Toward the Participatory MDL: A Low-Tech Step to Promote Litigant Autonomy

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MDLs rely, for legitimacy, on individual client autonomy. That fact justifies a system that affords MDL litigants few, if any, formal safeguards, even while furnishing class members in class actions elaborate procedural protections. In this Chapter, we zero in on litigant autonomy in MDLs. We explain why autonomy matters, dissect its elements, and evaluate how much autonomy MDL litigants seem to have in practice. We then zoom in on a necessary component of litigant autonomy: information. As we explain, when it comes to the promotion and protection of litigant autonomy, effective communication—and the provision of vital information that it enables—is not sufficient, but it is necessary. Even well-informed litigants can be excluded from vital decision-making processes, but litigants, logically, *cannot* call the shots while operating in the dark.

With that background, we review some troubling evidence indicating that at least some MDL litigants felt confused and uninformed regarding their suits—and, in light of that evidence, we assess what MDL transferee courts are doing to keep litigants up-to-date and well-informed. Here, we furnish the results of our own rigorous empirical analysis of court-run MDL websites, which are often extolled, including by judges, as a key venue for client-court communication. Unfortunately, our analysis reveals deep and pervasive deficits with respect to these sites' usability and relevance. If this is where case-related communication is supposed to be happening, then litigant confusion is unsurprising. We close with several recommendations for courts seeking to harness simple technology to promote better court-litigant communication. We fully recognize: Improved MDL websites aren't a panacea. But they might, however marginally, promote the autonomy interests of litigants—and light a path for future reform.

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INTRODUCTION

Debate about legal tech and the future of civil litigation typically focuses on high-technology innovations. This volume is no exception, and with good reason. Advanced technologies are spreading (or seem poised to spread) throughout the legal landscape, from discovery to ODR to trials, and from individual lawsuits to aggregate litigation. These tools' practical utility and social value are rightly contested.[1]

But in some contexts, straightforward, *low-tech* solutions hold tremendous promise—and also demand attention. Here, we zero in on a modest tool that bears upon the management of multidistrict litigation, or MDL. In particular, we explore how improved online communication could enhance litigant autonomy, usher in a more "participatory" MDL, and supply a platform for further innovation.[2]

The MDL statute—28 U.S.C. §1407—is a procedural vehicle through which filed federal cases involving common questions of fact, such as a mass tort involving asbestos or defective pharmaceuticals, are swept together into a single "transferee" court, ostensibly for pretrial proceedings (though very often, in reality, for pretrial adjudication or settlement).[3] Thirty years ago, MDLs were barely a blip on our collective radar. As of 1991, these actions made up only about 1% of pending civil cases.[4] Now, by contrast, MDLs make up fully half of all new federal civil filings.[5] This means that *one out of every two litigants* who files a claim in federal court might not really be fully represented by the lawyer she chose, get the venue she chose, or remain before the judge to whom her suit was initially assigned. Instead, her case will be fed into the MDL system and processed elsewhere, in a long, labyrinthian scheme that is often far afield and out of her sight.[6]

Given these statistics, there's no real question that the MDL has risen—and that its rise is significantly altering the American system of civil justice. There is little consensus, however, as to

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[1] A growing discourse centers on the use of cutting-edge technology in aggregate litigation. *See, e.g.*, Peter N. Salib, *Artificially Intelligent Class Actions*, 100 TEX. L. REV. 519, 544 (2022) (suggesting that machine learning algorithms could resolve individual questions and help satisfy the predominance requirement of Rule 23); Alexander W. Aiken, *Class Action Notice in the Digital Age*, 165 U. PA. L. REV. 967, 997 (2017) (urging courts and parties to consider using machine learning to identify and notify otherwise-unknown class members).

[2] Here, we play off Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017). In that piece, Cabraser and Issacharoff argue that technological and jurisprudential change have diminished the "absence" of class members because (inter alia) members are kept informed by social media, case-specific websites, and, sometimes, their individual attorneys. The insight is important, but class actions are today largely a dead letter (at least in the mass tort sphere). Recognizing that reality, we apply some of their insights to where mass tort cases are more frequently litigated: the MDL.

[3] For an overview of the MDL process, see Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2327 (2008). For the infrequency of remands, see Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 16 (2021) (noting that more than 97% of cases centralized via MDL are resolved without remand).

[4] Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 7 (2019).

[5] Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd,* manuscript at 2 (forthcoming, CORNELL L. REV. 2022) ("[O]ne out of every two civil cases filed in federal court in 2020 was part of an MDL.").

[6] As Beth Burch puts it: "[Litigants] select a lawyer and a forum, but like Dorothy in the Wizard of Oz, they may quickly find themselves on unfamiliar turf." ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 124 (2019).

whether the MDL's ascent is a good or bad thing. Some celebrate the MDL for promoting judicial efficiency, addressing harms that are national in scope, channeling claims to particularly able and expert advocates, creating economies of scale, and increasing access to justice—giving *some* judicial process to those who, without MDL, would have no ability to vindicate their essential rights.[7]

Others, meanwhile, find much to dislike. Critics frequently seize on MDLs' relatively slow speed,[8] their heavy reliance on repeat play,[9] and the free-wheeling judicial "ad hocery" that has become the device's calling card.[10] Beyond that, critics worry that the device distorts the traditional attorney-client relationship and subverts litigant autonomy.[11] Critics fear that aggregation alters traditional screening patterns, which can unleash a "vacuum cleaner effect" and ultimately lead to the inclusion of claims of dubious merit.[12] And critics note that the device has seemingly deviated from its intended design: The MDL was supposed to aggregate cases for *pretrial* proceedings. So, the status quo—where trials are rare and transfer of a case back to a plaintiff's home judicial district is exceptional—means, some say, that the MDL has strayed off script.[13]

Stepping back, one can see: The MDL has certain advantages and disadvantages. Furthermore, and critically, *many MDL drawbacks are baked in*. There are certain compromises we *must make*, if we want the efficiencies and access benefits MDLs supply. Aggregation (and, with it, *some* loss of litigant autonomy) is an essential and defining feature of the MDL paradigm. The same may be said for judicial innovation, the need to adapt the traditional attorney-client relationship, or the fact that some lawyers are tapped to lead MDLs in a selection process that will, inevitably, consign some able and eager advocates to the sidelines.

Recognizing these unavoidable tradeoffs, in our own assessment, we ask subtly different and more targeted questions. We don't hazard to assess whether MDLs, on balance, are good or bad. Nor do we even assess whether particular MDL features (such as procedural improvisation) are good or bad. Instead, we ask two more modest questions: (1) Do contemporary MDLs have *avoidable* drawbacks, and (2) if so, can *those* be addressed? In this analysis, we zero in on just one MDL drawback that is both practically and doctrinally consequential: MDL's restriction of litigant autonomy. And we further observe: Though *some* loss of litigant autonomy is an inevitable and inescapable byproduct

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[7] For certain advantages, see Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1234–35 (2018); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1676, 1696 (2017).

[8] MDLs "last almost four times as long as the average civil case." Burch & Williams, *supra* note 5, at 6; *see also* Fallon et al., *supra* note 3, at 2330 (arguing that the "excessive delay . . . sometimes associated with traditional MDL practice . . . cannot be defended").

[9] For criticism of repeat play, see Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1453 (2017). For a defense, see generally Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019).

[10] For a compilation of scholarly critiques, see Engstrom, *supra* note 4, at 9 n.21.

[11] *E.g.,* Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627, 1641 (1995) ("In a large-scale mass tort, the act of consolidating the individual cases into a jumbo lawsuit risks breaking individual attorney-client relationships.").

[12] Engstrom, *supra* note 4, at 24–25.

