PERCEPTIONS OF JUSTICE IN MULTIDISTRICT LITIGATION: VOICES FROM THE CROWD

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With all eyes on criminal justice reform, multidistrict litigation (MDL) has quietly reshaped civil justice, undermining fundamental tenets of due process, procedural justice, attorney ethics, and tort law along the way. In 2020, the MDL caseload tripled that of the federal criminal caseload, one out of every two cases filed in federal civil court was an MDL case, and 97% of those were products liability like opioids, talc, and Roundup.

Ordinarily, civil procedure puts tort plaintiffs in the driver's seat, allowing them to choose who and where to sue, and what claims to bring. Procedural justice tells courts to ensure plaintiffs can present evidence, participate, and tell their story—or risk inaccurate outcomes and judicial illegitimacy. But MDL's efficiency mantra trumps all, transferring plaintiffs with related facts away from their preferred venue, centralizing their cases with hundreds of others before a judge in a faraway forum, replacing their chosen attorneys with a judicially selected roster of lead lawyers, depersonalizing plaintiffs' narratives, and settling their cases en masse. Though MDL makes them feel like "just another number," one-shot plaintiffs can say little in response: many are sick, bankrupt, and silenced by private settlements' confidentiality provisions.

No longer. In conducting the first ever MDL procedural justice study, we spoke with over 200 plaintiffs from forty-two different states with diverse backgrounds, educations, and races. Their cases originated in thirty-two different state and

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federal courts, and 295 lawyers from 145 law firms represented them. Although 54% of their attorneys (or someone from their firm) led the MDLs, lawyers did little for the clients they stockpiled. When it came to their attorney experience, 64% of participants were somewhat or deeply dissatisfied, 50% did not feel that they could trust their attorney, 59% received few or no status updates, and 67% did not understand what was happening with their lawsuit.

Nor did MDLs feel efficient or accessible. They lasted almost four times as long as the average civil case, with 73% of respondents finding the delay unreasonable and only 1.3% ever attending a hearing. And yet, nearly 60% would have been willing to wait longer to tell their story—some up to five years more. Without those opportunities for input, only 25% thought claims administrators possessed or relied on accurate information, which raises questions about accuracy, substantive outcomes, and the system's ability to fulfill tort-law objectives. And though plaintiffs had many goals, from compensation to protecting others to holding corporations accountable, a mere 1.8% of all participants felt their lawsuit accomplished what they hoped.

One put it simply: "our judicial process is very broken." MDL needs reform. We ignite the discussion with proposals to increase: transparency through mandatory public closing statements that reveal attorneys' fees, costs, and settlement amounts; voice, access, and accuracy through the public's newfound familiarity with technology; and due process by appointing separate lead lawyers to represent plaintiffs with conflicting interests.

INTRODUCTION

> *"Justice has absolutely nothing to do with how this MDL is being handled. My life as it was and as I planned, was ruined."*[1]

From opioids to Roundup, news headlines keep multidistrict litigation (MDL) in the public eye, and with good reason: *one out of every two civil cases* filed in federal court in

[1] Participant 83. Participant number in subsequent citations refers to written responses from individuals who participated in our survey on plaintiffs' experiences in MDLs. Survey responses quoted in the Article have been modified for clarity in limited circumstances, and all modifications are indicated. For further discussion of this approach, see *infra* note 20. For further information on our research design, see *infra* subpart II.A. All survey results are on file with the Authors.

2020 was part of an MDL.[2] What happens to those suits is likely to affect courts' legitimacy, for MDLs hold out the promise of justice to many. Like factories, but with only a handful of workers, courts process thousands of claims. Lawyers use TV and internet ads with slogans like "for the people" and "protecting people like you!" to reach and represent the masses, pledging to pursue plaintiffs' rights and hold corporations accountable.[3]

But the clients pulled in by late-night commercials and social media campaigns, those bankrupted by their medical expenses, they all paint a grim picture of how well this process works: "I received no justice, no closure . . . . My rights[ ] were taken from me and thrown back in my face by the very people who are supposed to uphold them."[4] And yet, no one has bothered asking plaintiffs about their experience inside MDLs.[5] Until now.

MDLs emphasize efficiency by transferring related cases to one judge for pretrial litigation.[6] Streamlining the proceedings means judges take creative license with the ordinary lockstep path toward trial. But these shortcuts and the sheer volume of clients that attorneys accept put MDLs on a collision course

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2 *U.S. District Courts – Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020 [https://perma.cc/C7MA-KM6E] (listing 470,581 total filed cases in 2020); *Judicial Panel on Multidistrict Litigation – Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2020 [https://perma.cc/79RB-J98V] (listing 4,210 cases transferred and 227,285 cases initiated in the transferee districts for 231,495 cases filed in 2020); *e.g.*, Jan Hoffman, *First Opioid Trial Takes Aim at Johnson & Johnson*, N.Y. TIMES (May 26, 2019), https://www.nytimes.com/2019/05/26/health/opioid-trial-oklahoma-johnsonandjohnson.html?smid=url-share [https://perma.cc/59HQ-EY7N]; Sara Randazzo, *Roundup Plaintiffs' Lawyers Spar Over $800 Million in Fees*, WALL ST. J. (Mar. 4, 2021), https://www.wsj.com/articles/roundup-plaintiffs-lawyers-spar-over-800-million-in-fees-11614862800?page=1 [https://perma.cc/8FB7-5MST].

3 *E.g.*, Alison Frankel & Jessica Dye, *Medical Device Defendant Probes Origin of Mesh Claims*, REUTERS (Mar. 10, 2016) (noting that Alpha Law had more than 10,000 mesh claims on its docket); MORGAN & MORGAN, https://www.forthepeople.com/mass-tort-lawyers/ [https://perma.cc/6JY2-N7Y5] ("our attorneys fight For The People"); FREESE & GOSS, https://www.freeseandgoss.com [https://perma.cc/5D4D-NLHD] ("Protecting People Like You!"); CLARK, LOVE & HUTSON, https://www.triallawfirm.com/ [https://perma.cc/3ZB6-NYG2] ("We Are Committed To Holding Corporations Accountable").

4 Participant 85.

5 Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 L. & CONTEMP. PROBS. 199, 199, 204 (1990) ("[I]t is striking that the injured parties themselves are not represented in this symposium, either directly or indirectly," which "reflects a continuing failure to deal directly with client concerns.").

6 28 U.S.C. § 1407.

with decades of procedural justice research that explains what it takes to give people confidence in the courts and to feel treated fairly, win or lose. Impartial decisionmakers, a chance to participate and present evidence, to be treated with dignity, and to appeal to another person or court when error occurs are foundational components.[7]

To explore this tension, we designed the first ever MDL procedural justice study, which was widely dispersed (from mentions in *The New York Times* to write-ups in *Reuters* and *Law.com*)[8] and spent two years in the field getting to know hundreds of MDL plaintiffs. We focused on proceedings in which the defendant targeted its product toward women[9] for three reasons. First, research demonstrates that most products liability MDLs include the same repeat-player attorneys, settlement provisions, and judicial techniques, so we could keep the sample size manageable without sacrificing generalizability.[10] Second, harm from drugs and medical devices disproportionately affect females: women account for 67% of the FDA's medical device adverse event reports;[11] sex-neutral devices like hip implants and pace makers

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7 *See infra* subpart I.B.

8 Tina Bellon, *Q&A: Georgia University's Elizabeth Burch on New Women's Health MDL Research Project*, REUTERS (Dec. 13, 2018), https://www.reuters.com/article/products-mdl/qa-georgia-universitys-elizabeth-burch-on-new-womens-health-mdl-research-project-idUSL1N1YI2E3 [https://perma.cc/VXJ6-7JVZ]; Matthew Goldstein, *Women Who Sued Makers of Pelvic Mesh Are Suing Their Own Lawyers, Too*, N.Y. TIMES (June 14, 2019), https://nyti.ms/2XNYhAz [https://perma.cc/87S7-HM7P]; Max Mitchell, *Study Aims to Gauge Litigant Satisfaction in Women's Health MDLs*, LAW.COM (Dec. 17, 2018), https://www.law.com/2018/12/17/study-aims-to-gauge-litigant-satisfaction-in-womens-health-mdls/ [https://perma.cc/5SXG-PJE3].

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

10 ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 99–128 (2019); Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2152–66, 2171–82 (2020) [hereinafter Burch & Williams, *Judicial Adjuncts*]; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1469–1516 (2017) [hereinafter Burch & Williams, *Repeat Players*]; Nora Freeman Engstrom & Amos Espeland, Lone Pine *Orders: A Critical Examination and Empirical Analysis*, 168 U. PA. L. REV. ONLINE 91, 104 (2020); Margaret S. Williams & Jason A. Cantone, *An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation*, 55 GA. L. REV. 221, 249–62 (2020).

11 Marina Walker Guevara, *We Used AI to Identify the Sex of 340,000 People Harmed by Medical Devices*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 25, 2019), https://www.icij.org/investigations/implant-files/we-used-ai-to-identify-the-sex-of-340000-people-harmed-by-medical-devices/ [https://perma.cc/8PZP-PH93].

disproportionately fail in women;[12] and from 1997 to 2000, eight of the ten drugs pulled from the market posed greater risks to women.[13] Third, because of this, women's health MDLs comprise a substantial subset of all products liability MDLs.

In 2018, when we began our study, 32% of all MDLs involved products that exclusively or primarily injured women, as compared with 6.4% that primarily affected men.[14] Hundreds, sometimes thousands, and sometimes over a hundred thousand lawsuits have erupted from birth control like NuvaRing and Yaz; personal hygiene products like baby powder and Shower to Shower; medical procedures aimed at female incontinence like trans-vaginal mesh; and products designed to make women more "attractive" like diet drugs and breast implants.[15]

Through this study—presented here for the first time—stories of deep injustice emerged from both women and men, often the women's partners or children. Using both qualitative and quantitative analysis, we found that the procedural mechanisms that judges design to make MDLs easier for them are the very things that silence and pose barriers for plaintiffs—from transfers to a distant forum and decreased judicial interaction to short-form complaints and attorney leadership appointments.

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12 CAROLINE CRIADO PEREZ, INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN 336 (2019); Maria C.S. Inacio et al., *Sex and Risk of Hip Implant Failure: Assessing Total Hip Arthroplasty Outcomes in the United States*, 173 JAMA INTERNAL MED. 435, 435 (2013) (finding women were almost 30% more likely than men to need a repeat hip replacement surgery within the first three years).

13 Letter from Janet Heinrich, Director, Health Care—Public Health Issues, to Sens. Tom Harkin, Olympia J. Snowe & Barbara A. Mikulski & Rep. Henry A. Waxman of the U.S. Senate & House of Representatives (Jan. 19, 2001), https://www.gao.gov/assets/100/90642.pdf [https://perma.cc/8JB2-F43F].

14 Alexandra D. Lahav, *Medicine is Made for Men*, N.Y. REV. BOOKS (Feb. 11, 2021), https://www.nybooks.com/articles/2021/02/11/medicine-is-made-for-men/ [https://perma.cc/WF97-378Z]. Asbestos and Agent Orange are both "strongly associated . . . with harm to men's bodies." Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 18 J. L. & POL'Y 295, 303 (2009).

15 *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Apr. 15, 2021), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-April-15-2021.pdf [https://perma.cc/G2KJ-V672] (listing Talcum Powder, NuvaRing, and Textured Breast Implants); *Multidistrict Litigation Terminated Through September 30, 2021*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (2021), https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report%20Cumulative%20Terminated%20MDLs.pdf [https://perma.cc/X6UF-WY3J] (listing seven vaginal mesh, Silicone Gel Breast Implants, Diet Drugs, and Yaz MDLs).

We heard from 217 people from 42 different states, who were represented by 295 different attorneys from 145 distinct law firms, whose cases originated in 32 different state and federal courts, and who had diverse education levels, backgrounds, and races. In addition to demographic and geographic diversity, their responses vary substantially, all of which suggests they form a representative sample. Nevertheless, this study is the first of its kind, and no database of MDL plaintiffs exists for comparison purposes. Because the study was not mandatory for all litigants, it is possible that those who felt strongly about their experiences might have been more likely to participate.[16] In the consumer context, for instance, consumers with extreme experiences (either positive or negative) are more likely to review a product than those with moderate ones. But if an under-reporting bias affects the mean, scholars have found that it is "usually only for products that are of either extremely poor or extremely good quality" and "generally does not decrease, and in fact, often enhances the effectiveness of the mean star-rating as a measure of relative quality."[17]

Critics will prefer to ignore our results because we cannot guarantee representativeness, but our findings cannot be dismissed so easily. First, participants' experiences are a valuable contribution in and of themselves. We should be concerned that *anyone* spends years in court to redress harm only to walk away frustrated because the process sidelined them while attorneys they did not hire made key decisions on their behalf. Second, we hope others will continue the work we begin here.[18] Social science research should be replicated.

