Plaintiffs and Attorneys in Multidistrict Litigation:

STRENGTHS, DEFICITS, AND PATHS FORWARD

Convening at Stanford Law School

MAY 20, 2022

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PUBLISHED MAY 15, 2023

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"Public perceptions of the fairness of the judicial process in handling mass torts . . . are a significant aspect of these complex national litigations involving thousands of parties."

–*In re:* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 123 (E.D.N.Y. 2006)

Multidistrict litigation, or MDL, now dominates federal dockets, impacting hundreds of thousands of plaintiffs and routinely grappling with issues of national import. Though its rise is undeniable, its growth has also exposed, and helped to create, a series of deep cleavages regarding how best to adjudicate cases involving mass harms. Proponents tout MDLs' procedural flexibility, efficiency, and access-to-justice benefits, while detractors criticize this procedural tool for restricting litigant autonomy, promoting unbounded judicial improvisation, and favoring wholesale settlements over substantive and procedural justice.

In light of these competing narratives, on May 20, 2022, the Deborah L. Rhode Center on the Legal Profession at Stanford Law School and the Berkeley Law Civil Justice Research Initiative hosted a small group of distinguished scholars, judges, policymakers, and practitioners to discuss the lawyer-client relationship in MDLs. Inspired, in part, by a recent study by Elizabeth Chamblee Burch and Margaret Williams (now published in the Cornell Law Review) that paints a critical portrait of plaintiff satisfaction, litigant engagement, and attorney-client communication, the Convening sought to analyze contemporary MDLs' plaintiff-related strengths and weaknesses and to identify practical steps that judges, lawyers, or policymakers might take to address various deficiencies.

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Many participants agreed that MDLs furnish a valuable vehicle to address widespread harm—but, simultaneously, that there remains room for improvement. Furthermore, participants identified numerous reforms that seem capable of immediately and directly enhancing the plaintiff experience. In particular, improved online access to case information might improve litigant understanding, participation, and satisfaction; more robust case management and attorney oversight efforts might reduce agency costs and promote horizontal equity; and more consistent settlement transparency and review might enable greater confidence in, and critical assessment of, substantive case outcomes.

We didn't seek consensus in May 2022, we didn't obtain consensus in May 2022, and we certainly don't aim to reflect consensus here. But many Convening participants shared a willingness (and excitement) to critically examine MDLs from the plaintiffs' perspective—and to catalog what's working, gauge what isn't, and address those problems that can be easily and practically fixed. Accordingly, this document begins with an overview of MDLs' major strengths and deficits, as identified by various Convening participants, then turns to a set of potential reform proposals. Rather than endorsing any particular proposal, we seek to capture those ideas that generated the most enthusiastic discussion, to preliminarily consider the proposals' possible benefits and drawbacks, and to chart a possible research agenda that might better inform future reform activity.

I. Introduction and Background

On May 20, 2022, the Deborah L. Rhode Center on the Legal Profession and the Berkeley Law Civil Justice Research Initiative hosted a small group of distinguished scholars, judges, policymakers, and practitioners at Stanford Law School to discuss the lawyer-client relationship in multidistrict litigation (MDL).[1]

First, a bit of background. The rise of MDL is deeply familiar to those who assembled on May 20, but it is stunning on its face. In 1991, MDL actions made up about 1% of pending federal civil cases;[2] now, thirty years later, they comprise more than *half* of the federal civil docket.[3] That means that the claims of something like one in two federal civil filers are transferred into "transferee" courts, nominally for pretrial proceedings but usually for pretrial settlement or adjudication.

As MDL has grown, so, too, have competing views of its merits and demerits. For instance, many (including numerous Convening attendees) emphasize that multidistrict litigation helps judges efficiently and flexibly manage high-volume cases, provides a needed counterbalance to defendants' resources and expertise, fills the void left by the declining class action, and allows litigants to bring claims that otherwise might never make it to court.[4] For others, however, MDL is in

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1 Although we focused on the lawyer-client relationship within MDLs, we do not suggest that other issues do not demand similar attention from practitioners, scholars, and judges. Indeed, *many* aspects of MDLs are important—and many have been the subject of sustained scholarly attention and inquiry. *See, e.g.*, Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 Rev. Litig. 129, 134 (2018) (describing the "array of fresh, controversial, and challenging issues" presented by the "proliferation of MDL proceedings"); Zachary D. Clopton, *MDL as Category*, 105 Cornell L. Rev. 1297, 1341 (2020) (discussing, among other things, possible standards and review processes for JPML decisions); David L. Noll, *MDL as Public Administration*, 118 Mich. L. Rev. 403, 456 (2019) (describing several structural reforms to improve MDL "transparency, accessibility, and accountability"); Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 Tex. L. Rev. (forthcoming 2023) (discussing MDLs' apparent tendency to attract nonmeritorious claims). In the interest of preserving a reasonable scope for a one-day session, and in light of the import of the lawyer-client relationship to MDLs' legitimacy, public perception, and impact, we zeroed in on that particular issue and tabled others.

2 Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 Yale L.J. 2, 7 (2019).

3 *See, e.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835, 1838 n.2 (2022). This figure, though oft-cited, requires additional context. A count of newly "filed" cases places MDLs closer to 30%. *See* U.S. Jud. Panel on Multidistrict Litig., Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2021, at 5 (2021), https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021% 20Report.pdf [https://perma.cc/L8NN-YKTW] (noting that 103,065 civil actions were consolidated within MDLs in the twelve months ending September 30, 2021); *U.S. District Courts – Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2020 and 2021*, Admin. Off. U.S. Cts (Sept. 30, 2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_c_0930.2021.pdf [https://perma.cc/DL2V-7BVQ] (listing 344,567 civil filings in the year ending September 30, 2021); Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 Ga. L. Rev. 1245, 1246 (2019) (criticizing the use of "pending" claims as an accurate measure of MDLs' share of the federal docket). More generally, many note that statistics used to measure MDLs' relative prevalence must be viewed cautiously. *Cf.* David Noll & Adam S. Zimmerman, *Diversity and Complexity in MDL Leadership: Evidence from Case Management Orders*, 101 Tex. L. Rev. (forthcoming 2023) ("Class actions and MDLs, while both species of aggregate litigation, are counted very differently on the federal docket. A class action that benefits the same number of people as a 300,000-member MDL is only counted as one case on the federal docket, even though both may involve the same commitment of judicial management and resources.").

4 *See, e.g.*, 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) (describing the benefits of "repeat play" attorneys); Charles Silver & Lynn A. Baker, *Mass Lawsuits*

need of serious repair—or, worse, a teardown. Among other challenges, some say, are that cases in MDLs are slow moving; they are often litigated by a small set of "repeat play" attorneys whose interests may not fully align with those of their clients; some of the cases swept into MDLs are of uncertain or dubious merit; and the MDL mechanism enables (and sometimes rewards) judicial "ad hocery" that leads to procedural uncertainty and horizontal inequity.[5] And, most relevant for us here, critics note that MDLs sweep hundreds or thousands of cases into a far-off courtroom—where they might be litigated by unfamiliar attorneys, using procedures that arguably incentivize lawyers to prioritize claim quantity and to deprioritize individual clients' needs, preferences, and autonomy.[6]

Perhaps unsurprisingly, this structure—at once unusual and, now, typical for so many litigants—also upends expectations of what litigation should look and feel like. That mismatch comes through forcefully in a recent study authored by Elizabeth Chamblee Burch and Margaret Williams. Now published in the Cornell Law Review, that study served as a springboard for our gathering.

At the heart of the Burch/Williams study is a survey of 217 respondents who were represented by 295 attorneys from 145 law firms.[7] Among their findings:

- When asked if their lawyer "kept [them] informed about the status of [their] case," 59% of respondents strongly or somewhat disagreed.[8]

- When offered the prompt: "While my case was pending, I felt like I understood what was happening," 68% of respondents strongly or somewhat disagreed. Only 14% somewhat or strongly agreed.[9]

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and the Aggregate Settlement Rule, 32 Wake Forest L. Rev. 733, 744 (1997) (describing benefits that accrue to plaintiffs in aggregate litigation).

5 *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell L. Rev. 1445, 1453 (2017) (criticizing the repeat play that, they argue, is pervasive in multidistrict litigation); Engstrom, *supra* note 2, at 9 n.21 (compiling critiques of judicial "ad hocery"); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 469, 495 (1994) (describing firms that take on cases of dubious merit in search of larger settlements).

6 On the other hand, some might respond—and did respond—that these concerns about MDLs are overstated. For instance, an individual's case might be primarily litigated by leadership attorneys that the individual did not select—but his or her individually-retained attorneys remain attached, and leadership attorneys also represent claimants directly (sometimes in large numbers). And, some note, many individual claims are in "far-off courtrooms" even prior to transfer. *See infra* note 18 and accompanying text (describing the "compared to what" question).

7 Burch & Williams, *supra* note 3, at 1841. Not all respondents answered all questions, so the denominator for many of the proffered statistics was less than 217 (and, in some instances, considerably less).

8 *Id.* at 1873.

9 *Id.*

- 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.[10]

These specific statistics, troubling on their own, also point to a larger sense of dissatisfaction. As the study notes, when it came to their attorney experience, 65% of participants were somewhat or deeply dissatisfied.[11] Half of respondents (50%) indicated that they did not feel that they could trust their attorney to act in their best interest.[12]

The study is provocative and controversial—and, as Professor Nora Freeman Engstrom stated in remarks that opened the Convening, it comes with important caveats, some of them noted by the authors themselves.[13]

First, as to the study itself: Perhaps the primary issue, especially for drawing generalizable conclusions, is that the survey is based on a small convenience sample. The survey cataloged the views of more than 200 respondents. But those respondents were drawn from plaintiffs who *brought over 200,000 claims*, which are themselves a small fraction of the overall claims in MDLs across the United States.[14]

Second, more than 85% of respondents were pelvic mesh plaintiffs[15]—and it is not clear whether the issues that some respondents reported in regard to the pelvic mesh litigation are general issues endemic to large mass tort MDLs or are specific issues that are particular to that litigation.[16]

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10 *Id.* at 1876.

11 *Id.* at 1872.

12 *Id.* at 1873.

13 Although these caveats were raised at the start of the Convening, the study's methodology was not the subject of the remainder of the day's discussions.

14 *Id.* at 1863 n.137 ("In federal court alone, the 26 proceedings included in this study involved 220,903 actions."). As one of the study's coauthors has subsequently noted, some other influential studies of procedural justice in civil litigation have included a "similar number of participants." Elizabeth Chamblee Burch, *Data Versus More Data in Multidistrict Litigation*, 107 Cornell L. Rev. Online 268, 268–69 (2023) (describing several studies, including a highly influential RAND study).

15 Burch & Williams, *supra* note 3, at 1860 (listing the percentage of survey respondents by MDL).

16 It is clear, for instance, that the pelvic mesh litigation featured some lawyers with very large client inventories. *See, e.g.*, Shanin Specter, Letter from Shanin Specter, Att'y, to Comm. on Rules of Prac. & Proc. 3-4 (Dec. 18, 2020), *available at* https://www.uscourts.gov/sites/default/files/20-cv-hh_suggestion_from_shanin_specter_-_mdls_0.pdf [https://perma.cc/9VBW-8LM8] (reporting that, in the transvaginal mesh litigation, "several attorneys represented in excess of 5,000 clients" and that, given these case volumes, "many thousands of plaintiffs [were represented] by attorneys unable to discover or try all their cases") [hereinafter Specter Letter]. Yet, it is also true that in *other* mass tort MDLs, some other lawyers juggle very large inventories. *E.g.*, Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DePaul L. Rev. 377, 391 (2014) (providing examples). For other issues that affected the pelvic mesh litigation, see Alison Frankel, *First-Ever Survey of MDL Plaintiffs Suggests Deep Flaws in Mass Tort System*, Reuters, Aug. 9, 2021, and 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 [https://perma.cc/F63U-RDS6]

Third, the *type* of survey—opt-in and online—leaves it open to significant response bias, as some research suggests that opt-in surveys draw respondents with extreme, rather than representative, views.[17]

Fourth, and more generally, any serious discussion of the study needs to ask: *Compared to what?* Decades into the empirical legal studies revolution, we continue to know shockingly little about litigants' preferences, expectations, priorities, or lived experiences, whether in MDLs or elsewhere in civil litigation.[18] Are the dissatisfied plaintiffs highlighted here *more dissatisfied* than those in "traditional," one-off litigation? We cannot say. Even without aggregation, the realities of the judicial system often cause one-to-one attorney representation to bear little resemblance to the public's idealized image.[19]

Nor is it clear that, in the absence of the MDL, litigants would be litigants at all. Many MDL judges believe that, "*without the MDL*, the courthouses would be closed to the majority of cases that currently are consolidated,"[20] and academics similarly highlight aggregation's role in enabling litigation to proceed. As Abbe Gluck has written, "academics who complain that MDLs diminish access to court should confront the argument that, without MDLs, there might be substantially less access."[21]

(describing frustrations voiced by pelvic mesh litigants regarding, among other things, settlement amounts).

17 *See, e.g.*, Nan Hu et al., *Overcoming the J-shaped Distribution of Product Reviews*, 52 Commc'ns ACM 144, 145 (2009).

18 As the text indicates, do we know much *at all* about a typical personal injury claimant's baseline expectations or understanding. We don't know, in other words, what claimants think they are signing up for when they come to law. We don't know what they think the role of the plaintiff is, how pleasant they think litigation is "supposed" to be, or how long they think the entire process is "supposed" to take. For more on these deep and pervasive data deficits, see, for example, 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) ("We do not really know what these claimants want from the civil justice system, what they expect, or what they think of what they get. We do not know what trade-offs claimants would make, if they were free to make their own fully informed choices, between process and outcome and among monetary and nonmonetary outcomes. We do not know how claimants would assess the justice of alternative compensation schemes, nor what they might be willing to give up in order to provide more equitable compensation to others who share their injuries and experiences. Nor do we know how any of these preferences might vary across types of injury circumstances and personalities.").

19 As many scholars have noted, even one-to-one attorney-client relationships sometimes deviate sharply from the "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 that, even in non-aggregate tort litigation, the lawyer-client relationship is frequently attenuated, "perfunctory," and "superficial").