[13] As noted at *supra* note 3, more than 97% of cases centralized via MDL are resolved without remand. For criticism of that fact, see, e.g., Fallon et al., *supra* note 3, at 2330.

of aggregation and is therefore entirely understandable (the yin to aggregation's yang), the *present*-day MDL may be *more* alienating and involve a larger loss of autonomy than is actually necessary. As explained in Part I, that is a potentially large problem. But, we also argue, it is a problem that, with a little ingenuity, courts, policymakers, scholars, and litigators can practically mitigate.

The remainder of this Chapter proceeds in three Parts. Part I sets the scene by focusing on individual autonomy. In particular, Subpart A explains why autonomy matters, while Subpart B draws on MDL plaintiff survey data recently compiled by Elizabeth Burch and Margaret Williams to query whether MDL procedures might compromise litigant autonomy more than is strictly necessary. Then, to assess whether transferee courts are currently doing what they practically can to promote autonomy by keeping litigants up-to-date and well-informed, Part II offers the results of our own systematic study of current court-run MDL websites. This analysis reveals that websites exist but are deficient in important respects. In particular, court websites are hard to find and often outdated. They lack digested, litigant-focused content and are laden with legalese. And they rarely offer litigants opportunities to attend hearings and status conferences remotely (from their home states). In light of these deficiencies, Part III proposes a modest set of changes that might practically improve matters. These tweaks will not revolutionize MDL processes. But they could further litigants' legitimate interests in information, with little risk and at modest cost. In so doing, they seem poised to increase litigant autonomy—"low-tech tech," to be sure, but with high potential reach.

I. INDIVIDUAL AUTONOMY, EVEN IN THE AGGREGATE: WHY IT MATTERS AND WHAT WE KNOW

A. Why Individual Autonomy Matters

Litigant autonomy is a central and much-discussed concern of any adjudicatory design, be it individualized or aggregate. And, when assessing MDLs, individual autonomy is especially critical; indeed, its existence (or, conversely, its absence) goes to the heart of MDL's legitimacy. That's so because, if litigants swept into MDLs truly retain their individual autonomy—and preserve their ability meaningfully to participate in judicial processes—then the source of the MDL's legitimacy is clear. On the other hand, to the extent consolidation into an MDL means that individual litigants necessarily and inevitably sacrifice their individual autonomy and forfeit their ability meaningfully to participate in judicial processes (and offer, or withhold, authentic consent to a settlement agreement), the MDL mechanism sits on much shakier ground.[14]

On paper, that is not a problem: MDLs, as *formally* conceived, do little to undercut the autonomy of individual litigants. In theory, at least, MDLs serve only to streamline and expedite pretrial processes; they (again, in theory) interfere little, if at all, with lawyer-client communication, the allocation of authority within the lawyer-client relationship, or the client's ability to accept or reject the defendant's offer of settlement. That formal framework makes it acceptable to furnish MDL

[14] *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259, 1264 (2017) (explaining that MDLs derive their legitimacy, in large part, from the notion that the individual retains "ultimate control over her claim," and further observing that the MDL "is ultimately grounded on premises of individual claimant autonomy").

plaintiffs (unlike absent class members, say) with few special procedural protections.[15] It is thought that, even in an MDL, our old workhorses—Model Rules of Professional Conduct 1.4 (demanding candid attorney-client communication), 1.7 (policing conflicts), 1.2(a) (clarifying the allocation of authority and specifying "that a lawyer shall abide by a client's decisions concerning the objectives of representation"), 1.16 (limiting attorneys' ability to withdraw), and 1.8(g) (regulating aggregate settlements)—can ensure the adequate protection of clients.

In contemporary practice, however, MDLs are much more than a pretrial aggregation device.[16] And, it is not necessarily clear that in *this* system—characterized by infrequent remand to the transferor court, prescribed and cookie-cutter settlement advice, and heavy-handed attorney withdrawal provisions—our traditional ethics rules continue to cut it.[17] Indeed, some suggest that the status quo so thoroughly compromises litigant autonomy that it represents a denial of due process, as litigants are conscripted into a system "in which their substantive rights will be significantly affected, if not effectively resolved, by means of a shockingly sloppy, informal, and often secretive process in which they have little or no right to participate, and in which they have very little say."[18]

Individual autonomy is thus the hinge. To the extent it mostly endures, and to the extent individual litigants really can participate in judicial proceedings, authentically consent to settlement agreements, and control the resolution of their own claims, MDL's legality and legitimacy is clearer. To the extent individual autonomy is a fiction, MDL's legality and legitimacy is more doubtful.

The upshot? If judges, policymakers, scholars, and practitioners are concerned about—and want to shore up—MDL legitimacy, client autonomy should be fortified, at least where doing so is possible without major sacrifice.

B. Litigant Autonomy: What We Know

The above discussion underscores that, in MDLs, litigant autonomy really matters. That insight tees up a clear—albeit hard-to-answer—real-world question: How much autonomy do contemporary MDL litigants *actually have*?

1. Context and Caveats

That is the question to which we now turn, but before we do, a bit of context is necessary. The context is that, ideally, to gauge the autonomy of MDL litigants, we would know exactly how much autonomy is optimal and also how much is minimally sufficient—and how to measure it. Or, short of that, we could perhaps compare rigorous data that captures the experiences of MDL plaintiffs

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[15] For the many procedural protections afforded class action litigants, see FED. R. CIV. P. 23.

[16] *See* Bradt & Rave, *supra* note 14, at 1271 (explaining that, in contemporary MDLs, "actual individual control of the litigation by claimants is limited"); Gluck & Burch, *supra* note 3, at 67 & 72 (calling the notion that an individual plaintiff controls her case a "fiction" and insisting that, in an MDL, a litigant "does not control her own lawsuit in any meaningful way").

[17] *E.g.,* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 99–100 (2017) (describing the coercive mechanisms in certain MDL settlement agreements).

[18] Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 114 (2015).

as against one-off "traditional" plaintiffs to understand whether, or to what extent, the former outperform or under-perform the latter along relevant metrics.

Yet neither is remotely possible. Though litigant autonomy is an oft-cited ideal, we don't know exactly what it would look like and mean, if fully realized, *to litigants*. Worse, decades into the empirical legal studies revolution, we continue to know shockingly little about litigants' preferences, priorities, or lived experiences, whether in MDLs or otherwise.[19]

These uncertainties prevent most sweeping claims about litigant autonomy. Nevertheless, one can, at least tentatively, identify several ingredients that are necessary, if not sufficient, to safeguard the autonomy interests of litigants. That list, we think, includes: Litigants can access case information and monitor judicial proceedings if they so choose; litigants can communicate with their attorneys and understand the signals of the court; litigants have a sense of where things stand, including with regard to the strength of their claim, their claim's likelihood of success, and where the case is in the litigation lifecycle; and litigants are empowered to accept or reject the defendant's offer of settlement.[20] A system with these ingredients would seem to be fairly protective of individual autonomy. A system without seems the opposite.

2. Findings from the Burch-Williams Study

How do MDL litigants fare on the above metrics? A survey, recently conducted by Elizabeth Burch and Margaret Williams, offers a partial answer.[21] The two scholars surveyed participants in

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[19] For the empirical revolution, see Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195, 1196 (2013). As Deborah Hensler has powerfully reflected, we (still) don't know much about what claimants want, and we don't know much—of anything—about litigants' lived experience in, or satisfaction with, the judicial process. Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1626 (1995).

[20] Alexandra Lahav boils it down even further, observing: "Autonomy requires that each individual plaintiff have a right to participate in the proceeding that determines his entitlements." Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 610 (2008). Others see it slightly differently, describing litigant autonomy as including "process rights to supervise or manage one's own litigation; to engage in a meaningful relationship with an attorney of the litigant's choosing; to have an opportunity to develop the litigation and evidence related to the litigation; and to appear and give testimony before a jury." Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601, 613–14 (2015) (compiling perspectives). Similar to our summary of necessary elements, Bradt and Rave have observed that, "for individual consent to work as a governance mechanism, claimants need information—about things like how the settlement will work, the strength of their claims, and their likelihood of success." Bradt & Rave, *supra* note 14, at 1265.

