Ethics by Appointment: An Empirical Account of Obscured Sanctioning in MDL Cases

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Ethical norms in litigation are policed through overlapping regulatory regimes. One of these regimes is internal to litigation and split into different components, including Federal Rules of Civil Procedure 11, 26(g), and 37; Federal Rule of Appellate Procedure 38; 28 U.S.C. §§ 1927 and 1447(c); as well as courts' inherent authority to sanction litigants and attorneys. In the standard narrative, these tools provide immediate corrections to unethical conduct, unlike bar sanctions or derivative malpractice actions that are delayed and uncertain. Together, these tools aim to effectuate the goal of Federal Rule of Civil Procedure 1: to make sure parties cooperate "to secure the just, speedy, and inexpensive determination of every action and proceeding." This Essay assesses the extent to which these litigation sanction devices work in "every action," or whether multidistrict litigation ("MDL") cases are also idiosyncratic in this respect.

Using docket sheets from numerous MDL cases, I examine how often and with what result internal sanctions are used in MDL cases. The findings show low usage rates and low success rates (compared to 10,000 non-MDL cases filed during the same time window). This suggests that courts in MDL cases have replaced the policing function of formal sanctioning devices with other devices, most prominently the power to select, empower, and replace lead counsel.

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INTRODUCTION

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This Essay makes four contributions. First, it provides fresh empirical measures of sanctioning rates in MDL cases. Second, it documents and explains previously overlooked facets of unorthodox MDL litigation behavior. Third, the empirical contributions provide the backdrop to connect disparate doctrinal strands (litigation sanctions, lead counsel governance, client oversight and communication, case and settlement management, and judicial ethics). Fourth,

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1. *See, e.g.*, Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n, 886 F.3d 852, 857–58 (10th Cir. 2018) (explaining overlapping regimes); Metz v. Unizan Bank, 655 F.3d 485, 490–91 (6th Cir. 2011).

2. FED. R. CIV. P. 11, 26(g), 37.

3. FED. R. APP. P. 38.

4. 28 U.S.C. §§ 1447(c), 1927.

5. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.152 (2004) (discussing different sources of sanctioning authority).

6. FED. R. CIV. P. 1; *see* Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 62–63 (2018) (discussing the nature and tradeoffs between the procedural values in Rule 1). *See generally* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287 (2010).

7. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1689 (2017) (explaining the idiosyncratic "exceptionalism" of MDL approaches).

this Essay empirically compliments and contextualizes the doctrinal contributions of other essays in the symposium.[8]

I. BACKGROUND AND MOTIVATION

MDLs are a massive and currently essential feature of the federal civil litigation landscape. It is difficult to imagine the federal judiciary handling the existing civil caseload without the use of MDLs. It is troubling, then, that MDLs are also fragile. They rely on a heightened degree of coordination between parties and tight judicial management.[9] For example, one-sided adversarial motion practice that is entirely ordinary in regular litigation can easily throw a wrench into complex litigation proceedings.[10] Similarly, action taken in parallel state proceedings can undermine federal complex litigation and prevent resolution.[11] The current doctrinal fabric recognizes that all efficiency gains that MDLs promise, and which justify their existence, can easily be squandered. Endless motions, on many different tracks, with diverging and perhaps unethical aims, will not "promote the just and efficient conduct of such actions."[12] Instead, doctrine and judges aim to shepherd cases toward efficient resolutions, often settlement. This can require a tight choreography between judges and attorneys, opposing counsel, and even counsel on the same side of the "v."[13]

To accomplish this choreography, MDL judges are empowered to "adopt[] special procedures."[14] They have increasingly accepted the invitation and

8. *See generally* Candice Enders & Joshua P. Davis, *The Ethics of Defense Counsel's Communications with Absent Class Members Before Class Certification*, 74 HASTINGS L.J. 1331 (2023); W. Bradley Wendel & Joshua P. Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, 74 HASTINGS L.J. 1459 (2023); Lauren Godshall, *The Ethics Gap: MDL Leadership Versus the Attorney-Client Relationship*, 74 HASTINGS L.J. 1353 (2023); Melissa Mortazavi, *Where Neutrality Stops and Reality Begins: Why Considering Identity Is Vital to Lead and Class Counsel Selection*, 74 HASTINGS L.J. 1403 (2023); Eli Wald, *Class Actions' Ethical Kiss: The Class Action Lawyer's Client Is the Class*, 74 HASTINGS L.J. 1433 (2023).

9. *See, e.g.*, *In re* Phenylpropanolamine Prods. (PPA) Liab. Litig., 460 F.3d 1217, 1229 (9th Cir. 2006) ("[A]dministering cases in multidistrict litigation is different from administering cases on a routine docket.").

10. *See generally, e.g.*, *In Re* New Motor Vehicles Canadian Exp. Antitrust Litig., 229 F.R.D. 35, 41 (D. Me. 2005) (chastising a party for filing a summary judgment motion that, though ordinarily allowed by the Rules without judicial approval, was filed without the court's permission and would complicate class certification and discovery schedules, explaining that "[t]his litigation is difficult and complex enough without surprises").

11. *See, e.g.*, Standard Microsys. Corp. v. Tex. Instruments, Inc., 916 F.2d 58, 60 (2d Cir. 1990) (noting the need for intervention where "a federal court is on the verge of settling a complex matter" and otherwise permissible state proceedings would undermine settlement discussions).

12. 28 U.S.C § 1407 ("[MDL] transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.").

13. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 10.21 ("Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the court.").

14. FED. R. CIV. P. 16(c)(2)(L) ("At any pretrial conference, the court may consider and take appropriate action . . . adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.").

developed a broad spectrum of "unorthodox procedures."[15] Courts have, or at least think they have, broad leeway to use such procedures.[16] For example, they can set tight schedules for motions,[17] force discovery coordination,[18] allocate common benefit fees,[19] adopt a system of master and short-form complaints,[20] require plaintiff factsheets,[21] employ the use of *Lone Pine* orders,[22] and revise contingent fee contracts,[23] to name only a few. But none of these unorthodox

15. *See* Gluck, *supra* note 7, at 1669.

16. *See, e.g.*, *In re* Asbestos Prods. Liab. Litig. (No. VI), 718 F.3d 236, 243 (3d Cir. 2013) ("We review a district court's interpretation of its own orders with deference, particularly in the MDL context."); *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 822 (D.C. Cir. 2009) ("District judges [in the MDL context] must have authority to manage their dockets, especially during a massive litigation such as this, and we owe deference to their decisions whether and how to enforce the deadlines they impose."); *In re* Deepwater Horizon, 907 F.3d 232, 235 (5th Cir. 2018) (agreeing with other circuits that "a special deference [is] required in the context of an MDL").

17. *See, e.g.*, *In re* Phenylpropanolamine Prods. Liab. Litig., 460 F.3d 1217, 1232 (9th Cir. 2006) ("[MDL courts] must [be able to] establish schedules with firm cutoff dates if the coordinated cases are to move in a diligent fashion toward resolution by motion, settlement, or trial.").

18. *See, e.g.*, *In re* Activated Carbon-Based Hunting Clothing Mktg. & Sales Pracs. Litig., 840 F. Supp. 2d 1193, 1198 (D. Minn. 2012) (citing the oft-repeated argument that "[t]he primary purpose behind assigning multidistrict litigation to a transferee court is to promote efficiency through the coordination of discovery"); *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005) ("Centralization under Section 1407 is necessary in order to eliminate duplicative discovery . . . .").

19. *See generally* Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees To Promote MDL Integrity*, TEX. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4351292.

20. *See, e.g.*, Master Long Form Complaint, *In re* Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig., No. 14-mn-02502 (D.S.C. May 30, 2014), ECF No. 160 (defining generalized allegations, factual background, and central causes of action); *In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d at 1224 ("Case Management Order 6 . . . set[s] forth the basic principles for taking fact discovery of plaintiffs. No objections were lodged to the order in its final form. It requires all case-specific discovery to occur during the time periods permitted in the order, and adopts a 'Plaintiff's Fact Sheet' (PFS) protocol in lieu of interrogatories to streamline the process. The PFS is a questionnaire to be signed under oath seeking information about the plaintiffs' injuries, medical history, current medical condition, identification of the product claimed to have caused injury, specifics of the injury suffered, and the identity of the plaintiffs' healthcare providers. It also includes blank authorizations to be signed by plaintiffs to allow defendants to collect medical and other records.").

21. *See, e.g.*, *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 567 (S.D. Tex. 2005) ("[A]ll Plaintiffs in recently-transferred actions must submit sworn Fact Sheets within 60 days from the date of transfer by the Panel."); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 496 F.3d 863, 865–66 (8th Cir. 2007) ("The district court, for case management purposes, issued two important pretrial orders [approving the plaintiff fact sheet process]. . . . Pretrial Order # 2 required all attorneys, including Counsel, to provide a current email address for correspondence with the court. The order also required all plaintiffs to complete a 'Plaintiff's Fact Sheet'—a lengthy and detailed medical questionnaire that included a medical disclosure form. A second order, Pretrial Order # 5, required that the Gaydoses comply with Pretrial Order # 2.").

22. Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637057 (N.J. Super. Ct. Nov. 18, 1986). They originated in a New Jersey state case but have since been used in many federal cases. *See, e.g.*, *In re* Zimmer NexGen Knee Implant Prods. Liab. Litig., No. 11-cv-05468, 2016 WL 3281032, at *1 (N.D. Ill. June 10, 2016) (finding and ordering a *Lone Pine* order as "necessary to ensure that certain cases in [the MDL] have sufficient merit to proceed to trial"). *See generally* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2 (2019).

23. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 554 (E.D. La. 2009) (arguing that the quasi-class in the Vioxx MDL "g[a]ve[] the Court equitable authority to review contingent fee contracts").

procedures work efficiently if lawyers act unethically, make unnecessary motions and arguments, or unduly push the boundaries of permissible and sensible discovery. All of this suggests a heightened importance of ethical checks and sanctions in MDL practice.[24]

Ethical norms in MDL litigation are policed through overlapping regulatory regimes. One of these regimes is internal to litigation. In the standard narrative, in-litigation sanctions provide immediate corrections unlike bar sanctions or derivative malpractice actions that are delayed and uncertain. Furthermore, the attenuated and complex relationship between lawyers and clients in MDLs also raises the specter of less meaningful supervision and checks by clients. Part of the reason for this is the complexity and procedural quirkiness of many MDLs, but part of the reason is also the simple fact of physical distance: § 1407 is, after all, a transfer device that moves many actions for the brunt of meaningful litigation to a distant forum.[25] Given these limitations on downstream sanctioning devices, we would expect in-litigation sanctions to carry more weight. This Essay focuses on in-litigation sanctioning devices, but I want to emphasize that a fuller account would examine other regulatory regimes as well.[26]

MDL judges have numerous in-litigation sanctioning devices available to police ethical norms. I will briefly review them here to remind readers of the range of in-litigation sanctioning devices and to explain how they might take on added significance in the context of MDL practice. This doctrinal overview thus creates the context for understanding the surprising finding that these devices are rarely invoked.

Perhaps the most versatile in-litigation sanctioning tool is Rule 11 of the Federal Rules of Civil Procedure. It applies to all non-discovery papers in civil cases in federal district courts.[27] It does not apply to discovery practice or appellate procedure.[28] The main purpose of Rule 11 is "to deter baseless filings and curb abuses."[29] It allows courts to impose sanctions for frivolous and

24. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 10.151 ("The rules and principles governing the imposition of sanctions in complex litigation require special care because misconduct may have more severe consequences.").

25. *See generally* Roger Michalski, *Transferred Justice: An Empirical Account of Federal Transfers in the Wake of Atlantic Marine*, 53 HOUS. L. REV. 1289 (2016).

26. Time and data limitations prevent me from doing so here, but I hope future researchers explore these regulatory regimes and the interaction among them more fully.

27. Willy v. Coastal Corp., 503 U.S. 131, 134–35 (1992) ("Th[e] expansive language [defining the scope of the Federal Rules] contains no express exceptions and indicates a clear intent to have the Rules, including Rule 11, apply to all district court civil proceedings.").

28. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 406 (1990) ("On its face, Rule 11 does not apply to appellate proceedings.").

29. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 553 (1991); *Cooter*, 496 U.S. at 393 ("[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts.").

improper pleadings, non-discovery motions, and other papers.[30] Attorneys have an affirmative duty when filing such material with the court to certify that they conducted a reasonable inquiry and that the document is well grounded in fact, legally tenable, and not presented for an improper purpose (such as causing unnecessary delay or needlessly increasing litigation cost).[31] When violated, courts generally have broad discretion to impose a range of sanctions.[32]

Considering that "baseless filings and . . . abuses"[33] are the precise dangers to the efficiency of MDLs, Rule 11 would seem like an ideal device to police abuses in MDL practice. Yet there is also reason to doubt the effectiveness of Rule 11 in MDLs. Most notably, Rule 11 does not require sanctions. Instead, courts have broad discretion regarding whether violations warrant sanctions.[34] Numerous courts have indicated a reluctance to use Rule 11 aggressively for fear of "chilling" important litigation.[35] The Federal Justice Center's Manual for Complex Litigation also reflects an ambivalence in its approach to sanctions, both warning against their use as a management tool and encouraging them.[36] Given the limited availability of sanctions and these conflicting normative

30. FED. R. CIV. P. 11(b)–(c) ("By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [it is not frivolous or being used for abuse]. . . . If . . . violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."). However, the Rule is not applicable to discovery violations. FED. R. CIV. P. 11(d) ("This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.").

31. FED. R. CIV. P. 11(b)(1)–(4).

32. FED. R. CIV. P. 11(c)(1)–(4) (outlining the guidelines for permissible sanctions). *But cf.* 15 U.S.C. § 78u-4(c)(1) (outlining the guidelines for mandatory sanctions); Thompson v. RelationServe Media, Inc., 610 F.3d 628, 636 (11th Cir. 2010) (finding that Rule 11 sanctions are mandatory under the PSLRA).

33. *Bus. Guides, Inc.*, 498 U.S. at 534.

34. FED. R. CIV. P. 11(c)(1) ("[T]he court *may* impose an appropriate sanction." (emphasis added)); FED. R. CIV. P. 11(c)(4) ("A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.").

35. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) ("Rule [11] must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy."); McGhee v. Sanilac County, 934 F.2d 89, 92 (6th Cir. 1991) ("[R]ule [11] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."); White v. Gen. Motors Corp., 908 F.2d 675, 685 (10th Cir. 1990) ("[When imposing Rule 11 sanctions,] the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances."); Sussman v. Salem, Saxon & Nielsen, P.A., 150 F.R.D. 209, 217 (M.D. Fla. 1993).

36. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 10.151 ("Although sanctions should not generally be a management tool, a willingness to resort to sanctions, sua sponte if necessary, may ensure compliance with the management program.").

commitments, Rule 11 may not be as broadly used in MDL practice as initially thought.[37]

Rule 16 is perhaps almost as versatile as Rule 11. At first sight, it looks deceptively like a rule merely concerned with pretrial conferences and scheduling matters. However, for complex litigation in general, and MDL practice in particular, meaningful and respected deadlines are vital.[38] Rule 16 authorizes and perhaps nudges courts toward active case management to "expedit[e] disposition of the action," prevent "protracted" and "wasteful pretrial activities," and facilitate settlement.[39] Otherwise, all MDLs might become *black holes* from which actions never emerge.[40] This would undermine the fundamental goal of determining actions within a meaningful timeframe.[41] Federal appellate courts, in various contexts, have encouraged district court judges to use Rule 16 as an active case-management tool.[42] MDL judges must and routinely do use scheduling orders to ensure that litigation moves forward.[43] One would imagine, then, that the sanctions authorized in Rule 16[44] are an important and often utilized tool to keep attorneys on track.

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37. This is true at least in ways that reach the court and might show up on docket sheets. Rule 11 contains a safe harbor provision that grants allegedly offending parties twenty-one days to withdraw or correct violations. FED. R. CIV. P. 11(c)(2). This could mean that Rule 11 does important work in deterring and correcting abuse and mistake, but all behind the scenes.

38. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 11.2 ("Federal Rule of Civil Procedure 16 authorizes the court to hold pretrial conferences in civil cases. These conferences are the *principal means* of implementing judicial management of litigation." (emphasis added)).

39. FED. R. CIV. P. 16(a).

40. *See generally* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013).

41. *See* FED. R. CIV. P. 1 ("[The Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

42. *See, e.g.*, Montanez v. Simon, 755 F.3d 547, 552 (7th Cir. 2014) ("Trial judges have substantial case-management authority to control the course of litigation in their courts. In cases lacking private incentives to limit the scope of litigation, active judicial oversight can help prevent straightforward cases like this one from spiraling out of control. The Federal Rules of Civil Procedure authorize judges to monitor and influence the scope of litigation."); Wong v. Regents of Univ. of Cal., 410 F.3d 1052, 1060 (9th Cir. 2005) ("In these days of heavy caseloads, trial courts in both the federal and state systems routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines. Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders, and that failure to do so may properly support severe sanctions and exclusions of evidence. The Federal Rules of Civil Procedure explicitly authorize the establishment of schedules and deadlines, in Rule 16(b), and the enforcement of those schedules by the imposition of sanctions, in Rule 16(f).").

43. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 10 ("Fair and efficient resolution of complex litigation requires at least that . . . the court exercise early and effective supervision (and, where necessary, control)."); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 611 (9th Cir. 1992) ("As the torrent of civil and criminal cases unleashed in recent years has threatened to inundate the federal courts, deliverance has been sought in the use of calendar management techniques. Rule 16 is an important component of those techniques.").

44. *See, e.g.*, FED. R. CIV. P. 16(f)(1)(C) (authorizing sanctions for "fail[ure] to obey a scheduling or other pretrial order").

