 percent of participants did not know.[110] Instead, they said things like: "The orders are signed by Honorable Judge Presiding with no specific name."[111] "[I]ts a woman. [I] do not know her name that is all the lawyer told me."[112] "Dont know. They keep changing it."[113] "Can't be for certain, sorry."[114] "Don't recall, it's changed a couple of times . . . ."[115] "Not sure. [W]ill dig through papers to find it. I think [I] need to write him a letter. Would he read it? Would it really change anything?"[116] "Don't know if I even have a judge . . . ."[117] "I'm guessing Judge [name]. That's where I found my name on his docket in wave 6."[118] "There was no judge," said one pelvic-mesh plaintiff in the MDL.[119] "Never got assigned," replied another who thought her case was remanded (it wasn't).[120] Another listed "Special Master [Name],"

102. Participant 113.
103. Participant 153.
104. Participant 44.
105. Participant 55.
106. Participant 63.
107. Participant 205.
108. Participant 199.
109. Participant 200.
110. *E.g.*, Participant 129 ("I don't remember.").
111. Participant 230.
112. Participant 121.
113. Participant 14.
114. Participant 209.
115. Participant 179.
116. Participant 65.
117. Participant 205.
118. Participant 77.
119. Participant 21.
120. Participant 213.

a private attorney hired by the plaintiffs' attorneys to disburse settlement funds, as the *judge*.[121]

### C. WHAT PLAINTIFFS UNDERSTOOD ABOUT OUTCOMES

Because MDL plaintiffs have their "own" lawyers who are supposed to counsel them about when and whether to settle, judges tend not to consider conflicts of interest between plaintiffs when appointing lead attorneys.[122] We thus consider what participants understood about settlement and begin by reporting all respondents' eventual outcomes as recorded in courts' dockets below in Table 8.

A significant subset settled, though that number likely undercounts settlements since some settled before filing suit, some cases listed as dismissed might have been dismissed because they settled, and some cases dismissed without prejudice may have been refiled and settled later.

*Table 8. Participants' Individual Outcomes*

| Outcome | Respondents | Percentage of Total |
|---|---|---|
| Dismissed | 82 | 55.4% |
| With prejudice | 40 | 27.0% |
| Without prejudice | 36 | 24.3% |
| On motion for summary judgment | 2 | 1.4% |
| On appeal | 1 | 0.7% |
| No detail | 3 | 2.0% |
| Settled | 61 | 41.2% |
| Unknown | 5 | 3.4% |
| **Total** | **148** | **81%** |

This section considers what ethics rules entitle plaintiffs to know versus what they actually understood about their settlements, how lawyers convince clients to settle, how participants felt about their outcomes, and where they turned for information about the proceeding. Eighty-one percent of settling respondents reported feeling somewhat or extremely dissatisfied with the fairness of the settlement process.[123] And only 25.1 percent somewhat or strongly agreed that the claims administrator—the person paid to divvy up settlement amounts—had the information necessary to make informed decisions about how to handle their claim.[124] That suggests that information losses went both ways and raises questions about how effective tort law can be when settlement allocations may not to reflect substantive entitlements.

121. Participant 44.
122. Bough & Burch, *supra* note 37, at 70–71.
123. Burch & Williams, *supra* note 48, at 45 tbl.16.
124. *Id.* at 46 tbl.18.

### 1. Uninformed Consent to Settle

For plaintiffs of any kind, deciding whether and when to settle is complicated. But mass-tort plaintiffs face an added layer of uncertainty: "Settling" often means dismissing their lawsuit with prejudice to enter into a settlement *program* where compensation is not guaranteed and outcomes are not transparent.[125] In global settlements, lead lawyers negotiate compensation criteria with the defendant and put a claims administrator in place to decide who gets what.[126] Sometimes dissatisfied plaintiffs can appeal their eligibility and their award to a special master, but there is always a risk they will give up their right to sue in exchange for nothing.[127]

Aggregate settlements carry two other risks: illicit bias and horizontal inequity. First, on bias, no disqualification standards or ethics rules exist for claims administrators.[128] As John Fabian Witt points out, "the informal settlement system rules may be replete with illicit mechanisms that would be unacceptable in a publicly accountable and transparent system."[129] One need look no further than the allegations of race–norming—a practice that assumed a lower level of cognitive function for Black players and curved their test scores accordingly—in the *NFL Concussion* MDL to see how this might be true.[130]

Second, under private settlements' secrecy, insiders—lead lawyers, claims administrators, and special masters—can shade justice in ways that benefit them and undermine horizontal equity.[131] For instance, lead lawyers have access to the behind-the-scenes negotiations that can give

125. BURCH, *supra* note 61, at 141.

126. *E.g.*, Oragnon USA, Inc. & Negotiating Plaintiff's Couns., NuvaRing Master Settlement Agreement § 1.05 (Feb. 7, 2014) (on file with author).

127. BURCH, *supra* note 61, at 158–59.

128. *See* Symposium, *A Novel Approach to Mass Tort Class Actions: The Billion Dollar Settlement in the Sulzer Artificial Hip and Knee Litigation: A Symposium*, 16 J.L. & HEALTH 169, 196 (2001) ("Basically I'm in a situation while where people's claims are pending, that I owe my fiduciary relationship to those people who are adverse to me. And that's sort of a funny situation to be in. But it goes on on a daily basis.").

129. John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 275 (2007).

130. Will Hobson, *NFL Says It Will End Controversial 'Race-Norming' in Concussion Settlement with Players*, WASH. POST (June 3, 2021, 6:00 AM), https://www.washingtonpost.com/sports/2021/06/03/nfl-concussion-settlement-race-norming [https://perma.cc/J5NB-WWLJ]; Pete Madden, Cho Park & Ryan Smith, *Negotiator of NFL Concussion Settlement Program on Race-Norming: 'I Was Wrong,'* ABC NEWS (June 2, 2021, 11:15 AM), https://abcnews.go.com/US/negotiator-nfl-concussion-settlement-program-race-norming-wrong/story?id=78031699 [https://perma.cc/BJ8G-KNB2]. That practice emerged publicly only because the judge certified a class within the MDL and continued to oversee the settlement administration. To be sure, the public tort system itself presents similar discrimination risks by using statistical tables for wages, life expectancy, and work-life expectancy.

131. Burch & Williams, *Judicial Adjuncts*, *supra* note 70, at 2206–10.

their clients an edge when filing claims.[132] And attorney insiders suggest that settlement values "all depend[] on who's in the lead" and imply that horizontal inequity can result from information asymmetries between leaders and individual attorneys: "If the firm isn't a big player in the proceeding, it doesn't have all the facts, depositions, and information. The firm is left trying to find out what the defendant has paid to other, bigger players."[133] Finally, attorneys may be tempted to allocate more money to some clients for reasons that have little to do with claim value, such as paying less to referred clients to avoid losing money to referral fees.[134]

Confidential payouts can add to plaintiffs' frustrations, making it hard to compare outcomes. Yet, Ben Depoorter's survey of attorneys revealed that confidentiality provisions didn't prevent lawyers from talking with one another.[135] He concluded, "although information on settlement agreements is not generally available to the public, as opposed to published verdicts, legal professionals—to whom such information is most relevant—are aware of emerging settlement trends."[136]

Lawyers are supposed to use those insights to counsel their clients and preserve clients' decision-making autonomy.[137] Clients, not their attorneys, have the ultimate say in settling.[138] But lawyers exercise considerable influence and clients look to them for guidance.[139] Advising clients typically entails analyzing consequences and weighing the risks and benefits of going to trial—whether the judge tends to rule in the plaintiff's favor, how convincing the experts and the science on causation are, how

132. *See, e.g.*, Letter from Gregg Borri to Judge Miller at 2, *In re* Biomet M2a Magnum Hip Implant Prods. Liab. Litig., No. 13-md-2391 (N.D. Ind. Apr. 27, 2015), ECF No. 91 (claiming that leaders had inside information that Biomet would challenge the base payment of any client who sought enhancements); Case Management Order No. 3 at 2–3, *In re Biomet*, No. 12-md-2391 (N.D. Ind. May 27, 2015).

133. Burch & Williams, *Judicial Adjuncts*, *supra* note 70, at 2212–13 (quoting an MDL insider).

134. *E.g.*, Huber v. Taylor, 469 F.3d 67, 70–71 (3d Cir. 2006); *In re* New York Diet Drug Litig., 47 A.D.3d 586, 586 (N.Y. App. Div. 2008) (allowing referring attorneys and their clients to intervene); Parker & Waichman v. Napoli, 29 A.D.3d 396, 397–98 (N.Y. App. Div. 2006).

135. Ben Depoorter, Essay, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 966–67, 971–72 (2010).

136. *Id.* at 973.

137. *See generally* DAVID A. BINDER, PAUL BERGMAN, PAUL R. TREMBLAY & IAN S. WEINSTEIN, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (3d ed. 2011) (describing a client-centered model of counseling).

138. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2021) ("A lawyer shall abide by a client's decision whether to settle a matter.").

139. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 364 (2008).

generous juries in that venue have been historically, how much a dollar in hand today is worth versus more later, and various other factors.[140]

In aggregate settlements, attorneys must provide additional disclosures to comply with ethics rules. They must tell clients: (1) the aggregate settlement's total amount; (2) the existence and nature of all the claims involved; (3) other clients' participation and amounts; and (4) lawyers' total fees and costs and how they apportioned them among clients.[141]

Most of the 295 mass-tort lawyers in our study communicated rarely with participants,[142] which put them in a difficult spot when defendants offered to settle. One respondent said, "Wasnt suppose[d] to be in MDL [but was] offered settlement by complete strangers."[143] As this section explains, our participants' lawyers rarely seemed to counsel them, and some engaged in strategies designed to strongarm them into settling.

We asked settling plaintiffs what details their attorneys gave them before they agreed to settle and allowed them to select multiple options from a list of eight possibilities.

*Table 9. Pre-settlement Information Provided to Respondents by Attorneys*

| **Before you agreed to settle or agreed to enter into a settlement program did you (check all that apply):** | **Number of Respondents** | **Percentage N=99** |
|---|---|---|
| Have an estimate of your approximate monetary award based on the settlement program's tiers, allocation formula, or points | 46 | 46.5% |
| Know that your claim would qualify for settlement money | 44 | 44.4% |
| Know what your lawyer's fees would be | 44 | 44.4% |
| Know how much money you would receive from the settlement | 30 | 30.3% |
| Know how the litigation costs would affect your award | 21 | 21.2% |
| Know what your lawyer's other clients would receive | 14 | 14.1% |
| Know how litigation costs would be shared among your lawyer's other clients | 13 | 13.1% |
| No Answer | 21 | 21.2% |

Table 9 reveals how little respondents understood. (We did not have access to what information their attorneys sent them.) Less than half appear to have received the information required by ethics rules—monetary payouts, lawyers' fees, litigation costs, and how costs would be shared among clients—which

140. BINDER ET AL., *supra* note 137, at 395–407.

141. MODEL RULES OF PRO. CONDUCT r. 1.8(g) (AM. BAR ASS'N 2021); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 128 cmt. d(i) (AM. L. INST. 2000); ABA Comm. on Ethics & Pro. Resp., Formal Op. 438 (2006).

142. *See supra* Section II.B.

143. Participant 22.

raises questions about informed consent.[144] Only 46.5 percent had an estimate of their approximate award before agreeing to settle, and just 44.4 percent knew their claim would qualify for a payout and what their lawyers' fees would be. Less than one-third knew what they would receive before entering into the settlement program, only 14.1 percent understood what others within the aggregate settlement would get, and fewer still—13.1 percent—knew how costs would be shared among them.

One participant reported a disparity of hundreds of thousands of dollars between her settlement offer and another's but said "[I] was told [I] did not need to know where money was distributed."[145] Another revealed, "[M]y attorney told me that I was only entitled to know my settlement as proposed by the Special Master, not the settlement amounts of the other plaintiffs that my attorney represents."[146] In short, despite ethical requirements to provide clients with certain settlement information, participants understood little.

### 2. The Hill of Beans

Although pre-settlement details remained fuzzy, participants were clear on how little they recovered, especially relative to what they'd imagined. As Table 10 shows using a scale similar to the Census's income ladder, we asked settling participants how much they expected to recover (not what they actually received) based on out-of-pocket expenses like hospital bills and medical costs.

144. MODEL RULES OF PRO. CONDUCT r. 1.0(e) (AM. BAR ASS'N 2021); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 10.8 (3d ed. 2004) (suggesting that lawyers must advise clients on the wisdom of consenting). Violating Rule 1.8(g) can lead to various consequences, depending on the state, including fee forfeiture and suspension. *E.g.*, *In re* Hoffman, 883 So.2d 425, 432, 435 (La. 2004).

145. Participant 127.

146. Participant 31.

*Table 10. Settling Participants' Expected Recoveries Based on Damages*

| Expected Recovery | Number of Respondents | Percentage (N=99) |
|---|---|---|
| Less than $10,000 | 3 | 3.0% |
| $10,000 - $19,999 | 1 | 1.0% |
| $20,000 - $29,999 | 3 | 3.0% |
| $30,000 - $39,999 | 2 | 2.0% |
| $40,000 - $49,999 | 0 | 0.0% |
| $50,000 - $59,999 | 1 | 1.0% |
| $60,000 - $69,999 | 2 | 2.0% |
| $70,000 - $79,999 | 1 | 1.0% |
| $80,000 - $89,999 | 3 | 3.0% |
| $90,000 - $99,999 | 1 | 1.0% |
| $100,000 - $149,999 | 7 | 7.1% |
| $150,000 - $199,999 | 4 | 4.0% |
| $200,000 - $299,999 | 8 | 8.1% |
| $300,000 - $399,999 | 5 | 5.1% |
| $400,000 - $499,999 | 3 | 3.0% |
| $500,000 - $599,999 | 11 | 11.1% |
| $600,000 - $699,999 | 1 | 1.0% |
| $700,000 - $799,999 | 0 | 0.0% |
| $800,000 - $899,999 | 1 | 1.0% |
| $900,000 - $999,999 | 0 | 0.0% |
| $1 mil. - $1.5 mil. | 13 | 13.1% |
| Over $1.5 million | 13 | 13.1% |
| No answer | 16 | 16.2% |

We then asked that they compare their expectation with their actual recovery and found that participants received far less than they thought they would. Of the ninety-nine settling respondents, seventy-three reported their recovery was much lower than they expected, five found their actual payout to be slightly lower, five received more than they expected, and four percent said their recovery was about the same as they thought it would be.

These disappointing awards seemed to affect how they felt about their overall outcome. When we asked if they were satisfied with their case overall, seventy-four percent of settling participants were not. They were somewhat or extremely dissatisfied, as Table 11 demonstrates.