20 Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1676 (2017).

21 *Id.*; *see also* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 Sup. Ct. Rev. 183, 220 (2008) (arguing that "even legally valid claims that fail to justify their full cost of prosecution will be stillborn without some procedural device that promotes efficiency"); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 Fordham L. Rev. 1177, 1184 (2009) (noting that, without aggregation, "many cases could not credibly be pursued"). Unsurprisingly, attendees repeatedly discussed this tension at the May Convening. For further discussion of the potential access benefits of aggregation, along with the potential tradeoffs aggregation entails, see Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. Pa. L. Rev. 1765, 1768 (2017) ("Class actions and MDL proceedings aim to *enable access* to

In addition to the considerations above, since the Convening, two participants—Lynn A. Baker and Andrew Bradt—have offered a direct response to Burch and Williams's effort.[22] These scholars describe the paper as containing "serious allegations that do not match [the gathered] data," primarily due to two core issues: sample size and selection bias.[23] They note (as we did above) that only 217 individuals participated in the survey—and they warn against extrapolation from such a small number of claimants.[24] And they argue that the *selection* of those individuals was tainted, as respondents were partly drawn from articles, Facebook groups, and Twitter posts that were likely to attract those with deep frustrations about their MDL experiences.[25]

As discussed, we share some of these concerns. Although, by all accounts, Burch and Williams did not *themselves* offer any inappropriate descriptions of their planned study, one-sided depictions were nonetheless available. These alternative sources of information about the study may have skewed respondent selection and also primed some respondents with critical assessments of the MDL process.[26]

Despite these questions and concerns, prior to Burch and Williams's recent efforts, we remained in a near-total empirical void when it came to understanding the client experience in contemporary mass tort litigation. Now, thanks to their work, we know that at least *some* subset of plaintiffs report that the MDL journey was broadly unsatisfying, frustrating, confusing, and mystifying.[27] And just as importantly, vigorous discussion of what we *don't* know, along with what we do (or might) know, helps all of us to chart a robust research agenda going forward.

Against this backdrop, the Burch/Williams study—and the broader debate about the successes and failures of MDL within which it sits—offered a helpful point of entry for Convening partici-

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remedies through group-based redress in a public forum."), and Jenifer J. Norwalk, Comment, *The Case Against MDL Rulemaking*, 169 U. Pa. L. Rev. 275, 293 (2020) ("Although a lack of MDL rules may result in fewer procedural protections than available in the class action, it can also increase access to the courts."). For additional discussion of MDLs and access to justice, see Lynn A. Baker & Andrew D. Bradt, *MDL Myths*, 101 Tex. L. Rev. (forthcoming 2023).

22 Lynn A. Baker & Andrew D. Bradt, *Anecdotes Versus Data in the Search for Truth About Multidistrict Litigation*, 107 Cornell L. Rev. Online 249 (2023).

23 *Id.* at 251.

24 *See id.* at 252.

25 *See id.* at 254 (describing an article with a headline, albeit one not authored by Burch or Williams, asking if would-be participants were "Fed Up?"); *id.* at 255 (describing online requests for input in a Facebook post—again, not authored by Burch or Williams—urging participants to "share why your experience was so bad").

26 Of course, no research occurs in a vacuum; it is always possible that respondents see this or that source prior to responding to this or that survey. Additionally, in a subsequent explanation of the co-authors' dissemination methods, Burch reports that the authors reached out to other news outlets, like *The New York Times*, and plaintiffs' attorneys to request assistance in disseminating the survey—but received none. *See* Burch, *supra* note 14, at 269.

27 Moreover, some of Burch and Williams's high-level conclusions track, at least in part, the views of other experts. *See, e.g.*, Deborah R. Hensler, *No Need to Panic: The Multi-District Litigation Process Needs Improvement Not Demolition* 4 (2017) (unpublished manuscript) (on file with author).

pants to consider what reforms, if any, can be made to improve the attorney-client relationship in MDLs without sacrificing the benefits of aggregation—and which reforms, if any, are justified in light of their potential costs. Among the questions that we asked:

a. If you were grading the MDL experience from clients' perspective, what letter grade would you give it? Why?

b. Do existing ethical rules and professional norms sufficiently protect clients in aggregate litigation generally and MDLs in particular? If not, how might existing ethical rules and professional norms more effectively ensure adequate protection for parties in MDL? Should the Model Rules of Professional Conduct be amended to address any deficiencies?

c. Should transferee judges take additional steps to promote plaintiffs' interests in dignity and autonomy? If so, how, and from where would they get the authority? If they are able, are judges duty-bound to promote these interests?

d. Can client communication be improved? What are the obligations for those in leadership to ensure adequate attorney-client communication—and what are the best practices to promote a meaningful exchange? What are the obligations and best practices for counsel who are individually retained but are not tapped to perform common benefit work? And how might these best practices be identified and shared among lawyers in MDL proceedings?

e. How can judges, lawyers, and scholars work to improve client experiences in MDLs? Have innovative ideas and approaches been tried? To what effect? What elements of modern multidistrict litigation provide fertile ground for careful experimentation? And what knowledge gaps remain that, if resolved, would shed light on the way forward?

In our consideration of these (and other) questions, we were joined by a remarkable set of judges, practitioners, academics, and policymakers.[28] The Convening's attendees:

Hon. Robert Dow	Judge, U.S. District Court for the Northern District of Illinois and (starting Dec. 2022) Counselor to the Chief Justice of the Supreme Court of the U.S.
Hon. Eldon Fallon	Judge, U.S. District Court for the Eastern District of Louisiana
Hon. Amy St. Eve	Judge, U.S. Court of Appeals for the Seventh Circuit
Elizabeth Cabraser	Partner, Lieff, Cabraser, Heimann & Bernstein, LLP
Jocelyn Larkin	Executive Director, Impact Fund
Paul Rheingold	Of Counsel, Rheingold, Giuffra, Ruffo & Plotkin, LLP
Shanin Specter	Founding Partner, Kline & Specter, PC
Alexandra Walsh	Founder, Walsh Law
Lynn Baker	Frederick M. Baron Chair in Law and Co-Director, Center on Lawyers, Civil Justice and the Media, University of Texas School of Law
Anne Bloom	Executive Director, Civil Justice Research Initiative, Berkeley Law
Andrew Bradt	Professor of Law and Faculty Director, Civil Justice Research Initiative, Berkeley Law
Elizabeth Burch	Fuller E. Callaway Chair of Law, University of Georgia
Sergio Campos	Professor of Law, University of Miami School of Law
Nora Freeman Engstrom	Ernest W. McFarland Professor of Law and Co-Director, Deborah L. Rhode Center on the Legal Profession, Stanford Law School
David Freeman Engstrom	LSVF Professor in Law and Co-Director, Deborah L. Rhode Center on the Legal Profession, Stanford Law School
Deborah Hensler	Judge John W. Ford Professor of Dispute Resolution, Stanford Law School
Alexandra Lahav	Professor of Law, Cornell Law School (starting July 2022) and former Ellen Ash Peters Professor of Law, University of Connecticut School of Law
Ela Leshem	Fellow, Senate Judiciary Committee [*attending in personal capacity*]
Rick Marcus	Distinguished Professor of Law and Horace O. Coil Chair in Litigation, University of California College of the Law
Teddy Rave	Professor of Law, University of Texas School of Law
Todd Venook	Lecturer in Law and Associate Director, Deborah L. Rhode Center on the Legal Profession, Stanford Law School
Margaret Williams	Senior Research Associate, Federal Judicial Center [*attending in personal capacity*]
Adam Zimmerman	Professor of Law, Loyola Law School, Los Angeles

28 The day's participants joined us under a version of the Chatham House Rule. Accordingly, although the list of attendees is publicly available and listed here, we do not attribute any particular point to any particular speaker.

Lastly, a note on our mission. Stanford Law School's Deborah L. Rhode Center on the Legal Profession and Berkeley Law's Civil Justice Research Initiative convened these policymakers, academics, judges, and practitioners in an effort to foster dialogue, identify shared priorities, and discuss possible reforms. This document records some of the discussions that took place, synthesizes key themes, and highlights possible paths forward.[29] But it does not claim to represent any "universal view" among participants. Indeed, we were grateful for the hearty disagreements (on nearly every subject) that we witnessed, and we try to capture some of those tensions in the pages that follow.

The remainder of this Report unfolds in three Parts. Part II details attendees' nuanced consideration of where MDLs are, and are not, serving plaintiffs well, with a focus (as throughout) on the attorney-client relationship. It identifies several cross-cutting themes before exploring the strengths and deficits of MDLs that participants identified, again with respect to plaintiffs and their lawyers, in the formation, management, and resolution of these complex actions. Part III offers an introduction to nine potential reforms—none of which we specifically endorse but that, together, reflect the wide range of potential paths forward. Finally, Part IV offers a brief reflection on the status of MDLs writ large—and where, despite many disagreements, Convening attendees found some common ground.

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29 Because the Convening was governed by a version of the Chatham House Rule, this document describes all discussions without identifying specific participants or speakers.

II. Discussion: Themes, Strengths, and Deficits

A. Cross-Cutting Themes

Much of the day's conversation targeted specific components of MDL management and practice—including the selection and responsibilities of leadership counsel, court-to-plaintiff and lawyer-to-plaintiff communication, and settlement transparency and oversight. Guided largely by the concerns expressed by Convening participants themselves, as well as those raised by the Burch/Williams study, attendees identified strengths and weaknesses of the status quo with respect to these (and other) discrete elements of the modern MDL.

Beyond those specific topics, eight cross-cutting takeaways also emerged. As noted, we do not suggest that participants reached *consensus* on these topics, nor do we fully endorse each of the points below. What we can say, though, is that many participants agreed that these eight points merit further consideration and research.

1. **MDLs can provide a valuable vehicle to address widespread harm.** Despite their imperfections, MDLs promote access to justice, and, compared to some other mechanisms, offer efficiency and flexibility. MDLs, in other words, *enable* access to courts for litigants who might otherwise be excluded—albeit with some of the complex and significant tradeoffs described below. One Convening attendee put it this way: "Attacks on MDL are not attacks on MDL. They are attacks on access to the courts."

2. **Transferee judges overseeing large MDLs are assigned a herculean, amorphous, sometimes contradictory, and constantly evolving task.** Transferee judges' basic job description is challenging and internally inconsistent. Put simply, transferee judges are asked to move cases along *en masse* while respecting each plaintiff's personalized interest in a claim that is, and was, large enough to make it into federal court in the first instance.[30] They perform that task without much statutory or procedural guidance (beyond the Federal Rules of Civil Procedure) and without an authoritative or up-to-date set of best practices to guide them.[31] And they must make consequential decisions on a short timeline, aided by a small (and frequently inexperienced) staff.

3. **"Compared to what?" remains a key and pervasive question.** We simply do not know whether

30 For discussion of these challenges, and judges' understandable responses, see Engstrom, *supra* note 2, at 8.

31 Of course, transferee judges can (and do) attend conferences, including the so-called "Breakers" conference, and they can also draw on a range of manuals and guides. Burch and Williams reference these resources. *See, e.g.*, Burch & Williams, *supra* note 3, at 1922 n.480; *see also id.* at 1924 n.489. However, some of the resources that judges rely upon when managing complex litigation are incomplete and outdated. For instance, the most recent update to the Manual for Complex Litigation occurred in 2004.

MDLs are better or are worse than their non-aggregate counterparts when it comes to attorney-client communication, litigant participation, case outcomes (including settlement amounts), and overall party satisfaction.[32] This stubborn fact can stunt research, possible reform, and even productive dialogue. Many problems discussed at the Convening and recounted below may well be problems that *generally* plague the civil justice system.[33] But foregrounding that challenge, rather than dodging it, helps disentangle MDL-specific issues from those impacting the litigation system writ large. It also helps clarify where potential changes to MDL might yield logical follow-on reform in other areas of litigation (or vice versa).

4. **Despite uncertainty around the extent and nature of existing challenges, there is substantial room for improvement within the MDL.** Two particular areas that seem especially ripe for meaningful, attainable reform include expectation-setting for litigants and promoting transparency, including increased visibility into ongoing hearings, case timelines, and the possibility (and likely precursors) of remand and trial. Of note, several Convening participants suggested that improvement along these dimensions would help policymakers understand where improved *implementation*, rather than wholesale policy change, might yield benefits for both litigants and courts.

5. **Plaintiffs could, and should, be more informed (and, perhaps, better protected) than they often are.** The lack of transparency and information reported by plaintiffs in the Burch/Williams study—even if difficult to quantify—is real, and it is a barrier to litigant satisfaction, meaningful expectation-setting, and informed policy debate. There remains a sense that, as Deborah Hensler wrote in 2017, "[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."[34]

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32 The evidence presented by Burch and Williams suggests that some MDL plaintiffs are dissatisfied with the process relative to their expectations about that process. Even if fully accepted, however, their findings do not speak to the comparative question of whether litigants whose claims are addressed in "conventional" litigation are more or less satisfied than MDL plaintiffs. *See supra* note 19 and accompanying text. Nor does it address whether MDL claimants are more or less satisfied than those who are entirely shut out of the civil justice system. *See supra* notes 20–21 and accompanying text.

33 One participant summarized: "This conversation is about the pathologies of the civil justice system writ large." Fully separating MDL-specific challenges from those that exist more broadly in civil litigation is often impossible—in many cases, illogical—and, even where such distinctions would apply, we typically lack the data to meaningfully disentangle them. This is a longstanding problem in both civil litigation generally and MDL specifically. *See generally* 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 173 (David Freeman Engstrom ed., 2023).

34 Hensler, *supra* note 27, at 4.

6. **MDLs merit attention as their own complex structures—and as parts of a larger system that involves medical liens, claim generators, third-party litigation financiers, other courts (including state courts), and other forms of complex litigation.** Similarly, MDLs raise systemic questions—particularly of deterrence and court capacity—that extend far beyond the mechanism's four corners.