Discovery takes up a significant chunk of MDL activity. It has its own sanctioning regime sprinkled through Rules 26, 30, 32(d), 33(b)(3)–(4), 34(b), 35(b)(1), 36(a), and 37. These Rules focus on different aspects of discovery practice ranging from initial disclosures,[45] failure to preserve electronically stored information,[46] and discovery requests and responses,[47] to the use of specific discovery tools.[48] Generally, these sanctioning devices mirror Rule 11's concern with abuse and waste. Litigating parties, though adversarial to each other, must work together during discovery under threat of sanctions.[49] The Supreme Court has encouraged federal district court judges to be actively involved in the discovery process[50] and use discovery rules and sanctions to structure discovery to be efficient and prevent abuse.[51] Again, one might be tempted to think that the breadth and depth of these sanctioning devices, paired with the importance of discovery for MDL practice, would mean that such sanctioning is an important feature of MDLs.

Beyond the Rules, there are also statutes that permit federal courts to impose sanctions in MDLs. For example, 28 U.S.C. § 1927 authorizes sanctions against attorneys who engage in conduct that is unreasonable and vexatious, or

45. FED. R. CIV. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard [may impose other sanctions].").

46. FED. R. CIV. P. 37(e) ("If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court [may impose sanctions].").

47. FED. R. CIV. P. 26(g)(3) ("If a certification [for various disclosures and discovery requests provided in the Rule] violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.").

48. *See, e.g.*, FED. R. CIV. P. 30(d)(2) (sanctions for impeding, delaying, or frustrating the fair examination of a deponent); FED. R. CIV. P. 45(d) (sanctions for imposing undue burden or expense on a subpoenaed person).

49. *See, e.g.*, Kinetic Concepts, Inc. v. ConvaTec Inc., 268 F.R.D. 226, 243 (M.D.N.C. 2010) ("[T]he unambiguous dictates of the Rules . . . require attorneys to conduct discovery in a cooperative fashion . . . ."); Fudali v. Napolitano, 283 F.R.D. 400, 401 (N.D. Ill. 2012) ("While discovery may be the bane of modern litigation[,] . . . parties and their counsel have an obligation to participate fully, fairly and cooperatively in that often needlessly contentious endeavor." (citations omitted)); Beck v. Test Masters Educ. Servs., Inc., 289 F.R.D. 374, 386 n.10 (D.D.C. 2013) ("Discovery disputes are costly, and parties are encouraged strongly—both by the Court and by the Federal Rules of Civil Procedure—to cooperate in discovery rather than waging expensive battles tangential to the merits of the claims."); Littlejohn v. Bic Corp., 851 F.2d 673, 684 (3d Cir. 1988) ("Scrupulous compliance with court discovery orders is particularly important because our system of discovery relies on the cooperation and integrity of attorneys operating within the guidelines provided by the Federal Rules of Civil Procedure and the provisions of any protective order.").

50. *See* Herbert v. Lando, 441 U.S. 153, 177 (1979) (Powell, J., concurring) ("[J]udges should not hesitate to exercise appropriate control over the discovery process.").

51. Crawford-El v. Britton, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.").

that multiplies proceedings.[52] Attorneys who abuse the judicial process can be held accountable for unnecessary or excess costs, expenses, and fees.[53] Some common grounds for § 1927 sanctions are not applicable in many MDLs (for example, ignoring evidentiary rulings at trial or refusing to leave sidebar when ordered).[54] However, many other sanctions are available. For example, courts have sanctioned attorneys for advancing frivolous legal theories[55] and failing to comply with filing deadlines.[56] Deterring such conduct is important in regular litigation and perhaps even more so in MDL practice.[57] As with many other sanctioning tools, this might lead to the expectation that § 1927 sanctions are a common feature of MDL practice.

In addition to the sanctions available under the Rules and statutes, courts also have the authority to impose sanctions based on their "inherent authority."[58] As the name suggests, courts have inherent powers to sanction for bad faith, vexatious, wanton, and oppressive conduct.[59] The availability of sanctions under the Federal Rules or a statute does not displace a court's inherent authority to impose sanctions.[60] Typical examples of when sanctions might be imposed under a court's inherent authority include ignoring or violating a court order, abuse of the judicial process, delaying and disrupting litigation, raising bad faith objections, failing to attend and participate at court conferences, and bad faith

52. 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

53. *See In re* Schaefer Salt Recovery, Inc., 542 F.3d 90, 101 (3d Cir. 2008) (citing § 1927).

54. *See* Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 246 (1st Cir. 2010).

55. *See, e.g.*, Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 57 (2d Cir. 2018).

56. *See, e.g.*, Siu Ching Ha v. Baumgart Café, No. 15-5530, 2018 WL 1981478, at *5–8 (D.N.J. Apr. 26, 2018).

57. *See* Royce v. Michael R. Needle P.C., 950 F.3d 939, 958–59 (7th Cir. 2020) (noting that the court may look beyond individual actions by an attorney and, instead, consider such actions in the context of the procedural history of the case).

58. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution[,] . . . powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . ."); Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962) (finding that federal courts possess certain "inherent power[s]" not conferred by rule or statute "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); Goodyear Tire & Rubber Co. v. Haeger, 132 S. Ct. 1178, 1182 (2017).

59. *See generally* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates . . . .").

60. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) ("We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.").

filings and misrepresentations. Unlike many other sanctioning devices, sanctions under a court's inherent authority are available for in-litigation activity and conduct leading up to litigation.[61] A court may sanction a party, attorney, law firm, and even nonparties. Again, the breadth and scope of this sanctioning device suggests that it could be broadly used in MDLs.

The sanctioning devices discussed thus far are perhaps the most common in regular litigation and likely the ones of most consequence in MDLs. However, there are others: Federal Rule of Civil Procedure 56(h) (sanctions for filing affidavits or declarations in bad faith or solely for delay in the context of summary judgment),[62] Federal Rule of Civil Procedure 41 (involuntary dismissal for failure to comply with rules or a court order), Federal Rule of Appellate Procedure 38 (sanctions for frivolous appeal),[63] 28 U.S.C. § 1447(c) (sanctions for improper removal),[64] and, rarely, sanctions authorized under local rules.[65]

Together, these sanctioning devices are aimed to effectuate Rule 1's goals to make sure "the parties" cooperate "to secure the just, speedy, and inexpensive determination of every action and proceeding."[66] The aim of the following Parts is to assess the extent to which these litigation sanction devices work in "every action," or whether MDL cases are also idiosyncratic in this manner. Given the need for cooperation between attorneys in MDL cases, one might expect that in-litigation compliance tools, if anything, have a heightened role to play in MDL practice. Part II introduces the data and methods used to test that proposition. Part III finds that the data does not support this expectation.

II. DATA AND METHODS

To learn more about litigation behavior in MDLs, I examined the docket sheets of MDLs 2000[67] to 3000[68] filed with the Judicial Panel on Multidistrict Litigation ("JPML") between September 2008 and March 2021. Docket sheets, though imperfect, provide a useful way to track litigation behavior that, in many ways, surpasses reliance on reported opinions alone. Many of the litigation devices studied here might never result in opinions. And even if they did, they

61. *See, e.g.*, Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd., 483 F. App'x 634, 635 (2d Cir. 2012).

62. FED. R. CIV. P. 56(h) ("If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.").

63. FED. R. APP. P. 38.

64. 28 U.S.C. § 1447(c).

65. *See generally, e.g.*, E.D. MICH. CIV. R. 11.1; Miranda v. S. Pac. Transp. Co., 710 F.2d 516 (9th Cir. 1983).

66. FED. R. CIV. P. 1.

67. *In re* U.S.A. Exterminators, Inc., Fair Lab. Standards Act (FLSA) Litig., No. 2000 (J.P.M.L.).

68. *In re* Charles Hayes False Imprisonment Litig., No. 3000 (J.P.M.L.).

might not be reported in the databases of the main commercial providers. Furthermore, while many MDLs are well known and their dockets easily retrievable,[69] many other MDLs have labored in relative obscurity. This is a reminder to speak cautiously and clearly when we discuss MDLs. They exhibit tremendous variation. Some are large, with many member cases and participating attorneys, while many others are tiny in comparison. Similarly, many MDLs are not familiar to academics and commentators, while there are a handful of superstar cases (e.g., opioids) that are well discussed in the academic[70] and popular literature.[71] Well-known MDLs and obscure MDLs likely function in fundamentally different ways. This Essay surveys all MDLs, specifically for the presence of in-litigation ethical sanction requests and grants.

A. FROM THE JPML TO THE DISTRICTS

I began the data collection by constructing a database of all MDL cases.[72] To do so, I accessed every case brought to the JPML.[73] All applications are sequentially numbered. For example, JPML docket number 2501[74] was filed on

69. *See generally, e.g.*, *In re* Nat'l Prescription Opiate Litig., No. 17-md-2804 (N.D. Ohio May 6, 2022) (Order re: Public and Media Logistics).

70. *See generally, e.g.*, Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285 (2021); Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637 (2019); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021); Matt Irby, *The Opioid Crisis in Indian Country: The Impact of Tribal Jurisdiction and the Role of the Exhaustion Doctrine*, 43 AM. INDIAN L. REV. 353 (2019); Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175 (2019); Stacy L. Leeds, *Beyond an Emergency Declaration: Tribal Governments and the Opioid Crisis*, 67 U. KAN. L. REV. 1013 (2019).