*Table 11. Settling Participants' Satisfaction with Outcomes*

| Satisfaction with Outcome of Case Overall | Number of Respondents | Percentage N=99 |
|---|---|---|
| Extremely dissatisfied | 69 | 69.7% |
| Somewhat dissatisfied | 5 | 5.1% |
| Neither satisfied nor dissatisfied | 7 | 7.1% |
| Somewhat satisfied | 5 | 5.1% |
| Extremely satisfied | 3 | 3.0% |
| No answer | 10 | 10.1% |

Many felt defendants offered them too little even for garden-variety economic losses like medical bills and lost income. As one participant revealed, "I made an Excel spreadsheet of . . . how much money I lost [in wages]. . . . [T]he final offer is literally less than a third of how much money I lost in 10 years of working."[147] That "small amount of money that I received was nowhere near enough to replace my income that I have lost," explained another.[148] And a third observed, "The offer made to me by [defendant] only considered the removal of the mesh. It did not include any treatments or doctor visits, or my expenses to see an out of state doctor."[149]

Respondents were likewise upset when their settlements failed to cover non-economic losses like past and future pain and suffering as well as their partners' loss of consortium claims. As multiple comments reflected: "40% [of my offer went] to attorney and [to] pay back my Insurance for Cost and I would get pennies. . . . My medical cost[s] were unbelievable."[150] "[Mesh manufacturers] owe me for removal and me and my husband both for pain and suffering."[151] "A few thousand dollars will not compensate me for the years of discomfort, loss of relationships, how mesh has ruined my life."[152] "They did not include my husband at all."[153] "The settlement offers take in to consideration medical issues, but do not consider the emotional pain and suffering from loss of intimacy with a spouse or partner."[154]

Finally, once plaintiffs agreed to settle, some attorney-client relationships returned to the status quo—waiting for the payout, with little information in hand. "It has been 8 long yrs. and I have not received anything, this past June was 1 yr. since I received a letter from the case manager telling me that I would receive my settlement fund because [they were checking into liens]. [W]ell it has been 1.5 yrs. now and nothing."[155]

Three participants summed things up: "The proposed settlement grid does not effectively address or compensate for injuries. It is a joke."[156] The second said, "I didn't get paid for all my medical[.] I didn't get paid for my $500000 worth of lost wages[.] I didn't get paid for future medical expostulate[.] I didn't get paid for all I lost[;] the MDL is a joke . . . ."[157]

147. Participant 151.
148. Participant 78.
149. Participant 200.
150. Participant 110.
151. Participant 211.
152. Participant 124.
153. Participant 117.
154. Participant 228.
155. Participant 178.
156. Participant 65.
157. Participant 50.

And a third put it simply: "I believe the whole thing was a misjustice considering my injuries, compensation and theirs."[158]

## III. SOURCES OF INFORMATION LOSS

"I feel like this entire experience spiraled out of control and I don't understand how it did. If it is because I was suing such a large company?? I don't know," mused one participant.[159] "[I] do not have a copy of any documents besides medical records and settlement papers," said another.[160] "Had no clue what was going on," explained a third, "[h]ealth concerns took over and left little time to be a participant in life itself."[161]

How is it possible that plaintiffs understood so little about their lawsuits? As the last comment suggests, plaintiffs can have a lot on their plate: They're having to manage their lawsuits from a distance and search for publicly available news of the proceeding—both things their lawyer should be doing—and must often juggle chronic health concerns, too.

We explore several potential sources of information loss in this Part, beginning with MDL transfer and the appointment of lead attorneys since some comments suggested that aggregation itself can play a role: "[My law firm] filed me under someones else name," said one participant.[162] But an attentive attorney could easily explain the nuances of coordination, transfer, and leadership appointments. Other comments indicated that those explanations were few and far between, suggesting that individual representation also played a role: "I haven't been given any legal documents"[163]; "I never was told anything about what or where the process was"[164]; and "I never really got paper work. Just the papers requesting my signature for settle that the lawyer be paid."[165] Consequently, this Part also considers the rise of volume lawyering.

### *A. MDL TRANSFER*

As noted earlier, few participants knew where their case was pending or the presiding judge's name. Those results seem indicative of a process that puts many miles between plaintiffs and courts. Docket searches revealed that participants' cases originated in at least thirty-two different state and federal courts, and terminated in at least twenty-nine state and federal courts. As Table 12 below shows, most lawyers filed participants' cases directly in the MDL, though 11.9 percent moved from their original

158. Participant 79.
159. Participant 84.
160. Participant 1.
161. Participant 75.
162. Participant 57.
163. Participant 31; *see also* Participant 60 ("Never received any documents.").
164. Participant 185.
165. *Id.*

fora either through removal from state to federal court or transfer via MDL. Even if they could not identify which court their case was in, roughly half could nonetheless recognize whether their case had been transferred from one court to another.

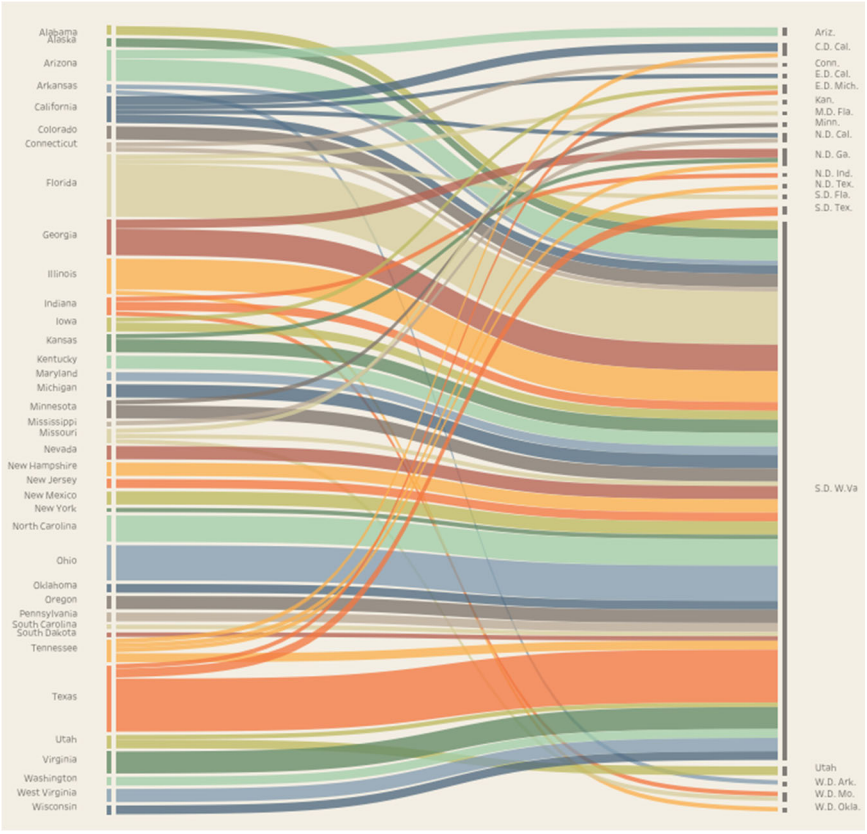
*Table 12. Participants' Case Origins and Transfer*

| **Case Movement** | **Percent of Total (N=217)** |
|---|---|
| Federal – directly filed in MDL | 61.2% (133) |
| Federal – transferred to MDL | 8.3% (18) |
| Federal – removed then transferred to MDL | 2.7% (6) |
| Federal – removed from state court | 1% (2) |
| State Court | 14.2% (31) |
| Settled before filing | 2.7% (6) |
| Unknown | 9.7% (21) |

Comments in the space provided for the court's name suggested that transfer itself was less puzzling to participants than why their case was so far from home: "West Virginia . . . I am from Georgia but was told the judge for my area required filing with that area due to overwhelming number of plaintiffs."[166] "New Jersey but [I] cannot remember why."[167] Another said, "Ohio [I] think," but the case was in state court in a different state.[168] One participant asked, "[Law Firm 2], also [Law Firm 1] took my case in beginning and sent my case to Mass. WHY??"[169]

166. Participant 75.
167. Participant 111.
168. Participant 41.
169. Participant 64.

*Figure 1. Participants Home States Versus District of Filing Suit*




As Figure 1 above illustrates by identifying participants' home states on the left and the districts in which attorneys filed their lawsuits on the right, mass torts may move cases far away from where plaintiffs live.[170] Sometimes, the move can be ascribed to MDL transfer, as in the case of West Virginia. Only four of our participants lived in West Virginia, but because the Panel coordinated all seven pelvic-mesh proceedings before the Southern District of West Virginia, and the court permitted direct filing, 122 participant cases were filed there. Cases transferred to West Virginia from locations as far away as Arizona, New Mexico, Utah, Texas, and Alaska.

Other times, plaintiffs' attorneys concentrate cases in a particular state court, often the defendant's principal place of business or state of incorporation.[171] Picking where to sue entails juggling the economics of the

170. This amazing figure is the work of Margaret S. Williams.

171. *Cf.* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1783–84 (2017) (making it clear that it is no longer enough that the claims of some plaintiffs in a mass action relate to the

claims, favorable substantive law, jurisdictional considerations, and interpersonal considerations—e.g., whether the lawyer trusts and works well with the MDL leaders, or not. Those considerations may explain filings in New Jersey, for example, where many pharmaceutical companies are headquartered, and Delaware, where many companies are incorporated.

### *B. LEAD LAWYERS*

Lead lawyers are in a unique position vis-à-vis the court and the plaintiffs. As Section I.A described, leaders' individual clients pay them a standard contingency fee, but all MDL plaintiffs must typically pay them a common-benefit fee when their case settles. Though leaders' fiduciary obligations to nonclient plaintiffs are ill-defined in case law,[172] their appointment order typically allocates certain tasks, like communicating.

Communicating information often falls to liaison counsel. As *The Manual for Complex Litigation* explains, liaison counsel should disseminate "communications between the court and other counsel," call lawyers' meetings, "advis[e] parties of developments," and coordinate activities.[173] A previous study found that courts appointed liaison counsel in 46.27 percent of all MDLs (not just products liability), and that other attorneys contested the appointment in only fifteen percent of those cases.[174] Looking solely at the twelve MDLs that related to our participants,[175] judges in ten (eighty-three percent) appointed liaison counsel.[176]

Most appointment orders required liaison counsel to distribute orders, motions, and pleadings to all plaintiffs' counsel on record as well as maintain document repositories that those lawyers could access.[177] The theory seemed to be that communicating with individual attorneys would allow information to flow downhill to clients because those attorneys are better in hands-on roles.[178]

But few of the lawyers described in our study communicated well with clients, leaders included.[179] Despite the high number of plaintiffs represented

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forum state, but rather each plaintiff must show a sufficient relationship between the forum and the claim).

172. David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 453 (2020).

173. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

174. Noll, *supra* note 172, at 448–49.

175. Note that we count the *Caldera* class action, which is related to the *American Medical Systems, Inc.* proceeding, as a separate proceeding because it was adjudicated before a different judge.

176. Perhaps products-liability cases with personal injuries and more plaintiffs impose greater communication demands on leaders.

177. *E.g.*, Pretrial Order #4 at 6–7, *In re* Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig., No. 12-md-2325 (S.D. W. Va. Apr. 17, 2012).

178. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 313–14 (1996).

179. *Supra* Section II.B.

directly by lead attorneys and firms, client dissatisfaction ran deep, as Table 13 shows.

*Table 13. Participants' Overall Satisfaction with Attorneys*

| **Considering your entire experience, how satisfied were you overall with the manner in which your lawyer handled your case?** | **Frequency** | **Percentage N=217** | **Percentage N=168** |
|---|---|---|---|
| Extremely satisfied | 13 | 6.0% | 7.7% |
| Somewhat satisfied | 12 | 5.5% | 7.1% |
| Neither satisfied nor dissatisfied | 18 | 8.3% | 10.7% |
| Somewhat dissatisfied | 30 | 13.8% | 17.9% |
| Extremely dissatisfied | 79 | 36.4% | 47.0% |
| No Answer | 65 | 30.0% | |

Rather than enhance clients' understanding, lead lawyers' appointment seemed to perplex some participants by erecting a barrier between them and the court. "My attorney is not personally participating, from what I understand," said one participant.[180] A second shared, "I really liked my attorney [name], however I feel that the Federal attorney [who] spoke for all of us made poor decisions in our interest."[181]

Common-benefit funds likewise popped up as a particular source of discontent and confusion, as different participants' comments indicated: "The MDL process was never explained to me. I still feel I should not have paid 3% into the common benefit fund."[182] "The court gave lawyers I had never heard of or met a substantial part of my settlement."[183] "I feel the MDL was a complete wa[]ste of time for my case and only served the purpose of making a ton of money for all the attys involved!"[184]

With little explanation given to them, many participants were confused by common-benefit fees: "I wrote [MDL Judge Name] & told him to give me the [X] dollars that was paid to the courts from my settlement because everyone was talking about it & His secretary told me I had no right asking for that & he did not take it I wrote back & asked then who is the MDL COURT ANYWAY ?"[185]

180. Participant 105.
181. Participant 78.
182. Participant 212.
183. Participant 75.
184. Participant 103.
185. Participant 201.

The lack of guidance and counseling that participants received was plain. What was less clear, however, was whether leaders or individual attorneys contributed to information bottlenecks. Both have a duty to communicate. Liaison counsel's principal job is disseminating information to individual attorneys. And individual attorneys' ethical obligations require them to keep clients "reasonably informed," "comply with reasonable requests for information," and to explain things so clients can make "informed decisions."[186]

### C. *INDIVIDUAL ATTORNEYS*

While MDL transfer and layers of lawyers can both contribute to information losses, individual attorneys could help clients navigate each. But the business of law has changed, shifting the profit model away from a Main Street shop that runs on reputation, referrals, and client counseling and towards a Costco-style warehouse that relies on advertising.[187] Warehousers have been around since the earliest mass torts like asbestos, Dalkon Shield, and the Bhopal disaster,[188] but tort reform may have forced more boutique lawyers to adopt a mainstay of the low-end personal-injury bar: the volume model.[189]

#### 1. Volume Lawyering

Tort reform changes lawyers' economic calculus.[190] "Reform" at the state level capped punitive and non-economic damages for pain and suffering, imposed higher evidentiary burdens for punitive damages, tweaked joint and several liability, and modified collateral source rules.[191] When faced with taking on industry giants like General Motors, Merck, Johnson & Johnson, and Bayer, the recovery from one case alone is often no longer worth the investment.[192]

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186. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2021); *see also* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 20 (AM. L. INST. 2000) (listing the same ethical obligations).

187. *See, e.g.*, Engstrom, *supra* note 84, at 1091–92.

188. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 74 (1995) ("Some attorneys are selective about the cases they take, while others will take almost any case without regard to its merit . . . ."); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1364–65 (1995) (describing how attorneys in asbestos and the Dalkon Shield litigation represented large volumes of plaintiffs); Resnik et al., *supra* note 178, at 313 (describing "tort class action lawyers").

189. Engstrom, *supra* note 21, at 1520–21; Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y. L. SCH. L. REV. 243, 248–49 (2006).

190. Georgene Vairo, *The Role of Influence in the Arc of Tort "Reform,"* 65 EMORY L.J. 1741, 1744–46 (2016); Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 110–12 (2015).

191. Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183, S186 (2007); Vairo, *supra* note 190, at 1744.