7. **The potential for improved case management processes and tools, some reliant on technology, is high, and judicial innovation on this front is near-constant.** But much of technology's potential is unreached, and successful innovations often spread more slowly than merited. Many participants agreed that courts ought to invest in better ways to harness technology—and in basic technological know-how.[35]

8. **Many research questions remain.** This Report offers a starter list for high-yield targets for further research, judicial iteration, and careful experimentation. Despite (or, indeed, because of) MDLs' immense size, tremendous influence, and clear staying power, there is much still to learn. Much more rigorous research is needed, and researchers would benefit from more and better data about MDLs' operations, outputs, and effects.

Beyond these cross-cutting takeaways, participants spent much of the day discussing what works well in the modern MDL from the perspective of individual litigants; what parts of MDL merit improvement; and, if Convening participants could wave a magic wand and suddenly alter any component of the attorney-client relationship in MDL, what they might change. Our (synthesized and summarized) review of those discussions is below.

From here, this compilation tracks the course of the day. Below, in Part B, we provide a brief overview of the observations that participants shared on what works, and what doesn't work, in the modern MDL. Then, in Part C, we address possible solutions. In this Part, rather than advocating for any proposal, we've opted to capture the diversity of proposed reforms, their possible benefits and drawbacks, and key questions for those considering their implementation or conducting further research.

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35 To be sure, technological change is well-trodden ground in the literature regarding MDL—but much low-hanging fruit remains. *See, e.g.*, Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 856 (2017) (describing the role of "case-specific websites" in "large litigations"); Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 Wm. & Mary L. Rev. 1165, 1235 (2018) ("[A]ll MDL hearings, depositions, and trials should be web-cast, with the recordings made available on the case website. While every plaintiff may not be able to physically attend proceedings, modern technology makes observation a relatively straightforward task . . . ."). For further discussion of straightforward technology that judges might profitably utilize in MDLs, see Venook & Engstrom, *supra* note 33.

B. Strengths and Deficits in MDL Practice

In the far-ranging discussion, Convening participants identified a host of strengths and weaknesses of MDL practice. For ease of reference, we have grouped these observations and hypotheses by the approximate lifecycle of litigation: from the case's identification, filing, and consolidation; to its management by a transferee judge, including through the selection of leadership counsel, discovery, and the resolution of key motions; to its resolution, including settlement.[36]

Below, perceived advantages are denoted by a plus sign (⊕); drawbacks are denoted by a minus sign (⊖). Observations that defy easy categorization (i.e., that were identified, during our May discussion, as having potential advantages *and* drawbacks) are denoted by a (±).

CASE FILING AND MDL ORIGIN

⊕ **In many cases, aggregation enables more litigants to access the judicial system than if each person had to go it alone.**

⊖ **Some law firms represent thousands or even tens of thousands of clients. When client "inventories" get large, trouble often follows. That trouble can manifest in a number of ways, including perfunctory attorney-client relationships, inadequate attorney-client communication, cursory case screening, and low-dollar settlements.**

⊖ **Some attorneys file cases that, upon closer inspection, lack even minimal merit.**

⊖ **Some plaintiffs come in with unrealistic expectations—and certain lawyers do little to furnish adequate information to (re)set expectations at a realistic level.**

± **Some claims are filed in state courts, leading to a bifurcated structure that impedes global resolution—but that, at times, offers certain advantages to certain plaintiffs.**

36 The "lifecycle" of an MDL is often more nuanced than described here. *See generally* Ryan C. Hudson et al., *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. Rev. 801, 805 (2021) (describing five procedural stages of an MDL: formation, transfer, proceedings, disposition, and remand). And, of course, some MDLs do not make it through all phases of this lifecycle—as some, for example, may be resolved much sooner and on a litigation-wide basis. *E.g.*, *In re* Lipitor Mktg., Sales Practices & Prods. Liab. Litig., 892 F.3d 624, 647 (4th Cir. 2018) (affirming the transferee court's grant of summary judgment, thus terminating the *Lipitor* litigation); *In re* Zoloft Prods. Liab. Litig., 858 F.3d 787 (3d Cir. 2017) (affirming the transferee court's grant of summary judgment, thus terminating the *Zoloft* litigation); Meridia Prods. Liab. Litig. v. Abbott Labs., 447 F.3d 861 (6th Cir. 2006) (affirming the transferee court's grant of summary judgment, thus terminating the *Meridia* litigation).

CASE MANAGEMENT AND OVERSIGHT

MDLs avoid duplication of generic discovery—and, often, reduce other litigation costs.

MDLs are a site of ongoing experimentation, innovation, and refinement, including recent efforts to better utilize technology. This "ad hocery" has many benefits but also clear drawbacks.

There is a clear push to increase diversity in plaintiff leadership. But some worry that new voices are sometimes relatively inexperienced.

Many plaintiffs appear to have little information about, or ability to participate in, their case. Courts have taken insufficient steps to facilitate remote attendance at hearings.

Some MDLs last a long time and can become a black hole. Remands are rare and often come late in the litigation's lifecycle.

It is not clear that PSC/Executive Committee members are typically subject to sufficient oversight. Leadership counsel may sometimes prioritize their own client inventories, or their own pocketbooks, at the expense of the whole.

SETTLEMENT, COMPENSATION, AND CLOSURE

MDL plaintiffs have increased leverage, as compared to plaintiffs who file against defendants on an individual basis.

MDLs can (sometimes) set the stage for a global settlement, potentially unlocking a peace premium —though true global resolution is very rare.

Some MDLs appear to feature an over-emphasis on settlement, at the possible expense of other resolution mechanisms (most notably, trials).

Some lawyers and judges appear to stack the deck in favor of settlement—raising the question of whether clients' consent to settlement is fully authentic.

Some settlements are accompanied by a lack of transparency and information that prevents meaningful evaluation, including by plaintiffs themselves.

Some settlements are beset by lengthy delays caused in part by burdensome administrative processes, particularly lien resolution. Plaintiffs' lawyers are often powerless to expedite these processes—but are nevertheless blamed for the delays.

The allocation and structure of common benefit fees have become sites of controversy. It's unclear who should get how much—and whether these fees are even necessary.

During case resolution, the court and counsel may insufficiently emphasize procedural justice. Clients sometimes feel that they are not given an adequate opportunity to tell their story—a belief consistent with the infrequency of trial and relative rarity of individual proceedings.

CASE FILING

STRENGTHS: Where MDLs Appear to Serve Plaintiffs Well

Participants identified several components of the attorney-client relationship that are serving parties well, including in the early stages of each case. Perhaps most importantly, many participants agreed that, as compared to a world without the MDL mechanism, **plaintiffs' claims today are more likely to be taken up and litigated by experienced and well-financed attorneys**.[37] Indeed, one participant noted that MDLs make it more possible for attorneys to bring relatively low-value (but meritorious) claims.[38] These access-to-justice effects, their benefits for plaintiffs (who might otherwise have been unable to vindicate their rights), and their ultimate contribution to the deterrence—and disclosure—of defendants' tortious conduct mark, for many participants, the core success of case origination and MDL formation.

DEFICITS: Where Plaintiffs in MDLs Might Be Better Served

Nonetheless, the early stages of MDL, as practiced today, did raise serious concerns for many participants. Several of these deficits centered on case filing and client acquisition. Perhaps most notably, plaintiffs' **attorneys often strive to represent high numbers of plaintiffs**—sometimes stretching beyond the number that a lawyer or firm can actively represent.[39] Such "lawyering at scale" presents challenges for attorney oversight and, in extreme cases, risks distorting the attorney-client relationship beyond recognition. Moreover, mass advertising has generated client leads that leave potential plaintiffs as mere numbers on a spreadsheet. As some attendees noted, **plaintiffs may therefore be seen as part of an "inventory,"** and plaintiffs' injuries—and their legitimate substantive and procedural interests in a case, including in making their voices heard—risk being diminished at the expense of an attorney or firms' larger operation.[40]

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37 The access benefits are particularly crucial, given that, in the wake of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), few mass tort cases can be certified as class actions pursuant to Federal Rule of Civil Procedure 23. For scholarly discussion of these potential access-to-justice benefits, see, for example, Gluck, *supra* note 20, at 1676 and *supra* notes 20–21 and accompanying text.

38 Of course, "low value" here is relative, as most cases within a federal MDL are required to meet federal courts' amount-in-controversy requirements to invoke diversity jurisdiction (currently, $75,000). *See, e.g.*, *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 646 (S.D. Tex. 2005) (considering MDL cases' amount in controversy).

39 *See, e.g.*, 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/RU6Q-QSZD] (reporting that, in the transvaginal mesh litigation, "several attorneys represented in excess of 5,000 clients"). For further discussion of the potential harms that emerge from "attenuated attorney-client relationships," see Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. Rev. 87, 95 (2011).

40 One recent article describes "a little-known, sophisticated legal ecosystem that includes marketing firms that find potential clients, financiers who bankroll law firms, doctors who review medical records, scientists who analyze medical literature and the lawyers who bring the cases to court." Sarah Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine that Powers Thousands of Roundup Lawsuits*, Wall St. J. (Nov. 25, 2019), https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480. For a more general discussion of firms using advertising to generate high claim volumes, see Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. Rev. 805, 816 (2011).

Another persistent (and related) challenge is that, **in MDLs, for a number of reasons, lawyers may not carefully vet clients or claims prior to case initiation**—meaning that, in MDLs, some proportion of claims lack merit.[41] Indeed, some participants highlighted consolidated cases in which high percentages of plaintiffs *had not used the product at issue*.[42] The prevalence of these truly nonmeritorious claims—and their survival long into the litigation—can cause all kinds of trouble: They can tarnish the system's legitimacy, give judges pause, contribute to massive case inventories, stall case resolution, impair the value of legitimate claims, and leave defendants skeptical of global resolution. Conversely, some participants noted that **MDLs sometimes fail to capture *enough* claims**, in part because would-be litigants might not recognize they have a claim until after the statute of limitations elapses. Ensuring the litigation of the *right* claims thus emerged as a central goal of the potential reforms that participants discussed.

Finally, many participants indicated that some lawyers **fail to set realistic expectations for plaintiffs as cases begin**. As one participant put it, "lawyers promise the moon," but clients are often left wanting with respect to both substantive and procedural outcomes. In response, many MDL clients seek answers on their own, sometimes from information sources that are not appropriate under the circumstances.

MANAGEMENT AND OVERSIGHT

⊕ STRENGTHS: Where MDLs Appear to Serve Plaintiffs Well

"Once the MDL lands in the hands of the MDL judge, the MDL case actually ramps up and begins."[43] As participants observed, this judicial management entails a seemingly infinite number of decisions that ultimately impact case timelines, the flow of litigation, and even substantive outcomes.

Perhaps unsurprisingly, several attendees highlighted transferee judges' **ongoing experimentation and innovation**. The prevalence of this experimentation and innovation is widely understood in MDLs (and has its well-documented and much-discussed downsides, too).[44] Through incremen-

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41 *See generally* Engstrom & Venook, *supra* note 1; D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 Tex. L. Rev. (forthcoming 2023) (suggesting that the nonmeritorious claim problem may be overstated but nevertheless concluding "it is quite plausible that MDLs bring more claims into the litigation systems and that, on average, those claims will tend to have lower expected values than claims that would have been filed in the absence of an MDL").

42 *See* Engstrom & Venook, *supra* note 1.

43 Hudson et al., *supra* note 36, at 809.

44 As one scholar has noted, this *ad hoc* procedure presents serious tradeoffs:

> Such judicial improvisation frustrates the legitimate expectations of parties, as litigants cannot know ex ante whether the formal rule (with protections) or the improvised rule (without the protections) will apply. It raises separation-of-powers concerns because if Congress has spoken to a procedural question, it is supposed to have the final say. It impairs consistency, predictability, and horizontal equity because, as long as judges are making it up as they go along, two even similarly situated decision-makers may decide cases differently.

Engstrom, *supra* note 2, at 74.

tal experimentation, judges have helped to facilitate access for litigants and manage caseloads of increasing size. Innovative approaches to tapping lawyers for leadership roles, census processes, plaintiff fact sheets, "science days," and common benefit fees have helped delineate responsibility and manage immense case volumes—and embodied the creativity and agility that is, in some senses, the MDL's calling card.[45]

Two particular innovations merit special mention here. Convening participants referenced several **judges who had expressly considered diversity in constructing PSCs**[46]—including one who noted that "diverse leadership is integral to the success of these proceedings" and recognized the need to "develop the future generation of diverse MDL leadership by providing competent candidates with opportunities for substantive participation now."[47] Many participants argued that diverse leadership, in turn, helps serve diverse parties.[48] And, second, several participants noted the use of **innovative mechanisms for culling and managing large volumes of claims**—including preliminary census checks and plaintiff fact sheets, which were discussed at length.

Other judicial innovation centers, rightly, on plaintiff information; for instance, two judges' recent online hearings demonstrate the potential of readily-available technology—implemented quickly—to alleviate plaintiffs' concerns and respond to their questions.[49] On this issue specifically, judges have shown an admirable **willingness to embrace new technologies, including in response to COVID-related challenges**.

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45 For more on plaintiff fact sheets, see Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 Yale L.J.F. 64, 80 (2019), and Margaret S. Williams et al., Plaintiff Fact Sheets in Multidistrict Litigation Proceedings: A Guide for Transferee Judges 1 (2019).

46 For an overview of diversity considerations in MDL leadership—including "what *kind* of diversity" courts should strive to encourage—see Elizabeth Chamblee Burch, *Diversity in MDL Leadership: A Field Guide*, 89 UMKC L. Rev. 841, 842 (2021). For a more general discussion of diversity (including judicial consideration thereof) in MDL leadership appointments, see Noll & Zimmerman, *supra* note 3.

47 *See* Case Management Order No. 2 (Organizational Structure and Appointment of Counsel Leadership) at 5, *In re* Blackbaud, Inc., Customer Data Breach Litig., 3:20-mn-02972-JMC (D.S.C. Jan. 8, 2021), ECF No. 14 (noting that the court was "committed to the diversity of MDL leadership," including in light of the claims "from diverse Plaintiffs").

48 Participants debated how to consider the value of diversity as against other valuable characteristics, including experience. A similar debate has played out in the law review literature. *Compare* Burch & Williams, *supra* note 5, *with* Bradt & Rave, *supra* note 4.