71. *See, e.g.*, Meryl Kornfield & Lenny Bernstein, *Drug Distributors, Johnson & Johnson Reach $26 Billion Deal To Resolve Opioid Lawsuits*, WASH. POST (July 21, 2021, 5:46 PM), https://www.washingtonpost.com/health/2021/07/21/opioid-settlement-distributors; Jan Hoffman, *CVS and Walgreens Near $10 Billion Deal To Settle Opioid Cases*, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/health/cvs-walgreens-opioids-settlement.html; Soma Biswas, *Endo International Files for Bankruptcy To Weather Opioid Lawsuits*, WALL ST. J. (Aug. 17, 2022, 3:32 PM), https://www.wsj.com/articles/endo-international-files-for-bankruptcy-to-weather-opioid-lawsuits-11660730243.

72. To my knowledge no such database exists, though some databases have focused on segments of MDL practice. *See, e.g.*, *Statistical Analysis of Multidistrict Litigation, Pending MDLs as of September 15, 2022*, U.S. JUD. PANEL ON MULTIDIST. LITIG., https://www.jpml.uscourts.gov/pending-mdls-0 (last visited May 12, 2023); U.S. JUD. PANEL ON MULTIDIST. LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 2000: INDEX TO TRANSFEREE DISTRICTS WITH MULTIDISTRICT LITIGATION PENDING AS OF SEPTEMBER 30, 2000, OR DISMISSED SINCE OCTOBER 1, 1999 (2000), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2000.pdf; *see also MDL Data*, ELIZABETH CHAMBLEE BURCH, https://www.elizabethchambleeburch.com/mdl-data (last visited May 12, 2023).

73. Data collection is ongoing and currently limited to between August 2002 (for MDL 1500) and March 2021 (for MDL 3000).

74. *See generally* Motion of Lloyds TSB Bank PLC, Now Known as Lloyds Bank PLC, for Transfer of Related Actions to the Northern District of California for Coordinated or Consolidated Pretrial Proceedings Pursuant to 28 U.S.C. § 1407, *In re* Lloyds Bank PLC Int'l Mortg. Serv. Loan Litig., No. 2501 (J.P.M.L. Oct. 8, 2013), ECF No. 1.

October 8, 2013, and JPML docket number 2502[75] is the next case filed two days later on October 10, 2013. For each case, I collected the JPML docket number, name, and date filed with the JPML.

Of course, not every application to create an MDL is successful. The JPML routinely denies such requests. I did not collect docket sheets for cases where MDL transfers were denied.[76] For the cases where the JPML granted transfers, I collected the name of the federal district where the MDL cases would be transferred to, the name of the assigned judge, the current status of the case (open or closed), the date of termination (if any), and most importantly, the so-called master docket ID[77] that distinguishes the case from the docket IDs of all of the MDL member cases.[78] The master docket ID allows for retrieval of docket sheets for individual MDLs that the JPML created.

The docket sheets for each MDL were manually downloaded from Westlaw. Other options exist but were not suitable because of expense or the cumbersome format of the source. Westlaw docket sheets can be downloaded in a number of formats, including revisable form text ("RFT") that I processed into standard and more useable data frames. Within those data frames, each row constitutes one docket entry. This allows for easy, reliable, and reproducible analysis.

Docket entries are a testament to endless human ingenuity: the same act can be described in innumerable ways. This makes it particularly problematic when the docket entries in these MDLs come from a rotating cast of many clerks at many courts. Clerks and courts each have different ways of entering court proceedings. Take for example, references to the Federal Rules of Civil

75. *See generally* Motion of Plaintiff, Dianne Christopher, for Transfer of Actions for Coordinating or Consolidated Pretrial Proceedings, *In re* Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II), No. 2502 (J.P.M.L. Oct. 10, 2013), ECF No. 1.

76. Some future researcher might, however, find it useful to have access to the list of all cases that reached the JPML.

77. Mindful of the complicated history of the term "master," some fields have renamed commonly used terms that incorporate that word. For example, many real-estate agents no longer refer to the biggest bedroom in the house as the "master bedroom." *See, e.g.*, Sydney Franklin, *The Biggest Bedroom Is No Longer a 'Master*,*'* N.Y. TIMES (Aug. 5, 2020), https://www.nytimes.com/2020/08/05/realestate/master-bedroom-change.html ("The term's racist and sexist undertones lead New York's real estate community and others to rethink outdated industry jargon."). Similarly, many tech people have reevaluated use of the term. *See, e.g.*, Elizabeth Landau, *Tech Confronts Its Use of the Labels 'Master' and 'Slave*,*'* WIRED (July 6, 2020, 7:00 AM), https://www.wired.com/story/tech-confronts-use-labels-master-slave/. However, elsewhere the term seems to be less controversial. *See, e.g.*, *Masters & Certificate Admissions*, U.C. L. S.F., https://www.uchastings.edu/admissions/ll-m-msl-hpl-admissions/ (last visited May 12, 2023). I use the old term here for lack of a commonly agreed-upon alternative that communicates the special status of this docket ID in a sea of other docket IDs that are not of interest.

78. *See* JUD. PANEL ON MULTIDIST. LITIG. & FED. JUD. CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE COURT CLERKS 2 (2008) ("Every MDL must have a master docket sheet to represent activity in the centralized action, which is referred to as the lead, coordinated, master, or main case.").

Procedure. Clerks sometimes reference the Rules using the full name (and with varying capitalization), sometimes using various abbreviations, and sometimes using Bluebook conventions (and other times not). They might introduce spaces between words (sometimes one, or sometimes more), use periods, or just smush everything together.[79] On top of that, there are endless opportunities for typos. And all of that just in the most quotidian act of referencing the Federal Rules of Civil Procedure. Searches for motions, rulings, and opinions are more complex and varied still.

It is easy to bemoan this complexity, but it is important to remember that the vital and primary purpose of federal dockets is to enable and facilitate federal court proceedings. Federal dockets' primary audience is busy judges, clerks, and attorneys in the proceedings. Strangely, the world is not built for the convenience of legal academics writing symposium pieces.

Researchers therefore must develop robust tools to search for entries of interest that can be finetuned and are sensitive to endless variation. The tool chosen for this Essay is a battery of search algorithms built on messy regular expressions ("regex"). Regex searches can achieve a complexity and sensitivity difficult to match with, say, Boolean searches.[80] Regex expressions are a bit like discovery requests: broad searches can return too much material, burying the needle in a mountain of hay.[81] Errors can also occur on the other side of the spectrum where too narrow of a search misses most of the needles. Finding the right balance is more art than science and built on experimentation and learning from mistakes. Generally, it is better to start broadly and develop algorithms that are increasingly precise. Most docket activity related to sanctions is not the request for sanctions itself or a motion granting or denying the sanction request. Instead, the brunt of the docket activity is non-merits "chatter" such as requests to extend page limitations for filings or shift hearing dates, various stipulations and affidavits, requests to redact or un-redact material, and the like. The current searches do not distinguish between motions by parties that request sanctions and court orders to show cause why sanctions should not be imposed.[82] Many docket entries warn parties that failure to do something might result in sanctions. However, often this occurs in the context of boilerplate docket entries that may apply to all cases and that clerks routinely enter on the docket. I did not count

79. *See*, *e.g.*, "F.R.CIV.P.RULE 11," "F.R.CIV.P. RULE," "F.R.C.P.Rule," "Fed.R. C.P. Rule," etc.

80. It must be emphasized that this approach is not in the methodological fancy-pants category. It just takes time, effort, and some familiarity with federal dockets.

81. For example, standing orders that are routinely entered on the docket often mention the possibility of sanctions without meaningful relation to specific litigation activity.

82. Future researchers might find it useful to distinguish the two.

such broad warnings as sanction requests. Sanction grants were counted even if the order granting sanctions only imposed some of the requested sanctions.[83]

I ran the resulting algorithms over the MDL dockets, but the results are difficult to interpret without a meaningful comparison category. There are numerous candidates, but perhaps the most obvious one is simply a random sample of federal dockets from non-MDL cases. These cases provide a baseline against which to measure MDL cases. Here, I applied the same algorithms I used for the MDL cases to 10,000 non-MDL cases selected from the same years as the MDL cases. This was to account for as many intervening variables as possible, such as doctrine changes that made use of some of these devices easier versus harder, or likelier versus unlikelier.[84]

Beyond detecting the presence of ethical sanction requests and impositions, I also collected from each data sheet information about the overall number of cases contained in the MDL, the number of docket entries, the subject matter of the suit,[85] and the number of attorney appearances.

B. CAVEATS AND LIMITATIONS

The approach detailed above has numerous strengths and improves upon the current state of the literature. However, it is important to interpret all findings with the method's caveats and limitations in mind.

First and foremost, a methodology based on docket entries can only detect what is in the dockets. Most of the activity related to in-litigation sanctioning regimes likely shows up in the dockets.[86] For example, a motion for sanctions under Rule 11 must show up on the docket sheet. Similarly, it would be unusual if court-imposed sanctions were not docketed. However, the Rule explicitly contemplates a motion that is served on the other party but never filed with the court.[87] Such non-filed motions ordinarily do not show up on the docket.