[21] The study's findings should be viewed with caution. One issue is the survey's exceedingly low response rate. The survey ultimately cataloged the views of more than 200 respondents, but those respondents were drawn from claimants in more than 200,000 actions. A low response rate is widely understood to limit a survey's generalizability. *See, e.g.*, Nicholas D. Lawson, *"To Be a Good Lawyer, One Has to Be a Healthy Lawyer": Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J. LEGAL ETHICS 65, 75 (2021). Meanwhile, more than 85% of respondents were pelvic mesh plaintiffs—and it's not clear that issues that plague mesh litigation plague the MDL system more generally. *See* Alison Frankel, *First-Ever Survey of MDL Plaintiffs Suggests Deep Flaws in Mass Tort System*, REUTERS, Aug. 9, 2021 (discussing this issue). Beyond that, as Burch and Williams acknowledge (Burch & Williams, *supra* note 5, at 4-5 n.16), the paper's methodology (an opt-in survey, which was available online but was not actually sent to claimants) leaves it open to significant response bias, as opt-in surveys may draw respondents with extreme views. *See, e.g.*, Nan Hu et al., *Overcoming the J-shaped Distribution of Product Reviews*, 52 COMM. ACM. 144, 145 (2009). It is possible, then, that respondents were substantially more dissatisfied than the average MDL litigant, or that sample bias otherwise skews the survey's results. *Cf.* Lindsay M. Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST

recent MDLs, gathering confidential responses over multiple years.[22] In the end, 217 litigants (mostly women who had participated in the pelvic mesh litigation) weighed in, represented by 295 separate lawyers from 145 law firms.[23]

The survey captures claimants' perspectives on a wide range of subjects, including their reasons for initiating suit and their ultimate satisfaction with case outcomes. As relevant to litigant autonomy, information, and participation, the scholars found the following:

- When asked if their lawyer "kept [them] informed about the status of [their] case," 59% of respondents strongly or somewhat disagreed.[24]

- When offered the prompt: "While my case was pending, I felt like I understood what was happening," 67.9% of respondents strongly or somewhat disagreed. Only 13.7% somewhat or strongly agreed.

- When asked how their lawyers kept them informed and invited to list multiple options, more than a quarter of respondents—26%—reported that their attorney did not update them at all.

- Of the 111 respondents who reported on their attorneys' methods of communication, only two indicated that their lawyer(s) utilized a website to communicate with them; only one indicated that his or her lawyer utilized social media for that purpose.

- 34% of respondents were unable or unwilling to identify their lawyer's name.

Caveats apply: Respondents to the opt-in survey might not be representative, which stunts both reliability and generalizability.[25] The numbers, even if reliable, supply just one snapshot. And, with one data set, we can't say whether litigant understanding is higher or lower than it would be if the litigants had never been swept into the MDL system and instead had their case litigated via traditional means. (Nor can we, alternatively, say whether, but-for the MDL's efficiencies, these litigants might have been shut out of the civil justice system entirely.[26]) Nor can we even say whether MDL clients are communicated with more, or less, than those whose claims are "conventionally" litigated.[27]

L. REV. 733, 821 n.173 (2021) (discussing sampling biases). Just as importantly, as the text points out, most surveyed MDL litigants expressed confusion—but *compared to what baseline*? *See infra* note 26 and accompanying text.

[22] Burch & Williams, *supra* note 5, at 14.

[23] *Id.* at 15.

[24] *Id.* at 26.

[25] For discussion of this and other methodological concerns, see *supra* note 21.

[26] *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1184 (2009) (observing that if it weren't for "aggregation many cases could not credibly be pursued"). Currently, many who want a personal injury lawyer are unable to get one, and those who cannot find qualified counsel hardly ever prevail. *See generally* STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE esp. 231 (2015).

[27] Even in the absence of aggregation, the attorney-client relationship sometimes bears little resemblance to a "traditional" model. *See* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1500 (2009) (documenting how settlement mill lawyers who represent individuals pursuing one-off claims very rarely meet, or communicate with, clients); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92 (1989) (reporting

Even recognizing the study's major caveats, however, five larger points seem clear. First, when surveyed, MDL litigants, represented by a broad range of lawyers (not just a few "bad apples"), reported infrequent attorney communication and persistent confusion.[28] Second, knowledgeable and independent experts echo litigants' concerns, suggesting, for example, that "[p]laintiffs [within MDLs] have insufficient information and understanding to monitor effectively the course of the litigation and insufficient knowledge to assess independently the outcomes that are proposed for their approval if and when a time for settlement arrives."[29] Third, plaintiffs' lawyers in MDLs frequently have very large client inventories—of hundreds or thousands of clients.[30] When a lawyer has so many clients, real attorney-client communication and meaningful litigant participation is bound to suffer.[31] Fourth, when it comes to the promotion and protection of litigant autonomy, effective communication—and the provision of vital information—is not sufficient, but it is certainly necessary. Even well-informed litigants can be excluded from vital decision-making processes, but litigants, logically, cannot call the shots while operating in the dark.[32] And fifth, per Part I above, to the extent individuals swept into MDLs unnecessarily forfeit their autonomy, that's a real problem when it comes to MDL legitimacy and legality.[33]

These five points paint a worrying portrait. Fortunately, however, alongside those five points, there is one further reality: Straightforward measures are available to promote litigants' access to case information, their ability to monitor judicial proceedings, and their understanding of the litigation's

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that, even in non-aggregate tort litigation, the lawyer-client relationship is frequently attenuated, "perfunctory," and "superficial").

[28] Notably, per Model Rule of Professional Conduct 1.4, lawyers—and even lawyers who practice law at scale—are duty-bound to communicate with clients. MODEL RULES OF PROF'L CONDUCT R. 1.4 (Am. Bar Ass'n 2020). *Id.* R. 1.3 cmt. 2 ("A lawyer's work load must be controlled so that each matter can be handled competently."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (AM. L. INST. 2000) (compelling lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," with no exception for lawyers with large client inventories).

[29] Deborah R. Hensler, *No Need to Panic: The Multi-District Litigation Process Needs Improvement Not Demolition* (Working Paper, 2017), at 4.

[30] *See* Alison Frankel, *Medical Device Defendant Probes Origin of Mesh Claims*, REUTERS, Mar. 10, 2016 (noting that, in the vaginal mesh litigation, one firm—AlphaLaw—had more than 10,000 claims); Shanin Specter, Letter to Rules Committee, Dec. 18, 2020, at 3, *available at* https://www.uscourts.gov/sites/default/files/20-cv-hh_suggestion_from_shanin_specter_-_mdls_0.pdf (reporting that, in the transvaginal mesh litigation, "several attorneys represented in excess of 5,000 clients"); Nathan Koppel, *Vioxx Plaintiffs' Choice: Settle or Lose Their Lawyer*, WALL ST. J., Nov. 16, 2007 (reporting that, in the Vioxx litigation, one lawyer had "more than 1,000 Vioxx cases," while another firm had "about 4,000" such cases); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 494 (1994) ("In asbestos litigation, for example, some lawyers represent more than ten thousand plaintiffs. In other mass torts, such as DES, Dalkon Shield, or toxic dump pollution, lawyers routinely have carried many hundreds of clients at a time. . . .").

[31] Weinstein, *supra* note 30, at 497 (explaining that, when lawyers simultaneously represent hundreds or thousands of clients, lawyers frequently "do not maintain meaningful one-to-one contact with their clients" and instead, too often, "[t]he client becomes no more than an unembodied cause of action").