49 *See, e.g.*, Dorothy Atkins, *Settling on Zoom: The Rise of Pro Se MDL Objectors*, Law360 (Dec. 22, 2020), https://www.law360.com/articles/1337218/settling-on-zoom-the-rise-of-pro-se-mdl-objectors [https://perma.cc/HG66-M2Z9] (quoting Judge Donato, who described a virtual hearing for participants as "the best thing ever," and describing a hearing held by Judge Davila); Hannah Albarazi, *Calif. Judge Stumps for More Video Hearings After Pandemic*, Law360 (Dec. 8, 2020), https://www.law360.com/articles/1335920/calif-judge-stumps-for-more-video-hearings-after-pandemic [https://perma.cc/8L46-ZH8Y] (summarizing Judge Donato's embrace of video hearings).

⊖ DEFICITS: Where Plaintiffs in MDLs Might Be Better Served

Still, participants identified and discussed substantial deficits in MDL management and oversight. These centered on four key issues: (1) plaintiffs' lack of information about, and participation in, the litigation; (2) the length of consolidated MDLs, paired with the infrequent remand of individual claims and even less frequent trials; (3) flawed oversight and appointment processes for plaintiffs' steering committees (PSCs); and (4) insufficient or ill-fitting oversight of plaintiffs' attorneys in general.

Across all four categories, participants noted a set of common culprits, discussed again below but worth mentioning here. Launching and maintaining a successful MDL, regardless of its size, presents a cavalcade of decisions large and small. As one participant noted, decisions made at the start "can have profound and sometimes hidden effects down the road." And, indeed, "some best practices of [ten] years ago are no longer best or even close to it, especially as technology evolves." Meanwhile, despite the constant emergence of innovative tools, best practices are slow to spread and slower to formalize. **Improved "prompts" and toolkits for judges**—that nonetheless preserve judicial flexibility—might help mitigate the four challenges described below.

First, **plaintiffs' lack of information and participation**—reported and, for many attendees, observed—troubled many of the Convening's participants. The Burch/Williams study, which partly motivated the gathering, reflects some plaintiffs' dissatisfaction with their attorneys, plaintiffs' limited insight into the proceedings, and their narrow involvement in the process. Although participants questioned whether the concerns raised by the survey respondents are actually worse in MDLs as compared to individual tort litigation—a topic discussed above[50]—many nonetheless agreed that plaintiffs are often under- or misinformed, sidelined, and kept from meaningful participation. And many agreed that this is a problem, particularly in an MDL system whose raison d'être, relative to other aggregation approaches, is *some* individualized representation. As Professor Alexandra Lahav has explained in her prior work: "Autonomy requires that each individual plaintiff have a right to participate in the proceeding that determines his entitlements."[51]

This challenge is amplified by the **length of MDLs and the infrequency of remands**.[52] Many participants recognized the downsides of long, slow, uncertain, and (to plaintiffs) invisible procedure.[53] And, as noted below, true "lived" timelines might stretch from the initial *harm*, not claim

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50 *See supra* notes 14–26 and accompanying text.

51 Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 610 (2008).

52 MDLs "last almost four times as long as the average civil case." Burch & Williams, *supra* note 3, at 1844. And something like 97% of cases within MDLs are resolved without remands. Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 16 (2021).

53 *See generally* George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. Tex. L. Rev. 71, 80 (2014) ("Cases that have stayed much too long in the transferee court have been referred to by courts and commentators as black holes.").

filing, to the actual *receipt of compensation*, not the moment of settlement—and given that liens can take months or even years to resolve, the receipt of compensation might substantially lag behind settlements. (Unsurprisingly, numerous reform proposals, some of which we set forth below, seek to tackle this issue head-on.) Others highlighted the infrequency of remands—with some chalking it up to a perception that remanding cases back to transferor courts is a sign of failure (although others noted that this warped perception is fading).[54]

Participants also identified **critical challenges in attorney oversight**. As noted above, attorneys with large claim "inventories" (itself a loaded term) are governed by trans-substantive ethical rules that require, among other things, undivided loyalty and candid attorney-client communication.[55] But several participants at the Convening wondered if those general, spottily-enforced, one-size-fits-all ethical obligations are sufficient in the context of MDL. Put another way: if plaintiff information and satisfaction are lacking, aren't attorneys, at least in some circumstances, to blame? What oversight mechanisms might facilitate more frequent attorney-client communication? What can we do to ensure lawyers aren't conflicted in their representation—or tempted to benefit some clients at the expense of others? Should all attorneys (and not merely leadership attorneys), or perhaps all attorneys representing a certain number of clients, be subjected to additional monitoring requirements? In light of these questions, some Convening participants suggested that **judges might play a more active role in ensuring that clients receive quality representation**. (Notably, and worth repeating, we lack real comparators here—both within MDL and across other procedural approaches. On the latter, several participants pointed out that, even outside MDLs, some lawyers' representation is "perfunctory" and "superficial," and it is not clear whether lawyers in MDLs communicate less or more—or are generally less or more loyal, faithful, or competent—than their non-MDL counterparts.[56])

Finally, attendees homed in on an area for potential improvement: **the structure, membership, and oversight of plaintiff leadership committees**. These committees play crucial roles in MDL: "The committees occupy leadership roles in the litigation-conducting documentary discovery, establishing document depositories, taking depositions, arguing motions, conducting bellwether trials, and in general, carrying out the duties and responsibilities set forth in the court's pretrial

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54 DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150, 152 (D. Mass. 2006) (stating that "it is almost a point of honor among transferee judges . . . that cases . . . shall be settled rather than sent back to their home courts for trial"); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 La. L. Rev. 399, 420 (2014) ("[T]ransferee judges prefer to avoid remand and the stigma of 'failure' that accompanies it."). For additional discussion of this perception, see *infra* note 100 and accompanying text.

55 Relevant rules include 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). For discussion of Rule 1.8(g), see Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 Tex. L. Rev. 1165, 1170 (2020); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733, 753 (1997).

56 *See* Engstrom, *supra* note 19 (collecting citations).

orders, including appearing before the court at periodic conferences or hearings."[57] The selection of and assignment of roles to such committees is thus of critical importance, even (or especially) for plaintiffs whose attorneys are *not* case leaders.

In many MDLs, leadership is appointed for the entire duration of the MDL—and when appointing lawyers to these sought-after posts, judges often give preference to those with demonstrated experience, a widely-used proxy for skills in leadership and organization that MDL management requires. (These selection processes are only sometimes competitive; in other cases, judges "rely on consensus slates or even competitive processes that resemble de facto popularity contests."[58]) This preference can lead to frequent "repeat play" among leadership attorneys—a phenomenon with advocates and detractors.[59] Moreover, several participants noted that, beyond this initial appointment, the subsequent *evaluation* of plaintiff leadership—including how zealously the given lawyer represents non-client plaintiffs, whether the lawyer communicates with non-client plaintiffs, and whether the lawyer communicates with the non-leader lawyers—is often lacking. In particular, participants expressed a concern that attorneys sometimes "coast" once installed in leadership; that leadership attorneys, potentially eager to maximize their common benefit fees, might "hoard" work for themselves; and that plaintiffs lacked a tool for reporting possible conflicts between, or inadequate representation by, leadership attorneys. This absence of plaintiff tools, paired with inadequate judicial oversight, troubled several participants. And this challenge loomed particularly large because "the MDL judge's selection of lead counsel is not subject to effective appellate review."[60] As described below, adjustments to the selection and evaluation of plaintiff leadership—and to the duties that they are assigned—might combat these deficits.

MDL SETTLEMENT, COMPENSATION, AND CLOSURE

⊕ STRENGTHS: Where MDLs Appear to Serve Plaintiffs Well

The benefits of the current system for case resolution hovered in the background throughout the day's conversations. Most obviously, **pooling claims in MDL increases plaintiff leverage, harnesses economies of scale, and gives defendants a meaningful chance at finality and closure**. As two Convening participants note elsewhere: "By aggregating their claims, plaintiffs can pool resources, share risk, coordinate litigation strategy, disable holdouts, and present a unified negotiating

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57 Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 373 (2014).

58 Burch, *supra* note 46, at 850.

59 *See supra* note 48; *see also* Matthew A. Shapiro, *Distributing Civil Justice*, 109 Geo. L.J. 1473, 1515 (2021) (describing scholarship arguing for and against the benefits of repeat-player attorneys).

60 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, 142 (2015). *See id.* at 142 n.10 (discussing the response of other plaintiffs' attorneys to leadership selection).

position—all things that offset some of the defendant's repeat-player advantage."[61] That increased leverage and coordination may enable plaintiffs and attorneys to secure satisfying payouts.

Echoing another theme, participants also highlighted the **benefits of ongoing experimentation and flexibility that have, in some circumstances, helped to engage and support plaintiffs**. For instance, one attendee described "personal statements" that accompanied settlement allocation and provided a formal opportunity for sharing individual stories. Another attendee recounted a public webinar regarding a settlement agreement, held by Judge McCafferty in a prominent MDL, that, the attendee recalled, more than 1,000 people attended virtually.[62] And judges routinely use magistrate judges, special masters, claims administrators, and other adjuncts—to mixed results, certainly, but at times to great effect.[63]

⊖ DEFICITS: Where Plaintiffs in MDLs Might Be Better Served

Still, many participants raised substantial concerns with the attorney-client relationship in MDL resolution. For many, concerns centered on settlement—a very common outcome of consolidated cases in MDL. Perhaps most frequently, Convening attendees stressed **an over-investment in settlement at the expense of trial** and, in some cases, **undue pressure (on clients and, at times, on their lawyers) to opt in to leadership-negotiated settlements**.[64] Indeed, several participants noted the rise in settlement structures that encourage rapid sign-on, in part to quell potential dissent, while others argued that client awards are unnecessarily deflated by this practice. Other Convening participants noted that a **lack of transparency regarding settlement amounts and costs of third-party services** contributed to opaque cost structures and plaintiff dissatisfaction. Participants pointed out that clients sometimes lack information that would, predictably, inform their decision whether to opt in to a settlement agreement, including meaningful comparators, expert

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61 Bradt & Rave, *supra* note 4, at 91. For additional discussion of the benefits that might accrue to plaintiffs who "su[e] collectively," see Silver & Baker, *supra* note ⁋4, at 744 ("Plaintiffs can gain several important advantages by suing collectively. These include (1) economies of scale in litigation costs, (2) increased leverage in settlement negotiations, (3) equalization of plaintiffs' and defendants' risks, and (4) conservation of defendants' assets.").

62 Transcript of Special Hearing Held Via Video Conference, *In re* Atrium Medical Corp. C-Qur Mesh Prods. Liab. Litig., No. 16-md-2753 (D.N.H. Mar. 17, 2022), https://www.nhd.uscourts.gov/ pdf/Atrium_SpecialHearing_3_17_22.pdf [https://perma.cc/6665-4Y5H].

63 For a discussion of the role of special masters and other adjuncts, see, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129, 2202 (2020). Magistrate judges, special masters, mediators, and accounting adjuncts are all frequently—but not universally—appointed by MDL judges. For further discussion of the use (and some judges' preference *not* to use) magistrates, see *id.* at 2156; Gluck, *supra* note 20, at 1693–94. For additional discussion of "allocation special masters," and the variability across special masters generally, see Baker, *supra* note 55, at 1184 (arguing that "one cannot usefully generalize about even a specific subset of special masters, let alone about special masters more generally").

64 *See generally* Daniel Fisher, *Plaintiffs* [sic] *Lawyer Rips Colleagues Over Multidistrict Litigation Fees, Pressure Tactics*, Legal Newsline (Dec. 11, 2020) https://legalnewsline.com/stories/568886067-plaintiffs-lawyer-rips-colleagues-over-multidistrict-litigation-fees-pressure-tactics [https://perma.cc/GY8F-9N9A] (describing an attorney who argued that other lawyers "pressured [clients] to accept settlement offers without providing them the information they needed to decide, including how much their individual claim would be paid"). For discussion of so-called "closure provisions," see, for example, D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 Fordham L. Rev. 2175, 2177 (2017); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 114 (2017).

forecasts concerning a likely outcome at trial, and information concerning a realistic timeline if the case were sent back to the transferor court. Compounding that difficulty, because some lawyers (and even some judges) seem to "push" the settlement once it is inked (particularly if, as is often the case, a settlement only becomes effective if a set percentage of plaintiffs opt in), some clients are left without an informed, neutral expert to guide their deliberation and evaluation.

Plaintiffs' *procedural* dissatisfaction, including at a case's close, was another common concern. Most notably, attendees lamented the **lengthy delays that, after settlement, stall the provision of client compensation**, **frequently traceable to complex, inflexible, and time-consuming lien-resolution processes**. Indeed, for many Convening participants, lien resolution was a particular sore spot. As some attendees noted, MDL settlements often "often include lengthy and detailed requirements regarding lien resolution."[65] The resulting processes can take years—and, in some cases, substantially consume plaintiffs' take-home compensation.

More generally, lien resolution administrators and other adjuncts embody an additional challenge: because of the host of adjuncts and other parties involved in settlement, administrative costs rise and delays lengthen.[66] Plaintiffs' awards diminish as **rising third-party costs** are paid—even as those plaintiffs lack clarity on why, and to whom, their awards are being redirected.

Numerous participants also raised concerns with the **current structure of common benefit fees**. After a case ends, judges award these fees to leadership attorneys for work that benefits all plaintiffs.[67] Currently, they tend to range from 4% to 8% of litigants' gross settlement amounts, with the monies deducted from the lawyers', not the clients', take.[68]

Convening attendees raised several related concerns about these fees: some suggested a more detailed oversight process that links compensation to *actual* common benefit work (or to ultimate plaintiff recovery), rather than to a predetermined percentage of the fund. Others asserted that common benefit fees were entirely unnecessary, arguing that attorneys are sufficiently incentiv-

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65 Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 Fordham L. Rev. 1833, 1860 (2011).

66 *See, e.g.*, Burch & Williams, *supra* note 63, at 2153 (listing judicial appointments related to settlement, including "escrow agents, certified public accountants, claims/fund/settlement administrators, lien-resolution administrators, auditors, common-benefit fund administrators, and qualified-settlement-fund trustees"). For a discussion of the challenges of "gathering and presenting empirical data" about special masters, see Baker, *supra* note 55, at 1185.