192. *See, e.g.*, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 48 (2017) (describing how early lawyers could not afford to pursue the GM ignition switch litigation because of damage caps).

Volume lawyers acquire large client portfolios principally through one of four means (or a combination thereof). First, some advertise on their own.[193] Second, in lieu of advertising, a firm may "purchase" dockets from other firms.[194] Third, a firm might hire lead generators—businesses that advertise, screen potential clients to different degrees, then sell those leads to lawyers.[195] Fourth, some lead generators and lawyers have formed law firms together.

Although the ABA's Model Rules of Professional Conduct forbid lawyers from partnering with nonlawyers to safeguard lawyers' independent judgement and loyalty to clients,[196] Washington D.C.'s Bar doesn't. Back in 1991, the D.C. Bar opted to allow nonlawyers (like lobbyists) and lawyers to form a law firm and share profits so long as nonlawyers provided "professional services" that furthered client needs and lawyers kept a watchful eye over the ethics of the whole enterprise.[197] Over the last two years, other states like Arizona and Utah have followed suit to different degrees.[198]

These changes allow advertisers, investors, and lawyers to share attorneys' fees. Rather than receive a flat fee-per-lead, an investor or lead generator can recoup a percentage of the client's recovery as a contingent fee. This arrangement, for example, allowed Alpha Law LLC, a Florida-based "law firm" that generated more than 14,000 pelvic mesh clients through its call center operations, to receive eighty-five percent of the client's attorneys' fee, whereas the trial lawyers actually doing the work, McSweeney Langevin LLC, received only fifteen percent.[199]

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193. *E.g.*, AkinMears, *'Pelvic Mesh Warning,'* ISPOT.TV (Apr. 19, 2013), https://www.ispot.tv/ad/700M/akinmears-pelvic-mesh-warning [https://perma.cc/DPU8-NB52].

194. Claimant, AkinMears', Claim at 6–7, AkinMears, LLP v. Alpha L. (2017) (Am. Arb. Ass'n, Arb.), https://static.reuters.com/resources/media/editorial/20191030/akinmearsarbitrationdemand.pdf [https://perma.cc/CP9T-27FX] (demanding arbitration over AkinMears' "purchase of 14,453 Confirmed and Valid Fee Agreements/Clients" in the pelvic mesh litigation).

195. *See* Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, WALL ST. J. (Nov. 25, 2019, 11:48 AM), https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480?mod=searchresults&page=1&pos=12 [https://perma.cc/J9CG-USTF] ("[M]arketers say some law firms will sign up almost anyone who says they used Roundup and got non-Hodgkin lymphoma . . . . Others want only those who used Roundup at least 30 times a year for many years, or those who used Roundup at work."); *e.g.*, *The Nation's Largest, Fully-Integrated Marketing Agency Dedicated to Law Firms*, CONSUMER ATT'Y MKTG. GRP., https://www.camginc.com [https://perma.cc/7626-4EVD] (providing "[e]ffective, data-driven marketing exclusively for law firms").

196. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2021).

197. RULES OF PRO. CONDUCT r. 5.4(b) (D.C. BAR ASS'N 2022).

198. Order Amending the Arizona Rules of the Supreme Court and the Arizona Rules of Evidence at 2, *In re* Restyle & Amend Rule 31, No. r-20-0034 (Ariz. Aug. 27, 2020); ABA Comm. on Ethics & Pro. Resp., Formal Op. 499 (2021).

199. Alpha Law LLP & McSweeney/Langevin LLC, Contingency Fee Retainer Agreement § VII (2014) (on file with author) [hereinafter Alpha Law Retainer]; *see also* Claimant, AkinMears', Claim at 6–7, AkinMears, LLP v. Alpha L. (2017) (Am. Arb. Ass'n, Arb.), https://static.reuters.com/resources/media/editorial/20191030/akinmearsarbitrationdemand.pdf [https://perma

For clients seeking justice and court access, easy acceptance should be a welcome shift from the previous regime where elite trial lawyers rejected nine out of every ten clients.[200] It's not. Because volume lawyers cast a wide net with minimal front-end screening, they often cannot afford to develop and litigate each case or spend time counseling and educating clients.[201] Technological prowess and mass communication skills seem to end once clients sign retainer agreements. And law firms receiving only fifteen percent of the total contingent fee, like McSweeney Langevin, have little financial incentive to devote time and energy to individual clients.

Some of our participants felt like "just another number,"[202] not vindicated or represented, as multiple comments by different respondents reflected: "I was completely helpless and out of the loop."[203] "[L]awyers are disconnected from their clients."[204] "I want a new lawyer. I want to resubmit a lawsuit. I don't feel my lawyer could be objective due to having too many mesh clients. No personal help."[205] "Just feel as though they signed me up and they are just waiting to be paid."[206] "This MDL lawsuit is absolutely unbelievable. There is no attorney client relationship."[207]

Being one of many meant that most participants knew little about what was happening with their lawsuit. Lawyers have all the insights and expertise—that's why people hire them—and attorneys have ethical obligations to keep clients updated.[208] But, prompted with "my lawyer kept me informed about the status of my case," sixty-five percent of respondents strongly or somewhat *disagreed*, with only twenty-seven percent somewhat or strongly agreeing.[209]

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.cc/CP9T-27FX] (describing another claim against Alpha Law based on the same type of arrangement).

200. David A. Hyman, Bernard Black & Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1594 ("[R]esearch by others shows that in med mal cases, plaintiffs' lawyers reject well over ninety percent of initial inquiries."); Nora Freeman Engstrom, *ISO The Missing Plaintiff*, JOTWELL (Apr. 12, 2017), https://torts.jotwell.com/iso-the-missing-plaintiff [https://perma.cc/6F6K-WVST].

201. *See* Hensler & Peterson, *supra* note 36, at 1050–51 (describing differences between boutique lawyers and volume attorneys); *see also* Hensler, *supra* note 21, at 93 (showing that even in more traditional tort relationships, plaintiffs may have little interaction with lawyers).

202. Participant 198 ("I felt like I didn't matter at all and I was just another number."); Participant 18 ("I don't feel like anyone fought for me. Just a number."); Participant 27 ("I felt that I was treated just like another number. No empathy whatsoever.").

203. Participant 61.

204. Participant 109.

205. Participant 67.

206. Participant 9.

207. Participant 184.

208. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2021).

209. A previous study on cases from 1978 reported that fifty percent of individual litigants received regular written reports from their lawyers. HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 64 (1990).

Ignorance was not bliss. "I was never updated and it took months before I knew what [my law firm] did with my MDL," said one.[210] "I wish they kept me in the loop as to what was going on. No communication," lamented another.[211] A third said, "I wasn't kept informed of what was going on and had to continue to follow up with them . . . ."[212] Others expressed similar sentiments: "I never heard from anyone regarding my case"[213]; "[t]hey are not communicating with me"[214]; "[g]etting status info is like pulling teeth"[215]; and "[t]hey never contacted me as to where my case was heading."[216]

When we asked participants about all the ways in which their attorneys kept them informed, which Table 14 below chronicles, the knowledge gap became readily apparent. Even the most frequent type of communication—email (costless and effective)—was not frequent in an objective sense: Fewer than twenty percent of respondents reported receiving one. And even then, it wasn't always regular: "[O]ver a 3 year period my attorney spoke with me via email less than 10 times," explained one.[217]

*Table 14. Lawyer-Client Communication Methods*[218]

| **Method of Communication**[219] | **Frequency** | **Percentage (N=217)** |
|---|---|---|
| Email updates | 43 | 19.8% |
| Phone calls with lawyer | 36 | 16.6% |
| Mail | 32 | 14.7% |
| Phone calls with a case manager/paralegal | 28 | 12.9% |
| Client initiated contact | 27 | 12.4% |
| In-person meetings with lawyer | 6 | 2.8% |
| Phone calls (not specified) | 2 | 0.9% |
| Website | 2 | 0.9% |
| Text | 1 | 0.5% |
| Social Media | 1 | 0.5% |

210. Participant 57.

211. Participant 177.

212. Participant 7.

213. Participant 1.

214. Participant 70.

215. Participant 212; *see also* Participant 168 ("No communication from the lawyer for three years, until another lawyer from the firm was assigned to my case."); Participant 8 ("I made sure to stay in contact with them. They never updated me with any information."); Participant 95 ("Usually the communications were every 12-18 months with no updates in between.").

216. Participant 231; *see also* Participant 118 ("My attorney is not communicating with me . . . . My attorney has my settlement money but refuses to educate me on what more he needs from me to release it to me!").

217. Participant 12.

218. We include all participants here because several remarked on their communications with their attorneys even where they did not previously disclose attorney information.

219. Three respondents provided some information about contact from their attorney, but not enough to code. *E.g.*, Participant 184 ("I never heard from them until the settlement offer."). Another five respondents specified the "other" option but provided no further information.

Only 16.6 percent reported speaking on the phone with their attorneys, and in-person meetings were even more rare (2.8 percent).[220] "I never met or talked to my lawyer until 7 or 8 years after I signed with a firm," remarked one participant.[221] A second noted, "9 years and just spoke to my attorney, I called, called always talked to assistant of some kind. I feel like I don't matter . . . ."[222]

As that comment suggests, 12.9 percent spoke with assistants, case managers, and paralegals, not the attorney they retained. Their words convey their exasperation: "Never talked to actual lawyer just flunkies."[223] "To this day [I] cannot get a return call from [law firm]. They go [through] staff like [I] go through undies."[224] "I have never spoken with my attorney; I have spoken with 'Virginia' in the Law Office."[225] "I was contacted by paralegals from the office. The office paralegals are different at each email or mail contact."[226] "I never spoke to my lawyer my emails were never answered has no[w] been 8 yrs."[227]

Not only did lawyers rarely send client updates, but our initial assumption—that attorneys, not clients, initiated contact—was incorrect as we discovered in coding participants' responses. When participants specified "other," 12.4 percent volunteered that *they were tracking down their lawyers* to find out what was going on, often without luck. "I wasn't kept informed of what was going on and had to continue to follow up with them . . ." explained one.[228] "They go weeks without returning phone calls," said another.[229] A child of one plaintiff noted that that the law firm "[t]old her that they were so busy litigating that they didn't have time to speak with her. She doesn't have her court documents be[c]ause they haven't sent her anything. . . . She wishes she'd known more about tort reform before she started this whole thing."[230]

Knowledge gaps widened. Communication deficits meant not only that clients received little information, but that attorneys may have received little client data too:

> I had to call my attorney to get updates. And I have never spoken to him. I can only get his legal secretary. . . . I asked multiple times if

220. One was quite happy with her attorney: "[Name] and his team have done an incredible job with keeping me up to date on everything and take time to answer any questions or concerns." Participant 223.

221. Participant 83.

222. Participant 174 (spacing omitted).

223. Participant 157.

224. Participant 68.

225. Participant 128; *see also* Participant 199 ("I never heard from my lawyer[,] only his paralegal & only when I called them or emailed them."); Participant 119 ("I've actually never spoken to any of the attorneys in my law firm, only the legal aide.").

226. Participant 55.

227. Participant 178.

228. Participant 7.

229. Participant 60.

230. Participant 63.

> anyone had actually looked at my medical records to see if I had a good case. And was never given an answer to that question.[231]

Another said, "I accidentally found out my case had been dropped by someone working at the New York Times [for not having revision surgery] . . . . I have had 4 revision [surgeries], but they were not seen by the court."[232] And a third complained, "I wish they would read the huge amount of information that they requested from me. . . . [I provided a] binder almost 2 inches thick of surgery reports, imaging, and insurance records. I really don't think that they ever even looked at it."[233]

Failing to inform clients about their case contributed to overall dissatisfaction with the attorney-client relationship.[234] Of the 168 who indicated hiring an attorney, only 14.9 percent were somewhat or extremely satisfied with how their attorney handled their lawsuit. In contrast, forty-seven percent were extremely dissatisfied, and 17.9 percent were somewhat dissatisfied. "I feel as if I was not truly listened to. There are facts in my case that were not brought to the table. I dont believe my law firm did their homework," revealed one.[235] Another elaborated, "The way we were mistreated, we had no say about any of it, the lawyer would often hang up when I would ask questions, and then I was made to settle even though it was unfair."[236]

When asked if there was anything else they would like to share with us about their attorney experience, some comments were scathing: "I feel totally cheated by this whole process!"[237] "Its a scam and we were guinea pigs over greed of lawyers and pharma."[238] "[T]he attorneys made out like bandits for doing nothing. . . . We have blatantly seen a great deal of harm done!! Not only by BIG PHARMA but by the ATTORNEYS that took advantage of the people who needed their help the most!!"[239] "Victims (in general) are suffering horribly and are being taken advantage of by lawyer and neglected and/or turned away by physician."[240] "I am on my second lawyer. He is no better than the first. No one is happy with the system."[241] "Just tired of being bullied and lied to by our own attorneys."[242]

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231. Participant 193.

232. Participant 94.

233. Participant 105.

234. *See* Allen E. Smith & Patrick Nester, *Lawyers, Clients, and Communication Skill*, 1977 B.Y.U. L. REV. 275, 278 ("Communicative failure and the resulting failure in attorney-client relationships accounts for a great deal of client dissatisfaction.").

235. Participant 137.

236. Participant 141.

237. Participant 170.

238. Participant 32.

239. Participant 17.

240. Participant 22.

241. Participant 111.

242. Participant 158.

Others conveyed a lack of trust in their attorney, and, overall, only eighteen percent strongly or somewhat trusted their lawyer:[243] "[Name] Law Firm Is CORRUPT They Are A Back Handed Law Firm, Deceitful In Everything They Did . . . I Did NOT Get To Personally Talk To An Attorney – [attorney name] Had A Mesh Litigation Center & They Lied To Me The Entire Way."[244] "I have learned not to be so trusting and next time I will be much more aggressive and have someone help me if I dont understand."[245] "[M]y lawyer lied to me . . . ."[246] "They have been rude and given me false information."[247] "This was not set up for the victims[;] the victims pay everybody and walk away with very little and people keep taking and taking . . . . I was lied to by the doctors by the manufacturers and even by my own attorney."[248] "I am very patient but [I] have a bad feeling about my attorney . I feel she may not have my best interest at heart."[249] "I feel completely taken advantage of."[250] "This whole situation has been a nightmare."[251]

### 2. Lawyers as Closers, Not Counselors

Despite few case updates throughout years of litigation, some participants reported their lawyers surfaced when it came time to settle. "I don't think I ever talked to a lawyer at the law firm until I was waiting for my settlement check to come," remarked one participant.[252] Another confirmed, "All they ever did was the first interview over the phone with me and then 6 years later sent me settlement papers."[253]

But even then, during that crucial decision, the genuine give and take of educating and advising clients on the risks of settling versus trial seemed rare. "The lawfirm did not help me to [understand] any part of the process," one respondent confided, "I tried to get them to explain the lawsuit but it was like they didnt answer my questions or [answered] my question with a question."[254] Another added, "I just feel like my voice was not heard and that I was lumped into a group of people that were just given X amount of dollars."[255]

Mistrust continued. "I'm not certain if my attorney is truly advocating for a fair settlement for me, or whether my attorney is helping me weigh the

243. *See* Burch & Williams, *supra* note 48, at 24–25 tbl.8.
244. Participant 107.
245. Participant 46.
246. Participant 189.
247. Participant 127.
248. Participant 50.
249. Participant 106.
250. Participant 84.
251. Participant 94.
252. Participant 190.
253. Participant 199.
254. Participant 134.
255. Participant 7.

pros/cons of trial," explained one.[256] A second noted, "We were not given much information about presenting our personal cases. We were not given information except what was being given and taken."[257] "I have been lied to, bullied, and threatened that I would not get anything . . . . I now mistrust all lawyers and most doctors," said a third.[258]

Even when lawyers began contacting clients to urge them to settle, the communication sometimes seemed one-way, with attorneys failing to update client records—to the detriment of both. "My firm accepted an offer from [defendant] without consulting me or updating my file with additional surgeries," commented one.[259] Another said, "I feel although I sent updates to lawyer it was never noted and they just wanted to settle to end the process."[260] And one participant was left to guess about suing and settlement: "I was part of the mass tort[] so I assume that means a lawsuit was filed before I settled but I am not sure."[261]

In his study of Wisconsin trial lawyers, Herbert Kritzer discussed three ways in which traditional attorneys prepare clients to settle by: (1) discussing the likely net amount a client can expect; (2) playing on clients' risk aversion; and (3) bad-mouthing the client's case by emphasizing weaknesses.[262] As the following paragraphs explore, these techniques appeared in mass torts, too, but with some important differences.