[32] Recognizing this, Rule 1.4(b) demands that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROF'L CONDUCT R. 1.4 (Am. Bar Ass'n 2020). For the decisions reserved exclusively for the clients, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 (AM. L. INST. 2000)

[33] Public confidence in our courts may also suffer. *See* Weinstein, *supra* note 30, at 497 (drawing a connection between adequate communication, litigant satisfaction, and public confidence).

current path and likely trajectory. And, as we will argue below in Part III, these measures can be implemented by courts now, with little difficulty, and at reasonable cost.

II. CURRENT COURT COMMUNICATION: MDL WEBSITES AND THEIR DEFICIENCIES

Part I reviewed survey findings that indicate litigants within MDLs report substantial confusion and limited understanding. As noted, when given the prompt: "While my case was pending, I felt like I understood what was happening," only 13.7% somewhat or strongly agreed.[34] These perceived communication failures are surprising. It's 2023. MDL websites are common, and emails are easy; "the marginal cost of additional communication [is] approaching zero."[35] What explains these reported gaps?

To gain analytic leverage on that question, we rolled up our sleeves and looked at where some MDL-relevant communication takes place.[36] In particular, we trained our gaze on MDL websites—resources that, per the JPML and Federal Judicial Center, "can be . . . invaluable tool[s] to keep parties . . . informed of the progress of the litigation."[37] These sites are often described as key components of case management.[38] Scholars suggest that they facilitate litigants' "due process rights to participate meaningfully in the proceedings."[39] And, perhaps most notably, judges themselves have described these websites as key conduits of court-client communication.[40]

Do MDL websites fulfill their promise of keeping "parties . . . informed of the progress of the litigation" by furnishing well-curated, up-to-date, user-friendly information? To answer that question, we reviewed each page of available websites for the twenty-five largest currently pending MDLs. Each of these MDLs contained at least 500 pending actions; together, they accounted for nearly 415,000 pending actions, encompassing the claims of hundreds of thousands of individual litigants, and

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[34] Burch & Williams, *supra* note 5, at 25.

[35] Cabraser & Issacharoff, *supra* note 2, at 854.

[36] Of course, MDL websites are not—and should not be—the only site of communication. Lawyers, as noted above, are duty-bound to communicate with clients, *see supra* note 32, and many lawyers take this responsibility seriously, *cf. In re* Shell Oil Refinery, 155 F.R.D. 552, 573 (E.D. La. 1993) (commending class counsel for excellent and patient communication with class members).

[37] JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES A POCKET GUIDE FOR TRANSFEREE JUDGES 8 (2011).

[38] *E.g.,* BOLCH JUDICIAL INST., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 88 (2d ed. 2018) (offering "Best Practice 13 F").

[39] Bradt, *supra* note 7, at 1235.

[40] Abbe Gluck reports that, in her interviews with transferee judges, judges viewed MDL websites as an indispensable tool to help litigants "follow" the litigation. Gluck, *supra* note 7, at 1689–90. Likewise, Judge Eduardo C. Robreno, the transferee judge in MDL-875, has explained that that MDL's dedicated website facilitated the court's "communication with thousands of litigants." Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 131 (2013); *accord In re* Asbestos Prod. Liab. Litig. (No. VI), 614 F. Supp. 2d 550, 551 (E.D. Pa. 2009) ("The Court has established an MDL 875 website . . . . The website . . . is a helpful tool for the Court and the litigants.").

constituted 98% of actions in *all* MDLs nationwide.[41] Thus, if judges are using court websites to engage in clear and frequent communication with individual litigants, we would have seen it.

We didn't. Websites did exist. Of the twenty-five largest MDLs, all except one had a website that we could locate.[42] But, many of these sites were surprisingly limited and difficult to navigate. Indeed, the sites provided scant information, were not consistently updated, and often lacked straightforward content (like Zoom information or "plain English" summaries).

A. An Initial Example: The *Zantac* MDL

Take, as an initial example, the website that accompanies the *Zantac* MDL, pending in the Southern District of Florida.[43] We zero in on this website because it was one of the best, most user-friendly sites we analyzed. But even it contained serious deficiencies.

For starters, finding the website was challenging. A preliminary search—"Zantac lawsuit"—yielded over 1 million hits, and the official court website did not appear on the first several pages of Google results; rather, the first handful of results were attorney advertisements (mostly paid) or attorney and law firm websites.[44] A more targeted effort—"Zantac court website"—bumped the desired result to the first page, albeit below four paid advertisements.

Once we located the site, we were greeted with a description of the suit: "This matter concerns the heartburn medication Zantac. More specifically, this matter concerns the ranitidine molecule—the active ingredient of Zantac. The Judicial Panel for Multidistrict Litigation formed this MDL (number 2924) on February 6, 2020."[45] We also were shown six links (Media Information, MDL Transfer Order, Docket Report, Operative Pleadings, Transcripts, and Calendar) and a curated list of PDF files (as displayed below).

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[41] We arrived at this figure by calculating the number of actions pending in the twenty-five largest MDLs and then comparing that figure to the total number of pending actions. *See* JPML, MDL STATISTICS REPORT: DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (Jan. 19, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-January-19-2022.pdf.

[42] To confirm the existence of official websites, we searched on Google for combinations of the MDL number, names of judges affiliated with the MDL, and topical search terms (e.g., "3M hearing loss MDL"). As the text explains, of the twenty-five largest MDLs, as measured by number of actions currently pending, only one (MDL-2848) lacked a website. Interestingly, the twenty-four sites we reviewed were court-run, though some sites in MDLs are attorney-run. These twenty-four websites represented websites from seventeen different judicial districts. We trained our gaze on the twenty-five largest MDLs in part because research indicates that "large MDLs are significantly more likely to have public websites than small ones." Gluck, *supra* note 7, at 1690.

[43] MDL STATISTICS REPORT, *supra* note 41.

[44] In an effort to minimize "personalized search effects," we performed searches in "incognito mode." *See* Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CAL. L. REV. 351, 374, 401 & n.270 (2014) (noting that incognito mode "reduces personalization concerns").

[45] *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-2924, https://www.flsd.uscourts.gov/zantac [https://perma.cc/A9AB-ECM7].

20-MD-2924-Rosenberg - In Re: Zantac (Ranitidine) Products Liability Litigation

This matter concerns the heartburn medication Zantac. More specifically, this matter concerns the ranitidine molecule—the active ingredient of Zantac. The Judicial Panel for Multidistrict Litigation formed this MDL (number 2924) on February 6, 2020.

Media Information »

MDL Transfer Order

Docket Report (PACER)

Operative Pleadings »

Transcripts »

The following calendar lists all scheduled hearings in this MDL. Calendar activity pertaining to other cases before Judge Rosenberg is omitted from display, but all web-based calendar information is subject to change. The most accurate source for scheduled hearings is PACER.

Calendar

Selected case documents of special interest

Search

Title	Docket No.	Filing Date
MDL Pretrial Order # 71 - Deposition Protocol for Depositions in Class Action Cases	5093	01/19/2022
MDL Pretrial Order # 70 - Order Relating to Deceased Claimants in the Initial Discovery Pool	4922	12/23/2021
MDL Pretrial Order # 69 - Bellwether Selection	4683	11/19/2021
MDL Pretrial Order # 68 - HIPAA Qualified Protective Order	4189	09/01/2021

The "Calendar" led to a plain site listing basic information about an upcoming hearing, but with few details. The hearing in question was described only as "Status Conference—Case Mgt," and it did not specify whether litigants could attend, either in person or remotely.[46]

THIS PAGE WAS LAST UPDATED 03/13/2022 at 22:00.