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16 Ideally, to test for response bias, we would compare the characteristics of the obtained sample with those of the known characteristics of the population. Nir Menachemi, *Assessing Response Bias in a Web Survey at a University Faculty*, 24 EVALUATION & RSCH. EDUC. 5, 6–7 (2011); Thomas G. Reio, Jr., *Survey Nonresponse Bias in Social Science Research*, 21 NEW HORIZONS ADULT EDUC. & HUM. RES. DEV. 48, 49–50 (2007). Little is known about the underlying plaintiff population, but we do provide data on broader demographic characteristics to allow for comparison to the general population. *Infra* notes 131–133. Our efforts to promote the study in the press, directly to attorneys, and via social media aimed to reach a diverse and representative group of participants, and we provided participants (and attorneys) with the principal investigator's contact information so they could raise any questions or concerns about legitimacy.

17 Bharat Bhole & Brid Hanna, *The Effectiveness of Online Reviews in the Presence of Self-Selection Bias*, 77 SIMULATION MODELLING PRAC. & THEORY 108, 109 (2017).

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

And if courts follow our proposals to increase transparency on outcomes and attorneys' fees, and lawyers allow access to their client roster, it will eliminate some of the burdens that we faced in conducting this study.

This study likewise comes at a vital time: the Federal Rules Advisory Committee is currently weighing MDL-specific rules, but it hears principally from judges and attorney insiders who benefit from the status quo.[19] Before now, little was known about the inner workings of attorney-client relationships or settlements; private deals keep data on substantive outcomes confidential, and attorneys regularly warn clients against discussing their case. Our study offers a first look into this opaque world, revealing everything from why plaintiffs sue and their relationship with their lawyers to their satisfaction with outcomes and how the courts treated them.

Using their words[20] to tell their stories on their terms paints a vivid picture of the very real people caught up in MDLs. It adds data to problems that scholars speculate about, like the effect of coercive settlement terms on plaintiffs.[21] And it unearths new concerns that have evaded scholarly attention because they were buried in the secrecy of settlement, like whether horizontal equity occurs within claims administration and whether administrators apply rules fairly and consistently based on reliable information.[22] Our rich empirical findings also have far-reaching normative implications in at least four critical areas: (1) judicial legitimacy, (2) attorneys' ethical obligations, (3) due process rights to adequate representation, notice, and an opportunity to be heard, and (4) procedural justice (from both a dignitary and instrumental perspective).[23]

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19 *Advisory Committee on Civil Rules, Agenda Book*, U.S. CTS., 159–71 (Apr. 23, 2021), https://www.uscourts.gov/sites/default/files/2021-04-23_civil_agenda_book_with_supplemental_materials.pdf [https://perma.cc/V75X-BGNF].

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

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

22 *E.g.*, Will Hobson, *NFL Says It Will End Controversial 'Race-Norming' in Concussion Settlement with Players*, WASH. POST (June 3, 2021), https://www.washingtonpost.com/sports/2021/06/03/nfl-concussion-settlement-race-norming/ [https://perma.cc/R39K-3BAV].

23 On instrumental theories, see, for example, Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972) (setting forth and justifying the constitutional right to be heard); Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 487–95 (2003) (describing and

On the positive side, mass advertising and less stringent attorney intake criteria open courts to thousands who might otherwise have no access to justice.[24] But those features gave many false hope. Instead of acting as dependable gatekeepers, mouthpieces, translators, and counselors, some attorneys functioned as vacuums by indiscriminately pulling in claims and then bullying their clients into settling.[25] One participant confessed, "I absolutely feel like I don't matter. I would even say I kinda feel like my attorney just wishes I would die so they could just forget about the whole thing."[26]

Our findings reveal a system under stress that all too often fails to justly serve those who need it most. Participants from all corners of the United States, whose cases originated in 32 different state and federal courts, and who had different education levels, backgrounds, and races had much in common when it came to their attorney-client experiences: 64% were somewhat or deeply dissatisfied with their lawyer, and 50% did not feel that they could even trust their attorney to act in their best interest.[27] Their tales could not be chalked up to a few bad apples: 295 different lawyers from 145 law firms represented participants.[28] Nor were the attorneys MDL neophytes. They were insiders—judges handpicked 54% of them (or someone from their firm) to lead these MDLs.[29] The problems participants raised are systemic, not idiosyncratic.

Although more than half of our respondents felt they could confide in their attorneys, nearly half then felt unheard, feeling

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critiquing fairness arguments for procedural rules); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 89–90 (1975) (empirically evaluating subjects' sense of fairness and satisfaction across varying trial procedures). On dignitary theories, see, for example, Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888 (1981) (describing "process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons."); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCH. 830, 830–31 (1989) (evaluating Thibault and Walker's psychological theory of control regarding procedural preferences). On systemic legitimacy, see, for example, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–75 (2004) (arguing that "a right of participation is essential for the legitimacy of a final and binding civil proceeding").

24 Elizabeth Chamblee Burch & Margaret S. Williams, *MDL for the People*, 108 IOWA L. REV., Part III.C.1 (forthcoming 2022) (on file with authors).

25 *See infra* subpart III.A.

26 Participant 226.

27 *See infra* subpart III.A; Table 8.

28 *See infra* Part III (discussing lawyer information gleaned from docket searches).

29 *See id.*

that their attorney had not actually considered their facts.[30] As one said, "I've actually never spoken to any of the attorneys in my law firm, only the legal aide."[31] Fifty-nine percent received little information about their case's status, and 67% did not feel like they understood what was happening with their lawsuit.[32] Attorneys seemed to communicate with their clients only when it was time to settle, with some participants feeling badgered into acquiescing.[33] These findings sharply contrast with attorneys' ethical obligations,[34] suggesting that the recent exposé of mass-tort titan Tom Girardi may not be an isolated incident.[35] Finally, with little contact and some respondents reporting that they had to do all their own legwork, it was unsurprising that 60% felt their attorneys' fees and costs were unreasonable.[36]

MDLs last almost four times as long as the average civil case, making it somewhat predictable that 73% of respondents found the delays unreasonable.[37] What may be incredible to some, however, is that nearly 60% would be willing to wait even longer—some up to five years more(!)—to tell their story.[38] Procedural changes like short-form complaints and fact sheets seemed to diminish conventional outlets for voice through pleadings and depositions, and the vast majority of participants had no idea when hearings occurred.[39] Without those opportunities for input, few settling plaintiffs felt claims administrators possessed or relied on accurate information, which raises questions about accuracy and substantive outcomes.[40] Perhaps most disturbing of all, regardless of how their case ended, *a mere 1.8% of* all *participants felt their lawsuit accomplished what they hoped it would.*[41]

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30 *See infra* Table 8.

31 Participant 119.

32 *See infra* Table 8.

33 *See id.*

34 MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020) (requiring an attorney to "reasonably consult" with a client to accomplish the client's objectives and to keep them "reasonably informed about the status of the matter").

35 Harriet Ryan & Matt Hamilton, *Vegas Parties, Celebrities and Boozy Lunches: How Legal Titan Tom Girardi Seduced the State Bar*, L.A. TIMES (Mar. 6, 2021), https://www.latimes.com/california/story/2021-03-06/how-california-state-bar-enabled-tom-girardi [https://perma.cc/KL5D-MHL6].

36 *See infra* Table 11.

37 *See infra* subpart IV.A.

38 *See infra* subpart IV.B; Figure 4.

39 *See infra* subparts I.B, IV.C.

40 *See infra* Table 14.

41 *See infra* subpart V.C.

Still, apart from the intrinsic human element, why should we care what people want from MDLs? There are political reasons, of course. As Austin Sarat points out, "[I]t would be strange, indeed, to call a legal system democratic if its procedures and operations were greatly at odds with the values, preferences, or desires of the citizens."[42] Then there are pragmatic reasons: a public that lacks confidence in the judicial system is less likely to voluntarily comply with the law.[43] Finally, there are substantive reasons: when sheer numbers and procedural shortcuts afford MDL plaintiffs fewer participation opportunities and attorneys rarely communicate with their clients, it's not just plaintiffs' voice and dignity that suffers—it's accuracy, too. If outcomes fail to reflect substantive entitlements, scholars and courts alike must wrestle with the impact on fundamental tort theories like corrective justice and law and economics, along with their aims of compensating, deterring, and recognizing wrongs.[44]

Part I begins by introducing MDL's specialized procedures and norms and contrasting them with decades of procedural justice research demonstrating what people want from courts. Part II introduces our quantitative and qualitative findings, starting with the study's design and representativeness and turning to an in-depth look at why plaintiffs sued and what they hoped to accomplish in subparts II.A and II.B, respectively.

Part III considers plaintiffs' relationships with their attorneys—the face of justice for so many. Parts IV and V explore how traditional procedural justice metrics like voice, opportunities to be heard, dignity, delay, and error correction fare in the courts and whether plaintiffs felt satisfied by how their case ended. Finally, Part VI considers the systemic implications of our findings for ethics, judicial legitimacy, due process, and procedural justice.

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42 Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 430 (1977).

43 *See* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMPAR. L. 871, 872–73 (1997) (citing authority on the effects of public confidence in the legal system on compliance with the law and court action).

44 In this sense, we tend to agree with Nathanial Donahue and John Fabian Witt. *See* Nathaniel Donahue & John Fabian Witt, *Torts as Private Administration*, 105 CORNELL L. REV. 1093, 1098, 1160–65 (2020) (noting that private administration "tends to displace the normative project of corrective justice and to replace that project with an amoral managerial system designed to advance the interests of the private parties who build and manage it, mainly repeat-play defendants, insurance companies, and plaintiffs' lawyers").

What should justice look like in a world of process scarcity, and how can courts afford more process to more people? Many ideas are needed here, and we aim simply to ignite that discussion in Part VI with proposals to increase due process and transparency along various axes. On transparency, for instance, mandating public closing statements that reveal attorneys' fees and settlement amounts may drive down fees by making the market more efficient while providing courts and scholars with accurate substantive data to compare results and transaction costs across systems (e.g., class actions versus non-class MDLs). Likewise, the public's newfound familiarity with technology can transport distant courtrooms into plaintiffs' living rooms. With access, plaintiffs can observe lead lawyers and judges at work in MDL hearings and bellwether trials and, at times, participate directly. Finally, on due process, we focus on one failsafe in particular that has long been recommended by the *Manual for Complex Litigation* as well as a few judges: appoint separate attorneys to represent diverse interests—a linchpin of due process in class actions.[45]

I
THE MDL JUNCTION

Centralization can promote efficiency and justice. In small claims, for instance, aggregating through class actions makes suing worthwhile by remedying a litigation drought.[46] With little at stake, few absent class members have any desire to

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45 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004); *see also* Stephen R. Bough & Elizabeth Chamblee Burch, *Collected Wisdom on Selecting Leaders and Managing MDLs*, 106 JUDICATURE 69 (2022) (providing examples of judges that have appointed separate attorneys to represent diverse interests in MDLs); Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 477–78 (2012) (explaining a judge's decision to appoint separate counsel in the MDL resulting from the 9/11 attacks); *Advisory Committee on Civil Rules, Agenda Book*, U.S. CTS., 201–02 (Apr. 10, 2018), https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf [https://perma.cc/H4RN-T254] (remarks of Judge Sara S. Vance) (noting that judges are increasingly appointing diverse lawyers to leadership roles in MDLs).

46 Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 122 (2010) ("[T]he primary purpose of the class action is to remedy a litigation drought . . . ."); *see also* FED. R. CIV. P. 23(b)(3) (stating that one of the prerequisites of forming a class is that the class action be superior to other methods of adjudication at increasing fairness and efficiency).

personally control their claims.[47] But MDL addresses a litigation flood, as in opioids, talc, or pelvic mesh. In these cases, aggregation offers a lifeline to judges and defendants who might otherwise drown in a sea of similar lawsuits.[48]

At first glance, the aggregate form matters little, for all manner of coordination means plaintiffs lose some independence in return for a unified front and streamlined proceedings. Yet, a litigation flood presents issues of party autonomy, decisional control, and preclusion that rarely confront litigation droughts.[49]

By its own statutory terms and constitutional authority, MDL's foundation is the *individual* suit: plaintiffs hire their own lawyers, choose their venue, transfer for coordinated pretrial proceedings, and then return back to their chosen forum for case-specific discovery and trial. In practice, nothing could be further from truth—plaintiffs involuntarily cede control and rarely return home.[50] But without individual suits anchoring MDLs, deep-rooted constitutional tensions over personal jurisdiction, choice of law, and preclusion would quickly bubble over.[51] Nevertheless, MDL's paradoxical status seems to allow it to operate on its own plane, constrained neither by the hard-and-fast rules of individual suits nor by the due process demands of class actions.

This Part begins not with MDL, but with foundational procedural justice concepts that hold true across many

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47 *See generally* David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1569 (2017) (stating that class actions are needed to alter defendants' behavior or else claims will lay dormant).

48 *See generally* 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, 116–18 (2015) (describing the purposes of the MDL litigation and the problems it was created to address).

49 *See generally* Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 776–77 (2019) (discussing sources that describe the autonomy problems and agency costs of MDL litigation).

50 *See infra* notes 71–73 and accompanying text (highlighting that 99% of cases aggregated in MDLs are resolved by judges and therefore do not "return home").