First, Kritzer noted that lawyers would emphasize "what the client would net after fees, expenses, and the payment of subrogated claims" rather than the gross settlement amount.[263] This kind of advice is needed in mass torts where previous bankruptcies and medical liens can complicate clients' bottom line, but participants' remarks suggested that advice was rare.[264]

Defendants want to ensure that they will not incur penalties for failing to resolve healthcare liens, like Medicare, when settling personal-injury claims, so most agreements require plaintiffs to indemnify defendants. But few rules govern paying lien resolution administrators. As others have documented, paying fees from a global settlement risks charging plaintiffs without liens

256. Participant 31.

257. Participant 198.

258. Participant 141.

259. Participant 80.

260. Participant 135.

261. Participant 217.

262. KRITZER, *supra* note 60, at 171–72.

263. *Id.* at 171.

264. *See, e.g.*, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2009 WL 5195841, at *10 (D. Minn. Dec. 15, 2009) ("[Attorney] asserted that he believed that the more conservative route was to give his clients no [settlement] range, rather than having them feel that they were mislead [sic] into a settlement if the projected range turned out to be inaccurate.").

unfairly (and unethically).[265] Moreover, if administrators get paid only if they find a lien, it can incentivize them to ignore plaintiffs' assertions to the contrary.

As Table 9 showed, only 30.3 percent of participants knew what they would receive from their settlement, and healthcare liens proved to be a particular source of anger and confusion, as multiple comments from different participants reflected: "Even though I pay my insurance premiums they also got money for doing what I paid them for . . . over 30 years. Everyone became leeches."[266] "I also know that it was my responsibility to reimburse my insurance company which I feel is a slap in the face because I paid those premium[s] and it should not have come out of my compensation they should have gotten their own compensation or sued themselves."[267] "I also really feel outraged that insurance companies could put a lien against your settlement. They are allowed to take up to 25% of our money, however they don't pay any percentage of our legal fees. . . . I think they need to file their own lawsuit . . . ."[268] "I did not feel like I should have had to [pay] my medical bills again when I have insurance that I pay union dues to have."[269]

Caught in a mass process, some reported paying liens they never owed: "They held out thousands[,] they said for medical, I was told by medical I did not owe."[270] "[I] was told by private insurance company that they did not have any medical liens against me and was not expected to pay back anything to them. The settlement master offered payment to them which, of course they accepted."[271]

Other remarks reflected the effect of volume-business models:

> They also . . . said I owed Medicare [amount]. Medicare was not involved in any surgery or medical care for my transvaginal mesh . . . . They did not have any contact with Medicare, just said 'they assumed I [had] Medicare because it was not plausible that my primary insurance [name] would only pay the contracted amount with my employment insurance.' The attorney agreed with them and put it on my settlement sheet. . . . My attorney is not communicating with me.[272]

Participants were similarly shocked when lawyers reduced their awards for past bankruptcies, apparently without explaining why: "I feel everyone is

265. Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833, 1860–67 (2011).

266. Participant 75.

267. Participant 78.

268. Participant 151.

269. Participant 122.

270. Participant 64.

271. Participant 170.

272. Participant 118.

making money off of us. . . . They are making us repay medical bills and if we filed bankruptcy at anytime we have to repay that. Lawyer fees come out first. So not much left for us," said one.[273] Another remarked, "My lawsuit resulted in reopening a bankruptcy that had been closed for almost ten years. . . . My attorney has been hired by the bankruptcy court to help take even more of my money."[274] One comment, in particular, illustrates the lack of information from lawyers (replaced by a threat) and the search for insights elsewhere:

> What has my settlement have to do with a bankruptcy simply because I was implanted BEFORE I filed (2002)! What gives them the right? . . . They sent me a letter explaining they were going to settle. They said if I did not agree they would drop my case. It had already been explained to us we could not expect millions. We understood that. (I was in a lot of mesh support groups, that is why I say we). But what I didnt expect were the deductions. I never expected to have to reimburse so much.[275]

As that comment illustrates, instead of explaining likely net settlements to their clients, some mass-tort attorneys initially appeared to play to clients' risk aversion—Kritzer's second tactic: "Attorney said it could be years before getting a trial date and also made it feel forced bc they wouldn't give advice on your individual case and whether you should settle or go to court."[276]

But some clients weren't risk averse. As plaintiffs' attorney Thomas Cartmell recognized in the pelvic-mesh cases, "While the risks of going to trial are very real . . . some MDL plaintiffs with strong cases who have already waited several years just to reach remand have become patient over time and do not seem concerned about the possibility of waiting another several years for a final resolution."[277]

So, mass-tort attorneys apparently turned to Kritzer's third tactic—bad-mouthing the case to the client and playing up its weaknesses—but with a twist: threatening to no longer represent clients who refused to settle.[278] Despite the unethical nature of this practice,[279] thirty-eight percent of the

273. Participant 165.

274. Participant 217.

275. Participant 142.

276. Participant 32; *see also* Participant 38 ("[I] did not want to settle. [I] was told that if [I] did not settle [I] would get nothing at all. [S]ince [I] was very behind on bills[,] [I] settled. [I'm] not happy about it."); KRITZER, *supra* note 60, at 171–72 (listing client risk aversion as the second tactic lawyers use to encourage clients to settle).

277. Thomas P. Cartmell, *MDL Remand: Plaintiffs' Perspective*, 89 UMKC L. REV. 983, 986–87 (2021).

278. KRITZER, *supra* note 60, at 171–72.

279. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2021) ("A lawyer shall abide by a client's decision whether to settle a matter."); Erichson & Zipursky, *supra* note 11, at 283.

ninety-nine participants with settlement information reported that their attorney would no longer represent them if they didn't settle.[280]

Settlements felt forced, as various comments reflected: "[M]y attorney started calling me weekly sometimes daily threatening me that if I didn't take the settlement offer I would be dropped . . . . [I] was actually scared when the phone would ring afraid it was my attorney trying to force me to basically screw myself."[281] "I grew concerned with Atty [name] when she would not put things in writing and felt she was pressuring me to settle in the couple of phone calls we had."[282] "They tried to push me into taking a low ball settlement. Horrid communication[,] a letter once a year saying nothing at all."[283] "I was on an assembly line and just waited for years. Offered a lowball settlement which was tak[e it] or leave it."[284] "I was urged to agree to participate in an aggregate settlement that was absolutely not in my best interest. . . . In their own interest to achieve participation guidelines set forth in the Master Settlement Agreement between them and [company], my attorneys concealed the existence of a witness for [company] intimately related to my case."[285]

In sum, some participants' lawyers did not appear to discuss likely net amounts and opted instead to provoke clients' risk aversion. When that failed, they threatened to drop them as clients.

## IV. IMPLICATIONS

Plaintiffs' lawyers play a crucial regulatory role in acting as a failsafe to government enforcement, but tort reform has encouraged business practices that rely less on personal touches and more on warehousing cases. "I truly feel we were not important to the attorneys. They were out for . . . quick money with as little communication with you as they can get away with," surmised one respondent.[286] When plaintiffs understand little about their case, they cannot monitor their attorneys or provide informed consent to settle as MDL procedures presume.

Using original data on how participants found their attorneys, this Part explores the implications of plaintiffs' information deficits and suggests that traditional market constraints are unlikely to mitigate attorney-client agency problems. It also considers where plaintiffs sought information when they did not receive regular updates from their lawyers and how less reliable sources may have impacted how they understood their case.

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280. Burch & Williams, *supra* note 48, at 31. Past studies revealed that fifty-three percent of mass-tort settlements included a requirement that attorneys withdraw from representing non-settling clients. BURCH, *supra* note 61, at 44.

281. Participant 226.

282. Participant 184.

283. Participant 14.

284. Participant 61.

285. Participant 230.

286. Participant 118.

### *A. PRINCIPAL-AGENT PROBLEMS ARE UNCHECKED*

Knowledge *is* power—when clients know little about their case, they have little control, autonomy, or ability to monitor the agents working on their behalf. Contingent fees help align interests between one-shot clients and repeat-player attorneys, but only to a degree. For decades, scholars have documented ways in which clients' desires to maximize monetary value or achieve extra-monetary goals like holding corporations accountable diverge from their lawyers' interest in maximizing hourly rates.[287] Tort lawyers receiving an early settlement offer who have not invested much time might be inclined to accept it, whereas a plaintiff might prefer to take her case to trial or hold out for a better deal, even if it means more work for the attorney.[288]

Yet, in traditional lawyer-client relationships, three market constraints—client referrals, peer referrals, and fee arrangements—play a critical role in ensuring that lawyers are faithful agents who communicate with, inform, and counsel their clients. Using our original data, this section examines how each check falls short as a salve in mass torts. The private bar thus remains unchecked—constrained by neither clients, peers, nor markets.

#### 1. Ads Abound, Client Referrals Are Rare

Traditionally, lawyers' long-term need to find future clients can help align current client-lawyer interests. When attorneys depend on their reputation for fair dealing and on clients for new and repeat business, then they may be less inclined to sell current clients short.[289] Herbert Kritzer notes that because clients are a source of referrals, "[l]awyers want their clients not only to leave the case satisfied but also to stay satisfied."[290]

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287. *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 686–89 (1986); James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J. L., ECON., & ORG. 349, 349–50 (1993); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 189–91 (1987); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 165–69 (2003); Witt, *supra* note 129, at 274–75; Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007).

288. *See* Korobkin & Guthrie, *supra* note 139, at 122 (discussing how lawyers can seek personal gain when their interests conflict with their clients' interests).

289. CANONS OF PRO. ETHICS Canon 27 (AM. BAR ASS'N 1908) ("The most worthy and effective advertisement possible . . . is the establishment of a well-merited reputation for professional capacity and fidelity to trust."); Stephen Daniels & Joanne Martin, "*It's Darwinism – Survival of the Fittest:" How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 LAW & POL'Y REV. 377, 383–85 (1999); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 858–59 (2011) (noting that "mass advertising diminishes the reputational imperative"); Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 813–14 (1998); Parikh, *supra* note 189, at 257; Witt, *supra* note 129, at 274.

290. Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 775–76 (2002); *see also* Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or*

We asked respondents how they found their attorneys, allowing them a choice between attorney advertisement, referred by another attorney, referred by a friend or a relative, or other. Many who chose "other" explained, and some of their notes fit within existing categories (e.g., "mesh injury hotline" is an advertisement) while other information could be coded into categories we did not have, such as an internet search. Table 15 below shows our results. Given our original categories, there may be overlap between "attorney advertisement" and "internet search."

*Table 15. How Participants Found Their Attorneys.*

| **How did you find your lawyer?** | **Frequency** | **Percentage** |
|---|---|---|
| Attorney advertisement | 76 | 45% |
| Referred by another attorney | 37 | 22% |
| Referred by a friend or a relative | 16 | 10% |
| Internet search | 12 | 7% |
| Other | 7 | 4% |
| Don't know | 3 | 2% |
| No Answer | 17 | 10% |
| Total Respondents who Indicated Hiring a Lawyer | 168 | 100% |

Only ten percent of participants found their attorneys through friends and family. In the past, direct-to-consumer advertising was limited to a handful of personal-injury law firms (often called "mills"). Mills saturated a market using television commercials and billboards, which allowed them to maintain a high-volume, low-case value practice.[291]

Today's mass-tort lawyers appear to rely principally on advertisements—social media blitzes and TV commercials, often placed by lead generators—not client referrals.[292] Search engine optimization, not word of mouth, is the currency of the day. Tort reform makes individual cases less valuable, and, perhaps unwittingly, judges also encourage bulk representation when they consider how many clients a lawyer represents in selecting attorneys for lucrative leadership roles.[293]

With few people finding mass-tort lawyers through referrals, one-shot clients have little impact on attorneys' reputation and future business.[294] Lawyers' reputations are built on leading MDLs and generating headline-grabbing aggregate settlements (minus the fine print) that feature prominently in internet searches. Information on client loyalty, how

*a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 670 (1995) (discussing reputational capital as an asset).

291. Daniels & Martin, *supra* note 289, at 390.

292. For information on lead generators, see *infra* notes 304–09 and accompanying text.

293. *See* Duval, Jr., *supra* note 38, at 393–94 (noting that some courts consider "the number of clients per case that a lawyer has").

294. Engstrom, *supra* note 289, at 812.

clients felt about the process, or what clients actually recovered is hard to come by. Although the poor communication, distrust, and mistreatment participants reported would deter future and repeat business, with so few people seeking personal recommendations, badmouthing attorneys is likely to have little reputational sting.

### 2. Lawyer-to-Lawyer Referrals Help Little

Attorney referrals serve as a second conventional constraint. Lawyers refer cases to specialists in other areas, to loop in lawyers with particular skills (like trial) and to spread financial risk or avoid having to develop a cash-intensive case.[295] Lawyer-referral networks, inherently run by repeat players, typically help one-shot clients in two ways.