UNITED STATES DISTRICT COURT
Southern District of Florida
The Honorable Robin L. Rosenberg

Case 9:20-md-02924 - Hearings Calendar

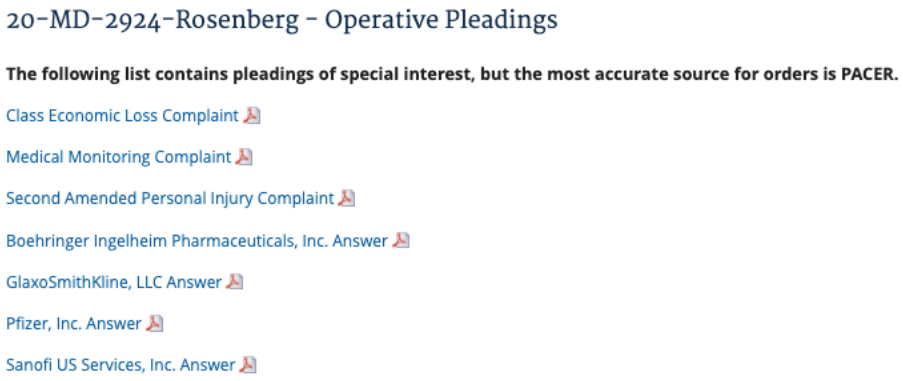
March 14, 2022 - May 6, 2022

Date	Time	DE #	Hearing Type	Interpreter/Court Reporter	Duration	Court Room
04/01/2022	02:30		Status Conference - Case Mgt			West Palm Beach Division

A litigant who clicked on the "Operative Pleadings" tab was taken to seven PDF documents (Pfizer, Inc. Answer; Class Economic Loss Complaint; etc.) described as those "of special interest,"

[46] *Id.*, *Hearings Calendar*, http://web.flsd.uscourts.gov/uploads/ceoWeb/20MD2924_8weeks_ceo.htm [https://perma.cc/QK3N-C3JF]. Virtual hearing information could plausibly have been added after our March 2022 review, though the calendar lacked a heading for Zoom credentials or teleconference information.

plus a note that "the most accurate source for orders is PACER."[47] (The site did not include information regarding what PACER is, though it did include a link.)


20-MD-2924-Rosenberg - Operative Pleadings

The following list contains pleadings of special interest, but the most accurate source for orders is PACER.

Class Economic Loss Complaint

Medical Monitoring Complaint

Second Amended Personal Injury Complaint

Boehringer Ingelheim Pharmaceuticals, Inc. Answer

GlaxoSmithKline, LLC Answer

Pfizer, Inc. Answer

Sanofi US Services, Inc. Answer

Finally, a search box allowed for a search of the case's orders, again available as PDFs.

B. The Rest: Deficits Along Five Key Dimensions

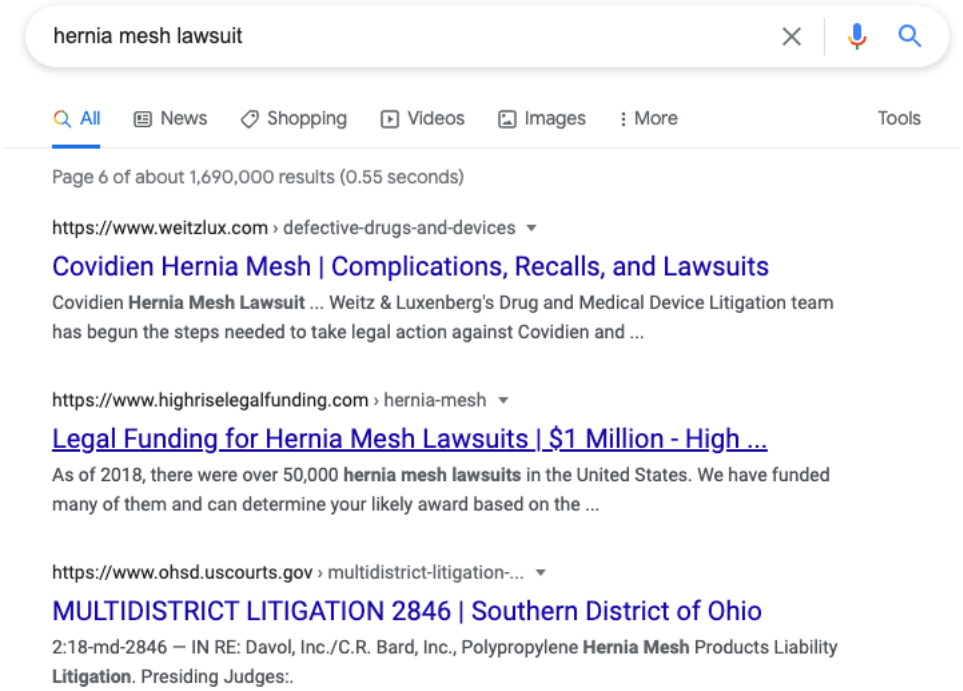
Within our broader sample, usability deficits were pervasive and very often worse than the *Zantac* MDL site. In the course of our inquiry, we reviewed websites along the following five dimensions: (1) searchability and identifiability; (2) plaintiff-focused content; (3) use of plain language; (4) whether the site supplied information to facilitate remote participation in, or attendance at, proceedings; and (5) timeliness. We found deficits along each.

1. Searchability and Identifiability. A website is only useful if it can be located. As such, our first inquiry was whether MDL websites were easy, or alternatively difficult, to find. Here, we found that, as in *Zantac*, court sites were often buried under a thicket of advertisements for lawyers or lead generators.[48] Common-sense search terms for the three largest MDLs yielded results on page thirteen, four, and six, respectively.[49]

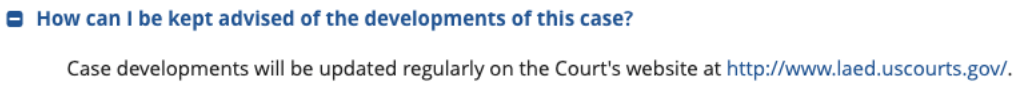
[47] *Id.*, *Operative Pleadings*, https://www.flsd.uscourts.gov/20-md-2924-rosenberg-operative-pleadings [https://perma.cc/EM7U-YA69].

[48] Burch and Williams found much the same, reporting that, in one major case, an MDL page did not appear in the first twelve pages of Google results. Burch & Williams, *supra* note 5, at 57.

[49] More specifically, we searched (on incognito mode in the Google Chrome browser): "3M earplug lawsuit"; "j&j talcum powder lawsuit"; and "hernia mesh lawsuit." Given Google's targeted results, the precise page results will likely vary by user. For more on incognito mode, see *supra* note 44.



2. Litigant-Focused Content. Next, we evaluated whether websites featured custom content seemingly geared to orient individual litigants. Most didn't. In particular, of the twenty-four sites we reviewed, only eleven contained any meaningful introductory content at all. Even then, those introductions focused primarily on the transfer process (including the relevant JPML proceeding) and a statement of the case's overall topic—not its current status or its anticipated timeline. Meanwhile, only six of the twenty-four offered MDL-focused Frequently Asked Questions. And of those, most offered (and answered) questions at a general level ("What is multidistrict litigation?") or that were clearly attorney-focused (regarding, for instance, motions to appear *pro hac vice*). Some others, while well intentioned, supplied limited help:[50]



Similarly, more than half of sites identified members of the cases' leadership structure (e.g., by listing leadership or liaison counsel) and provided contact information for outreach. But none directed plaintiffs with questions to a *specific* point of contact among those attorneys.