51 What makes MDL judges' power constitutional is that the court from which the action came (the transferor court) can properly exercise personal jurisdiction over the plaintiff and defendant. *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1296 (2018) ("So long as the cases were originally filed in (or removed to) a district court that has personal jurisdiction . . . the MDL transferee court does not need an independent basis for personal jurisdiction over the temporarily transferred cases."); *In re* FMC Corp. Pat. Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.").

settings, from workplaces and police encounters to courts.[52] It then contrasts those universal expectations with MDL practices. After all, from a plaintiff's perspective, it shouldn't matter whether her hip was injured in a car accident or by a faulty hip replacement; she naively imagines courts will treat her the same either way.

A. The Process-Rich World of Procedural Justice

Since the mid-1970s, scholars have created a robust empirical literature on procedural justice that demonstrates what litigants expect from courts: people want their attorneys to be involved with them and their case.[53] They desire expedient resolution and adversarial process before a neutral decisionmaker as well as control over the process through opportunities to participate, present evidence, and tell their story.[54] Neutrality means that judges should transparently decide legal questions using consistent principles and the facts of the case.[55] Litigants need ways to fix court error, want reliable precedent, and feel that if mistakes are likely to happen, both sides should be equally at risk.[56]

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52 *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104–06 (2006) (explaining the contexts in which procedural justice impacts people and the effects of those impacts); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2149 (2017) (concluding that concepts of procedural justice are necessary to understand police distrust among African American and poor communities); Joel Brockner & Batia M. Wiesenfeld, *Organizational Justice Is Alive and Well and Living Elsewhere (But Not Too Far Away)*, *in* SOCIAL PSYCHOLOGY AND JUSTICE 213, 219–20 (E. Allan Lind ed., 2020) (applying procedural justice concepts to employer-employee relationships).

53 *See* THIBAUT & WALKER, *supra* note 23, at 88. In 1975, the work of two prominent social psychologists—John Thibaut and Laurens Walker—gave birth to the field of procedural justice, which now spans well beyond psychology. *See generally* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132–38, 175 (2011) (examining the interplay between procedural justice and psychology); Donna Shestowsky, *Great Expectations? Comparing Litigants' Attitudes Before and After Using Legal Procedures*, 44 L. & HUM. BEHAV. 179, 180–81 (2020) (providing an overview of the literature).

54 Tom R. Tyler, *Psychology of Aggregation: The Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 713 (2015). *See generally* Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 798–802 (2016) (discussing research about litigant preferences).

55 Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 713 (2015).

56 *See generally* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 72, 75 (1989) (stating that litigants have broad desires for trustworthy, reliable adjudication).

Decades of real-world studies also conclusively demonstrate a surprising truth: people care as much or more about procedural fairness than they do about whether they won or lost.[57] For those who lost, if they perceive the process that led to that outcome as fair, they are more likely to comply.[58] Conversely, when citizens distrust courts, they are less likely to obey the law.[59]

In tort, where lawsuits act as a last resort for addressing corporate and regulatory mishaps, the potential effects of illegitimacy are hard to gauge. If companies fail to warn doctors and consumers about dangerous side effects, or if harmful devices are grandfathered in through FDA loopholes,[60] tort law is supposed to act as a band-aid: those affected receive compensation, the offending company faces financial repercussions, and that company must either remove the product from the market or label it appropriately.[61] But even in ordinary cases, tort reform, limits on punitive damages, and caps on non-economic damages complicate tort law's deterrence-and-compensation story.[62]

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57 *E.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 69 (1988) (discussing a study showing that the objective outcome of a procedure is not correlated to a litigant's satisfaction); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 69–73 (Joseph Sanders & V. Lee Hamilton eds., 2001) (reviewing studies).

58 *See generally* LIND & TYLER, *supra* note 57, at 53 (stating that citizens evaluate courts in terms of fairness, not whether they have won or lost); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 123–29 (2002) ("When people have supportive attitudes and values, they are more likely to rely on justice and trust when dealing with legal authorities . . . ."); Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 88 (2002) (discussing authority which showed that perceptions of fairness did not depend on whether a person won or lost the case); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 661–68, 673–74 (2007) (presenting data that shows individuals care less about the outcome of their case than the fairness of the process).

59 *See generally* TYLER, *supra* note 52, at 104–05 (discussing sources that say procedural justice impacts legitimacy).

60 *Premarket Approval (PMA)*, FDA (May 16, 2019), https://www.fda.gov/medical-devices/premarket-submissions/premarket-approval-pma [https://perma.cc/AR4U-L7FV].

61 *See generally* Linda J. Rusch, *Products Liability Trapped by History: Our Choice of Rules Rules Our Choices*, 76 TEMP. L. REV. 739, 740–50 (2003) (illustrating the theories of harm and compensation in products liability torts).

62 *See* Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 851–54 (1997).

B. The Streamlined World of MDL

How might procedural justice's tenets fare in MDL? On one hand, mass-tort lawyers' advertising and willingness to shoulder numerous clients supplies court access that may otherwise be absent.[63] On the other, however, the very soul of MDL is efficiency both in terms of speed and economies of scale for the courts and parties alike. When held to the light of well-established procedural justice expectations, MDLs may thus be destined to disappoint.

MDLs can disorient plaintiffs from the very beginning. Without plaintiffs' consent, MDLs transfer their cases out of their chosen fora (perhaps somewhere close to home) to a faraway state before a judge they've never heard of, with lawyers they did not select controlling their lawsuit.[64] There is no ability to opt out, and though the Judicial Panel on Multidistrict Litigation considers parties' location requests, it sometimes picks jurisdictions that no party desires.[65]

Once centralized before the MDL judge, plaintiffs may find that they have different injuries, claims, and goals; the MDL statute requires only a single common factual question.[66] Unlike the class actions that judges sometimes certify within MDLs, where common questions must *predominate* over individual ones,[67] the MDL statute's drafters explicitly considered and rejected a predominance requirement.[68] Even though plaintiffs had to involuntarily submit to a centralized process, drafters assumed that plaintiffs had their own attorneys who would conduct local discovery when the case returned home.[69] Limiting MDL to pretrial matters ensured that plaintiffs' autonomy remained intact: their own lawyers

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63 *See* Tyler, *supra* note 55, at 721 ("[O]ne important gain that is achieved by aggregation of cases is that it allows people who have a grievance to have an opportunity for their claims to be addressed within a legal forum.").

64 28 U.S.C. § 1407.

65 *See, e.g.*, *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1099–1100 (J.P.M.L. 1992) (consolidating an MDL in the Northern District of Alabama, despite no party requesting venue there).

66 28 U.S.C. § 1407.

67 FED. R. CIV. P. 23(b)(3).

68 Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1735–37 (2017).

69 S. REP. NO. 90-454, at 5 (1967) ("[T]he committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable.").

could still try their cases on their chosen turf and preserve their chosen law.[70] Or so the thinking went.

In reality, cases rarely return home: MDL judges resolve 99% of them, prompting some to call MDLs "black hole[s]."[71] The idea of individual counsel is likewise illusory. Most plaintiffs find their lawyers through social media and internet searches and even those who rely on traditional methods, like calling local law firms, will typically find their complex cases referred to others.[72] These specialists have the expertise and money to take on corporate giants, but they may represent hundreds (sometimes thousands) of clients.[73] The result is not the idyllic lawyer-client relationship the MDL drafters seemed to envision, but a client who may find herself represented by layers of lawyers she interacts with rarely.

1. *Organizing Representation and Fees*

The top layer of lawyers is those the MDL judge handpicks to spearhead the proceeding—lead counsel and steering and executive committees. This group manages the pretrial tasks that individual lawyers would ordinarily perform like coordinating and conducting discovery, filing and responding to motions, navigating the path to trial, and negotiating settlements.[74] Once again, because plaintiffs supposedly have their "own" lawyers, most judges select leaders based on attorneys' experience, financial resources, and cooperative tendencies as opposed to what a class action would dictate—

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70 Bradt, *supra* note 68, at 1738.

71 *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2020*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., at 12 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf [https://perma.cc/XV94-LUHC] (listing 414,479 total terminated cases, 4,188 of which were remanded); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126 (2013).

72 *See infra* Table 6; HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 62–63 (2004); Stephen Daniels & Joanne Martin, *"It's Darwinism – Survival of the Fittest:" How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 L. & POL'Y 377, 385 (1999); Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y. L. SCH. L. REV. 243, 252 (2006); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 274 (2007).

73 Frankel & Dye, *supra* note 3.

74 One study on all MDLs (not just products liability) suggested that "many" orders left leadership duties undefined. David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 464 (2020).

that plaintiffs with conflicting interests have their own representatives.[75]

Those selected tend to be specialists, creating repeat-player attorneys on both the plaintiff and defense side.[76] Insiders have used their plaintiffs-side leadership positions to bargain with defendants to increase their own common-benefit fees (a troubling departure from contingent-fee principles), and defense lawyers have negotiated for widespread closure and litigation releases on ethically dubious terms.[77]

When leaders successfully conclude plaintiffs' cases, judges award them "common-benefit fees" for their work on behalf of all plaintiffs as opposed to just their own clients. These fees can be considerable: leaders in the pelvic-mesh cases received over $366 million in common-benefit fees *plus* their contingent fees (somewhere around $2.9 billion for all attorneys!).[78] Common-benefit percentages range from 4% to 19% of plaintiffs' gross settlement amounts, and are supposed to come out of the individual attorney's contingent fee, though common expenses sometimes come from the plaintiffs' remaining portion.[79] Despite questionable authority,[80] these taxes often apply to both federal- and state-court plaintiffs alike.[81]

2. *Judicial Outsourcing*

To wrangle MDLs, judges frequently outsource their authority to judicial adjuncts like special masters, claims administrators, banks, notice experts, certified public accountants, and lien resolution administrators.[82] For plaintiffs, each new face bears the judicial imprimatur of court sponsorship, but adjuncts can have vastly different incentives

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75 *See* Bough & Burch, *supra* note 45, at 3.

76 Burch & Williams, *Repeat Players*, *supra* note 10, at 1493–94.

77 Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 90–107 (2017); *see infra* note 100 and accompanying text.

78 Pretrial Order No. 201 at 6, *In re* Boston Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig., No. 2:12-md-2326 (S.D. W. Va. Jan. 30, 2019) (noting that the sum of plaintiffs' resolutions totaled $7.25 billion and awarding leaders 5%). Contingent fees ranged from 33% at the low end to 45% at the high end. Taking 40% (minus 5% to leaders) as a standard contingency would mean $2.53 billion in contingent fees alone.

79 *See infra* notes 305–306 and accompanying text; BURCH, *supra* note 10, at 238–44.

80 *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 963 (N.D. Cal. 2021).

81 *In re* Genetically Modified Rice Litig., 764 F.3d 864, 871–74 (8th Cir. 2014); Silver & Miller, *supra* note 46, at 131–32.

82 Burch & Williams, *Judicial Adjuncts*, *supra* note 10, at 2152–62.

than courts and may operate with little transparency or judicial supervision.[83] For instance, when the adjuncts are private actors (often paid by the hour), MDLs often take longer, adding delay for plaintiffs. Products liability MDLs with special masters lasted 66% longer than those without, and, even controlling for personal-injury claims, outcome, and the number of actions, appointing a judicial adjunct of any kind made proceedings last longer than they otherwise would.[84]

Unless the court appoints a magistrate judge, who is a salaried court employee, then the repeat-player attorneys typically select and pay the adjunct.[85] But costs often fall solely on one-shot plaintiffs—plaintiffs alone bore the full costs in 54% of the adjunct appointments, and some special masters and claims administrators charged millions of dollars.[86] Higher costs mean lower settlement amounts. And both media outlets and attorneys have flagged multiple concerns with private adjuncts, from sky high costs, self-dealing, and bias to capture and cronyism between repeat lawyers and repeat private adjuncts.[87]

3. *Procedural Shortcuts and Resource Scarcity*

Shepherding thousands of cases through pretrial has also prompted judges to streamline pleadings, discovery, and motion practice in ways that further depersonalize plaintiffs' court experience and remove the Federal Rules of Civil Procedure's built-in protections.[88]

Ordinarily, complaints allow plaintiffs to express their grievances, publicize their narrative, and place their account into the public record.[89] But MDLs use master complaints with generic allegations and short-form complaints that often mean shoehorning plaintiffs' story into a six-page check-the-

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83 *Id.* at 2189–90.

84 *Id.* at 2183–85 (conducting a multi-factor survival analysis).

85 *Id.* at 2200.

86 *Id.* at 2192–97.

87 *Id.* at 2192–97, 2200; Paul Egan, *Concerns Mount Over Attorney Fees in Flint Water Settlement. Here's Why.*, DETROIT FREE PRESS (Mar. 23, 2021), https://www.freep.com/story/news/local/michigan/flint-water-crisis/2021/03/23/concerns-mounting-over-requested-attorney-fees-flint-case/4753904001/ [https://perma.cc/5KWJ-9MRP]; Hobson, *supra* note 22.

88 *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 785–87 (2017); Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 5–46 (2019).