83. Again, future researchers might want to use a more fine-toothed comb to sift through the thousands of docket entries, but the approach here seemed sufficient as a first cut. Similarly, future researchers might want to be more attentive to the nature of the sanctions imposed (that is, monetary or otherwise).

84. Perhaps future researchers would like to improve upon this strategy and switch from random sampling to weighted sampling based on the location of MDLs to account for the possibility that MDLs are not randomly distributed and that applicable law in MDL jurisdictions might tilt one way or the other. *See generally* Andrew D. Brad, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012).

85. The subject matter of a case listed in dockets is not always perfectly reliable, and thus to be treated with caution.

86. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 10.155 ("Unless the sanction is minor and the misconduct obvious, it is advisable to put findings and reasons on the record or issue a written order.").

87. FED. R. CIV. P. 11(c)(2) ("A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.").

Similarly, and perhaps more significantly, a judge admonishing an attorney during a hearing might not leave a trace on the docket. Such events could only be detected by pulling the transcripts for individual hearings.[88] That is a worthy area of inquiry of a more qualitative nature that I hope future researchers will pursue, but it is beyond the scope of this Essay.

The second important limitation of the data and chosen methodology arises because the dockets were downloaded only once. There is no easy way to continuously update dockets (unless one uses scrappers that are explicitly prohibited by the terms of use of common providers).[89] As such, the dockets are static as of the date of download. They are a snapshot in time rather than an up-to-date account of all litigation activity. Only cases that are terminated are as complete now as they were when the dockets were downloaded. This is one of the reasons why this study focuses on MDLs initiated many years ago rather than those initiated in the last few years. Most of the MDLs in the dataset are indicated as terminated or are likely terminated, even though that is not clearly indicated on the docket.[90]

Relatedly, the third major limitation of this study is that it does not include all MDLs. Old MDLs were excluded.[91] Similarly, very new MDLs were not included because they have not had enough time to develop mature dockets. For example, we would not expect an MDL created last week to feature discovery sanctions because there has not been sufficient time for discovery. The lack of discovery sanctions tells us only about time not having passed and nothing about legal ethics. Still, the use of a time window that excludes recent MDLs, while perhaps unavoidable, could potentially mean that all that is described in this Essay is passé, overtaken by more recent developments. There is no way to prove or disprove that assertion.[92]

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88. This manner of data collection would be very time-consuming. And many transcripts download as poorly formatted PDFs that once collected might not be machine-readable without significant work.

89. *See, e.g.*, *Terms of Use*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/legal-notices/terms-of-use (last visited May 12, 2023) ("[Y]ou will not use any robot, spider, other automatic software or device, or manual process to monitor or copy our website or the content, information, or services on this website . . . ."); *Terms of Service*, LEXISNEXIS, https://www.lexisnexis.com/terms/ (last visited May 12, 2023) ("You may not use any robot, spider, other automatic software or device, or manual process to monitor or copy our Web Site or the Content without Provider's prior written permission."); *Terms of Use*, BLOOMBERG L., https://www.bloomberg.com/notices/tos/ (last visited May 12, 2023) ("You shall not use or attempt to use any 'scraper,' 'robot,' 'bot,' 'spider,' 'data mining,' 'computer code,' or any other automate device, program, tool, algorithm, process or methodology to access, acquire, copy, or monitor any portion of the Service, any data or content found on or accessed through the Service . . . .").

90. Such indication can be shown, for example, by the lack of any docket activity in the last ten years.

91. Arguably MDLs that came before MDL 2001 in the year 2008 are of another era that has little to do with modern practice.

92. In approximately ten years, these dockets will have developed enough to be testable. However, whatever we figure out about these newly matured dockets will still not tell us anything, again, about more recently filed cases.

The fourth caveat is that some MDL dockets are not separate from non-MDL cases. Typically, clerks create new docket IDs for MDLs (for example, "4:08-md-2004"). However, it seems that for some MDLs—often smaller ones with fewer actual or anticipated member cases—clerks have used the docket ID for one of the founding cases of the MDL instead of creating a new ID. This means that those dockets feature pre-MDL litigation activity, MDL activity, and sometimes post-MDL activity. The approach used in this Essay includes all those docket entries and is thus overinclusive. A more precise approach would cut pre- and post-MDL docket entries.[93] The chosen approach is unlikely to constitute a significant problem because of the rarity of non-original docket IDs, and because it could only bias against the findings of this Essay, not strengthen them.

The fifth and final caveat is that while the study is limited to the presence of sanctions, it does not examine the nature or extent of those sanctions.[94] I encourage future researchers to dive into transcripts, motions, and orders to uncover a more detailed account of sanctioning in MDLs, but this study is limited to providing initial findings that lay the foundation for more detailed work.

III. FINDINGS

This Part presents the main finding of this Essay: in-litigation sanctioning devices are rarely used in MDL practice. Compared to non-MDL cases, in-litigation sanctions are more rarely requested and more rarely granted in MDL cases relative to litigation activity and number of attorneys; they are, however, more common in any given month of litigation.

A. LOW RATES OF INVOCATION

Figure 1 shows the average number of sanctions requested in various cases. It contrasts the average number of sanctions requested in non-MDL cases with the average number of sanctions requested in MDL cases of various sizes.

The Figure contrasts MDLs with fewer than a hundred member cases to those with between a hundred and a thousand, and to those with more than a thousand member cases. Not all MDLs are the same.[95] An MDL with four or five member cases functions differently than an MDL with a few thousand. For

93. This type of work can be time-consuming. I encourage future researchers to iterate and improve upon my approach.

94. For example, sanctions such as reprimand, cost shifting, waiver, striking, and dismissal.

95. *See* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1316 (2020) ("It is one thing to note that MDLs vary in size. But it is also important to acknowledge that, although the mega-MDLs dominate the narrative, they are not representative of MDL as a whole. First, if we simply counted the number of MDL proceedings, the mega-MDLs would represent less than 10% of them.").

example, mega-MDLs require more complex leadership structures and more restrictive tools to prevent duplicative and wasteful litigation. Conversely, the promise of efficiency shines ever more brightly as MDLs grow, and judges might approach them differently. Similarly, lead counsel in large MDLs tend to be more experienced with the demands of complex cases than many lawyers in small MDLs. In short, there are many conceivable reasons why sanctioning behavior is different in a small MDL than a big MDL.

Most in-litigation sanctions originate with parties moving the court to impose sanctions. However, some sanctions originate with the courts. Judges can and do issue show-cause orders that instruct attorneys to explain why sanctions should not be imposed for potential misbehavior. Figure 1, and all subsequent figures, lump sanction originations by parties and courts together.[96]

FIGURE 1: AVERAGE NUMBER OF SANCTIONS REQUESTED PER CASE, BY MOTION OR SHOW CAUSE

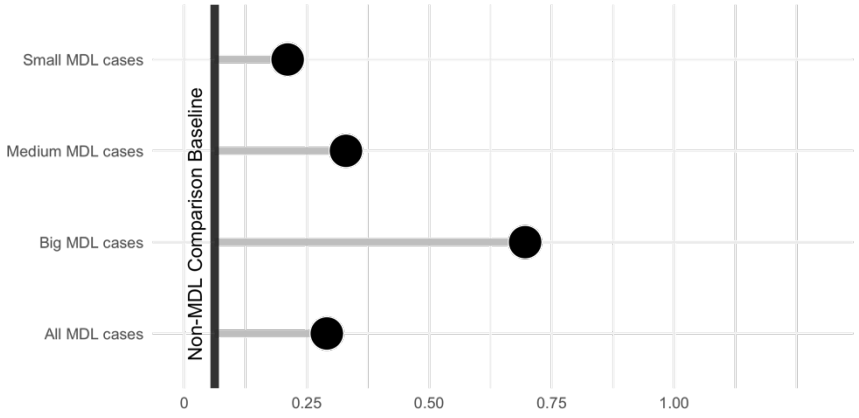


Figure 1 shows that the average number of sanctions requested per case is higher for MDL cases than non-MDL cases. The black line on the left shows the non-MDL baseline. It indicates the average number of sanctions requested across the range of randomly sampled non-MDL cases.[97] From top to bottom, the circles respectively indicate the averages for small MDL cases, medium MDL cases, big MDL cases, and all MDL cases combined. Across all of these

96. Future researchers will likely find it analytically useful to differentiate the two. For the purposes of this Essay, the added explanatory power does not warrant the increase in complexity.

97. As such, it shows something different than the number of non-MDL cases that have sanction requests because a single non-MDL case might have multiple sanction requests. Such a case affects the baseline number in Figure 1 (because it drives up the average), but it would not affect the measure of cases with any sanction activity any more than a case with just a single sanction request.

categories, MDL cases have more sanctions requested per case, often significantly more. However, there is also telling variation between MDL cases. Small MDLs, which often consist of only a handful of member cases, are most similar to the non-MDLs that they tend to resemble in terms of size, complexity, and judicial attention. Big MDLs, consisting of thousands of member cases, have far more sanction requests than the non-MDL cases that they do not tend to resemble. Medium-sized MDLs fall in the middle. As such, Figure 1 provides an initial sense of how sanction requests compare between MDL and non-MDL cases.