Finally, materials that were presented—typically, a partial set of key documents, such as court orders or hearing transcripts—were often unadorned. For instance, seven of the twenty-four reviewed sites linked to orders, as PDFs, with essentially no description of what those documents contain:[51]

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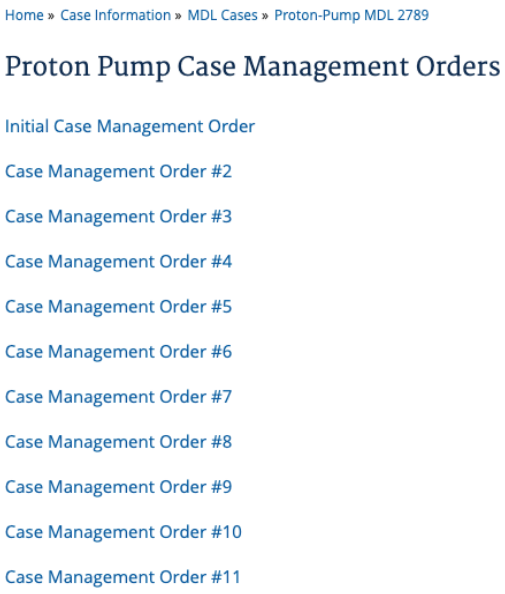
[50] *MDL Frequently Asked Questions*, *In re* Xarelto Prods. Liab. Litig., No. 14-MD-2592, https://www.laed.uscourts.gov/case-information/mdl-mass-class-action/mdl-faq [https://perma.cc/35FA-T3R5].

[51] *See, e.g.*, *Proton Pump Case Management Orders*, *In re* Proton-Pump Inhibitor Prods. Liab. Litig. (No. II), No. 17-MD-2789, https://www.njd.uscourts.gov/proton-pump-case-management-orders [https://perma.cc/HL2C-CPKP].



Home » Case Information » MDL Cases » Proton-Pump MDL 2789

Proton Pump Case Management Orders

Initial Case Management Order

Case Management Order #2

Case Management Order #3

Case Management Order #4

Case Management Order #5

Case Management Order #6

Case Management Order #7

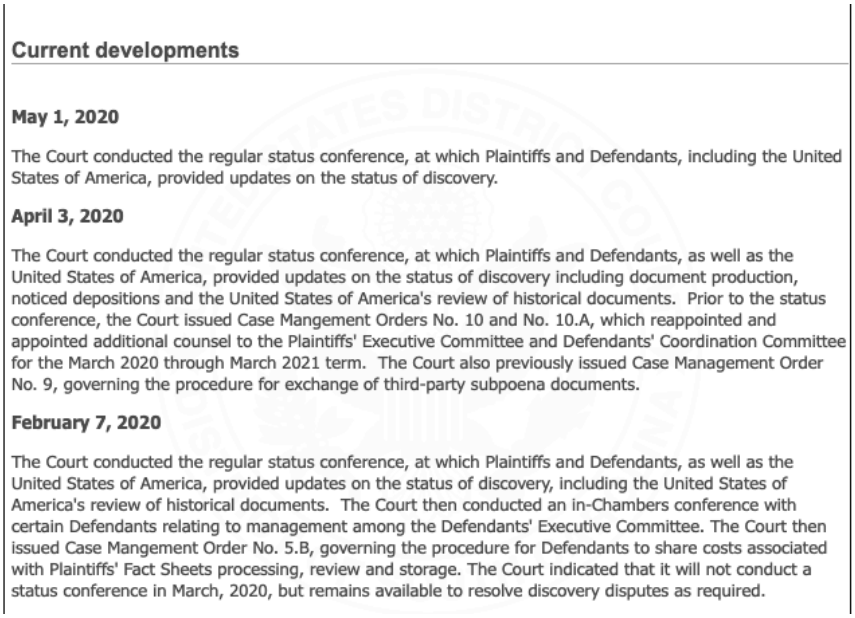
Case Management Order #8

Case Management Order #9

Case Management Order #10

Case Management Order #11

Better: Sixteen of the sites offered some descriptions of posted PDFs. But only *two* included status updates that went much beyond one-line order summaries.[52]



Current developments

May 1, 2020

The Court conducted the regular status conference, at which Plaintiffs and Defendants, including the United States of America, provided updates on the status of discovery.

April 3, 2020

The Court conducted the regular status conference, at which Plaintiffs and Defendants, as well as the United States of America, provided updates on the status of discovery including document production, noticed depositions and the United States of America's review of historical documents. Prior to the status conference, the Court issued Case Mangement Orders No. 10 and No. 10.A, which reappointed and appointed additional counsel to the Plaintiffs' Executive Committee and Defendants' Coordination Committee for the March 2020 through March 2021 term. The Court also previously issued Case Management Order No. 9, governing the procedure for exchange of third-party subpoena documents.

February 7, 2020

The Court conducted the regular status conference, at which Plaintiffs and Defendants, as well as the United States of America, provided updates on the status of discovery, including the United States of America's review of historical documents. The Court then conducted an in-Chambers conference with certain Defendants relating to management among the Defendants' Executive Committee. The Court then issued Case Mangement Order No. 5.B, governing the procedure for Defendants to share costs associated with Plaintiffs' Fact Sheets processing, review and storage. The Court indicated that it will not conduct a status conference in March, 2020, but remains available to resolve discovery disputes as required.

To a litigant, therefore, the average MDL site is best understood as a free, and often partial, PACER stand-in—not a source of curated, distilled, or intelligible information.

3. Jargon and Legalese. We next assessed whether the websites were written in plain language—or at least translated legalese. Here, we found that the majority of sites relied on legal

[52] *See, e.g.*, *Current Developments*, *In re* Aqueous Film-Forming Foams Prods. Liab. Litig., 18-MN-2873, https://www.scd.uscourts.gov/mdl-2873/current.asp [https://perma.cc/62RU-FNH3].

jargon when they described key developments.[53] For example, our review found websites touting privilege log protocols, an ESI order, and census implementation orders. Even case-specific Frequently Asked Questions—where one might most reasonably expect clear, litigant-friendly language—stopped short of "translating" key legal terms.[54] Put simply, site content was predominantly written in the language of lawyers, not litigants.

4. Information to Facilitate Remote Attendance. We also gauged whether the websites offered teleconference or Zoom hearing information. This information is important because consolidated cases—and the geographic distance they entail—leave many litigants unable to attend judicial proceedings in person, which puts a premium on litigants' ability to attend key proceedings remotely, via video or telephone.

Did the websites supply the logistical information a litigant needs in order to "attend" remotely? Not particularly. Of the twenty-four sites we reviewed, thirteen did not offer any case calendar that alerted litigants of upcoming hearings or conferences. Of the eleven that did:

- Five listed events on their calendar (though some of the listed events had already occurred) without any Zoom or telephone information;
- Two included Zoom or telephone information for some, but not all, past events;
- Two included Zoom or telephone information for *all* events listed on the case calendar; and
- Two included dedicated calendar pages but had no scheduled events.

Put another way, most sites did not include case calendars; of those that did, more than half lacked Zoom or other remote dial-in information for some or all listed hearings. That absence was particularly striking given that, in the wake of the covid-19 pandemic, nearly all courts embraced remote proceedings.[55]

Unsurprisingly, the sites' presentation of upcoming hearings also varied widely. In some instances (as on the MDL-2775, MDL-3004, and MDL-2846 sites shown below), virtual hearings were listed, but no dial-in information was provided.[56]

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[53] This problem has been discussed extensively in the context of class action notice. *See, e.g.,* Deborah L. Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183, 1235 (1982).

[54] *See, e.g.*, *MDL Frequently Asked Questions*, *supra* note 50 (noting that cases in MDL "may be transferred by the Judicial Panel on Multidistrict Litigation (The Panel) to any federal court for coordinated and consolidated pretrial proceedings," but offering no discussion of remand or definition of "pretrial proceedings"); *Frequently Asked Questions*, *In re* Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig., 18-MD-2846, https://www.ohsd.uscourts.gov/frequently-asked-questions [https://perma.cc/RP8H-JVCB] (using the same language).

[55] *See, e.g.*, David Freeman Engstrom, *Post-Covid Courts*, 68 UCLA L. REV. DISCOURSE 246, 250 (2020) (noting that, during the pandemic, courts "embraced remote proceedings and trials, whether by telephone or video connection").