67 As Judge Fallon explains: "Because the work that the PSC performs inures to the common benefit of all plaintiffs and their primary counsel (the counsel that they employed), MDL transferee courts usually establish a procedure for creating a common benefit fee to compensate the members of the PSC and the members of any subcommittees who have done common benefit work." Fallon, *supra* note 57, at 374. For a thorough discussion of common benefit fee mechanisms, including regarding the authority of transferee courts to provide them, see *In re* Syngenta AG MIR 162 Corn Litig., 61 F.4th 1126 (10th Cir. 2023).

68 *See* Engstrom & Venook, *supra* note 1; William B. Rubenstein, *On What A "Common Benefit Fee" Is, Is Not, and Should Be*, 3 Class Action Att'y Fee Dig. 87, 88–90 (2009) (describing assessments from numerous MDLs).

ized to perform common benefit work without them.[69] And, finally, some participants noted that common benefit fees—despite their pervasive use (and, often, their immense size)—have not (yet) seen the innovation and variation that define other MDL structures.

Lastly, but perhaps most mentioned: many participants argued, consistent with the findings of the Burch/Williams study, that **many plaintiffs do not receive the closure they seek**. Several shared the notion that plaintiffs' gut desires for procedural justice—feeling heard and seen, understanding and questioning a judge's decision, commiserating with other plaintiffs, seeing defendants be called to account—are too often unmet as MDLs reach their close.

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69 For instance, one participant has noted that many MDLs lack common benefit fees, particularly in state court. *See* Specter Letter, *supra* note 16, at 8.

III. Improving MDL: Nine Reform Proposals

In addition to the honest and frank assessments described above, we also sought input on practical, attainable solutions to address identified deficits.

As before, we neither sought nor obtained consensus on any particular reform. Some of the reforms listed below are purposely provocative, and their inclusion does not suggest any endorsement (from us or from the Convening's attendees). In fact, we would oppose certain of the reforms sketched below. In addition, it bears emphasis that one need not believe that MDLs are broken—or even in disrepair—to believe that certain incremental reforms might be beneficial.

Below, we first compile nine potential reforms in table form and then, subsequently, investigate these potential reforms in detail. By offering these proposals, we hope to reflect the wide range of policy choices and levers, the equally wide range of opinions regarding the most urgent challenges facing MDLs, and the many potential features of aggregate litigation that the Convening brought to light.[70]

Potential Reforms

CASE FILING AND MDL ORIGIN

1 Limit the Number of Clients Each Attorney Can Represent

The Federal Rules of Civil Procedure or the Model Rules of Professional Conduct should be amended to cap the number of clients a lawyer can represent at one time—or judges should be permitted or encouraged to set such a cap.

2 Penalize Attorneys Who File a Disproportionate Number of Nonmeritorious Claims

Judges should penalize lawyers who file a disproportionate number of nonmeritorious claims by adding a "tax" to assessed common benefit fees. Such a tax would increase lawyers' motivation to screen cases carefully prior to filing.

70 In zeroing in on these nine, we do not suggest that these are the only (or best, or most likely) ways for MDLs to evolve. Rather, the reforms detailed here were pulled from a laundry list, developed throughout the day, of reform options that participants raised (but did not always support). We selected these nine for deeper dives in large part because they embody some of the challenges of, and reveal some of the possible levers for, MDL reform.

CASE MANAGEMENT AND OVERSIGHT

3 Better Inform Plaintiffs Through Improved Use of Existing Technologies

Judges should fully utilize "low-tech" solutions to improve plaintiff engagement and information. For instance, judges should ensure that MDL case websites are up-to-date and easily accessed; that web-first content aimed at plaintiffs, likely written (and/or agreed upon) by attorneys, is made available to plaintiffs online; and that hearings (and, in limited cases, other proceedings) are available online.

4 Impose a (Flexible) Deadline After Which Remaining Cases Will Be Remanded

Shortly after case consolidation, transferee judges should impose a flexible deadline after which, absent a specific showing, open cases will be remanded if certain conditions are satisfied (for instance, if the plaintiff agrees to forego further generic discovery).

5 Appoint Leadership Counsel Through a Competitive Process That Looks Beyond Prior Case Experience

In place of "consensus" slates or application processes focused on attorney experience, judges should utilize competitive processes that consider, among other issues, specialization, adequate representation of plaintiff interests, racial, ethnic, and gender diversity, and developing new MDL leaders—as some transferee judges have begun to do.

6 Appoint Leadership Counsel for a Time-Limited Period and Offer Opportunities for Challenges and Removal

More transferee judges should appoint plaintiffs' leadership counsel for time-limited terms, not the length of the case. Judges should also establish processes by which new attorneys can apply to join case leadership and report potential conflicts of interest or otherwise-inadequate representation.

SETTLEMENT, COMPENSATION, AND CLOSURE

7 Enhance Oversight of Common Benefit Fee Allocation

Judges should draw clear boundaries regarding the structure and allocation of common benefit fees, including: (1) requiring rigorous documentation of common benefit work, (2) appointing a CPA to receive and review records submitted by leadership attorneys, and/or (3) ensuring that common benefit funds are not allocated by special masters who are themselves selected by leadership attorneys. Alternatively (and more radically), judges might choose to abolish common benefit fees altogether.

8 Mandate and Publicize Closing Statements, Including Fees Charged and Recoveries Obtained

Courts or state bar associations should require attorneys in MDLs to file closing statements that disclose fees charged, injury sustained, and settlement obtained, including the amount actually paid to the client. Some data from those filings should be made available to the public.

9 Publish Non-binding Judicial Opinions Regarding Settlement Fairness

Judges should issue non-binding opinions regarding proposed settlements, enabling clients to have greater confidence that the proposed resolution is reasonable and make more informed decisions about whether or not to sign on to the deal.

A. Case Filing and MDL Origin

1 REFORM PROPOSAL: Limit Attorneys' Number of Represented Clients

The Federal Rules of Civil Procedure or the Model Rules of Professional Conduct should be amended to cap the number of clients a lawyer can represent at one time—or judges should be permitted or encouraged to set such a cap.[71]

BACKGROUND

- Critics argue that lawyers in MDLs are incentivized to amass as many cases and clients as possible.[72] Some suggest that these client "inventories" have grown too large for attorneys to effectively and zealously represent each plaintiff individually—testing the sufficiency of long-standing ethical rules governing attorneys.[73] Shared attorneys, at least at this scale, may also create an increased risk of conflicts between plaintiffs. And a lawyer committed to representing high numbers of clients at scale might screen each resulting claim less thoroughly.[74]

- Lawyers representing large numbers of plaintiffs may be inclined to accept lower settlement offers than an individual client might otherwise pursue.[75]

POTENTIAL BENEFITS OF THE REFORM

- A flexible (and, presumably, rebuttable) cap on the caseloads of individual attorneys would further enable judges to ask pertinent questions regarding effective and zealous representation, attorney communication, and potential conflicts.

- Reforms along these lines—including more moderate options—might help ensure that attorneys are not taking on more cases than they can reasonably handle. In the absence of

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71 For one version of this proposal, see Specter Letter, *supra* note 16, at 4 ("The Federal Rules of Civil Procedure should be amended to reflect the following: (1) lawyers should not be allowed to acquire or handle more clients and/or cases than they can adequately represent; and (2) judges should ask pertinent questions and prevent such practices from occurring.").

72 *See generally* Engstrom & Venook, *supra* note 1; Specter Letter, *supra* note 16, at 2 ("The incentive to amass as many cases as possible is significant—many cases means a lot of money for the plaintiff's attorney in the event of a mass settlement.").

73 As it stands, Comment 2 to Rule 1.3 states that "[a] lawyer's work load must be controlled so that each matter can be handled competently." Model Rules of Pro. Conduct R. 1.3, Cmt. [2] (Am. Bar Ass'n 2020). But several Convening participants wondered whether 1.3 furnishes sufficient guidance to attorneys representing hundreds or thousands of clients. For further discussion of attorneys representing large numbers of clients, see, for example, Gluck & Burch, *supra* note 52, at 68 ("MDL plaintiffs cannot control their lawsuits or watch over their lawyers in the same way as they might in a run-of-the-mill case. True, they have contractual relationships with their 'own' attorneys, but those lawyers typically represent hundreds of other clients with similar claims and see them as a case-file number, not an individual.").

74 *See generally* Weinstein, *supra* note 5, at 495 (describing firms "that, like a vacuum cleaner, suck up good and bad cases, hoping that they can settle in gross"). Of course, many law firms employ non-legal personnel to support screening efforts.

75 At least one Convening attendee has publicly expressed concerns about this practice, noting that, "[i]n this situation, the plaintiff's attorney wins and the individual clients lose." Specter Letter, *supra* note 16, at 3.

overstretched lawyers, some Convening attendees argued, each client is more likely to receive competent and vigorous representation, including sufficient communication, and less likely to walk away with a lowest-common-denominator settlement.[76]

- Caseload reform might also assist in solving the related problems of inadequate vetting of would-be claims and unaddressed conflicts between plaintiffs represented by the same attorney(s) or firm(s).

POTENTIAL DRAWBACKS TO THE REFORM

- The current structure incentivizes plaintiffs' lawyers to participate in MDLs and, in the aggregate, gives force and leverage to plaintiffs. Any proposal that chips away at potential economies of scale risks diminishing the access-to-justice benefits that otherwise accrue in MDL (and other aggregate litigation).

- If we cap client inventories, we need some idea of what the cap should be. What's the right number of clients for one lawyer to represent? How many clients is too many? And is it appropriate to impose the same cap on both a cash-strapped solo practitioner and an experienced lawyer from a well-resourced firm? Currently, research on all these questions is close to nonexistent. Furthermore, even if we knew the "right" cap in case *x*, would that be the right cap in case *y*, involving different factual issues and evidentiary challenges?

- How might a potential cap treat as-yet-unfiled cases? What about state cases? Firms engaged in fee-sharing agreements? Might such a cap deter beneficial fee-sharing arrangements? These challenges pose serious complications to—and might impair successful implementation of—a caseload limit.

- Limiting client "inventories" is a novel, heavy-handed, paternalistic, and highly unusual approach. Why single out particular plaintiffs' lawyers for this extra scrutiny?

- Lawyers are typically regulated by the state. To the extent the Federal Rules are used to effect this reform, that represents a significant shift in lawyer regulation—which, in turn, represents a significant (and potentially problematic) departure from the status quo. Meanwhile, some might say that transferee judges should impose these caps—but it is not at all clear they have such authority.

- MDL-specific Rule changes arguably defy the "transsubstantive values that form the very soul of the FRCP."[77]

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76 *Id.* (explaining that, in the "transvaginal mesh litigation . . . several attorneys represented in excess of 5,000 clients" and that, as a consequence, "[t]hey were unable to discover—much less try—all of these cases" and ultimately "recommend[ed] and obtain[ed] inadequate settlements for their clients").

77 Gluck, *supra* note 20, at 1674.

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- How overstretched are plaintiffs' attorneys in MDLs, really, particularly given the roles that non-lawyers often play in plaintiff-side law practice? Critics routinely (and accurately) point to large caseloads in specific cases,[78] but the practice may not be widespread (or, even if widespread, not causally linked to plaintiff dissatisfaction, "false positive" claims, etc.). Policymakers might also ask whether this is an issue in *all* MDLs or, rather, just in especially large ("mega") MDLs.[79] And, if it is just a problem in the latter, the reform (even if accepted) might need to be targeted to just those particular actions.

- Would "soft" incentives (e.g., more expansive use of sanctions) cause meaningful downstream reductions in client inventories, as compared to more heavy-handed and prescriptive interventions?

- Would limiting attorney inventory impair access to justice? For instance, might attorneys decline to take low-value claims on the margins? Are these lower-value claims disproportionately held by traditionally disadvantaged groups? How can scholars (and, ultimately, policymakers) rigorously assess these tradeoffs?

- For these purposes, how would a court "count" a client when both a referring lawyer and a recipient lawyer represent the client for purposes of ABA Model Rule 1.5(e)(1)? Would inventory caps disrupt salutary referral arrangements? If so, how and to what effect?

2 REFORM PROPOSAL: Penalize Attorneys Who File a Disproportionate Number of Nonmeritorious Claims

Judges should impose penalties on those lawyers who file a disproportionate number of clearly nonmeritorious claims (e.g., those entirely lacking a cause of action) by adding a "tax" to assessed common benefit fees—thereby increasing lawyers' motivation to screen cases carefully prior to filing.[80]

BACKGROUND

- Common benefit fees allow courts to compensate attorneys for completing work that benefits plaintiffs they do not represent.[81] They are used primarily to combat a "free-rider" problem[82]

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78 *E.g.,* Nathan Koppel, *Vioxx Plaintiffs' Choice: Settle or Lose Their Lawyer*, Wall St. J., Nov. 16, 2007 https://www.wsj.com/articles/SB119517263199795016 (reporting that, in the Vioxx litigation, one lawyer had "more than 1,000 Vioxx cases"); Specter Letter, *supra* note 16, at 6 (reporting that, in the transvaginal mesh litigation, "several attorneys represented in excess of 5,000 clients").

79 It is true that mega MDLs appear to be on the upswing. *See, e.g.*, Williams, *supra* note 3, at 1275.

80 For a detailed discussion of this reform, see generally Engstrom & Venook, *supra* note 1.

81 *See* Fallon, *supra* note 57, at 373.

82 *In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 174 (S.D.N.Y. 2020) ("As this Court has previously explained, complex aggregate litigation often raises a classic free-rider problem. A subset of plaintiffs' lawyers do the lion's share of

—but also, secondarily, to encourage cooperation, structure the case in the transferee court, and incentivize certain behaviors from attorneys (both within and outside of the MDL).[83]

- There is evidence that some MDLs include at least some nonmeritorious claims.[84] To some, the apparent prevalence of these dubious claims suggests that attorneys are insufficiently incentivized to thoroughly vet would-be suits. (Indeed, attorneys seeking large awards or leadership positions sometimes do so by accruing *more* claims.)

POTENTIAL BENEFITS OF THE REFORM

- Common benefit fee penalties might combat the "small group of counsel that do not exercise diligence on the front end to catch those individuals that are seeking to file false claims."[85]

- Such a tax would punish attorneys for nonmeritorious claims, but only after the litigation has concluded. Some Convening attendees suggested that this approach could thread the needle—putting the onus on attorneys to screen for clearly false claims without increasing evidentiary burdens at early stages.