89 *See* Hollander-Blumoff, *supra* note 53, at 152–53 ("[V]oice begins with the pleading process.").

box form.[90] And in lieu of limited voice opportunities through depositions, requests to produce documents, and interrogatories, MDLs may use plaintiff profile forms and fact sheets without the Federal Rules' built-in limits.[91] The information sought is clinical and formulaic—lot numbers, implant dates, and medical facilities.[92] Convenience, not catharsis, is the chief goal.

Some plaintiffs do not even receive that much process. Tolling agreements struck between plaintiff and defense counsel pause statutes of limitations and allow cases to be "on file" but never actually filed.[93] Similarly, inactive dockets place cases in abeyance while parties discuss settlement but remove the threat of trial and relegate litigants to "purgatory."[94]

Nor do plaintiffs have many opportunities to test these ad hoc procedures on appeal.[95] Because most are interim orders, § 1291's final-order rule means that appellate courts will rarely intervene.[96] Without a final judgment, parties are limited to mandamus and interlocutory appeals.

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90 *See, e.g.*, Short Form Complaint Template, *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2327 (S.D. W. Va.), https://www.wvsd.uscourts.gov/MDL/ethicon/pdfs/EthiconShortFormComplaint.pdf [https://perma.cc/F3LG-KR3B] (demonstrating the check-the-box format).

91 Williams & Cantone, *supra* note 10, at 241–43, 254; *see, e.g.*, Pretrial Order No. 17 at 4–8, *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2327 (S.D. W. Va. Oct. 4, 2012) (noting that plaintiffs can use plaintiff fact sheets and profile forms to take advantage of the MDL process).

92 *See, e.g.*, Plaintiff Profile Form, *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2327 (S.D. W. Va.), https://www.wvsd.uscourts.gov/MDL/ethicon/pdfs/EthiconPlaintiffProfileForm.pdf [https://perma.cc/Z558-QNJA] (asking device information, surgery history, etc. and providing check-boxes for "outcomes attributed to device").

93 *E.g.*, Aff. of Herbert M. Kritzer at 18, *In re* Vioxx Prods. Liab. Litig., No. 2:05-MD-01657-EEF-DEK (E.D. La. Mar. 31, 2009) (citing JOINT REPORT NO. 30, PLAINTIFFS' AND DEFENDANTS' LIAISON COUNSEL 8 (Dec. 12, 2007)) (noting that 14,100 claimants entered into tolling agreements with Merck); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 156 (2012); PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 6:35 (2006).

94 J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. TORT L. 3, 23 n.81 (2012) (quoting Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 ADVOC. 80, 81 (2007)); James S. Lloyd, Comment, *Administering a Cure-All or Selling Snake Oil?: Implementing an Inactive Docket for Asbestos Litigation in Texas*, 43 HOUS. L. REV. 159, 161 n.10 (2006); *e.g.*, Pretrial Order No. 186, *In re* Boston Scientific Corp., Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326 (S.D. W. Va. June 13, 2018).

95 *See* Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. 933, 977–78 (2018) (discussing the ways in which other aspects of civil litigation are insulated from rigorous appellate scrutiny).

96 *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV.

4. *Settlement as "Automatic Washer-Dryers"*

Most lawsuits settle in most civil cases: MDL Judge Jack Weinstein observed, "Federal judges tend to be biased toward settlement. We are the kitchen help in litigation. We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts' automatic washer-dryers."[97] But the "settlement culture," as Judge William Young labeled it, "is nowhere more prevalent than in MDL practice."[98]

Still, it's not just the settlement culture that differs in MDL, it is the settlement structure itself. Rather than settle directly with plaintiffs, defendants strike deals with plaintiffs' law firms that allow them to impose conditions on both plaintiffs and their counsel. Because corporate defendants want to maximize closure, the terms they insert incentivize plaintiffs' attorneys to strongly encourage their clients to take the deal.

For example, walkaway, withdrawal, or "blow" provisions allow defendants to terminate a settlement offer if too few plaintiffs settle, meaning that no one (attorneys included) gets paid.[99] Attorney-recommendation provisions require plaintiffs' lawyers to uniformly recommend that all of their clients settle, while attorney-withdrawal provisions go one step further by demanding that lawyers withdraw from representing clients who refuse.[100] Despite their prevalence, all but the walkaway provision have been called unethical under the Model Rules of Professional Conduct.[101]

1669, 1707 (2017) (finding only around 100 MDL cases in Westlaw that were appealed over five years).

97 Jack B. Weinstein, *Comments on Owen M. Fiss,* Against Settlement *(1984)*, 78 FORDHAM L. REV. 1265, 1265 (2009).

98 Delaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 150 (D. Mass. 2006).

99 Burch & Williams, *Repeat Players*, *supra* note 10, at 1504–09 (explaining that walkaway provisions allow defendants to walk away from settlement offers and release them from contractual obligations).

100 *Id.* at 1504–05 (referring to two of the four interrelated closure provisions of settlement).

101 Erichson & Zipursky, *supra* note 21, at 267–68, 283–91; Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 980 (2010); Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233, 3235 (2013).

II
PROCEDURAL JUSTICE IN MDL: A QUALITATIVE AND QUANTITATIVE STUDY

Theory aside, little is known about how plaintiffs actually feel or fare, and so very much is at stake. MDLs are growing exponentially. In 2020, MDL cases accounted for *over three times* the federal criminal caseload;[102] 50% of all new federal civil filings were MDL cases;[103] and 97% of those MDL cases were products liability.[104]

To remedy the information deficit, we designed a study to elicit feedback from those disproportionately affected by mass torts: women and their families. Women are not mini-men. But historically, clinical trials enroll more men than women and "gender-neutral" dosages are keyed to men despite critical differences in women's size, metabolism, kidney enzymes, and immune response.[105] For decades, pharmaceutical companies have pushed out new female contraceptives from pills to IUDs, forcing them to bear the burden of life-threatening side effects like pulmonary embolism and perforated organs.[106] Women

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102 In 2020, parties filed 68,696 criminal cases, whereas civil courts saw 495,086 newly filed cases—231,495 of which were MDL cases. *Table JCI—U.S. Federal Courts Statistical Tables For The Federal Judiciary*, U.S. CTS. (Dec. 31, 2020), https://www.uscourts.gov/statistics/table/jci/statistical-tables-federal-judiciary/2020/12/31 [https://perma.cc/YH3P-REEY]; *Judicial Panel on Multidistrict Litigation – Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2020 [https://perma.cc/79RB-J98V] (listing 4,210 cases transferred and 227,285 initiated in the transferee districts for 231,495 cases filed in 2020).

103 *U.S. District Courts – Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020 [https://perma.cc/C7MA-KM6E] (470,581 total filed cases in 2020); *Judicial Panel on Multidistrict Litigation – Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2020 [https://perma.cc/79RB-J98V] (231,495 MDL cases filed in 2020).

104 *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Dec. 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-December-15-2020.pdf [https://perma.cc/T42B-TCTZ] (adding the total actions in the 59 pending MDLs equals 322,443 cases out of a total of 330,816 cases pending on the MDL docket).

105 PEREZ, *supra* note 12, at 317-333; Annaliese K. Beery & Irving Zucker, *Sex Bias in Neuroscience and Biomedical Research*, 35 NEUROSCIENCE & BIOBEHAVIORAL REVS. 565, 571 (2011); Jennifer L. Carey et al., *Drugs and Medical Devices: Adverse Events and the Impact on Women's Health*, 39 CLINICAL THERAPEUTICS 10, 10–13 (2017); Londa Schiebinger, *Women's Health and Clinical Trials*, 112 J. CLINICAL INVESTIGATION 973, 973–74 (2003).

106 *E.g.*, *Possible Risks and Side Effects for NuvaRing*, NUVARING, https://www.nuvaring.com/risks-side-effects/ [https://perma.cc/Q7A4-WWM4] (last

endure the residual effects of giving birth, like incontinence, or encounter high-risk products like pelvic mesh and slings, many of which were pulled from the market in 2019.[107] Despite all of this, multiple studies document doctors' tendency to trivialize women's complaints about pain, particularly when it comes to their reproductive system.[108]

A. Research Design

To hear directly from plaintiffs involved in 26 MDLs and related state proceedings,[109] we designed a survey that relied, in part, on core questions used in previous procedural justice studies.[110] We received Institutional Review Board (IRB) approval to gather plaintiffs' confidential responses through a weblink[111] and used Qualtrics software to pose a mix of 111 open- and closed-ended questions[112] about plaintiffs'

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visited Sept. 16, 2022); Gina Kolata, *The Sad Legacy of the Dalkon Shield*, N.Y. TIMES MAG. (Dec. 6, 1987), https://www.nytimes.com/1987/12/06/magazine/the-sad-legacy-of-the-dalkon-shield.html [https://perma.cc/8FF8-G3PW]. *See generally* Emily Anthes, *Why We Can't Have the Male Pill*, BLOOMBERG (Aug. 3, 2017), https://www.bloomberg.com/news/features/2017-08-03/why-we-can-t-have-the-male-pill [https://perma.cc/NPR9-JKRD] (speaking on how regulators of male contraceptives have less tolerance for side effects of male contraceptives than female contraceptives).

107 Press Release, FDA, FDA Takes Action to Protect Women's Health, Orders Manufacturers of Surgical Mesh Intended for Transvaginal Repair of Pelvic Organ Prolapse to Stop Selling All Devices (Apr. 16, 2019), https://www.fda.gov/news-events/press-announcements/fda-takes-action-protect-womens-health-orders-manufacturers-surgical-mesh-intended-transvaginal [https://perma.cc/C2NR-9Z4U].

108 *See, e.g.*, GENA COREA, THE HIDDEN MALPRACTICE: HOW AMERICAN MEDICINE MISTREATS WOMEN 79–89 (updated ed., 1985) (providing an overview of studies that show doctors' dismissal of women patients' problems as trivial or speaking to them in a condescending manner).

109 We included seven pelvic mesh MDLs (American Medical Systems, Boston Scientific Corp., C.R. Bard, Coloplast, Cook Medical, Ethicon, and Neomedic), Johnson & Johnson talcum powder, Mentor ObTape, Yasmin/Yaz, Mirena IUD (and Mirena IUS Levonorgestrel), NuvaRing, Silicone Gel Breast Implants, Ortho Evra, Norplant, Fen-Phen diet drugs, Dalkon Shield, Power Morcellator, Ephedra, Fosamax, Monat Hair Care, Rio Hair Naturalizer, Prempro, Protegen Sling, and Zoloft.

110 TYLER, *supra* note 52, at 179–219; LIND ET AL., *supra* note 56, at 81–84. We would be happy to share a copy of the survey with anyone interested.

111 Human Subjects Office, Exempt Determination, Human Research Protection Program at the University of Georgia (Nov. 16, 2018) (IRB ID STUDY00006718). Only one of us (Burch) was privy to participants' names and other identifying information.

112 Most of the closed-ended questions were five-point Likert-scale questions, with the mid-point of the range showing neither end point, and the high and low values the extreme ends. Other closed-ended questions were "check all that apply" options or factual information (e.g., gender of respondent, court of case filing) where there is no scaling required.

interaction with the courts, their attorneys, and the claims-administration process.[113]

Over the course of two years, we aimed to reach a random sample of plaintiffs in the covered proceedings through a variety of means. Our study was widely noted in the press, including *The New York Times*,[114] *Reuters*,[115] *Law.com*,[116] *Mesh News Desk*,[117] and a plaintiff-run *Mesh Awareness Newsletter* and *Mesh Angels* site—all places in which plaintiffs and their lawyers might find it.[118] We created an explanatory website,[119] posted on social media like Twitter, and joined public and private Facebook support groups dedicated to mesh, medical devices, osteoporosis, ovarian cancer, talc, breast implants, NuvaRing, and Mirena, each with thousands of members who might also be litigants in related lawsuits.[120] Posts advertised the opportunity for participants to share their stories and sought feedback about their litigation experience.[121] Finally, we contacted 42 plaintiffs' attorneys, several from each MDL that included a mix of lead and non-

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113 We also asked about third-party funding, but only 13% of respondents obtained cash advances and only 5% used medical funding to remove the product.

114 Goldstein, *supra* note 8.

115 Bellon, *supra* note 8.

116 Mitchell, *supra* note 8.

117 Jane Akre, *Fed Up? Want to Talk to MDL Panel? Here's How!*, MESH NEWS DESK (Dec. 4, 2018), https://www.meshmedicaldevicenewsdesk.com/articles/fed-up-want-to-talk-to-mdl-panel-heres-how [https://perma.cc/H5E3-DEL9]; Jane Akre, *Still Time to Participate in MDL Satisfaction Survey for Pelvic Mesh Plaintiffs*, MESH NEWS DESK (Apr. 4, 2019), https://www.meshmedicaldevicenewsdesk.com/articles/17472-2 [https://perma.cc/2545-88L9]; Beth Chamblee Burch, *U of GA Study Closing Soon – Has Your Voice Been Heard?*, MESH NEWS DESK (Dec. 1, 2020), https://www.meshmedicaldevicenewsdesk.com/articles/u-of-ga-study-closing-soon-has-your-voice-been-heard [https://perma.cc/6NCK-G8K9].