However, this initial sense provides limited utility. After all, MDL cases are typically much more complex than non-MDL cases. For example, many cases on the federal docket are erroneously removed state cases that lack subject matter jurisdiction and are remanded within a few days. It would be unreasonable to expect as many sanctioning requests in those cases compared to an MDL case that keeps a federal judge busy for multiple years. Similarly, many non-MDL cases feature only two or a handful of attorneys.[98] MDL cases, in contrast, often involve hundreds of attorneys.[99] All else being equal, we would expect more sanction requests as the number of attorneys increases. Finally, many non-MDL cases have only a handful of docket entries: a few for pleadings, perhaps some initial discovery activity, and then some indication of an early settlement. MDL cases, in contrast, sometimes feature *thousands* of docket entries that indicate a tremendous amount of motion work and contestation.[100] Again, all else being equal, we would expect the number of requested sanctions to increase as the number of docket entries increases.

Considering these limitations, Figure 1 can be improved upon by supplementing measures that relate the absolute number of sanction requests to variables expected to impact the incidents of potentially sanctionable behavior.[101]

Figure 2 begins that work. It shows the average number of sanction requests per thousand docket entries.[102] Typically, more docket entries mean more litigation opportunities and, with that, more opportunities to engage in behavior that might trigger a sanction request by a party or a show-cause order

98. For example, at the time of the data collection in the fall of 2022, *In re Zostavax (Zoster Vaccine Live) Products Liability Litigation* featured only a few attorneys. *See* No. 2848 (J.P.M.L.).

99. *See, e.g.*, *In re* McKinsey & Co., Inc., Nat'l Prescription Opiate Consultant Litig., No. 2996 (J.P.M.L.) (listing hundreds of attorneys).

100. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., No. 2804 (J.P.M.L.) (featuring around 5,000 docket entries at the time of writing).

101. Such incidents, of course, might be triggered either by a motion from a party or a show-cause order by a court.

102. Of course, most non-MDL cases never reach 1,000 docket entries. The number was chosen to make the figure more readable and intuitive. It would be cumbersome to evaluate what 0.002 sanction requests per docket entry might mean.

by a court.[103] Again, as in Figure 1, the black line indicates the non-MDL baseline, while the points indicate different slices of MDLs sorted by respective size.

FIGURE 2: REQUESTED SANCTIONS PER 1,000 DOCKET ENTRIES, BY MOTION OR SHOW CAUSE

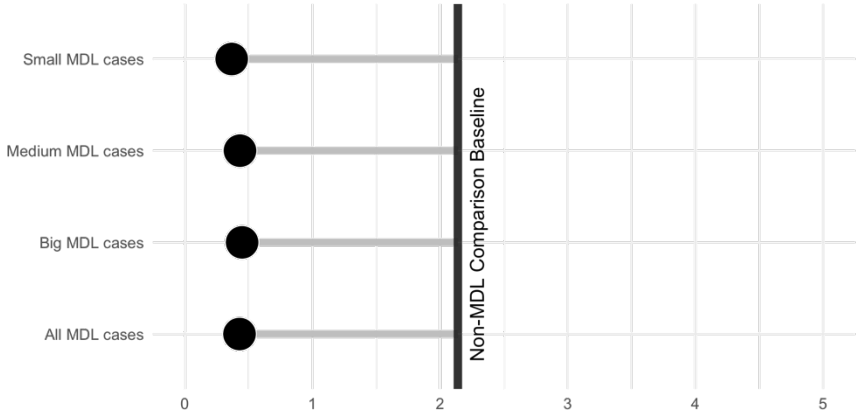


Figure 2 clarifies the story begun in Figure 1. Yes, MDLs have more sanction requests per case, but not when compared to a proxy measure of litigation activity. Once we account for the number of docket entries, MDLs typically have far fewer sanction requests than non-MDL cases. Put differently, a thousand docket entries comprised of dozens or even a hundred non-MDL cases[104] tends to produce far fewer sanction requests than a thousand docket entries in a single MDL case. This is true for small MDL cases, medium MDL cases, and large MDL cases; they are all similarly sanction penurious.

Figure 3 repeats this exercise of comparing sanctions to something more meaningful than cases. It relates sanction requests to the number of attorneys present in a case. This is an imperfect proxy. After all, a firm might staff ten attorneys on a case but have all the heavy lifting done by one attorney. Good and bad decisions, frivolous and needed motions, unethical quagmires and shining beacons of attorney paragons could all depend on the one attorney who actually handled the case, not the nine others who just happened to be staffed on it. Figure 3 must be read with this limitation in mind. Still, as the number of attorneys in a case increases, the possibilities for potentially sanctionable behavior increases

103. And, alas, those are docket entries themselves.

104. Simple non-MDL cases, for example those related to erroneous removals, might only have a handful of docket entries.

as well. Similarly, as there are more attorneys, there are more eyes watching the opposing parties' attorneys, and therefore a greater likelihood that somebody observes potentially sanctionable behavior. A greater number of attorneys also increases the likelihood that someone will have the motivation, time, and money to move for sanctions. As such, a per-attorney measure of sanction requests provides a more meaningful measure of overall sanction activity than a simple case-by-case measure.

FIGURE 3: REQUESTED SANCTIONS PER 1,000 ATTORNEYS OR PRO SE LITIGANTS, BY MOTION OR SHOW CAUSE

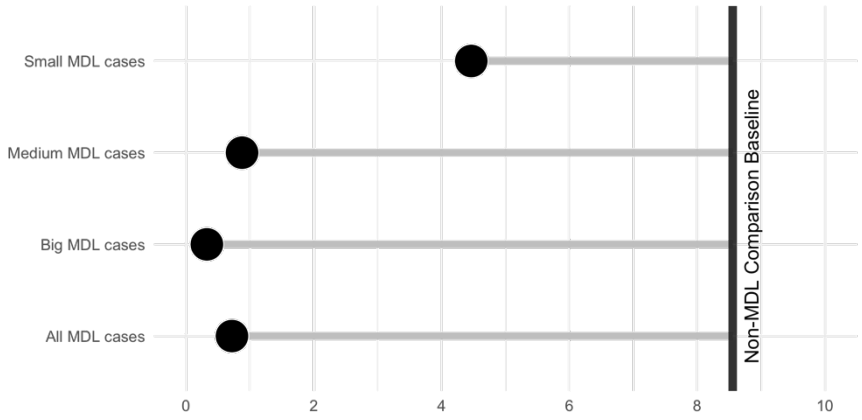


Figure 3 shows, again, that MDL cases have less sanction activity than the baseline non-MDL cases. Put differently, 500 non-MDL cases where the plaintiff and defendant were represented by only one attorney would produce more sanction requests than one massive MDL case with a thousand attorneys in it. And again, small MDL cases most closely approximate non-MDL cases, and big MDL cases least approximate non-MDL cases.

Figure 4 presents the third and final measure of requested sanctions compared to something other than mere cases: it relates sanction requests to the length of litigation. Again, this is an imperfect proxy. A case might linger for long on the federal docket without any meaningful litigation activity.[105] Conversely, parties might be motivated and able to pack a tremendous amount of motion work into a few productive weeks. As such, length of litigation is not

105. Thus, the need for the frequently used involuntary dismissal. *See* FED. R. CIV. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.").

a useful measure on its own, but it rounds out, enriches, and complicates the picture of sanctioning activity when combined with the insights of the previous Figures.

FIGURE 4: REQUESTED SANCTIONS PER MONTHS OF LITIGATION, BY MOTION OR SHOW CAUSE

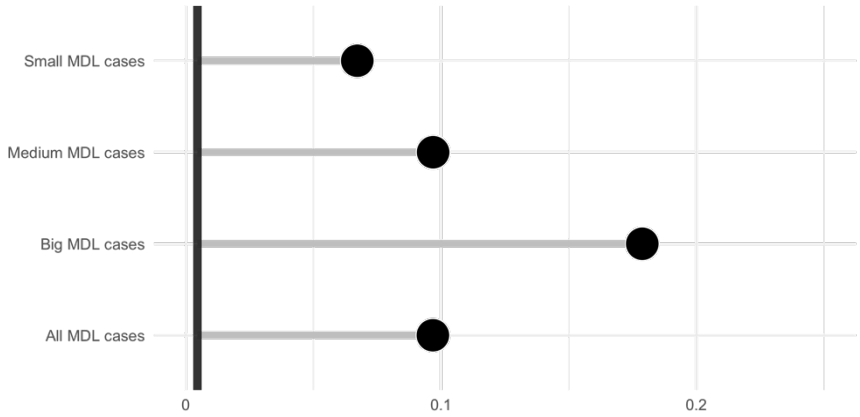


Figure 4 shows a reversal of the pattern that we have seen above. Relating sanctioning requests to the number of months of litigation shows that MDL cases have higher incidents of sanctioning requests *per month of litigation* compared to the non-MDL baseline. Put differently, in any given month of litigation, there is a higher probability of a sanction request in an MDL case than a non-MDL case. The increase in probability is smallest for small MDL cases, slightly bigger for medium MDL cases, and much bigger for big MDL cases.