POTENTIAL DRAWBACKS TO THE REFORM

- Debate over common benefit fee allocation, and the normative decisions underlying it, is already heated.[86] Judicial orders that increase the range of behaviors incentivized (or disincentivized) by award allocation—that is, beyond merely rewarding work—are controversial.[87] Would further use of this tool lead to meaningful downsides? How might judges carefully consider these risks?

- If judges overreach (or threaten to overreach), they risk punishing attorneys for bringing colorable, but ultimately noncompensable, claims—or even claims that are entirely meritorious but that rely on documentation that is difficult, costly, or time-consuming to obtain. MDLs' access-to-justice benefits might therefore suffer.

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the work, but that work accrues to the benefit of all plaintiffs.").

83 For a more general discussion of the considerations facing judges in the design of common benefit funds, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal*, 63 Vand. L. Rev. 107, 142 (2010). For a general primer on common benefit fees, see Bolch Jud. Inst., Duke L. Sch., Guidelines and Best Practices for Large and Mass-Tort MDLs 64–80 (2d ed. 2018).

84 Engstrom & Venook, *supra* note 1.

85 Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 350 (2014); *see also* Engstrom & Venook, *supra* note 1.

86 For one foray into this vibrant debate, see Charles L. Becker et al., *How Not to Manage a Common Benefit Fund: Allocating Attorneys' Fees in Vioxx Litigation*, 9 Drexel L. Rev. 1, 27–28 (2016) (describing an order which, among other things, "directed that plaintiffs' counsel who agreed to participate in the MDL pay an assessment based on their speed of decision"); Charles Silver, *The Suspect Restitutionary Basis for Common Benefit Fee Awards in Multi-District Litigations*, 101 Tex. L. Rev. (forthcoming 2023).

87 *See, e.g.*, Burch, *supra* note 64, at 114 (describing punishments for "latecomers" in common benefit awards and settlements).

- To assess any proposed "tax" in a targeted, well-tailored fashion, judges would need a rigorous, reliable vetting process—perhaps one that extends beyond existing efforts. That process might further contribute to cost and delay. Some meritless claims may be cheap and easy to identify (e.g., did the plaintiff use the product at issue?), while others may be much costlier (e.g., did the plaintiff collude with her physician to fake a diagnosis?).

- Some believe that we ought to be *outlawing*, or at least discouraging, common benefit fees—and not doubling down on their payment.[88]

- Other, more modest reforms, like increasing the use of targeted plaintiff fact sheets and not basing leadership appointments on the number of clients represented, might be sufficient to screen out most truly meritless claims before they distort settlement dynamics.

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- How pervasive, *really*, are nonmeritorious claims, particularly in certain MDLs?[89] And how bad is it if they sit on the docket while other claims are litigated?

- How might a judge seeking to combat nonmeritorious suits—through this or another mechanism—allow for reasonable errors while combatting bad-faith filing or egregious under-screening? How might judges encourage screening while assuring that *meritorious* suits, as well as suits of plausible-but-uncertain merit, are still filed?

- Assuming nonmeritorious claims are a substantial issue, and assuming a judge seeks to combat these filings, might sanctions (or another appropriate remedy) be utilized instead? Why a common benefit tax? Is the use of Federal Rule of Civil Procedure 11 sufficient to address this issue?[90]

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88 *See infra* note 127 and accompanying text.

89 As Professor Rave has convincingly explained, some have provided estimates, but no one actually knows. *See* Rave, *supra* note 41.

90 For instance, one court imposed Rule 11 sanctions on two attorneys who filed 1,250 "sanctionable cases." *In re* Engle Cases, 283 F. Supp. 3d 1174, 1249 (M.D. Fla. 2017).

B. Case Management and Organization

3 REFORM PROPOSAL: Better Inform Plaintiffs Through Improved Use of Existing Online Technologies

Judges should fully utilize "low-tech" solutions to improve plaintiff engagement and information. For instance, judges should ensure that MDL case websites are up-to-date and easily accessed; that web-first content aimed at plaintiffs, likely written (and/or agreed upon) by attorneys, is made available to plaintiffs online; and that hearings (and, in limited cases, other proceedings) are available online.[91]

BACKGROUND

- Some MDL plaintiffs report feeling underinformed about the progress, timeline, and current status of their case. The challenges are exacerbated by physical distance (claims may be transferred to faraway courts) and case leadership structures (plaintiffs' representation is often driven by a lawyer they did not select and do not know).
- Nearly all large MDLs have case websites, as several Convening attendees noted, but they are often outdated, poorly curated, and (it appears) underutilized. And while some judges regularly use online streaming for status conferences and other hearings, many do not—despite the rapid embrace of such technologies prompted by the COVID-19 pandemic.

POTENTIAL BENEFITS OF THE REFORM

- If implemented well, online streaming and improved MDL websites would enable litigants to monitor, and potentially weigh in upon, MDL proceedings. Interested plaintiffs would be consistently updated on key developments and more capable of attorney monitoring.
- Improved plaintiff-court communication might serve a valuable diagnostic function, helping policymakers to disentangle dissatisfaction that is driven by a lack of information and transparency from dissatisfaction that is driven by structural barriers or substantive case outcomes.
- Because some judges have already embraced video technology, judges eager to innovate could follow a ready-made template, leading to rapid implementation.[92]

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91 For a detailed discussion, see generally Venook & Engstrom, *supra* note 33.

92 *See supra* note 49.

POTENTIAL DRAWBACKS TO THE REFORM

- Additional investment in technology would undoubtedly create new financial costs for transferee courts. Who pays?

- Though it might bridge *geographic* divides, an increased reliance on virtual access might exacerbate the *digital* divide. Tens of millions of Americans lack access to broadband internet, and limited access to technology (including to smartphones) disproportionately impacts low-income households.[93]

- Judges sometimes assert (albeit without empirical evidence) that plaintiffs in MDL are *more* informed than typical plaintiffs.[94] If that's the case, would these efforts on the margins make a meaningful difference? Or just exacerbate problems that, many say, already plague MDLs (delay, high cost, etc.)?

- Lawyers, particularly lawyers who repeatedly litigate similar cases, might be tempted to perform for the cameras—which could undermine civility, add to adversarial conflict, and (in extreme cases) impact judicial decision making.[95]

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- As Burch and Williams note, some plaintiffs in their survey (with the usual sample-size caveats) expressed dissatisfaction with communication from their attorneys. But is this problem pervasive in *all* civil litigation, or at least all complex civil litigation? If so, what are the salient differences in MDL? Do they truly justify innovative uses of technology?

- The COVID-19 pandemic dramatically increased the rate of uptake of video hearings; indeed, livestreams have already enabled plaintiffs to voice concerns directly in mass torts. Have judges, litigants, and attorneys benefited from this change? What challenges have they encountered?

- If we build it, will they come? If courts invest in better technology, will litigants actually access the information that becomes available?

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93 *See generally* Maia Spoto & Madison Alder, *Rural Digital Divide Complicates Virtual Court Participation*, Bloomberg L. (Aug. 29, 2022), https://news.bloomberglaw.com/us-law-week/rural-digital-divide-complicates-virtual-court-participation [https://perma.cc/KP34-UANX].

94 *See, e.g.*, Gluck, *supra* note 20, at 1689.

95 For the expression of a similar concern in the context of the United States Supreme Court, see Letter from Jeffrey P. Minear, Counselor to the C.J., to Gerald E. Connolly, U.S. Congressman et al. (Oct. 2, 2017), https://arstechnica.com/wp-content/uploads/2017/10/scotusletter.pdf [https://perma.cc/R72Z-VCYW] ("I am sure you are, however, familiar with the Justices' concerns surrounding the live broadcast or streaming of oral arguments, which could adversely affect the character and quality of the dialogue between the attorneys and Justices.").

- Will access to more online case information actually inform plaintiffs, or will it instead contribute to information overload? Is the problem a lack of information—or plaintiffs' need for someone to curate, interpret, and explain complex information to them? Do MDL lawyers and judges have the right skills and incentives to supply appropriate information via online channels? If not, might third parties supply necessary know-how? If courts choose to contract with third-party tech and communication experts, how will they be selected and compensated?

- Will technology-based improvements in access and enhanced visibility into how the sausage is made inspire or diminish confidence in judicial processes, including in the management of a particular MDL?[96] Have courts in other litigation areas seen similar effects—or other downsides —since moving to remote proceedings?

- To the extent technological innovation requires technological investment, how will this investment be financed? Our nation's courts are already cash-strapped. Where will new investment come from—and, in a world of limited resources, are we confident that *this* investment will yield the most bang for the buck?

- If lawyers, judges, and plaintiffs themselves were confident that online communication was robust, what other innovative case management techniques might present themselves? Would this incremental step make other, perhaps more radical, changes more attainable?

4 REFORM PROPOSAL: Impose a (Flexible) Deadline After Which Remaining Cases Will Be Remanded

Shortly after case consolidation, transferee judges should impose a flexible deadline after which, absent a specific showing, open cases will be remanded if certain conditions are satisfied (for instance, if the plaintiff agrees to forego further generic discovery).[97]

BACKGROUND

- Very few cases that are centralized in MDLs are remanded back to their home jurisdictions, and

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96 For a discussion of analogous concerns in the context of Supreme Court oral arguments, see Lysette Romero Córdova, *Will SCOTUS Continue to Livestream Oral Arguments and Are Cameras Next? Let's Hope So.*, Am. Bar Ass'n (Aug. 24, 2021), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/summer/will-scotus-continue-to-livestream-oral-arguments-and-are-cameras-next/ [https://perma.cc/FKL8-KXFJ].

97 For a related proposal that urges "episodic" remands, see Gluck & Burch, *supra* note 52, at 61 ("A different way to decentralize power from a single judge, if not via appeal, might be the use of episodic remands—sending cases back to their original federal districts at key points during an MDL. As one of us has proposed, benchmarks would vary by proceeding but remands could come at three key intervals: At the beginning, for plaintiffs with claims that fall outside of those that the lead lawyers plan to develop; once coordinated discovery ends and before case-specific summary judgment motions occur; and after the negotiation of a global settlement, for those plaintiffs who do not wish to settle."). Shanin Specter has similarly proposed a one-year "right to removal." Specter Letter, *supra* note 16, at 6–8.

MDLs often extend for years.[98] Given these facts, MDL plaintiffs can see their cases pending for several years in courts that are far removed from their home jurisdictions.

- Judges hoping to achieve a mass resolution of claims are arguably incentivized to maintain cases in the transferee court.[99] Some even believe that transferee judges view remand as tantamount to a failure.[100]

POTENTIAL BENEFITS OF THE REFORM

- The use of a set deadline, whether or not it is movable, provides *some* "fixed timeframe" for MDL proceedings.[101] Clients, as well as attorneys, might benefit from that clarity.

- A pre-existing remand deadline would presumably alter attorney behavior by increasing urgency, incentivizing efficient discovery and negotiation, and, perhaps most importantly, making real the threat of trial. It may also lessen attorneys' willingness to take on large numbers of clients without proper vetting.

- By increasing the frequency of remand, this reform (or others like it) returns cases swept into an MDL away from a single judge and, instead, to "multiple impartial decisionmakers," which some scholars call "one of the bedrock norms of civil procedure."[102] To some, that return to decentralization might be a potential benefit of this (and other, similar) reform proposals.

POTENTIAL DRAWBACKS OF THE REFORM

- The efficiencies of the MDL system derive largely from the consolidation of common proceedings. Much of the benefit likely accrues because consolidation promotes generic discovery and the resolution of shared pretrial issues, but a pre-set remand deadline (and, by extension, increasing frequency of remand) may reduce these economies of scale. In other words, the threat of removal might encourage parties to drag their heels and "run out the clock" rather than proceed

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98 *See supra* note 52 and accompanying text.

99 *See, e.g.*, Edward F. Sherman, *When Remand Is Appropriate in Multidistrict Litigation*, 75 La. L. Rev. 455, 467 (2014) (noting that "partial remands may reduce the MDL judge's leverage to obtain a global settlement").

100 *See, e.g.*, Burch, *supra* note 54. Judge Eduardo Robreno has written that, "[a]s a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process." Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 144 (2013). For further discussion of the remand-as-failure ethos that some judges have described, see Gluck & Burch, *supra* note 52, at 16.

101 Judge Joseph R. Goodwin, *Remand: The Final Step in the MDL Process—Sooner Rather Than Later*, 89 UMKC L. Rev. 991, 991 (2021) ("After handling nine product liability MDLs, I have concluded that one of the greatest failures in multidistrict litigation is the extraordinarily long time that cases linger in transferee courts. I have come to believe that in any adversarial proceeding, including multidistrict litigation, definite timeframes should be required. Establishing a fixed timeframe for an MDL proceeding in a transferee court will strongly encourage the parties to settle or have their cases scattered by remand or transfer.").

102 Gluck & Burch, *supra* note 52, at 59.

apace in the transferee court—impairing (rather than promoting) the timely resolution of claims.

- A "remand-by-default" approach may not fit well in certain types of litigation (e.g., antitrust) or specific cases (for instance, where individual trials require hefty preparation). Similarly, the appropriate period of time for (e.g.) generic discovery and *Daubert* motion practice might vary widely across cases. An inappropriate deadline could short-circuit discovery, sacrifice thoroughness, limit the ventilation of common issues, unnecessarily rush party negotiations, and—generally—erode the very efficiencies that MDLs exist to provide.

- Few civil cases reach trial in the federal system writ large.[103] Why should MDL be different?

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- If judges were to embrace a version of this proposal, on what metrics (case length, plaintiff satisfaction, rate of trial, etc.) should plaintiffs expect improvement? In cases where remand *is* used effectively (e.g., according to some scholars, pelvic mesh[104]), what benefits have accrued to plaintiffs? To judges? To defendants? How should these benefits be measured?

- How often do plaintiffs request remand? At what rate do judges currently grant or deny requests for remand, and why?

- Remands force a defendant to defend itself in multiple courts simultaneously.[105] Is that a reasonable and fair expectation? Alternatively, might more frequent remand unfairly diminish plaintiffs' leverage by putting a functional (if tentative) end date on consolidation?