First, because lawyers have more information about one another than a member of the public might, peer referrals can help clients find the most qualified representative. This mitigates the chances of a poor outcome from selecting an unqualified attorney and levels the playing field against repeat-player defendants.[296]

Second, the fees the referring lawyer receives and the enduring nature of referral relationships help offset an agent's economic incentive to invest as little time and money as possible by settling a one-shot client's claim quickly and cheaply.[297] Under the Model Rules of Professional Conduct, which all states have adopted with certain modifications, a lawyer who refers a case to an attorney from another firm may collect a percentage of the contingent fee under certain circumstances; the higher the monetary outcome the working lawyer achieves for the client, the better the referring lawyer fares.[298] And though the lawyers who do the work can resent sharing a fee with "people who literally don't do anything," they guard those sources jealously and work hard to develop and preserve those relationships.[299] In the past, high-end medical malpractice attorneys received 57.8 percent of their business through lawyer referrals and 20.6 percent through client referrals.[300]

Yet Table 15 above showed that only twenty-two percent of our respondents found their lawyer through attorney referrals. Using information that participants provided and that we culled from their

295. Daniels & Martin, *supra* note 289, at 386–87; Parikh, *supra* note 189, at 263.

296. Parikh, *supra* note 189, at 252; Witt, *supra* note 129, at 274.

297. Witt, *supra* note 129, at 274–75.

298. The client must know about and agree to both the referral and the fee-splitting, and the fees must reflect the services each lawyer performed, or each attorney must assume joint responsibility for the case. MODEL RULES OF PRO. CONDUCT r. 1.5(e) (AM. BAR ASS'N 2021).

299. Parikh, *supra* note 189, at 253–54, 273–76; *accord* Daniels & Martin, *supra* note 289, at 387–88.

300. Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1067 (2006).

dockets, 60.3 percent of all participants had only one firm officially listed as counsel on the docket. Multiple law firms represented only 35.4 percent of all participants.[301] Digging deeper by examining whether the same law firms partnered with one another repeatedly within the data, we found that most did not. Of the 35.4 percent of participants represented by multiple firms, only 13.3 percent were represented by law firms that paired with one another more than once. The rest seemed like temporary marriages of convenience.

What might explain the disparity between non-MDL medical-malpractice attorneys receiving a substantial amount of business from referrals and MDL attorneys in products liability receiving far less? We offer four possibilities.

First, our anecdotal discussions with MDL plaintiffs' attorneys suggested that official dockets may capture few co-counsel relationships, but that those relationships would still not serve as an ethical restraint. In the pelvic-mesh MDLs, for example, defendants required substantial "inventories" to engage in settlement talks. Lead attorneys served as toll roads, charging lawyers with few clients between ten and fifteen percent of the attorney's contingent fee (on top of common-benefit fees) to package a client for settlement.[302]

Second, if lead lawyers assume most of the work that a traditional lawyer would perform in an individual case, then mass-market volume lawyers who might have once referred high-end medical-malpractice cases to another attorney may now feel less pressure to do so.[303] Rather than split their fee with others who boast different skillsets, they might simply wait to see how the cases will settle. If there is a global deal, there may be less need to partner with other firms than if the defendant negotiates firm-by-firm inventory deals or settles only with plaintiffs in large batches.

Third, many lawyers rely on lead generators who specialize in advertising and packaging potential client leads, some of whom are pre-screened and some not.[304] Rather than collect a portion of the contingent fee as a lawyer-

301. Nine participants either did not hire attorneys or did not provide enough information to verify whether more than one law firm represented them.

302. Mazie Slater's Objection to Recommended Allocation of Common Benefit Fees and the Reimbursement of Shared Expenses and Held Costs at 18, *In re* Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 12-md-2327 (S.D. W.Va. Mar. 26, 2019), ECF No. 7712.

303. *See* Parikh, *supra* note 189, at 264.

304. Amanda Bronstad, *Ad Spending Up, Defense Bar Irked; Lawyers Argue in Court That 'Lead-Generator' Marketing Fuels Bogus Mass Claims*, LEXISNEXIS (Apr. 27, 2015), https://plus.lexis.com/api/permalink/d464254a-f4bb-4f8f-9ed7-8192611ab3ec/?context=1530671 [https://perma.cc/M5RH-G89Y]. In 2014, two of the top five TV mass-tort advertisers were lead generators. *Id.* (attributing this statistic to "The Silverstein Group, a Washington crisis-management and communications firm"). The growth of this market stands in contrast to past attorney views that those who appeal directly to consumers for business are "'scum,' 'bottom feeders,' 'incompetents,' or worse." Daniels & Martin, *supra* note 289, at 389.

to-lawyer referral would, most lead generators sell client leads at a flat rate, which varies based on demand and screening levels.[305] In the *Taxotere* lawsuits, for instance, plaintiffs alleged that the breast-cancer chemotherapy drug caused permanent baldness.[306] Lead generators demanded $1,750 for leads that they verified with photos showing thinning hair and upped the price to $3,500 for clients with a verified alopecia diagnosis.[307]

But unlike boutique medical-malpractice attorneys, most lead generators do not hire doctors and nurses to help them "screen cases with a ruthless eye," and they certainly do not spend thousands of dollars in deciding whether to accept a client.[308] Lead generators have little incentive to pair clients with the best lawyer; they want to maximize their own profits per lead. Lawyers with less experience or poor reputations who have difficulty securing clients through traditional means may thus rely heavily on lead generators.[309]

Fourth, law firms looking to skirt the costs of buying in bulk (both in terms of dollars and lack of client screening) have set up their own social media blitzes. For instance, just after the World Health Organization deemed Roundup "probably carcinogenic," Weitz & Luxenberg PC, a mass-tort law firm, registered the domain name www.RoundupInjuries.com.[310] And shortly after the Volkswagen diesel emission scandal broke, attorney Steve Berman quickly posted a YouTube video inviting potential plaintiffs to call him.[311]

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305. *See generally* MODEL RULES OF PRO. CONDUCT r. 7.2 cmt. 5 (AM. BAR ASS'N 2021); *Exclusive Leads for Lawyers-Lead Generation Frequently Asked Questions*, FORLAWFIRMSONLY.COM, https://www.forlawfirmsonly.com/lead-generation-for-attorneys/pay-per-lead-faqs [https://perma.cc/7FXG-P752] ("Q: Do I have to pay you a percentage of what I make? A: No."); Randazzo & Bunge, *supra* note 195 ("If hotline callers qualify as potential plaintiffs, the lead-generation companies hired by law firms send them law-firm contracts to sign and request their medical records for further screening. Other lead-generation companies working on spec sell the leads to law firms.").

306. Motion for Leave to File Amended Short Form Complaints of Bellweather Pool Plaintiffs at 1–2, *In re* Taxotere (Docetaxel) Prods. Liab. Litig., No. 16-md-2740 (E.D. La. Sept. 21, 2020).

307. Alison Frankel, *In Taxotere MDL, Sanofi Call Lead-Generation Smoke a Litigation-Funding Fire*, REUTERS: ALISON FRANKEL'S ON THE CASE (June 1, 2017, 11:07 PM), https://www.westlaw.com/Document/Ibd345ae0472011e7afo8f6d1e6678afd/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (last visited Nov. 2, 2022).

308. Daniels & Martin, *supra* note 300, at 1062–63.

309. *See* Barry P. Goldberg, *Lawyers Shouldn't Buy Their Leads*, SAN FERNANDO VALLEY BUS. J. (Mar. 15, 2020), https://www.sfvbj.com/news/2020/mar/16/lawyers-shouldnt-buy-their-leads [https://perma.cc/JXL7-7RNT] ("I am personally aware of a 'one star' lawyer who generates over $1 million a year buying leads.").

310. Randazzo & Bunge, *supra* note 195; *see also* Bronstad, *supra* note 304 ("Between 2012 and 2014, about $407 million was spent on 1.6 million TV ads, according to The Silverstein Group, a Washington crisis-management and communications firm. Last year, money spent on ads jumped to $162 million, compared with $113 million in 2013.").

311. Barry Meier, *Compensating Car Owners Will Be Big Test for Volkswagen*, N.Y. TIMES (Sept. 25, 2015), https://www.nytimes.com/2015/09/26/business/energy-environment/compensating-car-owners-will-be-big-test-for-volkswagen.html?smid=url-share [https://perma.cc/DBF4-U8F2].

When attorneys did partner with each other, comments from the 35.4 percent of client participants suggested that those relationships did not translate into greater client satisfaction. One said, "My lawyer partnered with a firm on the executive steering committe[e], because he only had 2 cases in this MDL. Very disheartening experience over all."[312] A second noted, "1st one I tried to retain kept me in the dark for 2-3 years and then sold my case to [name] [but neither would] communicate or talk to me."[313] "The lawyer in [Philadelphia] whom did nothing other than refer me to [Law Firm 2] was taking 10 percent as I originally signe[]d with them," said a third, "I feel I was victimized by these lawyers and not helped in any way."[314]

Referrals made some plaintiffs feel like commodities: "Farmed out to [Law Firm]," said one.[315] "Started with [name] who then 'sold' case to [Law Firm] and others??????" queried another.[316] Even participants with lawyers in the family felt helpless:

> I learned of the mass tort litigation and signed up and was given a name of a law firm that handled this matter in another state. . . . The lawyer I was assigned to was never available to answer ANY questions. My son is a lawyer and has been by my side throughout this process and even he could not get questions answers, neither through emails, phone calls or certified mail. As far as I know, none of my case was reviewed by a judge. I was left in the dark for the majority of my case. Never able to get any clear answers to my questions. I did write a letter of reprimand about this particular lawyer to the state bar in which she was practicing. I felt as though she did not even begin to understand my case or had any desire to represent me.[317]

In sum, peer-to-peer referral networks appear to do little to align attorney-client interests.

### 3. Sliding-Scale Fees

Finally, the nature of the contingent fee itself might counteract agency problems. If lawyers use a sliding scale that allows them to receive a greater portion of a client's settlement or award as a case progresses to trial and appeal, then it may help align lawyer-client interests as an attorney's investment of time and money increases.[318]

Lawyers do not readily divulge their retainer agreements, but we obtained twelve agreements that cover twenty pelvic-mesh law firms (one

312. Participant 159.
313. Participant 157.
314. Participant 200.
315. Participant 42.
316. Participant 157.
317. Participant 154.
318. Witt, *supra* note 129, at 273.

representing 10,000 plaintiffs and the others from lead lawyer firms) who collectively represented eighty of our participants.[319] Only three of the twelve agreements included sliding-scale fees. The first charged forty percent with an added five percent for an appeal—a fairly standard arrangement.[320] The second charged 33.3 percent for non-MDL cases, but raised the rate to forty percent for MDLs, presumably to recoup common-benefit fees paid out to lead lawyers even though one of the lawyers *was* a lead attorney.[321] And the third charged forty percent if the lawyers never had to file a complaint, forty-five percent thereafter, and then tacked any common-benefit fees on *top* of that percentage, all to come from the *client's* portion.[322] That hybrid lead generator-lawyer firm represented more than 10,000 pelvic-mesh clients.[323]

In short, sliding-scale fees in our sample were not prevalent, with only twenty-five percent of the agreements (four of twelve) employing them. And two of the three retainer agreements using sliding-scale fees did so to benefit the law firm at the client's expense.

Moreover, it is unclear that sliding-scale fees would overcome the mass-tort settlement dynamics described in Section I.A where firms have a bigger stake in settling than does any one client and defendants leverage that interest through settlement participation thresholds. In litigation over the hypertension drug Benicar,[324] for example, lawyers from one firm wanted to withdraw from representing a client because they claimed it would be financially burdensome to take his case to trial, even though he was one of only five of 2,000 plaintiffs who didn't want to settle.[325] "The fact it will be expensive to litigate the case is not a surprise to counsel," admonished the judge in denying the request; "[i]f counsel is now 'scared off' by the prospect of paying for trial," they never should have represented him.[326]

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319. Without access to all retainer agreements for all MDL plaintiffs, we cannot say whether these agreements are representative. One agreement came from a law firm that represented over 10,000 mesh plaintiffs (Alpha Law) and others came from lead law firms. Eight of the retainer agreements covered two or more law firms, with various fee splits.

320. Osborne & Associates, Authority to Represent 1 (2015) (on file with author) [hereinafter Osborne Retainer].

321. Aylstock Retainer, *supra* note 47, § 2.

322. Alpha Law Retainer, *supra* note 199, § II. This fee mirrored the escalator provisions that Nora Engstrom found in settlement mills. Engstrom, *supra* note 289, at 846.

323. Alison Frankel, *Medical Device Defendant Probes Origin of Mesh Claims*, REUTERS (Mar. 10, 2016), https://fingfx.thomsonreuters.com/gfx/legaldocs/gkvlgmyrgpb/frankel-mdlplaintiffs–meshprobe.pdf [https://perma.cc/N6GL-AW8J].

324. Benicar is not one of our covered proceedings; it is provided as relevant anecdotal information.

325. Memorandum Opinion and Order at 2–3, McDaniel v. Daiichi Sankyo, Inc., No. 17-cv-3495 (D.N.J. Aug. 15, 2018), ECF No. 12.

326. *Id.* at 8.

Nor did the retainer agreements themselves inspire confidence that attorneys had clients' best interests at heart. Seven of the twelve agreements included provisions that purported to give the attorney the right to withdraw from representing the client whenever convenient to the lawyer.[327] All but one contingency agreement departed from the standard lore of a 33.3 percent fee.[328] (The remaining eleven charged forty percent initially for MDL cases, with one upping the price to forty-five percent post-filing.) Four retainer agreements escalated costs by charging clients between seven and fourteen percent annual interest, which adds up over the life of an MDL and seems to violate several ABA ethics opinions.[329] All agreements charged lawyers' contingencies on plaintiffs' gross recoveries (before paying expenses or liens), which means attorneys had little self-interested reason to be frugal—they are spending clients' future

327. Blasingame & Chapman Retainer, *supra* note 47, § 5 ("The Firms may withdraw as counsel for the Client after giving written notice to the Client and in compliance with Court Rules and Standards of Professional Ethics."); Complaint at 13, Morrison v. Blasingame, Burch, Garrard & Ashley, P.C., No. 17-cv-4133 (S.D.W. Va. June 14, 2017) (including the Contract for Representation and Fee Agreement for Blasingame, Burch, Garrard & Ashley, P.C. and Morgan & Morgan as Ex. 1 to Complaint) ("If after investigating this matter, or at any stage in the litigation, the Firms determine that it [sic] wishes to withdraw from representation, the Firms may withdraw as counsel for the Client after giving written notice to the Client and in compliance with Court Rules and Standards of Professional Ethics.") [hereinafter Blasingame & Morgan Retainer]; Alpha Law Retainer, *supra* note 199, § IX ("Counsel may withdraw from Client's representation at any time, upon reasonable written notice to Client at Client's last known address."); Freese & Goss, PLLC, Matthews & Associates, & Edwards & de la Cerda PLLC, Transvaginal Mesh/Sling/ObTape – Contract of Employment § II (on file with author) ("Client further agrees that the Firms may withdraw from representing the Client if the Firms deem withdrawal warranted."); CLH Retainer, *supra* note 47, ¶ 5 ("Attorneys may withdraw from Client's representation in the claim at any time with written notice for any reason recognized under Texas law."); Motley Rice LLC, Motley Rice LLC Contract of Representation ¶ 11 (2011) (on file with author) ("Motley Rice may withdraw from representing me upon proper notice if it determines that the prosecution of my claim is not feasible, worthwhile, or meritorious, or for any other reason permitted by the court or applicable rules of professional conduct."); Declaration of Stephen M. Orlofsky in Support of Motion to Dismiss at 29, Gore v. Nagel, No. 19-cv-14287 (D.N.J. Aug. 30, 2019) (including the Pulaski & Middleman, L.L.C. & The Potts Law Firm, Vaginal Mesh/Sling Contract of Employment as Ex. D to the Motion to Dismiss) ("Client further agrees that the Firms may withdraw from representing the Client if the Firms deem withdrawal warranted.").