B. LOW RATES OF SUCCESS

The previous figures examined incidents of sanction requests. This Subpart examines how often sanctions were not only requested but actually imposed.[106] Sanction initiations are important (no sanctions can be imposed without them), but perhaps of limited usefulness because many sanction requests are denied. After all, it is easy to make a sanction request.[107] The request alone does not inform whether there was objectionable behavior. Grants of sanction requests are therefore a compelling measure of in-litigation sanction activity. As in the

106. I leave for another time the questions of what kind of sanctions were imposed, on what party, and for what kind of behavior.

107. Notably, sanction requests themselves can be frivolous.

previous Subpart, we start out with a baseline measure. Figure 5 shows the average number of sanctions granted per case.

FIGURE 5: AVERAGE NUMBER OF SANCTIONS GRANTED PER CASE

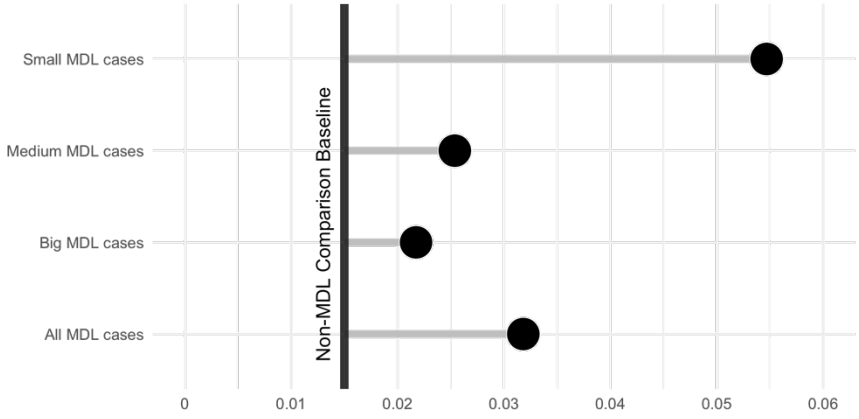


Figure 5 shows that there are typically more sanction grants per case in MDL cases compared to non-MDL cases. Put differently, we would expect more sanction grants in a randomly drawn MDL case than in a non-MDL case. But as before, this is only an initial and crude measure of sanctioning activity. Given the size and complexity of MDLs, we would of course expect more sanction grants. A relative measure of sanction grants is a better tool to understanding sanction grants.

As in the previous Subpart, the first relative measure is the number of docket entries. Again, it serves as a proxy for litigation activity. Figure 6 shows sanction grants relative to the overall number of docket entries in a case.

FIGURE 6: GRANTED SANCTIONS
PER 1,000 DOCKET ENTRIES

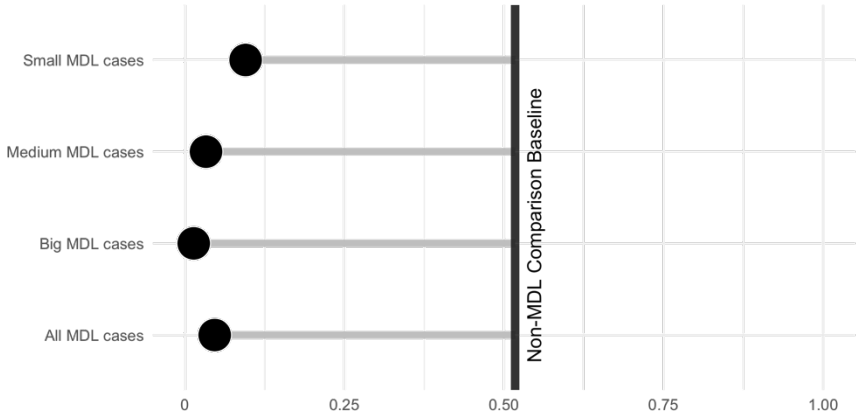
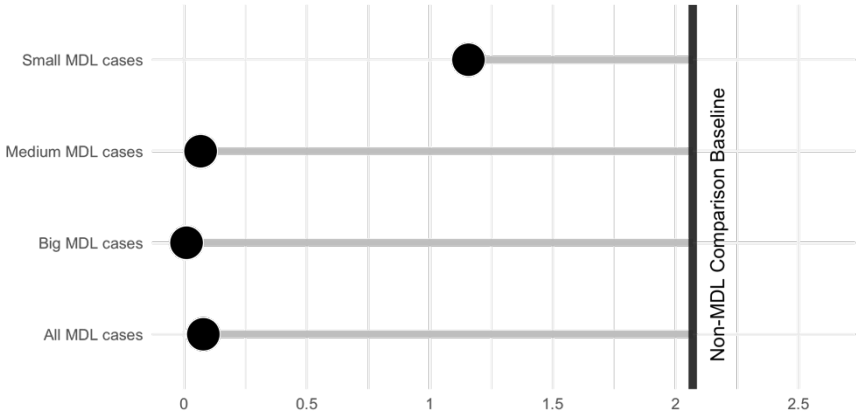


Figure 6 makes clear that sanction requests are a rare occurrence on MDL and non-MDL docket sheets. As we would expect, the vast majority of docket entries are not sanction grants. The comparison to non-MDL dockets shows that sanction grants are even more rare on MDL dockets. Often, these docket sheets have hundreds, and sometimes even thousands, of entries, but sanction grants are merely sprinkled among them. This holds true for all MDL sizes. Figure 7 repeats this story in relation to attorneys appearing in a case.

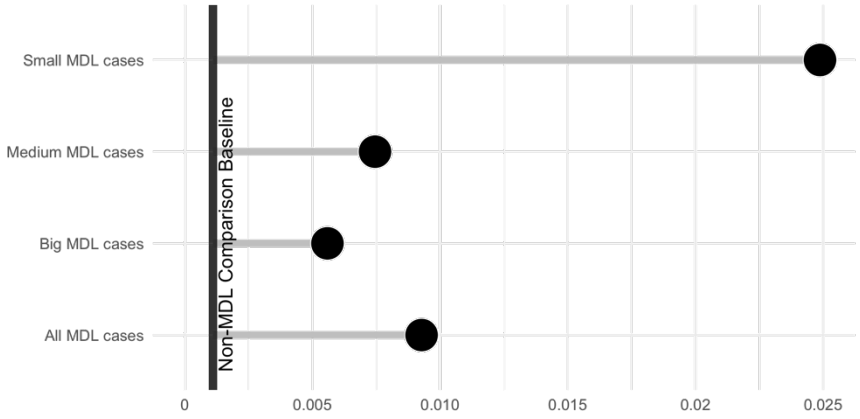
FIGURE 7: GRANTED SANCTIONS PER 1,000
ATTORNEYS OR PRO SE LITIGANTS



Only a few attorneys out of every thousand who appear in federal court face sanctions in non-MDL cases. But an even smaller number of attorneys in MDL cases face sanctions. These numbers do not distinguish between attorneys who are in MDL leadership positions and those who are not. Predictably, at least some of the granted sanctions are against attorneys who are not in leadership positions. Perhaps almost all of them are. This suggests that attorneys in MDL leadership positions rarely, if ever, are sanctioned.

Figure 8 completes the picture of sanctioning grants by relating sanction grants to the length of litigation. Figure 4 showed that MDL cases have a higher incident of sanction requests per month of litigation. Here, that pattern is repeated: MDL cases have a higher rate of sanction grants per month of litigation as well. Typical MDL litigation, it seems, in any given month tends to be fiercer and more contested compared to non-MDL cases, which means that not only are there more sanctions requested, but also more sanctions granted.

FIGURE 8: GRANTED SANCTIONS PER MONTHS OF LITIGATION



Together, these Figures suggest that sanction requests and sanction grants are clearly a feature in MDL cases. However, when related to a measure of litigation activity or the number of attorneys involved, it becomes clear that sanction requests and sanction grants are rarer in MDL than in non-MDL cases. That is not to say that they do not exist, but merely that sanction requests and sanction grants seem to function differently in MDL cases than in non-MDL cases.

IV. DISCUSSION AND IMPLICATIONS

The previous Parts present an apparent mystery: MDLs need vibrant ethical sanctioning regimes (Part I), yet they do not use them broadly (Part III). There are numerous possible explanations. However, the most likely explanation is that ethical norms are policed not through sanctioning regimes, but through the MDL leadership-appointment process.

This Part explores this explanation further. First, it explains how the appointment process can be used to police ethical norms in MDL litigation. Second, it examines implications for MDL practice. Third, it considers the other side of the coin and probes whether there are lessons for non-MDL cases that can be derived from how MDL cases police ethical norms without formal sanctions.