- A remand returns the case back to the transferor court. But how salutary is that, really? Many assume that the transferor court is close to the plaintiff's physical residence. But is it? How often? Don't some plaintiffs file federal lawsuits far away from their homes? Then, even if the transferor court *is* physically proximate to the plaintiff, to what extent is *physical distance* really the problem? Can we disentangle client frustrations with aggregate litigation in general, and MDLs more specifically, from the unique challenges associated with being removed *geograph-*

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103 *See, e.g.*, Thomas P. Cartmell, *MDL Remand: Plaintiffs' Perspective*, 89 UMKC L. Rev. 983, 983 (2021) ("Few cases ever reach a jury trial in the federal courts, whether or not they join an MDL."). For instance, in the twelve-month period ending September 30, 2022, only 0.7% of total federal civil cases reached trial. *U.S. District Courts —Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2022*, Admin. Off. U.S. Cts. (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2022.pdf [https://perma.cc/VZ9U-JXRG].

104 *See* Cartmell, *supra* note 103, at 985 ("By making remand a true 'endpoint,' the pelvic mesh MDLs maximized efficiencies, fairness, consistency, and opportunities for resolution."). *But see* Specter Letter, *supra* note 16, at 7 (stating that, in the transvaginal mesh litigation "[a] significant number of cases were not transferred back to their home districts until more than seven years [after the MDL was created]"). For more on the pelvic mesh litigation, see *supra* note 16 and accompanying text.

105 *See, e.g.*, Richard B. North, Jr., *MDL Remands: A Defense Perspective*, 89 UMKC L. Rev. 997, 1001 (2021) ("Significant funds and resources are required to defend hundreds of cases simultaneously in courts throughout the country. And remands can prolong and even increase the risks to defendants, risks that global settlements are designed to control.").

ically from their home jurisdiction (assuming, again, that a remand actually does reduce that geographic distance—which it might not)?

- Are there advantages to a more selective and deliberate approach to remands, like Judge Polster's "hub-and-spoke" model in the *Opioids* litigation, instead of increased remand by default?[106]

- If we did increase remands back to transferor courts, would that complicate litigants' efforts to forge global (or close to global) settlements? Is that, itself, a good or bad thing?

5 REFORM PROPOSAL: Appoint Leadership Counsel Through a Competitive Process That Looks Beyond Prior Case Experience

In place of "consensus" slates or application processes focused on attorney experience, judges should utilize competitive processes that consider, among other issues, specialization, adequate representation of plaintiff interests, racial, ethnic, and gender diversity, and developing new MDL leaders—as some transferee judges have begun to do.

BACKGROUND

- Leadership counsel in MDLs play an essential role in structuring and litigating plaintiffs' claims: "Because an MDL may collect hundreds or thousands of parties, the system's ability to resolve complex litigation depends on litigation being coordinated by one or more attorneys."[107] These lawyers take on a wide range of essential duties, and accordingly their appointment is typically among a transferee judge's first priorities.

- Transferee judges utilize a variety of processes for appointing leadership counsel. Most commonly, they utilize either "consensus" slates (where lawyers submit proposed leaders to the court) or open application processes that focus on experience in large, complex cases (especially in other MDLs).[108] In selecting case leaders, judges have historically focused (primarily) on "attorneys' experience, financial resources, and cooperative tendencies"—characteristics that likely benefit most plaintiffs but that arguably consider a relatively narrow set of qualifications.[109] But

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106 *See* D. Theodore Rave & Francis McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 L. & Contemp. Probs. 21, 40 (2021).

107 David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 Lewis & Clark L. Rev. 433, 438 (2020).

108 For a description of a "slate," see, for example, *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 954 (N.D. Cal. 2021) ("In this MDL, it was not difficult to decide which lawyers should take the lead because only one group came forward, presenting themselves as a slate."). One recent study found that, in pending MDLs, approximately 38% of appointment orders involved a contested process. *See* Noll, *supra* note 107, at 446. Another recent analysis found that, of 251 reviewed appointment orders, 43 (17%) were contested. Noll & Zimmerman, *supra* note 3.

109 Burch, *supra* note 46, at 844. Burch also notes that these factors "favor repeat players." *Id.*

the result, as one scholar recently summarized, is that "the attorneys who spearhead these proceedings often look a lot like they did fifty years ago, predominately white and predominately male."[110]

POTENTIAL BENEFITS OF THE REFORM

- Greater diversity may have many concrete benefits. For one, a more diverse PSC might be a *better* PSC, just as there is some evidence that a more diverse corporate board is correlated with stronger corporate performance.[111] Further, some argue that "[a]n individual litigant who sees herself in the decision-maker or in the attorney will have a much stronger sense of participation, and thus legitimacy"—meaning that a diverse PSC may promote litigant satisfaction and litigants' sense of procedural justice.[112] Others argue that steps to diversify PSCs are worthwhile because they promote equity within the legal profession, which is still plagued by stubborn racial and gender disparities.[113]

- As noted above, transferee judges have started to consider diversity when they appoint plaintiff leadership.[114] At least one judge has also appointed a "Leadership Development Committee" that aimed to provide "mentorship" and "further experience in preparation for future service on steering committees."[115] Further innovation could easily build on these recent efforts.

- Some scholars argue that repeat play distorts attorney incentives.[116] To the extent these scholars are right, new voices might be *better* voices—more responsive to the needs and interests of individual clients.

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110 *Id.* at 841. For additional analysis of gender diversity among MDL leadership, see generally Noll & Zimmerman, *supra* note 3.

111 *E.g.*, Brooke D. Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 Ind. L.J. 617, 641 (2018) (compiling data, from other contexts, showing that "higher participation by women . . . begets better results"); Fawn Lee, *Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU*, 36 Fordham Int'l L.J. 1471, 1481 (2013) ("Empirical evidence suggests that board diversity leads to economic benefits such as an increase in firm value, improved corporate governance, an increase in the return on equity, and a higher return on invested capital.").

112 Coleman, *supra* note 111, at 642.

113 For an overview of the persistent inequities of leadership in the legal profession, see generally Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 Geo. J. Legal Ethics 1041 (2011).

114 *See* Case Management Order No. 2 (Organizational Structure and Appointment of Counsel Leadership) at 5, *In re* Blackbaud, Inc., Customer Data Breach Litig., 3:20-mn-02972-JMC (D.S.C. Jan. 8, 2021), ECF No. 14.

115 Pretrial Order #20 at 7, In re Zantac (Ranitidine) Prods. Liab. Litig., No. 9:20-md-02924-RLR (S.D. Fla. May 8, 2020), ECF No. 685.

116 For instance, as Burch and Williams have argued, "judicial pressure toward cooperation and consensus," which arguably favor repeat players, "may erode dissent and the adequate representation that follows from it." Burch & Williams, *supra* note 5, at 1463. For additional discussion of repeat players' possible conflicts of interest, see, for example, Burch, *supra* note 87, at 135.

POTENTIAL DRAWBACKS TO THE REFORM

- In part because of the limited pool of attorneys who have historically obtained leadership positions, a selection process that prioritizes diversity might yield leadership committees with fewer resources and less experience—and plaintiffs likely benefit when they are represented by experienced, specialized, and well-resourced advocates.[117]

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- Transferee judges sometimes use other opportunities—outside of formal appointment to PSCs—to develop new potential MDL leaders, including setting aside common benefit work for non-PSC attorneys. Have these approaches been successful? Where do they fall short?
- How might judges shape a competitive process to surface relevant *types* of diversity—including in regard to identity, experience, know-how, etc.? What best practices can we draw from elsewhere in the legal system?
- What does the evidence indicate concerning the relative value of attorney experience? For example, are clients more satisfied when litigation is led by those with relatively more or less experience in the MDL ecosystem? Are substantive outcomes, on balance, better?
- Are there some cases where it is particularly important to appoint a diverse leadership team? Are there some cases where diversity should yield to other considerations? Which one is which and how do we know?
- How should judges strike a balance between diversity and other priorities?
- What is the goal of these efforts? Is the aim for PSCs to reflect the legal profession as a whole? The upper precincts of the profession (which remain predominantly white and male)? The client population within the particular MDL? Or, should the PSC reflect the population of the United States more broadly?

6 REFORM PROPOSAL: Appoint Leadership Counsel for a Time-Limited Period and Offer Opportunities for Challenges and Removal

More transferee judges should appoint plaintiffs' leadership counsel for time-limited terms, not the length of the case. Judges should also establish processes by which new attorneys can apply to join case leadership and report potential conflicts of interest or otherwise-inadequate representation.

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117 *See, e.g.*, Bradt & Rave, *supra* note 4.

BACKGROUND

- Some attorneys appointed to leadership roles may not represent the interests of *each* plaintiff in the litigation. Some lawyers might preference their own clients, at the expense of the aggregate. Some might simply underinvest in case development. With an eye toward maximizing their common benefit fee allocation, some might hoard work for themselves. Or, some might be too eager to settle—even at the expense of claim maximization.[118]

- Many transferee judges appoint leadership indefinitely, and leadership lawyers often remain in place for the length of an MDL.[119] Indeed, as MDLs stretch on, *other* plaintiffs' attorneys may develop relevant expertise—but may lack an onramp into the leadership team.

POTENTIAL BENEFITS OF THE REFORM

- Plaintiffs themselves have limited recourse if the PSC does not meet their needs. For instance, plaintiffs "cannot fire leaders even if leaders ignore their interests,"[120] and accordingly, some scholars have argued for an increased oversight role for non-leadership attorneys.[121] A formalized process for replacement, paired with time-limited terms, would enable such oversight.

POTENTIAL DRAWBACKS TO THE REFORM

- "Appointment to the P[S]C is big business. Typically, its work is extensive and must be financed, so appointment to a P[S]C doesn't come cheap."[122] Accordingly, a rotating PSC might create substantial organizational and financial challenges in a given case. Moreover, high rates of turnover in MDL leadership might undermine the key collectivizing and efficiency benefits the MDL is supposed to provide.

- The ability to remove attorneys from leadership, even if rarely utilized, might cause or highlight tension between plaintiffs' attorneys.

- As with attorney oversight more generally, increased monitoring of leadership attorneys (including at the behest of other lawyers in the suit) creates additional burdens on judges and

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118 For discussion of the roles of individually-retained and leadership counsel in MDLs—and the challenging questions raised by these "layers of lawyers"—see Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 Lewis & Clark L. Rev. 469, 477 (2020).

119 As the text indicates, some judges already impose various limits. *See, e.g.*, *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 617 F. App'x 136, 139 n.2 (3d Cir. 2015) (describing the district court's decision not to renew a steering committee). For discussion of the use of term-limited appointments, see, for example, Dodge, *supra* note 85, at 372.

120 Burch, *supra* note 46, at 844.

121 *See, e.g.*, Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 395 (1996) ("Active engagement of some IRPAs could offer a genuine possibility of substitution of counsel on PSCs if misbehavior can be detected as a litigation proceeds.").

122 Christopher B. Mueller, *Taking A Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. Kan. L. Rev. 531, 539–40 (2017).

counsel. (And judges seeking a reasonable balance might, in turn, default to retaining existing leadership personnel.)

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- How often do genuine conflicts between leadership attorneys and MDL litigants arise? When those conflicts have arisen in the past, have they been adequately addressed?
- Would the threat of removal, or even of repeated reappointment processes, discourage qualified attorneys from seeking leadership positions and/or investing fully in the case's initiation and development?
- What risks might be associated with high rates of PSC turnover? How might those risks be ameliorated by transferee judges and attorneys?
- Transferee judges might understandably shy away from interpersonal conflict, particularly with prominent MDL lawyers. Would transferee judges simply rubber-stamp reappointments, creating friction but not actual reform?

C. Settlement, Compensation, and Closure

7 REFORM PROPOSAL: Enhance Oversight of Common Benefit Fee Allocation

Judges should draw clear boundaries regarding the structure and allocation of common benefit fees, including (1) requiring rigorous documentation of common benefit work, (2) appointing a CPA to receive and review records submitted by leadership attorneys, and/or (3) ensuring that common benefit fees are not allocated by special masters who are themselves selected by leadership attorneys. Alternatively (and more radically), judges might choose to abolish common benefit fees altogether.

BACKGROUND

- Common benefit fees pay those who perform common benefit work by "taxing individual attorneys and their clients a specific percentage of clients' gross settlement proceeds."[123] These fees can be controversial.
- Judges frequently award common benefit fees based on their individual assessments. But some believe that judges are poorly positioned to make these determinations because they sit at some remove—and thus may struggle to evaluate each individual lawyer's contribution to a particular litigation.[124] If judges *are* making poor decisions, common benefit fee distribution

123 Burch & Williams, *supra* note 5, at 1509.

124 For one critical discussion of judicial approaches to fee allocation, see Silver & Miller, *supra* note 83, at 170 ("Judges are

may not match the actual common benefit work attorneys perform, leading to persistent (and inefficient) over- or under-compensation (and attendant acrimony).[125]

- In light of the record-keeping, assessment, and calculations sometimes involved, judges often appoint either special masters or fee allocation committees (comprised of plaintiffs' attorneys) to divvy up common benefit fees. Among other issues, these intermediaries are often nominated or recommended by leadership attorneys, which some believe presents a conflict of interest.[126]

- Some believe that common benefit fees are entirely unnecessary, as attorneys would conduct "enough" common benefit work without *any* additional reward.[127]

POTENTIAL BENEFITS OF THE REFORM

- Ensuring that common benefit fees are not allocated by adjuncts *selected by* leadership would diminish the opportunity for, and appearance of, self-dealing. Additional transparency surrounding fund allocation might improve overall attorney satisfaction and reduce acrimony.

- Rigorous documentation of common benefit work helps "[t]o create a record of the type of work performed as well as the costs expended by the attorneys performing common benefit work."[128] If nothing else, judges should be equipped with this information when allocating common benefit fees.

POTENTIAL DRAWBACKS TO THE REFORM

- Hiring a CPA (or equivalent individual) to review records from counsel might be expensive and time-consuming.