328. Osborne Retainer, *supra* note 320, at 1.

329. Aylstock Retainer, *supra* note 47, § 3 (charging twelve percent per year); Alpha Law Retainer, *supra* note 199, § II.B (allowing "reasonable interest on all expenses"); Blasingame & Morgan Retainer, *supra* note 327, at 2 (charging seven percent); Osborne Retainer, *supra* note 320, at 1 (charging interest without specifying a rate). On ethics, see ABA Comm. on Ethics & Pro. Resp., Formal Op. 08-451 (2008) (discussing lawyers' obligations when outsourcing legal and nonlegal support services and stating "[i]f the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted . . . the lawyer may bill the client only its actual cost"); ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-379 (1993) ("A lawyer may not charge a client more than her disbursements for services provided by third parties . . . .").

settlement money and, when they charge interest on those costs, profiting more the more they spend.[330]

### *B. PLAINTIFFS MUST SEARCH FOR INFORMATION ELSEWHERE*

In general, the public understands little about courts: In a national civics survey in 2020 only fifty-one percent of those who participated could name all three government branches.[331] For most, information about the courts competes with other news and facts. For plaintiffs, however, details are far more salient. Everyday noise falls away as they scour websites and forums for information about the MDL, when they can expect a settlement, and how much money others are receiving. Knowledge is key to monitoring their case and their attorneys, as well as to feeling like the justice system treated them fairly, but with few updates from their attorneys, they were forced to look elsewhere.

#### 1. Media Reports

When faced with an information void, plaintiffs scour news reports and websites, forming impressions about the courts based on what they find. "I read what I could on the court[']s web page but [mesh] information stopped after the [company] started settlements except for the judge recommending all six companies needed to follow [American Medical System's] example," said one participant.[332] Another remarked, "Schedules and outcomes were mainly read about on Mesh News Desk," a specialty website devoted to mesh lawsuits that has a private Facebook group as well.[333] "I was never made aware of any hearing," added a third, "I only found out by searching online that my lawyers went on my behalf."[334]

Mainstream media covered only the highlights. As pelvic-mesh cases went to trial, for example, news outlets reported jury verdicts up to $120 million, whereas defense verdicts appeared only in specialized outlets.[335]

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330. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 653–55 (E.D. La. 2010); Pretrial Order #51A at 2–3, *In re* Vioxx Prod. Liab. Litig., No. 05-md-1657 (E.D. La. Sept. 11, 2013), ECF No. 64592.

331. *Amid Pandemic and Protests, Civics Survey Finds Americans Know More of Their Rights*, ANNENBERG PUB. POL'Y CTR. (Sept. 14, 2020), https://www.annenbergpublicpolicycenter.org/pandemic-protests-2020-civics-survey-americans-know-much-more-about-their-rights [https://perma.cc/8R7M-5H2Z].

332. Participant 66.

333. Participant 192.

334. Participant 186.

335. *E.g.*, Jane Akre, *Jury Finds for Boston Scientific in North Carolina Pelvic Mesh Trial*, MESH NEWS DESK (Oct. 19, 2015), https://www.meshmedicaldevicenewsdesk.com/articles/jury-finds-for-boston-scientific-in-north-carolina-pelvic-mesh-trial [https://perma.cc/6GW9-ELW6]; Sam Wood, *Pennsylvania Woman Awarded $120 Million in Vaginal Mesh Case Against Johnson & Johnson*, PHILA. INQUIRER (Apr. 25, 2019), https://www.inquirer.com/business/health/vaginal-mesh-

Over time, pelvic-mesh plaintiffs won twenty-eight of thirty-six jury trials, with substantial results that "rang[ed] from a low of $500,000, to a high of $120 million, [and] a median verdict of $6.7 million," though appellate courts overturned some verdicts—a fact that rarely made the news.[336]

Research shows that mainstream news can distort the litigation picture with flashy headlines when plaintiffs win and few reported defense verdicts.[337] Still, *The New York Times* reported the average pelvic-mesh settlement is approximately $60,000.[338] Shanin Specter, a plaintiffs' lawyer handling mesh cases, suggested average settlement amounts were lower still, "in the $40,000[–]$50,000 range."[339] Going further, Specter said that "[t]he . . . gap between success in the courtroom and failure at the settlement table is deeply troubling."[340]

Why did some mesh plaintiffs receive millions, whereas others got far less? With little individual counseling, plaintiffs were left guessing. In the class-action context, judges use the results achieved in analogous litigation as a factor to gauge a settlement's adequacy.[341] It's only natural that plaintiffs would do the same.

Without anyone to explain the difference in treatment, participants were understandably upset, as multiple comments reflected: "It is disturbing to me that some women who suffered [similar] complication received 10 times the amount I received."[342] "I feel as though nothing changed and the compensation . . . was insulting because it was so minimal compared to other similar cases."[343] "I was told the bellwether cases would help [determine] how much settlements would be. On average the bellwether cases were about $9 million. The settlement offered to me wasn't even close to that!"[344] "I feel my attorney used my very good case as leverage to gain financial gain for cases that had no merit. [One woman] went to court with my [company] Mesh and she was awarded 100 . . .

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johnson-and-johnson-ethicon-philadelphia-mcfarland-kline-specter-20190425.html [https://perma.cc/Y9DH-HLY4].

336. Cartmell, *supra* note 277, at 986–87.

337. *See* Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539, 542–43 (2006) ("[E]ighty-five percent of the magazine cases involved plaintiff victories compared to win rates ranging from twenty-seven to fifty-five percent in actual tort trials . . . .").

338. Goldstein, *supra* note 73.

339. Letter from Shanin Specter, Att'y, Kline & Specter PC, to the Comm. on Rules of Prac. and Proc. of the U.S. Cts. 3 (Dec. 18, 2020), https://www.uscourts.gov/rules-policies/archives/suggestions/shanin-specter-20-cv-hh [https://perma.cc/88EL-KT4R].

340. *Id.* at 4.

341. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:15 (Alba Conte & Herbert Newberg eds., 5th ed. 2014).

342. Participant 133.

343. Participant 89.

344. Participant 199.

million. I was pressured to settle for [less than 1% of that]."[345] Another elaborated:

> I have read in the news of judges considering every possible loss, not just physical, [emotional], financial, etc. . . . Plaintiffs were awarded millions of dollars, I believe the highest award was for a woman in Florida, I believe for $36 million dollars. This law firm offered [under $100,000] after their fees to settle. My loss and suffering was about the same or it could be even more extensive than of the woman in Florida and the amount for the two cases can not be [compared]. There are huge differences for cases that are basically the same. . . . Therefore, the judicial system is not treating the cases at the same level as it should.[346]

The lack of transparency about who received what and why prompted another respondent to remark, "The settlement should have been more based on my injuries and ongoing health problems."[347] One even looked outside of the pelvic-mesh proceedings for comparisons: "[W]hen I looked at, for example the hip device settlements, they averaged individually higher settlement Awards."[348]

### 2. Social Networks

Throughout the decades, plaintiffs have turned to one another for answers and support, both in person and through online groups. Asbestos Victims of America, Dalkon Shield victims' organizations, Silicone Breast Implant organizations, the Buffalo Creek Citizens Committee, and veterans' groups of Agent Orange litigants all brought plaintiffs together into ad hoc communities.[349] That trend continues today, with online Facebook groups making it easier than ever. Numerous groups have popped up around pelvic and hernia mesh, breast implants, medical devices, and IUDs, just to name a few.[350] Most have thousands of members from around the globe.

We asked participants whether their experience prompted them to find a support community and listed several possible options. Most answered the question (173), and, as Table 16 below shows, nearly sixty

345. Participant 96.

346. Participant 55.

347. Participant 140.

348. Participant 151.

349. GERALD M. STERN, THE BUFFALO CREEK DISASTER: THE STORY OF THE SURVIVORS' UNPRECEDENTED LAWSUIT 6–7 (1976); Hensler & Peterson, *supra* note 36, at 1023–24; Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 919–21.

350. *See supra* note 80 and accompanying text.

percent of all respondents participated in online or face-to-face discussions with others.

*Table 16. Online and In-Person Support Networks*

| Behavior | Number of Respondents | Percentage (N=217) |
|---|---|---|
| I have participated in discussions or meetings among victims of this product (including social media discussions on Facebook or Twitter, listservs, or blogs). | 85 | 39.2% |
| I have joined an in-person support group for people who have had similar experiences with the product or device. | 45 | 20.7% |
| I have spoken in public about this product (or this litigation). | 36 | 16.6% |
| I have organized discussions or meetings among victims of this product (including electronic discussions such as Facebook groups, Twitter, listservs, or blogs). | 30 | 13.8% |
| I have spoken to the media about this product (or this litigation). | 27 | 12.4% |
| I have written articles or letters for publication about this product or this litigation (magazines, newspapers, blogs, newsletters). | 22 | 10.1% |
| None of these. | 69 | 31.8% |
| No Answer | 44 | 20.3% |

Group engagement varied. Of the 102 who reported on their activity levels, more than one fourth checked in monthly, one fifth were active only once a year, and over half engaged once a week or more, as Table 17 below summarizes.

*Table 17. Frequency of Engagement in Support Networks*

| Frequency of Activity | Number of Respondents | Percentage (N=104) |
|---|---|---|
| Daily | 11 | 10.6% |
| Once a week | 17 | 16.3% |
| 2-3 times a week | 14 | 13.5% |
| 4-6 times a week | 11 | 10.6% |
| Monthly | 28 | 26.9% |
| Yearly | 21 | 20.2% |
| No Answer | 2 | 1.9% |

Groups bring people together and allow members worldwide to exchange information, post relevant news articles, and solicit advice on doctors and treatment. But, to prevent defendants from gaining information that might undermine their client's case, attorneys ask clients not to post information online.

Without information directly from their lawyers, misinformation can run rampant and lose context. That's particularly problematic if online networks

become plaintiffs' primary source of knowledge. Misleading information can be more pervasive than necessary, and plaintiffs may lack the nuance needed to make accurate apples-to-apples comparisons. Nevertheless, as we suggest in the next Part, these networks could become valuable communication tools if managed carefully.

## V. EMPOWERING PLAINTIFFS

MDLs can add value not just for courts and defendants, but for plaintiffs too. A well-oiled network of attorney advertisers and lead generators alert the public to their tort claims, and large numbers make suits possible in the face of tort-reform measures. Bigger numbers via aggregation credibly threaten corporate giants. And in an era of diminishing trials and escalating private arbitration, MDLs fill important voids—they make it economically feasible for lawyers to represent tort plaintiffs against goliath companies. They thereby open access to the courts.

But it is not enough to get *cases* into courts. Access to justice, public faith in the judiciary, and procedural fairness all require getting *people* into courts. Yet plaintiffs may get lost in the shuffle.

Decades of empirical procedural-justice scholarship demonstrates that plaintiffs want what MDL procedures assume they have: for their attorneys to be involved with them and their case.[351] For the process to feel fair, they expect some control through opportunities to participate, present evidence, and tell their story.[352] Without those opportunities and information about their suit, many plaintiffs felt their attorneys took advantage of them. And across all 217 plaintiffs, a scant 1.8 percent (four) felt like their lawsuit accomplished what they hoped it would.[353]

What can be done? With external factors like damage caps and tort reform affecting the economics of legal practice, there is room for reform at different levels. But bearing in mind MDL Judge Jack Weinstein's argument that "[j]udges in mass actions have a responsibility to ensure that the litigation

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351. In 1975, the work of two prominent social psychologists—John Thibaut and Laurens Walker—gave birth to the field of procedural justice, which now spans well beyond psychology. *See* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 89–90 (1975); *see also* Donna Shestowsky, *Great Expectations? Comparing Litigants' Attitudes Before and After Using Legal Procedures*, 44 L. & HUM. BEHAV. 179, 189 (2020) (discussing research that indicates a lawyer's involvement with a client impacts the client's reported satisfaction with the outcome of the case). *See generally* Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J.F. 525 (2014) (reviewing the literature).

352. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 31, 211–12 (1988); Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1105–07 (2013); Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 505 (2010).

353. *See* discussion *infra* Section V.C.

stays focused on the parties and remains responsive to their actual needs,"[354] we focus on five changes lawyers and courts can implement.

First, we have argued elsewhere that MDL judges should consider conflicts of interest in selecting lead lawyers, so we do not rehash those arguments here.[355] Second, mass-tort judges in both state and federal courts can increase court access (and information dissemination) through technology by allowing parties to watch proceedings and inviting plaintiffs to participate at key points. Third, courts and lead lawyers should set up online groups or forums where plaintiffs can exchange information with one another and lead lawyers without endangering their attorney-client privilege. Fourth, MDL judges can ask plaintiffs to evaluate individual attorneys as well as lead lawyers. Those evaluations should affect attorneys' compensation in the immediate proceeding, lend organizational theory and coherence to selecting future leaders, and enhance the market for attorney representation. Finally, both state bars and MDL judges should take plaintiffs' complaints about their attorneys seriously and sanction and discipline individual lawyers for ethical failings when appropriate.

### *A. BRINGING PLAINTIFFS INTO THE PROCESS*

Plaintiffs expect to be involved in their lawsuits. Notice, participation, and the opportunity to be heard are constitutional due process rights that form the cornerstone of fair process—including in mass litigation.[356] Previous field and laboratory studies confirm what our participants report: Telling one's story and voicing concerns to a neutral decision-maker are critical to perceptions of fairness.[357] Participating is likewise crucial to accuracy, for how can decisionmakers reach the right result without accurate inputs?

Litigants need to see and interact with judges. People expect judges to be neutral and trustworthy souls who will listen to them, respect them, apply rules consistently, and explain decisions to them.[358] Yet, of the forty-nine participants

354. Jack B. Weinstein, *Notes on Uniformity and Individuality in Mass Litigation*, 64 DEPAUL L. REV. 251, 275 (2015); *see also* Brian H. Bornstein & Hannah Dietrich, *Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes*, 44 CT. REV. 72, 77 (2007–2008) (noting the need for judges and lawyers to answer litigants' questions).

355. Burch & Williams, *supra* note 48, at 52–55.

356. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

357. LIND & TYLER, *supra* note 352, at 106; Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 93–96; Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 160 ("As researchers have learned, litigants report more satisfaction with types of processes in which they understand themselves as having an opportunity to give voice to their injuries, make their defenses, be treated with dignity, and have their claims heard and evaluated by unbiased decisionmakers.").

358. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 164 (2006); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30–31 (2007).

who settled after filing suit, only eight felt like the judge explained rulings and opinions to them.[359]

Communication studies show that our nonverbal cues—from eyerolls to sympathetic head nods—play a significant role in understanding, accounting for somewhere between sixty to sixty-five percent of the meaning conveyed.[360] Caseloads in mass torts make this harder for judges, of course, tempting them "to move cases in assembly-line fashion."[361] But as some judges observe, "[e]veryone who comes through the court system has a right to be treated with respect 100% of the time, a right to be listened to during the process, and a right to have key rulings in the proceeding explained in terms that they can understand."[362]

Even in an analog world, courts found ways to involve mass-tort plaintiffs. Nearly a decade ago, MDL Judge Jack B. Weinstein extolled the virtues of increased plaintiff participation, writing:

> We can arrange for every member of a class or aggregate litigation to obtain free access to our full docket in his or her case through a home computer. . . . Videos of hearings and civil trials can be made available through court or private facilities now in being. And social interaction through electronic chat rooms or social networking can provide for local group and national conversations among claimants and discussions with counsel.[363]

Where plaintiffs' physical conditions or geographic distance prevented in-person participation, Judge Weinstein brought the proceedings to them. In the *Agent Orange* litigation, he rode the circuit, "tour[ing] the nation to get input from veterans" and meeting with "a national network of social agencies organized to help veterans and their families."[364] "I was struck by the deep emotional underpinnings of the litigation," he recounted.[365] In desegregation and education cases, Judge Weinstein held public hearings and went directly to affected schools and communities.[366] In 2013, he livestreamed a summary-judgment hearing to class members in an assisted living facility.[367]

Judge Weinstein is not alone in his efforts. First, to hear from plaintiffs directly, Judge Alvin Hellerstein organized public hearings for Ground Zero

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359. Burch & Williams, *supra* note 48, at 41–42 tbl.14.

360. LAURA K. GUERRERO & KORY FLOYD, NONVERBAL COMMUNICATION IN CLOSE RELATIONSHIPS 2–3 (2006).

361. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 16 (2007).

362. *Id.*

363. Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 455 (2012).

364. *Id.* at 458; WEINSTEIN, *supra* note 188, at 95.

365. WEINSTEIN, *supra* note 188, at 95.

366. *Id.*

367. Boykin v. 1 Prospect Park ALF, LLC, 292 F.R.D. 161, 161 (E.D.N.Y. 2013).

workers litigating over injuries incurred in cleaning up the September 11, 2001 terrorist attacks.[368] Second, in the suit against Swiss Banks by Holocaust survivors, plaintiffs' attorney Elizabeth Cabraser noted, "The settlement approval process itself enabled class members to tell their stories in court, in formally reported proceedings, with permanent transcripts. Their personal stories became matters of permanent public record, accorded the dignity and weight of court testimony."[369] Third, in administering the September 11 Victim's Compensation Fund, Ken Feinberg ensured that victims had an opportunity to make a public statement "on the record, under oath."[370] Finally, in 2013, Australia livestreamed a class-action trial, providing class members with log-in information, and noting that "open justice is a fundamental principle of common law and should not only be done, but also be seen to be done . . . ."[371]

MDL transfer can put many miles between plaintiffs and courthouses. It doesn't have to, though. Technology can help bridge the distance, bringing courtrooms to couches. Given the public's widespread familiarity with technology today, especially after the COVID-19 pandemic when even preschoolers video conferenced, not making proceedings accessible to the participants is more difficult to explain.[372] Technological access furthers statutory goals and strategic plans: The MDL statute mandates party convenience and efficiency,[373] and the current Strategic Plan for the Federal Judiciary aims to enhance access to justice and harness technology's potential.[374] Plus, courts have a variety of resources at their disposal, from court librarians to Public Information Officers, who specialize in communicating with the public.[375]

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368. Order Setting Public Meetings on Settlement, *In re* World Trade Ctr. Disaster Site Litig., No. 21-mc-0100 (S.D.N.Y. July 19, 2010).

369. Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2232 (2004); *In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429, 430 (D.N.J. 2000) (providing an opportunity for Holocaust victims to tell their stories).

370. Tracy Breton, *Payments Pending for Fire Victims*, PROVIDENCE J., Aug. 3, 2008, at 4 (quoting Feinberg); *see also* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 95 (2005) ("I found myself meeting with thousands of applicants on an individual basis. I decided to make it as convenient as possible by visiting claimants in or near their homes.").

371. *Bushfires Class Action Trial to Stream Live for Victims*, MAURICE BLACKBURN LAWS. (Feb. 22, 2013), https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2013/bushfires-class-action-trial-to-stream-live-for-victims [https://perma.cc/YU45-64XV]; Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1652 (2016).

372. Bipartisan legislation recently passed the Senate to televise Supreme Court hearings. Josh Gerstein, *Senate Committee Approves Legislation to Put Supreme Court Hearings on Camera*, POLITICO (June 24, 2021, 1:26 PM), https://www.politico.com/news/2021/06/24/senate-supreme-court-hearings-on-camera-496067 [https://perma.cc/BVD7-CJNG].

373. 28 U.S.C. § 1407(a).

374. JUD. CONF. OF THE U.S., *supra* note 17, at 19–26.

375. *CCPIO Fact Sheet*, CONF. OF CT. PUB. INFO. OFFICERS (2018), https://www.ccpio.org/wp-content/uploads/2018/08/CCPIO-Factsheet-2018.pdf [https://perma.cc/9ABP-SD55]; *Holograms*

Benefits abound. Allowing plaintiffs to tune into key hearings and status conferences opens courts to plaintiffs, enables plaintiffs to hear lawyers' arguments and the judge's reasoning in real time, and permits them to decide firsthand whether the judge acts impartially and attorneys fairly advocate for them. When plaintiffs participate in proceedings, they can introduce new information and dissent—both of which are critical to fostering legitimacy and reaching the best possible outcome. Two of the world's leading experts on decision-making explain that minority views are critical "not because they may be correct but because *even when they are wrong* they stimulate thinking that on balance leads to better decisions. It stops the rush to judgment by providing a counter to the majority view."[376]

Although interacting face-to-face remains the gold standard, researchers are beginning to flesh out how online proceedings affect litigants' perceptions of justice.[377] Still, some access, knowledge, and voice is surely better than the status quo.[378] Allowing plaintiffs to keep up with their case without cross-country travel should be standard practice in MDLs. And the tools exist now to make this easier than ever.[379]

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*and 'Judicial Economy': How COVID Is Changing the Courtroom*, REUTERS (Jan. 24, 2022), https://mobile.reuters.com/video/watch/idRCV00AO7K?utm_campaign=The+Daily+Docket&utm_medium=email&utm_source=Sailthru&utm_term=DailyDocket-MailingList+v2 [https://perma.cc/3QQ3-NT2B].

376. Charlan J. Nemeth & Jack A. Goncalo, *Rogues and Heroes: Finding Value in Dissent*, *in* REBELS IN GROUPS: DISSENT, DEVIANCE, DIFFERENCE, AND DEFIANCE 17, 23 (Jolanda Jetten & Matthew J. Hornsey eds., 2011).

377. Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20, 38 (2021) (finding that empathic divides based on gender may infect legal proceedings but that proceedings can be designed and conducted to address those concerns to an extent); Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1320 (2020); Kevin S. Burke & Steve Leben, *Procedural Fairness in a Pandemic: It's Still Critical to Public Trust*, 68 DRAKE L. REV. 685, 699–700 (2020); Ted A. Donner, *Civil Jury Trials by Zoom: We're All Plugged into One World Now*, 51 SW. L. REV. 71, 90 (2021) (concluding that videoconferencing techniques for trial and pretrial would be beneficial even post-pandemic); *Researchers Can Help Courts Understand Whether Litigants Think the Civil Legal System Is Fair—And Why (or Why Not)*, PEW RSCH. (June 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/articles/2021/06/14/researchers-can-help-courts-understand-whether-litigants-think-the-civil-legal-system-is-fair [https://perma.cc/QX5G-AWUG].

378. *See generally* David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions* (U. Pa. Inst. for L. & Econ. Working Paper, Paper No. 22–29, 2022), https://dx.doi.org/10.2139/ssrn.4130696 [https://perma.cc/EVU7-RTQB] (finding that the further tenants had to travel to court the more likely they were to be no-shows and face eviction but that the availability and use of video technology in lieu of physical appearances could reduce barriers to justice).

379. Criminal Rule 53 prohibits electronic media coverage of cameras in the courtroom, specifically in U.S. District Courts. FED. R. CRIM. P. 53. Our proposal to allow litigants (not media) access to civil proceedings (not criminal) would not require a change in longstanding judiciary policy to implement.

### B. PROTECTING GROUP COMMUNICATION

Plaintiffs need a simple, safe place to find reliable, up-to-date information. Many MDL judges already create websites that make orders, transcripts, and leaders' contact information publicly available, but stumbling upon those sites sometimes requires legalistic search terms and a law degree to understand.[380] Google "pelvic mesh" and the court's seven sites are buried twelve pages deep beneath an avalanche of attorney ads, medical sites, and news stories—many of which appear prominently because they are paid promotions.

Courts and lawyers can cut through the noise of the internet. Plaintiff fact sheets routinely collect basic information that would allow courts and leaders to communicate directly with plaintiffs minus the legalese. Texting or emailing newsletters and links to upcoming court hearings directly to plaintiffs (who could, of course, choose to opt out) is an easy and low-cost way to disseminate information and set expectations.[381] The MDL Panel could likewise collect links to individual MDL sites on its website, thereby making them easier to find in a centralized location.

As Tables 16 and 17 above showed, some plaintiffs are already turning to online forums like Facebook groups to seek information and community. Although only 104 of our 217 respondents reported engaging in support groups of any type, of those who used them, 50.9 percent participated weekly, suggesting that online groups might be a good way to circulate information.

The difficulty, of course, is in ensuring that what's said in the group stays in the group and is not discoverable by defendants, who have an ethical obligation not to contact represented individuals.[382] One participant observed, "Groups are infiltrated with pharma spies, lawyers and just trolls."[383] "I was an original admin of the group [name] and the only original admin that is still in the victims of [group name] background discussions," reported another, "I was threatened with a cease and desist letter from [defendant] when I was an admin of the first group and I refused to cease and desist."[384]

Plaintiffs should be able to talk with those who represent them, cut through the layers of lawyers, and receive communications in plain English straight from the source. As Judge Weinstein suggested, court- or leader-created online groups could allow plaintiffs to communicate freely with one another and the leaders, so long as doing so doesn't waive the attorney-client

380. Todd Venook & Nora Freeman Engstrom, *Towards the Participatory MDL: A Low-Tech Step to Promote Litigant Autonomy*, *in* LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE (David Freeman Engstrom ed., forthcoming 2022) (searching for MDL websites, examining their content, and concluding "our analysis reveals deep and pervasive deficits with respect to usability and relevance").

381. *See generally* BRIAN OSTROM, JOHN DOUGLAS, SUZANNE TALLARICO & SHANNON ROTH, THE USE OF REMOTE HEARINGS IN TEXAS STATE COURTS: THE IMPACT ON JUDICIAL WORKLOAD (2021) (discussing the use and impact of conducting some judicial proceedings remotely).

382. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2021).

383. Participant 14.

384. Participant 209.

privilege or work-product protections.[385] Because lawyers generally waive the work-product doctrine only when they make disclosures that substantially increase the likelihood of putting documents in their adversary's hands,[386] it raises fewer concerns than the attorney-client privilege.

Extending the common-interest doctrine to group participants can alleviate attorney-client privilege issues. The common-interest doctrine evolved from situations where two clients retained the same attorney and has long been used by insurance companies, in joint defense strategies (such as by asbestos and tobacco defendants), and by plaintiffs involved in group litigation.[387] In these contexts, the doctrine extends to "two or more clients with a common interest in a litigated or nonlitigated matter" who are represented by the same or separate lawyers to encourage full and efficient case preparation.[388]

Litigating MDLs requires that leaders understand plaintiffs' diverse claims and concerns. Talking with one another helps plaintiffs connect side effects to product use, and centralizing communication prevents misinformation and rumors, gives plaintiffs an outlet, and affords leaders insight into plaintiffs' conflicting needs.

### *C. EVALUATING INDIVIDUAL AND LEAD LAWYERS' PERFORMANCE*

As Part II explained, client and peer referrals typically help align incentives between repeat-player attorneys and one-shot clients. But because mass-tort attorneys often find clients through advertisements and lead generators, those constraints are less effective in MDLs. Court-administered client surveys may bring back the reputational sting or endorsement of previous referral networks for both individual attorneys and lead lawyers. Websites like Google, Avvo, Yelp, and Lawyers.com already allow clients to review their attorneys. But they do not collect systematic data about attorneys' performance in communicating, advocating, and counseling clients. And, for lead attorneys, online reviews do not affect compensation or future leadership appointments.

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385. Weinstein, *supra* note 363, at 455.

386. Williams v. Bridgeport Music, Inc., 300 F.R.D. 120, 123 (S.D.N.Y. 2014); Brown v. NCL (Bahamas), Ltd., 155 F. Supp. 3d 1335, 1339 (S.D. Fla. 2015).

387. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §§ 5.14, 5.15 (3d ed. 2003) (concerning joint clients and joint defense broadly); EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 274–75 (5th ed. 2007) (concerning the common-interest privilege broadly and in insurance law); James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 632, 654 (1997) (concerning group litigation and asbestos litigation); *e.g.*, Reavis v. Metro. Prop. & Liab. Ins. Co., 117 F.R.D. 160, 165 (S.D. Cal. 1987) (concerning group insurance litigation).

388. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. §§ 75–76 (AM. L. INST. 2000) (applying the common-interest privilege to those with the same attorney and separate attorneys); MUELLER & KIRKPATRICK, *supra* note 387, §§ 5.14, 5.15.

As parents have long recognized and Jeremy Bentham astutely noted, "the more strictly we are watched, the better we behave."[389] Elizabeth Cabraser and Sam Issacharoff argue that because plaintiffs and their lawyers are present in MDLs, "they become the organizing springboard for a monitoring group that has the ability and the incentive to challenge the fruits of the representative action."[390] Perhaps. But not currently.

Individual lawyers are unlikely to challenge MDL leaders; they fear being blackballed and ostracized.[391] And it's hard for plaintiffs to police individual or lead attorneys without information about fundamental aspects of their case. Our participants described the issues with client monitoring. One noted, "[a]lthough, this was a massive case and the judge did an awesome job, there needs to be more oversight concerning the attorneys."[392] "[E]verything [the lawyers] did was not legal[.] I do not know how Judge [name] could let this go on," mused a second, "I am [an] hour and twenty minutes from Judge [name] I want to write him a letter does he k[n]ow what is going on."[393]

Courts appoint lead lawyers, in part, to ensure that essential information filters down to the plaintiffs via their individual counsel, who, as we have seen, may inhibit communication. Unfortunately, neither lead attorneys nor individual lawyers have adequate incentives to communicate regularly with plaintiffs. And once a deal is on the table, lead lawyers have powerful financial motives to encourage all eligible claimants to sign up; they are, as Andrew Bradt and Teddy Rave put it, "in sales-pitch mode, not counseling mode."[394]

Plaintiffs need organized channels, basic information, and to know that their feedback will have the court's ear. Asking plaintiffs to fill out attorney performance surveys (like the sample in Appendix A) could provide carrots and sticks: Court sponsorship can give evaluations meaning and including the aggregated responses in the public docket can promote accountability and transparency. Third-party sites like Avvo and Lawyers.com might even disseminate the data.