118 *Mesh Angels*, FACEBOOK, https://www.facebook.com/meshangelnetwork/ [https://perma.cc/32EW-WRYK] (last visited Sept 16, 2022).

119 Elizabeth Chamblee Burch, *Women's Health MDLs*, https://www.elizabethchambleeburch.com/womens-mdls [https://perma.cc/GPA5-Y3WE] (last visited Sept. 16, 2022).

120 *E.g.*, *Mesh Problems*, FACEBOOK, https://www.facebook.com/groups/meshproblems [https://perma.cc/3F9F-3U2C] (last visited Sept. 24, 2022); Elizabeth Chamblee Burch (@elizabethcburch), TWITTER (Dec. 3, 2020), https://twitter.com/elizabethcburch/status/1334558482733932544 [https://perma.cc/DKL7-CCY3].

121 *E.g.*, Elizabeth Chamblee Burch, *Study Aims to Gauge Litigant Satisfaction* (Dec. 18, 2018), https://www.elizabethchambleeburch.com/post/study-aims-to-gauge-litigant-satisfaction [https://perma.cc/A52F-3G46]; Elizabeth Chamblee Burch, *Confidential Study for Plaintiffs Involved in Women's Health MDLs* (Apr. 4, 2019), https://www.elizabethchambleeburch.com/post/confidential-study-for-plaintiffs-involved-in-women-s-health-mdls [https://perma.cc/F935-5AQ9].

lead lawyers, and asked for their assistance in distributing the survey to current and former clients.

1. *Representativeness*

Our efforts resulted in 293 total responses. Of those, we determined that 36 participants took the survey multiple times (46 extra responses), and we measured the last complete response for each.[122] We excluded 27 responses that did not leave enough information for us to verify their identity as well as 2 participants suing abroad and 1 lawyer.[123] Using court records and public records, we verified 217 responses, which form our core dataset. Most plaintiffs took part directly in the survey, but we also spoke with over 20 by phone and corresponded with over 90 by email and electronic messages.[124] Despite our asking how litigants felt about the process (not about confidential attorney-client communications or settlement data), some would-be participants who reached out by phone told us that they could not take the study because their attorneys advised them not to post anything about their lawsuit online.

Our 217 participants resided in 42 different states as well as two other countries (two international participants were injured in and had counsel in the United States). Participants were represented by 295 different attorneys from 145 distinct law firms. Their cases originated in at least 32 different state and federal courts and terminated in at least 29 state and federal courts.

Of the 217 respondents, seven people sued on behalf of someone harmed, and 210 discussed their own experiences.[125] They could select any one of 26 MDLs,[126] but the seven pelvic-mesh proceedings tended to be treated as a monolith, with participants suing multiple manufacturers for different products. Given the over-representation of mesh lawsuits among women's health MDLs, it is not unusual that those proceedings are overrepresented among our respondents in Table 1.

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122 Where participants filled out multiple entries, we used the last entry unless it was substantially incomplete (indicating that the participant realized that he or she had already filled out the survey previously).

123 The litigants abroad are included in a separate, simultaneous study.

124 Each phone conversation lasted one to two hours. Those litigants who did not take part in the survey are not included in the study.

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

126 We did not have participants from all of the included proceedings.

Table 1. Participants by MDL Proceeding[127]

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

Our survey was in the field between November 2018 and January 2021, and though we included women's MDL proceedings from 1975 to 2018, most respondents came from more recent proceedings. The time between suing and survey responses allowed most cases to end (even in the longest MDLs), but most were not so distant that people's feelings about the experience dulled. Table 2 shows that most cases began in the early 2010s, which is consistent with the initiation of the pelvic-mesh proceedings.[128]

Table 2. Years in which Participants Filed Their Complaint

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

127 Participants also came from related state-court lawsuits. We exclude those case numbers to preserve participants' anonymity.

128 As the 86.6% total reflects, we could not obtain filing dates for 29 participants.

Based on the dockets, 148 respondents (81%) saw their cases end, as Table 3 below shows.

Table 3. Years in which Participants' Cases Ended

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

People can perceive fairness differently depending on where they are in the course of litigation, with some studies showing that disputants prefer adjudication to settlement before suing, but, after enduring litigation, prefer settlement.[129] Judging from Table 3, keeping the survey in the field from the end of 2018 to the start of 2021 allowed us to capture most participants' experiences as their cases concluded in real time, with 74% ending during the survey period. Their reports thus cover the entire lawsuit, which they had freshly in mind as they completed the survey. For purposes of representativeness, we also report all participants' eventual outcomes as recorded in court dockets in Table 4.

Table 4. Participants' Eventual Outcomes as of February 2021

Outcome	Total	Percentage
Dismissed on appeal	1	0.46%
Dismissed on Summary Judgment Motion	2	0.92%
Dismissed	4	1.84%
Ongoing, remanded	13	5.99%
Ongoing	22	10.14%
Dismissed without prejudice	37	17.05%
Dismissed with prejudice	40	18.43%
Settled	63	29.03%
Unknown	35	16.13%

Given our focus on women's health MDLs, it was not unusual that 77.9% (169) of our participants were female, though partners sued as well.[130] Demographically, 73% of

129 Shestowsky, *supra* note 53, at 180.

130 Suits were typically for loss of consortium. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 392 (2d ed., 2021) (explaining loss of consortium as a species of emotional harm). We had 3 (1.4%) participants who

respondents were white, with the next largest groups being Black and multi-racial, multi-ethnic.[131] Forty percent had a high school degree and 35.4% had a college or more advanced degree.[132] Finally, 17.1% worked full time and 54.4% were not working professionally for various reasons (disabled, homemakers, retired).[133]

2. *Inherent Limitations*

For people of all social, economic, and ethnic backgrounds, studies demonstrate that the perceived fairness of court procedures is a near universal factor shaping their willingness to accept decisions.[134] As Tom Tyler points out, "[P]eople generally reacted to their experience in terms of procedural justice whatever their background, suggesting that focusing on procedural justice is a very good way to build trust and encourage compliance irrespective of who is using the courts."[135] Yet, gender-specific procedural and distributive justice research has produced varied results, with some finding that female litigants emphasize outcomes more than males, others finding the opposite, and some finding no differences whatsoever.[136]

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identified as male, 1 who identified as neither male nor female, and 44 (20.3%) who declined to say.

131 Forty-five (20.7%) declined to provide racial demographics, 159 (73.3%) were white, 5 (2.3%) were Black, 5 (2.3%) were multi-racial/multi-ethnic, 2 (0.9%) were American Indian or Alaska Natives, and 1 (0.5%) was Native Hawaiian or Pacific Islander. Three respondents listed their race as Hispanic/Latina, which federal policy defines as an ethnicity despite some contrary trends. *See, e.g.*, Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is Being Hispanic a Matter of Race, Ethnicity or Both?*, PEW RSCH. CTR. (June 15, 2015), https://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both/ [https://perma.cc/Q4JM-HAP4] ("69% of young Latino adults ages 18 to 29 say their Latino background is part of their racial background . . . ."). For reporting, we have incorporated those respondents into the white racial category.

132 Forty-seven (21.6%) declined to answer, but 6 (2.8%) had less than a high school degree, 87 (40%) were high school or GED equivalent graduates, 56 (25.8%) had college degrees, 17 (7.8%) had master's degrees, and 4 (1.8%) had doctoral degrees.

133 Forty-five (20.7%) provided no data, but 37 (17.1%) worked full time, 17 (7.8%) worked part time, 6 (2.8%) were homemakers, 60 (27.6%) were disabled and not working, 29 (13.4%) were not working for other reasons, 21 (9.7%) were retired, and 2 (0.9%) sought work.

134 Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 483–84 (2010).

135 *Id.* at 484.

136 *See* James H. Dulebohn et al., *Gender Differences in Justice Evaluations: Evidence from fMRI*, 101 J. APPLIED PSYCH. 151, 152, 162–64 (2016) (discussing and summarizing conflicting studies and finding neurological differences).

Survey research provides an opportunity for plaintiffs in the midst of lawsuits to share their experiences. Unlike some public opinion surveys where participants are randomly selected and representative of the larger population, our survey relied on a convenience sample. We posted the weblink in places where we expected plaintiffs to find it, and we did not limit participation to a pre-selected sample. Anyone participating in any of the covered MDLs could take the survey, but we know little about the sample size of the underlying population from which they are drawn.[137] To be fair, no one does, as no study like this has ever been attempted.[138]

Even if our participants were particularly motivated by positive or negative feelings, it is clear that they represent diverse demographic criteria and, as the results themselves show, respondents are not unified in how they evaluate the legal system and its many components. The varied responses further highlight the representative nature of the data and collectively provide valuable insights into the obscure MDL world.

Our study is the first to examine litigant satisfaction in MDLs, but it should be the first of many. More work and far greater access to plaintiffs' and claims' information is needed to compare our results in products liability with MDLs in antitrust, sales practices, securities, employment, and intellectual property. Nevertheless, the prominence of women's health MDLs in products liability proceedings and of products

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137 In federal court alone, the 26 proceedings included in this study involved 220,903 actions. Data on state court cases is incomplete, plus cases settle out of court and are often placed on hold via tolling agreements. Thus, it is not possible to get an accurate head count, much less identify the underlying demographic data.

138 There have, however, been other studies on tort litigants. *See, e.g.*, LIND ET AL., *supra* note 56, at 2 (researching how "procedures, case events, and impressions of the litigation process influence tort litigants' fairness judgments and satisfaction with their experiences with the civil justice system"); TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 248 (2009). And on group litigation. *See, e.g.*, Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 651–53 (2008) (researching how people who had suffered an injury or lost a family member in 9/11 think about the choice between collecting money from the VCF and pursuing civil litigation); Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 89–91 (2011) (researching procedural fairness judgments in class action suits).

liability to the larger world of civil litigation suggests this is an appropriate starting place to examine these critical issues.[139]

B. Why Plaintiffs Sued: It's Not Just About the Money

Why do plaintiffs sue? In her 2007 study of medical-malpractice plaintiffs and attorneys, Tamara Relis documented the gap between what lawyers assumed their clients wanted (principally money) and what clients actually wanted: a litany of non-fiscal objectives like admitting fault, retribution, protecting others, seeking answers, demanding apologies, acknowledging harm, and punishing the defendant.[140] Only 18% of the 17 plaintiffs in Relis's study wanted money alone, and 35% articulated money as a secondary objective.[141] Gender dynamics likewise played a role, with women exhibiting "unease in discussing the compensatory element" in ways that were absent for men.[142]

Other studies on group litigation echo some of these findings. Gillian Hadfield's survey of 9/11 victims revealed that choosing to litigate versus receiving a payout from the Victim Compensation Fund was about more than just money.[143] They wanted information about what happened, to hold responsible parties accountable, and to prevent future terrorist attacks.[144] Similarly, named plaintiffs in consumer class actions hoped to generate corporate accountability, help others affected by similar conduct, stop unfair practices, and send a message to other companies within the industry.[145]

We asked our participants the open-ended question, "Why did you decide to sue?" Like previous studies, they had multiple goals, and said things like: "To stop women from getting slaughtered by this garbage and to seek compensation for current [and] future medical expenses."[146] Most provided between one and three reasons, which we coded into seven categories, as Table 5 below shows. Unlike Relis's study, participants principally sought compensation for medical

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139 *See MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, *supra* note 104 and accompanying text.

140 *See* Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 721 (2007); John M. Conley & William M. O'Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 L. & CONTEMP. PROBS. 181, 196 (1988).

141 Relis, *supra* note 140, at 723.

142 RELIS, *supra* note 138, at 248.

143 Hadfield, *supra* note 138, at 659–70.

144 *Id.* at 661–63.

145 Meili, *supra* note 138, at 89–91.

146 Participant 77.

expenses and pain and suffering, though many also wanted to hold companies accountable, protect others from faulty products, have doctors and corporations acknowledge the harm they caused, punish defendants, and have their stories heard.