- Additional oversight might slow the MDL process, diminish attorneys' interest in serving in leadership roles, deter lawyers from performing work for the common benefit, and/or hamper judges' ability to efficiently manage large cases. It might also *exacerbate* conflicts between lawyers

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also less suited to setting and allocating fees for [common benefit work]. Judges gain nothing when [common benefit counsel's] fees are low, lose nothing when [common benefit counsel's] fees are high, and have no direct financial stake in the quality of [common benefit work]. Self-interest thus provides judges no incentive to ensure that the fees are reasonable. Moreover, the evidence suggests that judges have not, in fact, done a particularly scientific job at setting fees.").

125 Edward K. Cheng et al., *Distributing Attorney Fees in Multidistrict Litigation*, 13 J. Legal Analysis 558, 559 (2021) ("[C]ourts will rarely have sound, independent information regarding which lawyer did what.").

126 *See* Specter Letter, *supra* note 16, at 9–10.

127 *See, e.g.*, *id.* at 8 ("It is likely unnecessary for common benefit fees to exist. Plaintiffs' counsel who work for the common benefit of all plaintiffs are already amply motivated by their obligations to—and individual fee agreements with—their individual clients.").

128 Fallon, *supra* note 57, at 382.

who already sometimes disagree, at times vehemently, regarding fund allocation.[129]

- It is not clear that, in a world without common benefit fees, lawyers would have an adequate incentive to invest in case preparation and prosecution.

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- What are the most troubling practices when it comes to the *current* assessment and allocation of common benefit fees? Should policymakers and attorneys seek to combat specific tactics or urge specific approaches (e.g., allocation based on quantum-meruit principles) instead?
- Just how expensive would additional scrutiny be and how much time would it take?
- Some large consolidated cases operate *without* common benefit fees.[130] How do those cases fare? What might policymakers (and attorneys) learn from such cases? In a world without common benefit fees, will plaintiffs' lawyers systematically underinvest in the development of "generic" litigation resources? If yes, does that, in turn, systematically benefit those on the right side of the "v"?
- Economic theory would predict that, if individually-retained counsel is relieved of an obligation to pay common benefit fees, savings will be at least partly passed to clients—who, themselves, will pay less for legal services. Is this what we see in practice?[131]
- To what extent do problems with common benefit fees impact individual plaintiffs? If these fees are more efficiently or equitably allocated, would *individual plaintiffs* actually benefit?

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129 *See, e.g.*, Cheng et al., *supra* note 125, at 559 (explaining that, in the NFL litigation, "the dispute over attorney fees took almost as much time as the lawyers took to secure the original $1 billion settlement"); Jane Akre, *Garrard Swings Back to MDL Critics in Pelvic Mesh Litigation*, Mesh News Desk (Apr. 9, 2019), https://www.meshmedicaldevicenewsdesk.com/articles/garrard-swings-back-to-mdl-critics-in-pelvic-mesh-litigation [https://perma.cc/K2WN-6X3Q] (describing a high-profile dispute among law firms, some of which believed they had received insufficient credit, and resultant allocation, for common benefit work).

130 *See* Specter Letter, *supra* note 1616, at 8 (describing aggregate litigation that proceeded without common benefit fees and noting that plaintiffs' attorneys "are already amply motivated" to undertake common benefit work); *In re* Amtrak Train Derailment, 268 F. Supp. 3d 739, 749 (E.D. Pa. 2017) ("And the PMC did not seek common benefit funds—they did all of this for free, without charge for what amounted in some instances to 1000–1500 hours of services plus substantial expenses.").

131 For a skeptical take, see Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 Stan. L. Rev. 633, 667–68 (2013), which explains why contingency fees are "sticky" and seem to "buck economic predictions."

8 REFORM PROPOSAL: Mandate and Publicize Closing Statements, Including Fees Charged and Recoveries Obtained

Courts or state bar associations should require MDL attorneys to file closing statements that disclose fees charged, injury sustained, and settlement obtained, including the amount actually paid to the client. Some data from those filings should be made available to the public.[132]

BACKGROUND

- Similarly-situated litigants in MDL proceedings lack visibility into the outcomes achieved by their counterpart plaintiffs—and, relatedly, lack insight into whether they are overpaying their attorneys (or receiving smaller recoveries) as compared to their peers.

POTENTIAL BENEFITS OF THE REFORM

- Plaintiffs in MDL are often unable to assess the quality of representation, reasonableness of fee charged and costs incurred, and relative value of a settlement offer. Mandatory closing statements —and public data that aggregates them—would help to fill this void, potentially facilitating more competition, reduced costs, and better oversight of attorneys and other providers.[133] They might also help policymakers or plaintiffs to identify specific troubling but widespread practices.

- Mandated closing statements are not new, including in other contingency-fee contexts,[134] and so might be piloted quickly and at low cost.

POTENTIAL DRAWBACKS TO THE REFORM

- Although closing statements are used in other contexts, compiling and submitting relevant information may (depending on what is required) prove time-consuming and burdensome for attorneys; scrutiny of these forms might also burden the transferee court. Judges or bar associations would need to tread carefully to effect such a requirement without imposing unreasonable burdens on MDL lawyers, clients, or judges.

- Requiring closing statements *in MDL cases* (but not other cases) presents a formidable line-drawing challenge. For instance, should closing statement requirements apply only to cases that were actually filed in a given MDL? Companion cases filed in state court? Cases that are not filed but held on tolling agreements and ultimately resolved?

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132 For a detailed discussion of a similar proposal, see Burch & Williams, *supra* note 3, at 1919 (arguing that all PI lawyers should be made to file closing statements (citing Engstrom, *supra* note 40, at 810)).

133 *See id.* (noting that public closing statements might "help promote equality of outcomes for those similarly situated" and "create a more competitive market for the opaque pricing structure of MDL settlement services").

134 *See* Engstrom, *supra* note 41, at 867 n.292.

- Making settlement data available to the public, even in a confidential, aggregate, or anonymized fashion, presents serious logistical hurdles—and could impair negotiations with defendants. Indeed, defendants often value confidentiality and may be willing to pay for it; requiring disclosure may thus decrease plaintiffs' leverage and, by extension, their recoveries.

- More knowledge of recoveries and costs might *decrease* plaintiffs' satisfaction with MDLs—particularly if plaintiffs feel they have been shortchanged vis-à-vis other similarly situated litigants.

- Generally, we do not require lawyers or litigants to file (public) closing statements. Without clear evidence that *MDL lawyers*, in particular, are shirking their ethical obligations (and currently, as noted above, no such evidence exists), it is arguably inappropriate to single MDL lawyers/clients out for specialized scrutiny.[135]

- As discussed previously with regard to inventory caps, lawyers are typically regulated by the state. To the extent the Federal Rules are used to effect this reform, that represents a significant shift in lawyer regulation—which, in turn, represents a significant (and potentially problematic) departure from the status quo. Meanwhile, one might say that transferee judges should require the filing of closing statements—but it is not at all clear they have such authority.

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- Lawyers in New York's First Department are required to submit closing statements and may be subject to discipline if they fail to do so. What, if anything, can be learned from the New York experience?[136]

- In a world with public, searchable closing statements, lawyers and law firms can be expected to adjust their conduct to improve how they measure up against their peers, creating what is sometimes called the "sunshine effect."[137] So, for example, a transparency mechanism might spur additional client screening (as outputs are affected by inputs—and so a lawyer with a strong client inventory will "look" good).[138] In a world of increased transparency, how will lawyers' behavior change, and will all these underlying behavioral changes be, on balance, beneficial?

- How might lawyers game the new system?

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135 For discussion of this dearth of information, see *supra* notes 18–19.

136 For one study of closing statements in New York courts, see generally Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 Vand. L. Rev. 1971 (2017).

137 Engstrom, *supra* note 40, at 874 (describing this "sunshine effect" and compiling evidence).

138 *Id.* ("[B]y mandating the disclosure of abandoned claims, paltry settlements, dismissals, and outright losses, closing statements are likely to discourage firms from accepting as clients those with doubtful or unmeritorious claims.").

- How is additional information apt to affect client satisfaction?
- If information is made available, will it actually be consulted? How will it affect litigant—and prospective litigant—behavior?
- Are MDL lawyers particularly deficient along certain dimensions such that they should be subject to specialized scrutiny?

9 REFORM PROPOSAL: Publish Non-binding Judicial Opinions Regarding Settlement Fairness

Judges should issue non-binding opinions regarding proposed settlements, enabling clients to have greater confidence that the proposed resolution is reasonable and make more informed decisions about whether or not to sign on to the deal.

BACKGROUND

- MDL plaintiffs lack the protections that safeguard their class action counterparts, so, unlike in the Rule 23 context, there are no formal guardrails to ensure that a settlement is fair and adequate.[139] MDL plaintiffs may also lack information, even after the fact, regarding the reasonableness of an award and the underlying negotiations.
- Leadership attorneys may lack sufficient incentive to "fully explain" a "settlement that they desperately want to close."[140] Similarly, individually-retained attorneys may face pressures to convince clients to sign on, including through closure provisions that are designed to encourage attorneys to recommend settlement.[141]

POTENTIAL BENEFITS OF THE REFORM

- If a judge is likely to comment on a settlement, leadership attorneys will likely feel increased pressure to negotiate a reasonable deal and individually-retained attorneys may feel increasingly empowered to register their dissent.[142]

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139 *See, e.g.*, Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 Fla. L. Rev. 383, 423 (2007) (noting that settlements in non-class aggregation are "not subject to judicial supervision in the same way that a class action settlement is"). As a number of Convening participants noted, these guardrails may not always be wholly effective in the class action context. *See* Howard M. Erichson, *Aggregation As Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859, 873 (2016) (describing certain "features of class settlements" that "generally benefit defendants and plaintiffs' lawyers without providing value to class members").

140 Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 Cal. L. Rev. 1259, 1282 (2017).

141 For a discussion of these controversial provisions, see Engstrom, *supra* note 2, at 36 n.143; Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 Fordham L. Rev. 1943, 1946 (2017).

142 For more on these potential benefits, see Bradt & Rave, *supra* note 140, at 1285.

- A non-binding judicial opinion would partially protect and better inform claimants who are otherwise (mostly) unable to evaluate a settlement's reasonableness. This might prove particularly useful if specific provisions of a settlement (rather than the settlement amount or overall deal) raise judicial eyebrows.

POTENTIAL DRAWBACKS TO THE REFORM

- A non-binding opinion might seek to please all but satisfy none: it lacks teeth and is advisory in nature, but it risks shedding doubt on an already-negotiated settlement deal and creating conflicts between attorneys and clients.[143]

- Judges feel some pressure to resolve cases via settlement.[144] Would judges be willing to raise substantive critiques at risk of torpedoing a sought-after global resolution? What process might such a critical opinion trigger?

- Offering a non-binding opinion seems somewhat akin to offering an advisory opinion. Would such conduct cause the court to depart too far from its proper role under Article III?

KEY QUESTIONS AND POTENTIAL RESEARCH AGENDA

- Would the risk of judicial criticism complicate negotiations? Smooth the path for lopsided deals? Neither? And how might judges assess whether a settlement is or is not fair, especially since data regarding settlement outcomes is so sparse?

- What alternatives might a judge consider in lieu of publishing an opinion? Is judicial effort better spent on, e.g., hosting a public webinar to review the settlement in detail? Why or why not?[145]

- In several high-profile aggregated (but non-class) suits, judges have already "assert[ed] the authority to review and formally approve or reject even non-class aggregate settlements in MDLs."[146] Their decisions have brought intense scrutiny and triggered vigorous debate. What

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143 For a more general discussion of judicial involvement in settlement, see Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 Fordham L. Rev. 319, 335 (2011).

144 *See, e.g.*, Cartmell, *supra* note 103, at 984 (describing the "pressure on judges to make the most of their opportunities to facilitate settlements"); Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 883 (2005) (noting that "there is every reason to believe that multidistrict centralization increases pressure on transferee judges to promote an early settlement (since the MDL process creates incentives for judges to treat settlement as the ultimate goal of consolidation)"). For further discussion of the perceived pressure on transferee judges to facilitate settlement, see *supra* note 100.

145 For additional discussion of possible judicial roles in settlement negotiation and evaluation, see, for example, Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. Davis L. Rev. 835, 858 (1997) ("Judges should be obliged to structure settlement negotiations (ex ante) and to evaluate settlements (ex post) in all aggregates, be they called class actions, MDLs, consolidations or whatever.").

146 Bradt & Rave, *supra* note 140, at 1263; Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 Wash. U. L. Rev. 1015, 1016 (2013).

can we learn from those cases? Who benefited from judicial intervention, and how do we know?[147]

- Pursuant to Rule 23(e)(2), the court can approve a settlement that would bind class members only after conducting a hearing and finding, on the record, that the settlement is "fair, reasonable, and adequate." What is the verdict on these assessments? Do judges engage in rigorous review —or do they merely rubber stamp negotiated deals? Do judges even have the information they need to assess an agreement that the plaintiff and defendant *both* insist is adequate? [148]

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147 *See* Bradt & Rave, *supra* note 140, at 1264 (describing competing arguments that judicial intervention inappropriately interferes with parties' autonomy or benefits "scheming lawyers" able to negotiate without the formal protections of a class action).

148 *See* Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective, in* The Limits of Law 356 (1999) (reporting that, at least as of 1999, the vast majority of district courts had found the Rule's requirement to be satisfied); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1467 (2006).

IV. Conclusion

The May 20, 2022 Convening at Stanford Law School emphasized that the attorney-client relationship in MDL merits close inspection. The MDL's rapid growth, its conceptual and practical importance, and the procedural improvisation that is arguably its calling card—these features and characteristics enable and validate consistent efforts to improve and innovate.

Convening attendees found a great deal of common ground as they addressed these critically important questions, despite frequent disagreement regarding the nature and extent of the underlying challenges. To some, MDL is a house largely in order—but one where improved implementation and incremental, low-risk reform should be explored. To others, MDLs' flaws are substantial and merit rapid intervention. But all agreed that it's possible—and worthwhile—to fortify MDLs and to seek at least marginal improvements. This document aimed to capture these varied perspectives, identify shared foci of enthusiasm and energy, demonstrate the range of possible responses, and surface the difficult and complicated tradeoffs that would attend most meaningful reforms. The Rhode Center is eager for input as we continue to chip away at the challenges facing MDL, aggregate litigation, and the civil legal system more generally.