Even if MDL judges are reluctant to allow plaintiffs to evaluate individual counsel, they have a stronger duty to monitor lead lawyers. Judicially selected leaders usurp the traditional trial lawyer's day-to-day case management, a task for which courts compensate them (often generously) through common-benefit fees. Moreover, when plaintiffs know little about the status of their

389. JEREMY BENTHAM, FARMING DEFENDED (1796), *reprinted in* 1 WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., 2001).

390. Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 860 (2017).

391. BURCH, *supra* note 61, at 87–88, 96 (quoting a mass-tort attorney saying, "[N]o one will [speak out] because it's suicide"); Burch & Williams, *supra* note 27, at 1471–87.

392. Participant 133.

393. Participant 196.

394. Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1283 (2017).

case, it increases the burden on judges and court staff. For instance, in sanctioning a mass-tort lawyer for failing to communicate with his clients in the *Guidant* MDL, Judge Frank received "numerous complaints" from the attorney's clients, held a status conference, and spent time writing an opinion fining the attorney.[395]

Employers, clients, and the public evaluate job performance across many sectors (including judges).[396] Legal clients of all types are clamoring to tell counsel what they're doing right—and wrong. Data from BTI Consulting Group found that seventy-two percent of clients want to provide law firms with feedback but that only thirty percent of firms seek it in significant ways.[397] Online tools like Google forms, Survey Monkey, and Qualtrics, which we used to survey participants, provide easy ways for courts to disseminate attorney evaluations to plaintiffs while protecting plaintiffs' anonymity and ensuring the link goes only to actual plaintiffs.

To make plaintiffs' evaluations meaningful, judges should factor leadership performance surveys into compensation and future leadership selection. First, evaluations should affect leaders' common-benefit compensation in the MDL. Common-benefit fees have roots in restitution, and quantum meruit (how much is merited) lies at the heart of all the piecemeal doctrinal theories used to justify these awards.[398] Because quantum meruit requires that leaders confer a benefit, plaintiffs, as the beneficiaries, should be allowed to weigh in on leaders' performance and the benefits conferred—in dollars, in understanding the process, and in plaintiffs' feeling that they were treated with dignity.

Second, performance surveys can add organizational theory to selecting future leaders. Once MDL judges seek plaintiffs' attorney evaluations and include them on their dockets, new MDL judges can access them easily. As Nobel laureate Daniel Kahneman has explained, gut hiring decisions are often flawed; interviewers should "select a few traits that are prerequisites for success in this position."[399] Past performance and client satisfaction should play a significant role, particularly in choosing liaison counsel.

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395. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2009 WL 5195841, at *6–7 (D. Minn. Dec. 15, 2009).

396. *See Judicial Performance Evaluation in the States*, UNIV. OF DENVER, https://iaals.du.edu/judicial-performance-evaluation-states [https://perma.cc/9L2M-2MKW] (listing seventeen states that have adopted some form of judicial evaluation).

397. Dan Packel, *Too Many Law Firms Aren't Interviewing Their Clients. Here's What They Stand to Gain*, LEXISNEXIS (May 25, 2021, 12:36 PM), https://plus.lexis.com/api/permalink/48a5e1bb-c48d-441f-a03f-27564bfb39d3/?context=1530671 [https://perma.cc/G6N3-QGWV].

398. For an in-depth treatment of the issue, see BURCH, *supra* note 61, at 187–200. *See generally* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 102–09, 128–35 (2015) (discussing common-benefit fees and quantum meruit in greater detail).

399. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 232 (2011); *see also* Everett Spain, *Reinventing the Leader Selection Process: The U.S. Army's New Approach to Managing Talent*, HARV. BUS. REV., Nov.–Dec. 2020, https://hbr.org/2020/11/reinventing-the-leader-selection-process

### *D. DISCIPLINING UNETHICAL CONDUCT*

"What can I do to get some justice," asked one of our respondents, "I will contact bar associates they can not steal all of your money something has to be done."[400] From failing to communicate case updates, respond to reasonable requests for information, and provide clients with the required information on aggregate settlements, Sections II.B and III.B chronicled the many ways in which mass-tort plaintiffs' attorneys may violate ethics rules. These problems cannot be written off as a few bad apples. Our study alone includes 295 lawyers from 145 law firms, fifty-four percent of which led participants' MDLs in judicially appointed positions.

With MDLs comprising one out of every two cases filed in federal civil court in 2020, the way lawyers handle those cases has a tremendous impact on how the public perceives the justice system.[401] It is high time for state bar associations and MDL judges to discipline and sanction attorneys accordingly.[402] Only then will mass-tort norms begin to shift to those more befitting the professional conduct expected of lawyers.[403]

All lawyers have ethical obligations to communicate with their clients and must make more than a pro forma attempt at doing so.[404] A treatise on attorneys' professional ethics puts it simply: "A fundamental assumption underlying the attorney-client relationship is that lawyers must keep their clients reasonably informed."[405] Reasonably informing clients means keeping them up to date about important litigation events like filing a complaint, scheduling a deposition, and receiving a settlement offer.[406]

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[https://perma.cc/4XX8-J484] (suggesting similar ways in which the U.S. Army transformed its leadership-selection process). For a sample leadership application form that could be customized to add in communication abilities, see Burch, *supra* note 7, at 162–64.

400. Participant 196.

401. *See* sources cited *supra* notes 3–4 and accompanying text; s*ee also In re* Guidant Corp Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2009 WL 5195841, at *7 (D. Minn. Dec. 15, 2009) ("An MDL also creates a unique situation in which one attorney's actions can contribute to the common detriment of the MDL by, among other things, damaging the public's trust and confidence in the effectiveness and fairness of the MDL.").

402. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (noting that a court has the inherent authority to "discipline attorneys who appear before it"). Sometimes, state bar associations dismiss complaints against mass-tort attorneys without understanding the information that those lawyers are withholding from clients. Only when the MDL judge gets involved may the full picture emerge. *E.g.*, *Guidant*, 2009 WL 5195841, at *7 (noting that the Texas Ethics Board dismissed a complaint against an attorney without knowing that the attorney had been given a court-approved settlement allocation plan).

403. *See* Nancy J. Moore, *Ethics Matters, Too: The Significance of Professional Regulation of Attorney Fees and Costs in Mass Tort Litigation—A Response to Judith Resnik*, 148 U. PENN. L. REV. 2209, 2217–18 (2000) (noting that judges oversee attorney conduct).

404. *See* MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2021); *In re* Askew, 225 A.3d 388, 396 (D.C. Cir. 2020).

405. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS–THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.4-1 (2021).

406. *Id.* § 1.4-1(c).

So too must attorneys respond to reasonable requests from clients seeking information and explain matters to them so they can "participate intelligently in decisions."[407] This includes "explain[ing] the general strategy and prospects of success," and "consult[ing] the client on tactics that are likely to result in significant expense or to injure or coerce others."[408]

Information has currency for both sides. For personal-injury attorneys, missed deadlines account for more than half of all legal-malpractice damages,[409] and missed surgeries in client files leave money on the table. For MDL plaintiffs where other clients share similar facts and are suing the same defendant, receiving case updates and other clients' settlement values allows plaintiffs to make informed decisions about the risks and benefits of going to trial. As Judge Donovan Frank observed in sanctioning a mass-tort lawyer $50,000, "[w]ithout knowing whether he or she was to receive $1, $500, or $240 million, a client could not agree that a settlement was fair and reasonable."[410] Describing an attorney with the same behaviors as many of our participants identified, Judge Frank wrote, "if such a practice were the norm, the Court concludes that multi-district litigation would not serve the interests of litigants or justice and should be discontinued."[411] Our participants' responses suggest that this behavior does occur. We encourage future research to further understand how often.

## CONCLUSION

MDL's constitutional foundation is the individual suit. Paradoxically, MDL judges assume some degree of client autonomy and decision-making, which requires knowledge that participants in this first-of-its-kind study simply did not report having: "I think the wors[t] part is being left in the dark by the lawyers and not being able to have a say," concluded one participant.[412] Another said, "I wish the [lawyers] would check in with me, all I know is Settlement Counsel is working on it! I had to google what Settlement Counsel is and does! I wish they would explain things to me!"[413]

Courts and lawyers have lost touch with the people who need them most. When plaintiffs don't fully understand the process that they've been brought into, that exacerbates their distrust of the system and creates problems for

407. MODEL RULES OF PRO. CONDUCT r. 1.4(a)(4), 1.4 cmt. 5.

408. *Id.* at r. 1.4 cmt. 5.

409. HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS 117 (2018) (using 1947–2014 data from Missouri).

410. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2009 WL 5195841, at *11 (D. Minn. Dec. 15, 2009).

411. *Id.* at *13.

412. Participant 141.

413. Participant 130.

courts' legitimacy.[414] Our participants reported experiences that failed to live up to their expectations, and did not feel just at all.[415] One participant said simply, "We need help[;] we are not receiving justice. We are being taken by the same people and system that is here to help us."[416] Improving MDLs requires ironing out the disparity between what the law presumes and what reality reveals. It requires empowering plaintiffs so they can hold those who purport to represent them accountable.

414. Burch & Williams, *supra* note 27, at 1521–26; *see also supra* Section V.A–.B (for discussion on the problems that arise when plaintiffs are not brought into the litigation process or do not otherwise understand or trust the system).

415. *See* discussion *supra* Section V.C.

416. Participant 9.

APPENDIX: SAMPLE LEADERSHIP PERFORMANCE SURVEY

**Overall Process**

1) Overall, considering your interaction with lead attorneys and your lawyer, how satisfied were you with the way your case was handled?
   - o Very satisfied
   - o Somewhat satisfied
   - o Neither satisfied nor dissatisfied
   - o Somewhat dissatisfied
   - o Very dissatisfied

2) Overall, how fair do you think the outcome of your case was?
   - o Very fair (Skip to Question 4)
   - o Somewhat fair (Skip to Question 4)
   - o Neither fair nor unfair (Skip to Question 4)
   - o Somewhat unfair
   - o Very unfair

3) What about the outcome led you to feel it was unfair?
   [Open comment box]

4) Considering what had to be done, do you think the time it took to resolve your case was reasonable or unreasonable?
   - o Very reasonable
   - o Somewhat reasonable
   - o Neither reasonable nor unreasonable
   - o Somewhat unreasonable
   - o Very unreasonable

5) Considering your entire experience with the justice system, how satisfied were you overall with the manner in which the legal system handled your case?
   - o Very satisfied
   - o Somewhat satisfied
   - o Neither satisfied nor dissatisfied
   - o Somewhat dissatisfied
   - o Very dissatisfied

6) Has your case settled?
   - o Yes (go to Question 7)
   - o No (go to Question 9)

7) Some "settlements" in mass torts are actually settlement programs where you must submit certain documents to qualify for recovery. Before you agreed to settle or entered into a settlement program, did you (Check all that apply)
   - o Know that your claim would qualify for a settlement award
   - o Know how much money you would receive
   - o Have an estimate of your approximate monetary award based on the settlement program's tiers, allocation formula, or points
   - o Know what your lawyer's other clients would receive

- Know what your lawyer's fees would be
- Know how the litigation costs would affect your award
- Know how litigation costs would be shared among your lawyer's other clients

8) Before you settled, did your lawyer tell you that he or she would not be able to continue to represent you if you did not settle? In other words, did your lawyer suggest that you would need to find a new lawyer or represent yourself if you did not want to settle?
   - Yes (Please explain)
   - No

**Evaluation of Individual Counsel**

9) What is the name of your lawyer and your lawyer's law firm. [Open comment box]

10) Please indicate whether you agree or disagree with the following statements

| | Strongly Agree | Agree | Neither Agree nor Disagree | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| My lawyer explained the way he or she would charge me for attorneys' fees and litigation costs. | ○ | ○ | ○ | ○ | ○ |
| My lawyer kept me informed about the status of my case. | ○ | ○ | ○ | ○ | ○ |
| My lawyer considered the facts of my case. | ○ | ○ | ○ | ○ | ○ |
| My lawyer explained the benefits and risks of important decisions (like whether to settle) to me. | ○ | ○ | ○ | ○ | ○ |
| I could trust my lawyer to act in my best interest. | ○ | ○ | ○ | ○ | ○ |
| While my case was proceeding, I felt like I understood what was happening. | ○ | ○ | ○ | ○ | ○ |

11) How did your lawyer keep you informed about your lawsuit? [Check all that apply]
   - Email updates
   - Phone calls with lawyer
   - Phone calls with a case manager
   - Website
   - U.S. Mail
   - In-person meetings with lawyer

- Social media
- Other [Please specify]

12) Was your lawyer on the litigation's plaintiffs' steering (or executive) committee?
- Yes
- No
- I don't know

13) Considering what had to be done in your lawsuit, how reasonable did you find your attorney's fee?
- Very reasonable
- Somewhat reasonable
- Neither reasonable nor unreasonable
- Somewhat unreasonable
- Very unreasonable

14) Considering your entire experience, how satisfied were you overall with the manner in which your lawyer handled your case?
- Very satisfied
- Somewhat satisfied
- Neither satisfied nor dissatisfied
- Somewhat dissatisfied
- Very dissatisfied

15) Is there anything else you would like to share about your experience with your individual lawyer(s)?
[Open comment box]

**Evaluation of Lead Lawyers**

16) What is the name of the lead attorney who communicates with you?
[Open comment box]

17) Please indicate whether you agree or disagree with the following statements

| | Strongly Agree | Agree | Neither Agree nor Disagree | Disagree | Strongly Disagree |
|---|---|---|---|---|---|
| Lead lawyers kept me informed about the status of the MDL proceeding. | ○ | ○ | ○ | ○ | ○ |
| I could trust the lead lawyers to act in my best interest. | ○ | ○ | ○ | ○ | ○ |
| While my case was proceeding, I felt like I understood what was happening. | ○ | ○ | ○ | ○ | ○ |

18) How did lead attorneys keep you informed about the progress of the proceeding? [Check all that apply]

- Email updates
- Phone calls with lawyer
- Phone calls with an assistant
- Website
- Group forum/portal
- U.S. Mail
- In-person meetings with lawyer
- Social media
- Other [Please specify]

19) Were there any lead attorneys who stood out to you as being particularly helpful or particularly unhelpful? If so, please explain.
[Open comment box]

20) Considering your entire experience, how satisfied were you overall with the manner in which the lead lawyers handled the MDL?
- Very satisfied
- Somewhat satisfied
- Neither satisfied nor dissatisfied
- Somewhat dissatisfied
- Very dissatisfied

21) Is there anything else you would like to share about your experience with the lead attorneys?
[Open comment box]