[56] *Upcoming MDL Events*, *In re* Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prods. Liab. Litig., 17-MD-2775, https://www.mdd.uscourts.gov/upcoming-mdl-events [https://perma.cc/GX6W-8ZMC] (last accessed Mar. 15, 2022); *Multidistrict Litigation*, *In re* Paraquat Prods. Liab. Litig., 21-MD-3004, https://www.ilsd.uscourts.gov/mdl/mdl3004.aspx [https://perma.cc/7XLQ-H6KX] (last accessed Mar. 15, 2022); *Upcoming Court Proceedings*, *In re* Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig., 18-MD-2846, https://www.ohsd.uscourts.gov/upcoming-court-proceedings [https://perma.cc/65QA-SDFZ] (last accessed Mar. 15, 2022).

Home » Case Information » Multidistrict Litigation Cases »
In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation (MDL No.2775) » Documents

Upcoming MDL Events

Date	Event
June 23, 2021	A virtual status conference will take place at 9:00 a.m.
June 30, 2021	A pretrial conference and motions hearing in Redick v. Smith & Nephew, Inc., 1:17-cv-00944 will take place in Courtroom 7D at 9:30 a.m.
July 26, 2021	Trial begins in Paula and Jace Redick v. Smith & Nephew, No. 1:17-cv-00944
July 28, 2021	A virtual status conference will take place at 9:45 a.m.
August 25, 2021	A virtual status conference will take place at 9:45 a.m.
September 22, 2021	A virtual status conference will take place at 9:45 a.m.
October 27, 2021	A virtual status conference will take place at 9:45 a.m.
November 24, 2021	A virtual status conference will take place at 9:45 a.m.
December 22, 2021	A virtual status conference will take place at 9:45 a.m.

Upcoming Court Proceedings

Date & Time	Description	Location
4/01/2022 10:00 AM	Status Conference	Video Conference
5/13/2022 10:00 AM	Status Conference	Video Conference
6/10/2022 10:00 AM	Status Conference	Video Conference
11/15/2022 09:00 AM	Jury Trial	TBD

Home

Upcoming Court Proceedings

July 20, 2020 Status Conference will be held by telephone at 10:00am EST before Judge Edmund A. Sargus, Jr. and Magistrate Judge Kimberly A. Jolson.

In contrast, some MDL sites (like MDL-2741[57]) linked to Zoom information:

Upcoming Proceedings & Deadlines:

Date	Proceeding or Deadline	Courtroom (If Applicable)
4/14/2022	Motion for Preliminary Approval of Class Action Settlement	via Zoom

[57] *In re* Roundup Prods. Liab. Litig., 16-MD-2741, https://cand.uscourts.gov/judges/chhabria-vince-vc/in-re-roundup-products-liability-litigation-mdl-no-2741/ [https://perma.cc/4HL4-5AUF].

5. Timeliness. Lastly, recognizing that cases can move fast—and stale information is of limited utility—we evaluated the websites to see whether information was timely. Again, results were dispiriting. Of the sites that offered time-sensitive updates (e.g., calendars of upcoming events), several were not updated, meaning that a litigant or even an individually-retained plaintiffs' attorney who relied on the website for information was apt to be misinformed.[58] For instance, MDL-2913, involving Juul, was transferred to the Northern District of California on October 2, 2019. Its website included a calendar section and several "documents of special interest."[59] The latest document upload involved a conditional transfer order from January 2020[60]—even though several major rulings have been issued more recently.[61] (The website's source code indicates that it was last modified in May 2020.) Whether by conscious choice or oversight, the case's online presence did not reflect its current status. Other sites, meanwhile, listed "upcoming" proceedings that had, in fact, occurred long before.[62] And, when we accessed archived, timestamped versions of sites, we found several orders that were *eventually* posted—but not until months after they were handed down.[63]

Nor were the sites set up to keep interested visitors *repeatedly* informed, as most of the sites did not themselves offer a direct "push" or sign-up feature, so that visitors could be notified via text or email when new material became available.[64]

C. Explanations for the Above Deficits: Unspecified Audience and Insufficient Existing Guidance

What explains the above deficits? One possibility is that these websites were never *intended* to speak to, or otherwise benefit, actual litigants—and our analysis, then, is basically underscoring that websites, never meant to edify litigants, in fact, fail to edify.[65] To some judges and attorney leaders, in

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[58] *Cf. In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 605 (1st Cir. 1992) ("The IRPAs [individually-retained plaintiffs' attorneys] handled individual client communication . . . .").

[59] *In re* Juul Labs, Inc. Mktg., Sales Pracs. & Prods. Liab. Litig., 19-MD-2913, https://www.cand.uscourts.gov/judges/orrick-william-h-who/in-re-juul-labs-inc-marketing-sales-practices-products-liability-litigation/ [https://perma.cc/2VGD-SKBU] (last accessed Mar. 15, 2022).

[60] As of March 15, 2022, the latest document posted was filed on January 21, 2020. *See id.*

[61] *See, e.g.*, *In re* Juul Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020) (ruling on substantive motions to dismiss in October 2020).

[62] For instance, March 2022 searches revealed the following: MDL-2846 (providing, on the site's "Upcoming Proceedings" page, a status conference scheduled for July 20, 2020), *see Upcoming Court Proceedings*, *supra* note 56; MDL-2775 (listing, on the site's "Upcoming MDL Events" page, events up to June 2021), *see Upcoming MDL Events*, *supra* note 56.

[63] *See, e.g.*, MDL-2775 (per our search on the Internet Archive, not publicly posting orders for more than two months after the orders were issued). For discussion of the Internet Archive, which allows users to view older versions of websites, see Deborah R. Eltgroth, *Best Evidence and the Wayback Machine: Toward A Workable Authentication Standard for Archived Internet Evidence*, 78 FORDHAM L. REV. 181, 185 (2009).

[64] The majority of sites did link to electronic filing systems (i.e., ECF and/or PACER), which offer a "push" feature that alerts the user when a new document is filed. But ECF and PACER require the creation of separate accounts, and PACER is not free. *See, e.g.*, *In re* Roundup, *supra* note 57 ("To sign up for email alerts when a new document is filed, you may open an account with this Court's ECF system, then sign up for notices of electronic filing.").

[65] There is some variability, and perhaps confusion, on this point. *Compare supra* note 40 (compiling judges' views that the sites exist, at least in part, to facilitate communication with litigants), *with* 1 CHARLES S. ZIMMERMAN, PHARMACEUTICAL AND MEDICAL DEVICE LITIGATION § 10:3 (2021 update) (explaining that MDL websites are "designed primarily for lawyers, judges, and other professionals who have interests in the litigation"), *and* FED. JUDICIAL CTR. & JPML,

other words, these sites may serve merely as internal or specialized resources, whether for state court judges involved in overlapping litigation, individually-retained plaintiffs' counsel, or even scholars and journalists.[66] Or, it could be that the "audience" question has never been carefully considered or seriously addressed. As a result, the websites may be trying to be all things to all people but actually serve none, as content is too general for members of the plaintiffs' steering committee, too specialized and technical for litigants, and too partial or outdated for individually-retained plaintiffs' counsel or judges handling parallel state litigation.

A second culprit, in contrast, is crystal clear: Higher authorities have furnished transferee judges and court administrators with only limited public guidance.[67] In particular, current guidance tends to suggest categories for site content. But beyond that, it furnishes transferee judges only limited help. Illustrating this deficiency, the JPML and Federal Judicial Center's *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks* includes a discussion of recommended webpage content, but its relevant section provides only that:

> The following information should be included on a multidistrict litigation webpage:
>
> - Case name and master docket sheet case number
> - Brief description of the subject of the case
> - Name of the judge presiding over the case
> - List of court staff, along with their contact information
> - Names of liaison counsel, along with their contact information
>
> In addition, it is useful to include the following types of orders in PDF:
>
> - Case management orders
> - Transfer orders from the Panel
> - Orders applicable to more than one case
> - Individual case orders affecting one case, but potentially pertinent to others
> - Suggestion of remand orders.[68]

Several other pertinent resources are similarly circumscribed.[69] These publications have likely helped to spur websites' creation, but they have stunted their meaningful evolution.

BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 38 (2019) (indicating that transferee courts can use MDL websites to "apprise state courts of MDL developments"), *and* BOLCH JUDICIAL INST., *supra* note 38, at 82, 87–88 (highlighting court websites as an efficient way to "coordinate with state courts handling parallel state actions"), *and In re* McKinsey & Co., Nat'l Prescription Opiate Consultant Litig., 21-MD-2996, https://cand.uscourts.gov/judges/breyer-charles-r-crb/in-re-mckinsey-company-inc-national-prescription-opiate-consultant-litigation-mdl-no-2996/ [https://perma.cc/WH7C-LTUR] (explaining that the site is designed to assist "journalists and interested members of the public").

[66] For the fact that different experts seem to view the "audience" question differently, see *id.* (compiling inconsistent authority).

[67] There may be additional, non-public guidance on these subjects. *See* Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 382 n.9 (2014) (describing FJC materials available only to judges and their staffs).

[68] JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE COURT CLERKS 12, App. D (2d ed. 2014).

[69] For instance, the *Manual for Complex Litigation* also offers a model order for judges to use in creating a case website. It urges that a created site "contain sections through which the parties, counsel, and the public may access court orders, court

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Whatever the reasons for the above deficiencies, the facts are these: Among the websites we reviewed, most suffered from basic deficits that could very well inhibit litigants' access and engagement. And the deficits we identify could easily be addressed.

III. A SIMPLE PATH FORWARD: A "LOW-TECH" MECHANISM TO KEEP LITIGANTS BETTER INFORMED

As noted in Part I, MDLs rely, for legitimacy, on litigant autonomy, and while communication is not sufficient for litigant autonomy, it is necessary. Even well-informed litigants can be deprived of the capacity to make crucial decisions—but litigants, logically, cannot make crucial decisions if they are not reasonably well-informed. Meanwhile, while no one can currently *prove* that MDL litigants are underinformed, Part II compiled some evidence indicating information deficits are deep and pervasive. The Burch-Williams study paints a worrying portrait; knowledgeable scholars have long raised concerns; and our painstaking review of MDL websites reveals that one tool, theoretically poised to promote litigant understanding, is, in fact, poorly positioned to do so.

What can be done? Over the long run, the FJC, or another similar body, should furnish formal guidance to judges, court administrators, and lawyers on how to build effective and legible websites. This guidance would ideally be supplemented by a set of best practices around search engine optimization and language access. There is good reason to believe that such guidance would be effective. Noticeable similarities across existing websites suggest that transferee judge borrow heavily from one another. An implication of that cross-pollination is that better guidance from the FJC (or elsewhere) would (likely) rapidly spread.

In the meantime, we close with four concrete (though modest and partial) suggestions for transferee judges.

First, judges need to decide who these sites are really for—and then need to ensure that the sites well-serve their intended audience. We suggest that MDL websites ought to be embraced as (among other things) a litigant-facing tool, and, as discussed below, they should be improved with that purpose in mind.[70] But, even if courts are not persuaded, they *still* need to do a better job tailoring

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opinions, court minutes, court calendars, frequently asked questions, court transcripts, court docket, current developments, information about plaintiffs' and defendants' lead and liaison counsel, and other information to be identified by the parties or the court and its staff." FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 40.3, 762 (4th ed. 2004). It also recommends that judges order counsel to confer to "identify other information that might be included on the Web site," including case announcements or important documents. *Id.* Another (seemingly defunct) FJC site offers a sample order—covering, again, only the bare minimum. *See* Fed. Judicial Ctr., *Technology—Examples*, https://multijurisdictionlitigation.wordpress.com/technology/technology-examples/ [https://perma.cc/VL7E-XTTM]. We state that the FJC site is "seemingly defunct" because, inter alia, the site lists six "Sample MDL Websites," but, as of March 2022, none of the links were operational. *See id.*, *Sample MDL Websites*, https://multijurisdictionlitigation.wordpress.com/technology/sample-mdl-web-pages/ [https://perma.cc/32YG-TYSM] (last accessed Mar. 15, 2022).

[70] *Accord* 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, 478 (2012) ("It is important to

sites to *some* particular audience. As long as the specific audience remains undetermined, courts are less likely to serve any particular audience adequately.

If courts agree that websites should speak directly to litigants, then a second recommendation follows: At least some clearly delineated website content should be *customized for litigants*. Courts should, as noted, avoid legalese and offer more digested (rather than just raw) material. For instance, judges might ask attorneys to supply monthly or quarterly updates; these updates, which should be approved by both parties and the court, should summarize the progress made in the preceding month and highlight what is on tap in the MDL in the immediate future. Here, the website should capture both in-court activity and noteworthy activity scheduled outside of the court's four walls (e.g., depositions).

Third, irrespective of chosen audience, judges should take steps to ensure that MDL websites are visible and up-to-date. Regardless of who the websites are meant to serve, websites cannot serve that audience if they cannot be quickly located.[71] And, because stale information is of limited utility, judges should ensure that the websites offer an accurate, timely snapshot of the case's progress. The first steps are uncontroversial and straightforward; they include reliably adding hearings to the online calendar, removing them after they occur, and posting key documents within a reasonable time frame. Judges should also consider an opt-in sign-up that automatically emails or texts interested individuals when new content is added.

Fourth and finally, judges should ensure that websites clearly publicize hearings and status conferences, and, recognizing that MDLs necessarily and inescapably create distance between client and court, judges should facilitate remote participation whenever feasible. As noted above, many MDL judges have embraced remote hearings out of covid-generated necessity; judges overseeing large MDLs should consider how the switching costs they have already paid can be invested to promote meaningful litigant access, even from afar.[72] Indeed, judges might cautiously pilot tools for *two-way* client-court communication, or even client-to-client communication—though, in so doing, judges must be attuned to various risks.[73]

CONCLUSION: ZOOMING OUT

provide full and fair information at all stages of a mass tort litigation, in a systematic and regular manner, to the plaintiffs who are the real parties in interest."); Weinstein, *supra* note 30, at 502 (calling for the use of innovative communication mechanisms and noting that, even in aggregate proceedings, judges "must insist on maintaining the essential aspects of our fundamentally individual system of justice, including communication and participation").

[71] "Of course, judges are not search engine optimization experts." Burch and Williams, *supra* note 5, at 57. But others are, and an initial investment in developing and circulating best practices could yield meaningful improvement.

[72] *See* Bradt, *supra* note 7, at 1235 (advising that "all MDL hearings, depositions, and trials should be web-cast, with the recordings made available on the case website"—and, more generally, that "[c]ourts . . . should take advantage of the benefits of modern communications technology" in order to promote litigants' "due process rights to participate meaningfully in the proceedings").

[73] Notably, any plaintiff-to-court or plaintiff-to-plaintiff communication platform would need to protect privileged information. Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 391-92 (1996) (proposing a "clients' committee" to "facilitate client-attorney communication and to ensure client knowledge about the litigation"); Weinstein, *supra* note 30, at 501–02 (calling for judges to explore ways to promote litigant participation and fortify court-client "[c]ommunication").

We harbor no illusions about the role that better MDL websites can play. They're no panacea, and vigorous debates about the merits and demerits of MDL will (and should) continue. But even so: Improved, re-focused websites can keep litigants a bit more engaged; they can help litigants stay a bit better informed; and they can promote litigant participation in even distant MDL processes. More than that, improved websites can, however incrementally, promote litigant autonomy and, by extension, shore up the legitimacy of the MDL system. The day may come when some as-yet-unidentified high-tech innovation revolutionizes the MDL. Until then, low-tech changes can modestly improve the system, and just might serve as platforms for further reform.