A. APPOINTMENTS INFLUENCE LITIGATION BEHAVIOR.

MDL leadership appointments can influence litigation behavior, including ethical compliance. MDL judges control who is initially appointed to MDL leadership positions,[108] who is replaced,[109] who is appointed again in subsequent MDLs, and who is amply compensated.[110] These tools allow judges to influence the behavior of the key players in MDL litigation. The attorneys in MDLs vying for leadership positions know that competition for one of the few available spots is fierce and comes with significant prestige, money, and opportunities to litigate impactful cases.[111] One way to compete for an available spot is to have a clean ethical record, litigation experience that is far above the ethical floor, and, perhaps, a willingness to make tradeoffs between zealous advocacy for all the

108. *See* JUD. PANEL ON MULTIDIST. LITIG. & FED. JUD. CTR., *supra* note 78 (encouraging quick leadership appointments); *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., No. 15-md-02672, slip op. at 2 (N.D. Cal. Jan. 21, 2016) ("The Court vests [plaintiffs' lead counsel and steering committee] with the authority and duty to coordinate and oversee . . . schedul[ing,] . . . appear[ing] at periodic Court-noticed status conferences and hearings[,] . . . sign[ing] and fil[ing] all pleadings related to all actions[,] . . . [conducting binding] scheduling settlement discussions and discovery, setting agendas, entering into stipulations, [etc.] . . . ."); MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 10.22 ("Complex litigation often involves numerous parties with common or similar interests but separate counsel. Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and examines witnesses, may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily. Instituting special procedures for coordination of counsel early in the litigation will help to avoid these problems. In some cases the attorneys coordinate their activities without the court's assistance, and such efforts should be encouraged. More often, however, the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation."); DUKE L. SCH. CTR. FOR JUD. STUD., MDL STANDARDS AND BEST PRACTICES 25 (2014), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf ("One of the first challenges in presiding over multidistrict litigation is the appointment of counsel to lead the litigation. Multidistrict litigation involves numerous parties with common or similar interests but with separate counsel. It is necessary to establish a leadership structure for the plaintiffs, and sometimes for the defendants as well, to ensure the effective management of the litigation. The leadership team is responsible for coordinating discovery and other pretrial work in the cases. They develop the proof necessary for trial, draft motions, work with experts, and communicate with the other side and the court. They must be able to manage all aspects of the litigation. Determining the appropriate leadership structure and selecting the right lawyers to fill the positions is one of the first and most important case management tasks.").

109. *See* DUKE L. SCH. CTR. FOR JUD. STUD., *supra* note 108, at 49 ("The transferee judge should not hesitate to reconstitute the leadership team if it becomes necessary.").

110. *See, e.g.*, *In re* Air Crash Disaster on Dec. 29, 1972, 549 F.2d 1006, 1016 (5th Cir. 1977) ("[I]f lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation."); *In re* Genetically Modified Rice Litig., No. 06-md-1811, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010) ("An MDL court's authority to establish a trust and to order contributions to compensate leadership counsel derives from its 'managerial' power over the consolidated litigation, and, to some extent, from its inherent equitable power."); MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 14.215 ("Early in the litigation, the court should . . . establish the arrangements for the [attorneys in leadership position's] compensation, including setting up a fund to which designated parties should contribute in specified proportions.").

111. DUKE L. SCH. CTR. FOR JUD. STUD., *supra* note 108, at 49.

clients in the MDL and the desires of the MDL judge for speedy and efficient resolution. Each MDL is an opportunity to audition for the next MDL.[112]

Given the number of repeat players, this process seems to work efficiently.[113] Judges predictably are mindful of prior ethical issues as a reason not to appoint attorneys in MDL leadership roles. Similarly, judges justify appointments with reference to spotless ethical records. MDL judges are encouraged to consult with judicial colleagues about the prior records of applicants before making leadership appointments.[114] It is unclear whether these processes select more competent and more ethical lawyers, more experienced lawyers, or simply more compliant attorneys who might not litigate as fiercely and confrontationally as attorneys who do not have to be periodically selected by judges for litigation roles.

B. IMPLICATIONS FOR MDLS

If the analysis above is correct, and the appointment process has displaced in-litigation sanctioning devices to enforce ethical norms, then this has numerous implications for MDL practice.

First, the in-litigation sanctioning devices discussed in Part I strike a balance between competing procedural values. They are mindful of the need for the "just, speedy, and inexpensive determination" of a case while providing ample leeway for adversarial norms, and for attorneys to represent their clients aggressively and try out new arguments and strategies. An ethics-by-appointment approach sidesteps this balance inherent in the sanctioning devices and in the decades of caselaw interpreting them. Instead, it allows judges to strike their own balance. Perhaps even worse, because appointment decisions are not always openly discussed and explained, attorneys may self-censor their litigation behavior in MDLs, for fear of not being appointed to another MDL. This could be true even if a future judge would not look adversely upon contemplated litigation behavior. The absence of clear standards such as those

112. *Id.* at 36 ("The transferee judge should direct counsel [who want to be appointed to leadership roles] to identify cases in which they have served in a similar leadership capacity . . . ."); MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 5, § 22.62.

113. *See generally* Andrew D. Bradt & D. Theodore Rave, *It's Good To Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017).

114. *See* Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 394 (2014); *see, e.g.*, DUKE L. SCH. CTR. FOR JUD. STUD., *supra* note 108, at 36 ("[T]here are many ways for judges to learn more about the individuals who are vying for appointment. Judicial colleagues—and more recently special masters—are a valuable source of information for transferee judges about the competence and professionalism of counsel who have appeared before them. The transferee judge may want to require applicants to provide the names of judges and special masters who are familiar with their work in other MDL cases for this purpose.").

in Federal Rule of Civil Procedure 56(h) and accompanying case law makes it difficult for attorneys to calculate the true costs and benefits of their planned course of action. Risk-adverse attorneys who hope for MDL appointments and reappointments may strike a balance that is optimal for their careers but suboptimal for overall litigation activity.[115]

Second, numerous academics and some judges have pointed out the need to broaden the pool of attorneys in MDL leadership positions.[116] This could have the unintended effect of weakening the ethical-compliance function of the appointment process. If attorneys think it is less likely that they will get appointed to a future MDL leadership slot, perhaps because of a renewed focus on bringing more voices into the conversation, they may find it less urgent and profitable to comply with ethical norms in the current litigation. Insofar as the ethics-by-appointment process breaks down, this may restore the need to go back to the myriad of in-litigation sanctioning devices discussed in Part I—the unintended effects of which could be slower, more cumbersome, more expensive, and more contentious MDL proceedings.

C. IMPLICATIONS FOR NON-MDLS

Imagine that non-MDL judges had the discretion to periodically distribute a pot of gold to a static group of attorneys (whether prestige, opportunities, or more direct monetary rewards). Such attorneys might work harder to please the judge and stay in their good graces. Perhaps more formal sanctioning devices would become less useful and needed as attorneys self-censor without the need for adversarial proceedings and formal sanctions. This thought experiment suggests that formal in-litigation sanctioning devices are most needed where judges have less discretion and fewer pots of gold to distribute to a larger group of attorneys. This is a falsifiable empirical claim. If true, and all else being equal, we would expect less ethical compliance for pro hac vice litigants, and ethical compliance covarying with the discretionary power of judges (again, all else being equal and perhaps observed over time).

CONCLUSION

Ethics in complex litigation raises many complex doctrinal questions, normative puzzles, and policy conundrums. All of them exist against an

115. *See* Bradt & Rave, *supra* note 113, at 98 ("The biggest thing that differentiates the haves in litigation from the have nots is the ability to treat cases in the aggregate and make tradeoffs among them. Repeat players can play the averages and accept the risk of loss in individual cases to maximize the chances of winning across a whole series of cases. This allows them to take a risk-neutral, optimizing approach to any given case. One-shotters, by contrast, understandably care very much about the outcome of their individual cases and little about the outcome of any other cases, whether they are within the same MDL or not.").

116. *See generally* Mortazavi, *supra* note 8; Melissa Mortazavi, *Blind Spot: The Inadequacy of Neutral Partisanship*, 63 UCLA L. REV. DISCOURSE 16 (2015).

empirical background that is difficult to study. There are many MDLs and many types of MDLs. They are inherently variable and flexibly used by attorneys and judges. Dockets are a useful, initial way to study what actually happens in MDL practice beyond anecdotal evidence from the few famous MDLs that have caught people's attention. However, as this study has taken pains to point out, docket research is also difficult, time-consuming, and fundamentally hindered by the non-standardization of dockets. I hope future researchers will build upon the initial take of this Essay and develop more fully fledged models of in-litigation sanctions in MDL practice. We simply do not know much about who gets sanctioned (plaintiffs versus defendants; leadership attorneys versus outsiders; pro se litigants versus attorneys; attorneys for business, government, individuals, tribes, nonprofits, etc.). Similarly, more information is needed about which of the many in-litigation sanctioning devices are most commonly invoked, and which are most successful. We also do not know what kind of behavior is sanctioned. Finally, nothing here informs us about the possibility of repeat offenders. It could be that a handful of attorneys are responsible for most sanctionable behavior, or it could be that sanctions are broadly spread among MDL attorneys. All these observations point toward useful topics for future empirical research on docket sheets.

But docket sheets are not the only access point to study ethics in complex litigation. Much more can be done to learn about the content and context of docket entries ranging from informal conversations, hearing transcripts, telephone conferences, and attachments to docket entries. Similarly, the paucity of qualitative observations, survey work,[117] and integration of bar sanctions and malpractice suits suggests that researchers and policymakers have many remaining blind spots that call for future research.

117. *But see* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1856 (2022).