Table 5. Participants' Myriad Reasons for Suing

Reason(s) for Suing	**Frequency**	**Percentage (N=217)**
Never Again – Protect Others	61	28.1%
Compensation – Medical Expenses	60	27.6%
Compensation	60	27.6%
Accountability	48	22.1%
Acknowledge Harm	39	18.0%
Retribution – Punish	10	4.6%
Be Heard	9	4.1%
Other	5	2.3%
No Response	20	9.2%

When combined, desires for compensation and medical reimbursement topped the list of reasons to sue at 55.3%. But for many, suing "was a hard decision to make."[147] As one explained, "After realizing that this procedure that was done to me was going to require continuous care and medical costs, I saw the writing on the wall."[148]

Yet, participants bore no resemblance to the money-hungry plaintiffs depicted in pro-tort reform propaganda.[149] "My husband lost his mind over this and cannot work any more. I am not being greedy like I'm told. . . . As things are I will be a homeless street lady with no health insurance,"[150] one confided. Another noted, "Unfortunately, life revolves around money."[151] She explained, "I live on [Social Security Disability]. If I had a settlement that could help me get the removal surgery and make my life a little more comfortable while I'm ill from this. I go without. I even [go without] some of my medicines because I can not afford them."[152] A third revealed, "I'm a single mother taking care of my disabled son. . . . [We] are

147 Participant 154.
148 *Id.*
149 *E.g.*, Staci Zaretsky, *Hot Coffee: Spilling Our Way to the 'Evils' of Tort Reform*, ABOVE THE LAW (June 28, 2011), https://abovethelaw.com/2011/06/hot-coffee-spilling-our-way-to-the-evils-of-tort-reform/ [https://perma.cc/4RPU-67AB].
150 Participant 96.
151 Participant 67.
152 *Id.*

struggling each month to pay bills . . . ."[153] And another single, self-employed mom reported, "[I e]nded up losing my home after the 2nd surgery!"[154]

Many simply wanted to recover enough to pay their medical expenses: "I hoped for a settlement to cover all my doctor's bills," said one.[155] A breast-implant plaintiff "was just trying to get the money to explant."[156] And quite a few participants had to travel to out-of-network doctors to receive specialized care: "It cost me a great deal to find a Doctor that was in California whom was an expert in removal of the mesh. I had to take money from my husband[']s 401k to pay for several trips to out of state doctors."[157]

Descriptions of pain and suffering abounded, as did the consequences: divorce and attempted suicides were heart-breakingly common.[158] So, too, were family repercussions, job loss, and bankruptcy.[159] "I've lost my marriage I may lose my home if I don't get enough out of my settlement I've lost everything. I'm crippled I can barely walk some days."[160] Repeatedly, we heard things like, "My life is ruined. There is no pleasure or happiness. My self worth is gone. My body is wrecked and I want them to pay for what their product and their words have done."[161]

Suffering pain and infections from a pelvic-mesh implant at thirty-seven-years old later led one participant's 20-year marriage to crumble, with devastating effects:

> My two teenage sons lost all guidance and care from their mom and had become my care takers. After years of living in darkness and continued research for a doctor to assist my agonizing and failed health I found a surgeon nearly 1000 miles away and scheduled my appointment at the time a 6 month waiting list for Mesh patients. . . . By the time I had my full removal surgery November 2014 I was no longer employed and lived in complete isolation. I have been through depression to where I had a breakdown and attempted suicide. By summer of 2014 I had decided that

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153 Participant 62.
154 Participant 130.
155 Participant 3.
156 Participant 97.
157 Participant 200.
158 *E.g.*, Participant 186 ("My loss of income led to a divorce and attempted suicide.").
159 *E.g.*, Participant 180 ("[I] have filed Chapter 7[,] my house has been in foreclosure . . . .").
160 Participant 50.
161 Participant 59.

> would be last my holidays and year of my life. I could no longer be the burden to my precious sons who were just teenagers.[162]

Money alone cannot put people's lives back together, but it can provide access to much needed physical and mental health care.

Although most participants wanted compensation, they rarely desired only money, and many did not mention it at all. After compensation, 28.1% of respondents aimed to "[p]revent others from suffering like i did."[163] Some only wanted to protect others: "I didn't want this to happen to any other woman. It was never about money . . . ."[164] Like the medical-malpractice respondents in Relis's study and 9/11 litigants in Hadfield's study, our participants, too, litigated on principle.

Participants in nearly every MDL wanted to protect others. A breast-implant litigant implored, "Stop the implanting of the silicone."[165] A plaintiff taking Prempro estrogen wanted "[t]o prevent others from breast cancer."[166] A talc plaintiff remarked, "I want to expose how toxic Talc is so others will stop using it."[167] A NuvaRing plaintiff sued "[b]ecause there were no warnings of possible side effects that would result in this pulmonary embolism."[168] And mesh plaintiffs reiterated time and again that they wanted to: "Raise public awareness about dangers of mesh implants and PREVENT future use/ VICTIMS;"[169] "Ban a dangerous device from destroying other families;"[170] "Get the mesh off the market;"[171] "Not use this crap in other people;"[172] and "Change . . . what drug companies are allowed to do."[173]

After compensation and protecting others, participants sought accountability, with 22.1% saying things like, "I would like the company to be held accountable for the harm they have caused to people. It is not about money, but is about the company taking responsibility."[174] Others had more direct

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162 Participant 71.
163 Participant 149; *see supra* Table 5.
164 Participant 224.
165 Participant 48.
166 Participant 163.
167 Participant 56.
168 Participant 51.
169 Participant 213.
170 Participant 162.
171 Participant 195.
172 Participant 219.
173 Participant 206.
174 Participant 4; *see supra* Table 5.

comments: "J&J knew the mesh kit was extremely risky. I want to send them a message that they cannot mutilate women and get away with [it] in the United States of America."[175] Another said, "I wanted them held responsible! I can no longer have sex! It hurts too badly, even now."[176] Sentiments focused on accountability are particularly common when plaintiffs feel the defendant is morally culpable and restoring social order means holding those responsible accountable.[177]

Going hand-in-hand with accountability and protecting others, 18% of participants wanted doctors and companies to acknowledge their mistakes and the harm caused.[178] Echoing research showing gender bias in doctors' dismissiveness of women's physical pain,[179] some said, "I decided to sue because i was mentally and physically not been [ ]listened to by any doctor."[180] "My dr kept telling me pain was in my head . . . ."[181] "The amount of doors that I had to knock on pleading for help to get me out of pain all kept being dismissed and fell on deaf ears."[182] Others, however, focused on companies: "I don't want a penny I want the company to acknowledge their harm."[183]

Though less prevalent at 4.6%,[184] a subset of respondents also wanted payback, to punish those who wronged them: "They tried to kill me,"[185] declared one. "They Stole Our Lives," accused another.[186] Lawsuits were the answer. "[T]he only way to punish them for damaging us is to take money from these greedy criminals."[187] "Put an end to a greedy corporation that put profits over consumers health."[188] "I wanted this Company to pay for all the years I suffered from the pain, the

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175 Participant 111.

176 Participant 142.

177 *See* Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 361 (2003).

178 *See supra* Table 5.

179 Roger B. Fillingim, Christopher D. King, Margarete C. Ribeiro-Dasilva, Bridgett Rahim-Williams & Joseph L. Riley III, *Sex, Gender, and Pain: A Review of Recent Clinical and Experimental Findings*, 10 J. PAIN 447, 462 (2009) (reviewing studies showing gender bias in pain treatment).

180 Participant 62.

181 Participant 11.

182 Participant 71.

183 Participant 146.

184 *See supra* Table 5.

185 Participant 68.

186 Participant 107.

187 Participant 1.

188 Participant 147.

lack of being able to be intimate with my husband, the emotional depression it caused me."[189]

Finally, even before we asked participants about opportunities to be heard, 4.1% mentioned it as a reason to sue: "I wanted other women who were ill to be heard."[190] Some intertwined this goal with acknowledging harm—"I wanted the truth to come out about the companies greed, the FDA and the medical professional who would not believe me about the pain"[191]—whereas others wanted to "spread the word to women implanted with the device,"[192] and "speak out and not let big company's continue to hurt people."[193]

Participants' aims apart from compensation align not only with Hadfield's and Relis's findings, but findings from Britain and other medical-malpractice studies that collectively dispute the model of plaintiffs as purely economically driven actors.[194] When viewed through the classic naming-blaming-claiming framework, it is clear that participants readily identified their losses and injuries (naming), placed that blame on both device manufacturers and doctors (blaming), and sought redress through the courts (claiming).[195]

Given MDL's focus on common issues and the rarity of remand, however, it is possible that a disconnect may occur between blaming and claiming: if leaders develop only common questions about manufacturers, then doctors who ignored participants' pain or who contributed to their injuries may escape suit. Some participants' retainer agreements expressly left malpractice claims against doctors and hospitals off the table; lawyers agreed to pursue claims only against the product's manufacturer.[196] This kind of "bulk" treatment

189 Participant 200.

190 Participant 112; *see supra* Table 5.

191 Participant 66.

192 Participant 118.

193 Participant 177.

194 *E.g.*, Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 176 (1984); Hazel Genn, *Access to Just Settlements: The Case of Medical Negligence*, *in* REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' 393, 393–99 (A.A.S. Zuckerman & Ross Cranston eds., 1995); Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 521 (1984).

195 William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–36 (1980).

196 *E.g.*, Vaginal Mesh or Sling Implant: Attorney Employment Contract between Lee Murphy Law Firm, G.P. and Clark, Love & Hutson, G.P. ¶ 2 [hereinafter CLH Retainer] (on file with authors); Contingent Fee Legal Services Agreement between Blasingame, Burch, Garrard & Ashley, P.C. and Dan

comes into sharper focus as we turn to the attorney-client relationship.

III
LAWYERS AND THE MYTH OF INDIVIDUAL AGENTS

Clients see lawyers "as the go-betweens, the translators, initiated into the rules of the game," explain Patricia Ewick and Susan Sibley.[197] As intermediaries, lawyers have a foundational impact on how litigants perceive justice and fairness.[198] In fact, the individual attorney-client relationship is so central to the justice system that most procedural justice studies take it as a given, and a few consider it as a critical component of fair process.[199]

As subpart I.A explored, however, MDL complicates the paradigmatic attorney-client relationship: a single attorney may represent hundreds (sometimes thousands) of clients with various goals and injuries, and judges organize leaders so that only some lawyers speak for the entire group.[200] With higher volume representation and less individual attention, MDL clients may find it hard to control their own cases and they cannot fire judicially selected leaders. Thus, when lawyers act as clients' mouthpieces, some things may get lost in translation with no one the wiser except plaintiffs themselves who have few meaningful platforms to complain.

Chapman & Associates, LLC ¶ 1; Transvaginal Mesh Litigation: Attorneys Contingent Fee & Cost Employment Agreement between Aylstock, Witkin, Kreis & Overholtz, PLLC and Ennis & Ennis, P.A. ¶ 1 [hereinafter Aylstock Retainer] (on file with authors).

197 PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 153 (1998).

198 E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 973 (1990); Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737, 755 (1988).

199 Hollander-Blumoff, *supra* note 53, at 146. Early studies conflated clients' voices with the degree to which the attorney was able to present it. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 841 (2001); *see, e.g.*, John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 547 n.14 (1978) (rationalizing that the professional expertise of lawyers can only increase a litigant's perceived control over the process).

200 Even in more traditional tort cases, lawyer-client interests do not overlap perfectly. *See generally* KRITZER, *supra* note 72, at 60–63 (discussing contingent fees); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 75 (2000) (suggesting that preferences can differ when the agent is a repeat player and the principal is a one-shot player).

Most of our participants (168, 77%) indicated they hired counsel,[201] typically finding their attorney through an advertisement, but sometimes using attorney referrals or referrals from friends and relatives, as Table 6 shows.[202] For some, the MDL's creation and the ads that typically followed proved crucial: "I saw the advertisement in 2011 on Tv about other wom[e]n [ ]having the same problems as I with the Mesh implant and it was then I knew my pain was caused by a bad product."[203] Other methods seemed more suspicious: "I was contacted by my [law] firm. They knew about my medical history somehow."[204]

Table 6. How Participants Found Their Lawyers

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

Perhaps tellingly, 34% of respondents were unable (or unwilling) to identify their lawyer's name. "I don't even know who my lawyer is other than the firm," said one.[205] A small minority (only 42) knew whether their attorney served in an MDL leadership position.[206]

Through subsequent docket searches, we determined that 295 different attorneys from 145 distinct law firms represented 94.4% of our 217 participants, and that judicially selected lead lawyers or someone from the same law firm as a lead attorney

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201 Thirty-eight (18%) said they did not, and 5% did not answer this question. Because litigants were not always clear on the status of their relationship with counsel, we consulted the dockets. Of the 38 people who said they did not hire an attorney, only 2 were truly pro se, 21 were represented at some point by a law firm, and we were unable to identify information for the rest. We were also unable to find information for the 5% of respondents who did not complete the question.

202 Many respondents who chose "other" explained how they found their attorney. Some explanations fit within existing categories, like "mesh injury hotline," which is an attorney advertisement. Others provided information that we could code into new categories, such as internet search.

203 Participant 200.

204 Participant 119.

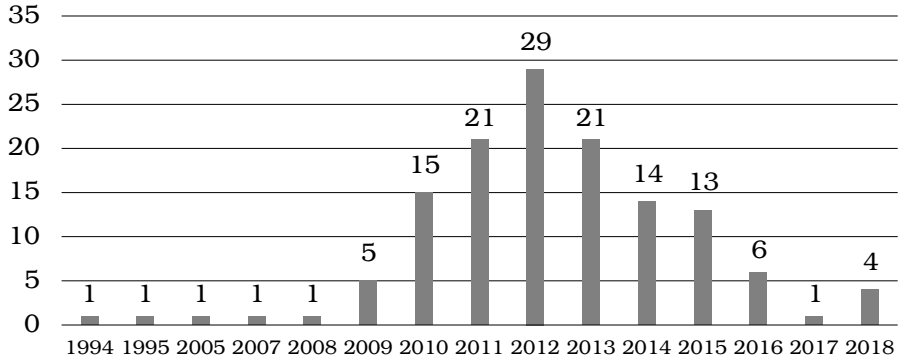
205 Participant 42.

206 Of those who did respond, 12 said no (29% of those who answered, 6% of all respondents) while 30 said yes (71% and 14% respectively).

represented 54% of them. Mainstream MDL insiders, not outliers, represented most respondents. Our numbers below, however, are based solely on participants' self-reported information.

Of the 217 respondents, 134 (62%) provided information regarding when they hired counsel, with the vast majority (85%) doing so within a six-year period between 2010 and 2015, as Figure 1 illustrates.[207]

Figure 1. Years in which Participants Hired Counsel



In considering participants' attorney assessments, we focus solely on the 168 who reported hiring an attorney, as they were the only ones to receive those prompts. As Table 7 shows, when asked to evaluate their entire attorney experience, 65% were somewhat or extremely dissatisfied.

Table 7. Overall Satisfaction with Lawyer

Considering your entire experience, how satisfied were you overall with the manner in which your lawyer handled your case?	**Frequency**	**Percentage N=168**
Extremely satisfied	13	7.7%
Somewhat satisfied	12	7.1%
Neither satisfied nor dissatisfied	18	10.7%
Somewhat dissatisfied	30	17.9%
Extremely dissatisfied	79	47.0%

Table 8 provides more insight into why. We discuss these results in detail in the sections that follow, but note the following key takeaways: (1) more than half disagreed that their attorney kept them informed; (2) more than half disagreed that they felt like they understood what was happening with their

207 Several respondents tied hiring their attorney to another event where the year was not given, and others were unable to remember.

case; (3) nearly half disagreed that their attorney explained the benefits and risks of important decisions; and (4) nearly half disagreed that their lawyer considered the facts of their case.

Table 8. Evaluation of Counsel

N=168	Strongly Agree	Somewhat Agree	Neither Agree nor Disagree	Somewhat Disagree	Strongly Disagree	No Response
I had a chance to explain my situation and tell my side of the story to my lawyer.	48 28.6%	42 25.0%	13 7.7%	20 11.9%	32 19.0%	13 7.7%
My lawyer considered the facts of my case.	24 14.3%	24 14.3%	28 16.7%	22 13.1%	56 33.3%	14 8.3%
My lawyer kept me informed about the status of my case.	16 9.5%	25 14.9%	12 7.1%	28 16.7%	72 42.9%	15 8.9%
While my case was pending, I felt like I understood what was happening.	10 6.0%	13 7.7%	16 9.5%	23 13.7%	91 54.2%	15 8.9%
My lawyer explained the benefits and risks of important decisions (like whether to settle) to me.	14 8.3%	25 14.9%	31 18.5%	26 15.5%	57 33.9%	15 8.9%
I could trust my lawyer to act in my best interest.	13 7.7%	17 10.1%	35 20.8%	23 13.7%	62 36.9%	18 10.7%
My lawyer explained the way he or she would charge me for attorneys' fees and litigation costs	31 18.5%	45 26.8%	13 7.7%	32 19.0%	33 19.6%	14 8.3%

A. Voice: Clients' Stories to Volume Lawyers

The only positive response in Table 8 is that 53% of participants agreed that they had an opportunity to explain

their situation to their attorney. "I feel that we had a good working relationship,"[208] said one. Others "really liked" their individual attorneys, but not the lead lawyers: "I feel that the [MDL leaders who] spoke for all of us made poor decisions in our interest."[209] Not all participants had anything charitable to say, however.

Although most felt like they could share their stories with their attorney, 46% somewhat or strongly disagreed that their attorney actually considered those facts, with only 28% agreeing that their lawyer took their facts into account. Clients felt distant from their lawyers even before the pandemic: "[I] would have preferred meeting the lawyers face to face. [I] never did have a face to face. [A]ll contact was through mail or phone calls. [S]ometimes email. [B]ut I never saw anyone in person. [S]o it felt like I wasnt really being heard."[210] Similarly, another said, "I feel as though I was never represented. To this day I have never spoken with the attorney . . . . I had absolutely no input in my own case."[211]

Feelings of being "not truly listened to"[212] sometimes meant that participants felt abandoned during depositions, with one sharing that her lawyers "waited till the night before to tell me that I had a deposition the next morning" and then "no showed and the person from Johnson and Johnson had to conference call them in so they could continue. I walked into that deposition so unprepared and alone."[213]

Others described how inattention impacted their outcome: "We were not given much information about presenting our personal cases. . . . I felt like I did[n']t have a input at all. The amount I got was so disappointing. So disappointing. I felt like I didn't matter at all and I was just another number."[214] And yet others grieved the lack of autonomy they felt after their attorney told them their case was settling: "I wasn't given a choice. I feel like I have been deceived and no one is looking out

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208 Participant 115.

209 Participant 78; *see also* Participant 58 ("Our legal counselors are doing their best to deal with a confounding and onerous process with the Ethicon MDL in West Virginia.").

210 Participant 38.

211 Participant 85; *see also* Participant 51 ("No personal interaction to tell my story or take in to account how this whole thing impacted my life. . . . I would love to file a malpractice suit and file a bar complaint and get him disbarred from ever practicing again. He is beyond unprofessional and an opportunist.").

212 Participant 137.

213 Participant 59.

214 Participant 198; *see also* Participant 67 ("I don't feel my lawyer could be objective due to having too many mesh clients. No personal help.").

for me only for their own money. My life has been ruined and my attorney apparently doesn't care. There's been no personal interaction with him."[215]

The lack of contact from attorneys who apparently took on a high volume of clients was a recurring theme as the following quotes from different participants illustrate: "These lawyers took way too many cases, dumped them in a pile and waited for a payout for themselves!"[216] "I don't feel like anyone fought for me. Just a number."[217] "I had absolutely no input in my own case. I feel as though I was scammed."[218] "Just feel as though they signed me up and they are just waiting to be paid."[219] "Mdl was a COMPLETE bad joke & waste of time. And [lawyers are] collecting millions if not trillions for doing next to nothing except warehouse cases."[220] "All the lawyers did was mass advertising so all these plaintiffs came forward, only to discover that the magnitude of injuries could not be fairly heard or reasonably covered."[221]

Comments also suggested that when attorneys' business models thrive on volume rather than "retail" client service, it can leave potential defendants and claims on the table, with clients dissatisfied and frustrated at not being able to achieve their litigation goals. "My goal originally was to call out the doctor; he botched the [surgery], but he's not a defendant. He admitted he got it too tight."[222] A second participant echoed, "Though I requested many times that my attorney look into actions against the Doctor, the component manufacturers and other[s], I felt he took the easy way out."[223]

Finally, attorneys' failure to appropriately interview their potential clients and take prompt legal action sometimes leads to settlement pressure down the road. One participant described how statute-of-limitations issues pushed her to settle after discovering her law firm had never filed her lawsuit. When her firm finally examined her medical records, "they determined that my statute of limitations probably expired prior to my signing with the attorneys" and, had they realized

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215 Participant 193.
216 Participant 17.
217 Participant 18. For additional examples, see Burch & Williams, *supra* note 24.
218 Participant 85.
219 Participant 9.
220 Participant 162.
221 Participant 65.
222 Participant 63.
223 Participant 40.

it, "they probably would not even take my case because they viewed it as a no-win."[224] If she didn't settle, they told her "the judge would more than likely throw out my case."[225]

B. Communication: Attorneys' Updates to Clients

Lawyers have ethical obligations to investigate before suing, keep clients "reasonably informed," and comply with "reasonable requests for information."[226] Nothing requires daily contact, but warehousing claims does not ameliorate ethical duties.[227] Prompted with "my lawyer kept me informed about the status of my case," Table 8 above showed that 59% of respondents strongly or somewhat *disagreed*, with only 24% somewhat or strongly agreeing. Comments like "[g]etting status info is like pulling teeth,"[228] "[h]ad no clue what was going on,"[229] and "[t]hey wouldn't tell you anything"[230] were common.

When asked to select the ways in which their lawyers kept them informed,[231] 44 (26%) reported their attorney did not update them and 13 respondents provided no information. The remaining 111 respondents listed between one and five communication methods, which Table 9 below shows, by frequency.

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224 Participant 151.

225 *Id.*

226 MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR. ASS'N 2021); RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (AM. L. INST. 2006) (observing that lawyers are subject to general fiduciary principles governing agency); *e.g.*, Doyle v. State Bar, 544 P.2d 937, 939 (Cal. 1976) (en banc) (noting the fiduciary nature of attorneys' duties to clients).

227 *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1258 (1982).

228 Participant 212. For additional examples, see Burch & Williams, *supra* note 24.

229 Participant 75.

230 Participant 148.

231 Options included the ability to report that their attorney did not keep them updated and to specify if communication with their attorney fell outside of the categories listed.

Table 9. Lawyer-Client Communication Methods

Method of Communication	Frequency	Percentage of Represented Respondents (N=168)
Email	39	23.2%
Phone calls with lawyer	36	21.4%
Phone calls with case manager	28	16.7%
In-person meetings with lawyer	6	3.6%
Website	2	1.2%
Social media	1	0.6%
Other Method	65	38.7%
Lawyer did not communicate	44	26.2%
No Answer	13	7.7%

Two things stand out about Table 9. First, even the most frequent communication means were not common in an objective sense. A mere 23.2% of participants received emails from their attorneys, *and that was the most frequent contact method*.[232] Put differently, 77% of respondents did not get so much as an email with case updates. More respondents reported receiving no updates at all than received an email. Quite a few disclosed they had never spoken directly with their lawyer: "I had to call my attorney to get updates. And I have never spoken to him. I can only get his legal secretary. . . . I asked multiple times to speak to my attorney and never was allowed to . . . ."[233]

Our second finding of interest—that lawyers did not contact their clients—came in exploring the comments included when participants chose "other." Although we could include some of the information in existing categories, we added new contact methods and re-coded their answers accordingly. Table 10 below shows our results, adding contact through the U.S. Postal Service, which 32% of respondents reported receiving,[234] and text and phone calls (without specifying who called), though both were very rare.

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232 *E.g.*, Participant 12 ("[O]ver a 3 year period my attorney spoke with me via email less than 10 times.").

233 Participant 193. For additional examples, see Burch & Williams, *supra* note 24.

234 *E.g.*, Participant 14 ("Horrid communication a letter once a year saying nothing at all."). Our participants are certainly not the first to express anger over their lawyer's failure to communicate. *E.g.*, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 494 (1994) (noting that "[e]ven with the best intentioned lawyers, some alienation of the individual seems inevitable").

Table 10. Updated Lawyer-Client Communication Methods[235]

Method of Communication[236]	**Frequency**	**Percentage (N=217)**
Email updates	43	19.8%
Phone calls with lawyer	36	16.6%
Mail	32	14.7%
Phone calls with a case manager	28	12.9%
Client initiated contact	27	12.4%
In-person meetings with lawyer	6	2.8%
Phone calls (not specified)	2	0.9%
Website	2	0.9%
Text	1	0.5%
Social Media	1	0.5%

What's particularly notable about Table 10 is not just that lawyers rarely sent clients updates, but that clients tracked down their lawyers to find out what was going on—often to no avail. Ethics rules mandate that attorneys "should promptly respond to or acknowledge client communications,"[237] but participants reported: "To this day i cannot get a return call from [law firm]. They go [t]hrough staff like i go through undies."[238] "I never spoke to my lawyer my emails were never answered has no[w] been 8 yrs. and am still waiting for my settlement."[239] "My law firm would not take my calls, or answer my questions."[240] "[I] email them to say im being evicted from my home and [losing] my car they never responded."[241]

Lawyers' ethical obligations go beyond merely communicating with clients—they must also explain things so clients can make informed decisions.[242] Yet a mere 13% of participants strongly or somewhat agreed that they felt like they understood what was happening while their case was pending, with a whopping 67% of respondents strongly or

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

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

237 MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 4 (AM. BAR. ASS'N 2021).

238 Participant 68.

239 Participant 178.

240 Participant 197.

241 Participant 62.

242 MODEL RULES OF PRO. CONDUCT r. 1.4(b) (AM. BAR. ASS'N 2021); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20(3) (AM. L. INST. 2000).

somewhat disagreeing. Comments were overwhelmingly negative, except one who said, "This process is emotionally hard. [Lawyer] and his team have done an incredible job with keeping me up to date on everything and take time to answer any questions or concerns."[243]

Others' reports were shocking: "In 4 years I was sent one letter updating me. The rest has been a disaster. They go weeks without returning phone calls. Removed me from the docket and I didn't find out [until] a year and a half later after I looked it up online."[244] Another said, "I accidently found out my case had been dropped by someone working at the New York Times newspaper. My case was turned over to a different law firm."[245] And we repeatedly heard things like: "The lawfirm did not help me to unders[t]and any part of the process."[246]

Finally, Rule 1.3 of the Model Rules of Professional Conduct requires lawyers to "act with reasonable diligence and promptness in representing a client."[247] Although we did not ask specifically about case preparation, participants often felt that they—not their lawyers—bore the brunt of it:

> I did all of the paperwork for them. If I had a surgery then I got my medical records, copied them & sent them the copies. They never had to do anything on my case. All they ever did was the first interview over the phone with me and then 6 years later sent me the settlement papers. They took 49% in lawyer fees & court fees.[248]

Another explained that after having her case for five years, her lawyers never obtained her medical records: "They even almost got my case threw out because they said I didn't have any corrective surgery. If they had bothered in getting my medical records they would have had all the proper knowledge of my case."[249]

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243 Participant 223.
244 Participant 60.
245 Participant 94.
246 Participant 134.
247 MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR. ASS'N 2021).
248 Participant 199; *see also* Participant 62 ("[I'm] the one who did all t[h]e legwork gathering medical documents"); Participant 64 ("I had to hand deliver to doctors all [correspondence] of attorneys, get the records my self during time of pain and suffering from mesh, and send them to attorneys."); Participant 65 ("No Discovery. My injuries are not heard nor handled appropriately.").
249 Participant 59.

C. Distrust: Client-Attorney Relationships

Trust lies at the heart of all agency relationships—clients must feel comfortable confiding in their lawyers and trust attorneys to act loyally on their behalf.[250] Codes of conduct and professional responsibility rules croon that "[n]either [an attorney's] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client"[251] and "trust . . . is the hallmark of the client-lawyer relationship."[252] Yet, as Table 8 above demonstrated, 50% of respondents did not trust their lawyer to act in their best interest. Only 17% strongly or somewhat felt they "trusted the lawyer to handle all of this."[253]

Some of the strongest sentiments of mistrust surfaced in the open-ended comment box that asked whether there was anything else that participants would like to share about their attorney experience: "I feel cheated and ashamed that I trusted [law firm]. I would have taken my case to trial had I known that they were not looking out for my best interest. I could have done a better job on my own;"[254] "I feel completely taken advantage of;"[255] "[I] have a bad feeling about my attorney. I feel she may not have my best interest at heart;"[256] "Not honest people . . . . [T]hey think they are above the law;"[257] "What a bunch of li[a]rs[.] I have never seen anything like it[.] I thought your attorney worked for you not against me[.] . . . I have all the pain they [have] all the money[.]"[258]

Some participants offered glimpses into why they distrusted their lawyer, with one saying, "I was treated cruel, I

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250 *See* RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006) (outlining the general fiduciary principle governing an agency relationship); MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (AM. BAR. ASS'N 2021) (recognizing that it is only by gaining a client's trust that lawyers are able to effectively represent clients); *see also* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149, 154–55 (1988) ("To fulfill these fiduciary duties, lawyers must inspire their clients' trust and confidence.").

251 MODEL CODE OF PRO. RESP. EC 5-1 (AM. BAR ASS'N 1969).

252 MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (AM. BAR. ASS'N 2021).

253 Participant 116.

254 Participant 186; *see also* Participant 183 ("I do not feel they acted in my best interest."); Participant 107 ("I Was Warned By A Precious Attorney That Worked For [my lawyer] That [my lawyer] Was SCREWING OVER MESH CLIENTS.").

255 Participant 84.

256 Participant 106.

257 Participant 204.

258 Participant 196. For additional examples, see Burch & Williams, *supra* note 24.

was told my life was not worth compensation . . . and most cruel I asked 1 attorney if he had to piss while talking to me on [the] phone, I could hear him."[259] Another remarked, "I was offered a small settlement . . . [w]hich I refused . . . . [S]ome months later [my lawyer] called me to say that [my law firm] had NEVER filed my case."[260] A third said, "[lawyer's name] Tricked Me !!! They Never Filed My Lawsuit !!! They Sent Me Papers AFTER The Due Date They Were Due ALWAYS !!"[261] Several felt revictimized: "I have not been represented and have incurred another layer of abuse by the lawyers who do not care about their clients;"[262] "I and the other women involved in this litigation have [ ]been violated by the attorneys [ ]that were supposed to be on our side fighting for us."[263] Others felt "that the victims had no representation and the lawyers looked out for their [own] paycheck."[264]

Some even reflected on actual and potential professional repercussions. One said her case had been dismissed, and explained, "My Lawyer did not show up[.] . . . He was Disbar[r]ed."[265] A second thought her attorney "should be disbarred."[266] A third felt "dissati[s]fied [ ]with the whole process,"[267] and a fourth thought she was "also a victim of legal malpractice."[268] A fifth concluded, "No one is happy with the system."[269]

D. Consent: Settlement Dynamics and Pressure

When a single lawyer represents multiple clients with different injuries, medical histories, and litigation goals, a proposed settlement can create conflicts between those who want to settle and those who do not, particularly when the offer requires that all or most clients say yes.[270] Yet provisions that

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259 Participant 64.
260 Participant 113.
261 Participant 107.
262 Participant 57.
263 Participant 197; *see also* Participant 184 ("The mesh is Part 1 of a two part nightmare. Part 2 is the MDL and the lack of representation.").
264 Participant 71; *see also* Participant 154 ("I feel as though I have not been represented in any wa[y] shape or form.").
265 Participant 129.
266 Participant 215.
267 Participant 155.
268 Participant 214.
269 Participant 111; *see also* Participant 196 ("What can I do to get some justice people have rights how can a[n] attorney take them away[?]").
270 *See* Erichson, *supra* note 101, at 1006–09 (noting that "[a]ll-or-nothing settlements pit the lawyer's interest in closing the deal against the interests of any clients who might wish to decline the settlement"). Nevertheless, multiple client

allow defendants to withdraw settlement offers if too few plaintiffs agree are common in mass-tort settlements—as is attorneys' need to cajole clients into acquiescing because no deal means no fees.[271] Plus, mass torts are not cheap for leaders to finance.[272] As one federal judge commented, "These debts create powerful motivations that potentially can interfere with the lawyer's professional obligation to serve clients' interests first and foremost."[273]

In the open-ended comments box, it became apparent that even though attorneys did not keep clients updated on their case, they made repeated contact when it came time to settle. Multiple participants reported feeling coerced: "I was bullied by the [law] office , TAKE IT [or] YOU RECIEVE NOTHING."[274] "I grew concerned with [attorney name] when she would not put things in writing and felt she was pressuring me to settle in the couple of phone calls we had."[275] "I was told if i didnt settle i would end up with nothing and no lawyer would help me . . . ."[276] "I feel like I was pushed into signing the settlement and told by the [mediator] if I go to court it could be years before

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representation is possible under ethics rules if, among other things, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and "each affected client gives informed consent, confirmed in writing." MODEL RULES OF PRO. CONDUCT r. 1.7(b)(1), (4) (AM. BAR. ASS'N 2021); *see also* Erichson & Zipursky, *supra* note 21, at 304, 311–20 (discussing the importance of consent in mass tort cases).

271 *See generally* Burch, *supra* note 77, at 94–107 (arguing that recommendation, withdrawal, and walkaway provisions impart closure, restrain competition, and augment a "shift toward considering clients as inventories and entities instead of individuals").

272 *See* Joe Nocera, *Forget Fair; It's Litigation as Usual*, N.Y. TIMES (Nov. 17, 2007), http://www.nytimes.com/2007/11/17/business/17nocera.html?page wanted=all [https://perma.cc/7CY7-QMTU] (noting a single Vioxx case initially cost $1–1.5 million to develop).

273 Hellerstein, *supra* note 45, at 474.

274 Participant 158; *see also* Participant 3 ("The attorney's office told me if I didn't settle I would get nothing"); Participant 141 ("The way we were mistreated, we had no say about any of it, the lawyer would often hang up when I would ask questions, and then I was made to settle even though it was unfair. . . . I have been lied to, bullied, and threatened that I would not get anything. . . . I now mistrust all lawyers and most doctors."); Participant 156 ("felt like [I] was bullied into accepting the offer . . . basically was told take it or leave it . . . or get nothing at all"). One plaintiff with two types of meshes, C.R. Bard and Johnson & Johnson, said "[B]ard settled and my lawyer told me if [I] do not take it then they will probably drop me and [I] would get nothing and the J & J is still pending and the J & J is the one that done the worst damage . . . ." Participant 121.

275 Participant 184.

276 Participant 211; *see also* Participant 1 ("Being told to take the settlement or get nothing was hard to hear, especially after 15 surgeries and never ending pain for life."); Participant 135 ("[A]lthough I sent updates to lawyer it was never noted and they just wanted to settle to end the process.").

I see any money."[277] "They tried to push me into taking a low ball settlement."[278] "[T]hey said with cr bard either accept what they offer or get nothing. I got angry and said no no way for what I had suffered would I SETTLE FOR a few thousand. [T]hey got angry at me."[279]

Ethics rules unambiguously give clients the final say on whether to settle.[280] Yet one participant told us, "My firm accepted an offer from J&J without consulting me or updating my file with additional surgeries."[281] Lawyers are supposed to explain the pros and cons, the risks and benefits, not usurp the client's choice or threaten the client by saying "Settle or you're fired!"[282] When we asked the 99 respondents whose cases settled[283] whether their attorney said he or she would withdraw from representing them if they declined to settle, 62% said no.[284] Of course, plaintiffs may have accepted the award immediately—numerous participants signaled financial straits, and a small sum today might be better than a larger one later.

Of the 38% of participants who indicated that their attorney would no longer represent them if they refused to settle, only one lawyer offered to refer the client to new counsel. Several said things like: "They sent me a letter explaining they were going to settle. They said if I did not agree they would drop my case."[285] "Amounts too low, [a lot] of harassment to settle[,] lawyers drop you if you don't settle."[286] "I was sent a settlement packet. It said if you don't settle, you may get less,

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277 Participant 180.

278 Participant 14; *see also* Participant 20 ("I was literally given 5 minutes to think over my decision and felt [I] needed to sleep on it."); Participant 137 ("My lawyer has accepted a very low offer. I was told if the offer was not accepted my case could be dismissed. . . . I feel betrayed.").

279 Participant 64.

280 MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR. ASS'N 2021) ("A lawyer shall abide by a client's decision whether to settle a matter"); *e.g.*, Participant 164 ("My lawyer told me not to accept 2 settlement offers and he proved wise.").

281 Participant 80.

282 Erichson & Zipursky, *supra* note 21, at 283.

283 This includes those who settled before filing suit.

284 Two participants did not answer the question.

285 Participant 142; *see also* Participant 161 ("I don't feel like my lawyer kept me up to date on what was going on and then I had to send an appeal to my own lawyer to get a little bit more money. . . . And I was told if I didn't agree to it then I would not get anything."); Participant 45 ("I shouldn't have let them talk me into settling. I wasn't informed of a 'cut off' date for removal surgery to be included in my settlement.").

286 Participant 47; *see also* Participant 61 ("Offered a lowball settlement which was [take it] or leave it.").

or nothing. Also, if I got a new attorney I would be out their fees in addition to my firm[']s fees."[287]

Three participants' experiences illustrate the toll this settle-or-you're-fired practice took on them and others and how the threat of withdrawal leaves clients between a rock and a hard place:

> (1) [M]y attorney started calling me weekly sometimes daily threatening me that if I didn't take the settlement offer I would be dropped by my attorney. And I would have to pay for travel to the east coast from my home [on the west coast]. . . . I would cry when they would call me because I didn't want the settlement it was and is much to[o] small to have the me[s]h removed . . . . I feel completely destroyed by the mesh[,] my attorney and the whole legal system.[288]

> (2) I was sent a [claims administrator] settlement packet and sent it back saying I didn't want to settle. I heard nothing for months and then received a call that I should reconsider from Paralegal. I said no I do not want to settle. Then I received a call from the attorney telling me they would stop representing me if I didn't and I should find another law firm to take my case. I said I would but it was wrong for them to drop me. I received a packet stating I had so much time to notify courts about my case. Mind you I know nothing of the law or how to go about representing myself.[289]

> (3) I was not given the chance to tell my story or what my injuries were so the settlement process was shoved down my throat I wasn't involved in it[;] it was shoved down my throat[.] . . . I was told all along that if I didn't like the settlement we would go to court then . . . out of the blue [lawyer] said that his partners did no longer want [ ] to be working with the [mesh] cases and that I had no choice but to settle because he was quitting. . . . I was left speechless I was sucker punched by my own attorney. . . . I think it should be against the law for an attorney to quit on his client when they're taking on a major lawsuit case like this . . . . I have

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287 Participant 119.

288 Participant 226. Others felt similarly:

> I was urged to agree to participate in an aggregate settlement that was absolutely not in my best interest. . . . My lawyer was aware of the existence of a witness who would have had a profound impact on my case. . . . My attorneys kept this information from me instead pushing me into a settlement that was in their best interest. . . . [It is in] their own interest to achieve participation guidelines set forth in the Master Settlement Agreement between them and Ethicon . . . .

Participant 230.

289 Participant 174.

> been bullied I've been pressured I've been lied to harassed . . . .[290]

Although commentators and courts alike largely agree that withdrawing under these circumstances is unethical,[291] as respondents' comments reflect, they are not aware of their rights. And some attorneys' retainer agreements purport to allow them to withdraw "at any time" or "at any stage in the litigation."[292] As our participants report, lawyers present them with an ultimatum, not a choice.

E. Costs: Attorneys' Fees and Expenses, Including Common-Benefit Fees

Past procedural justice studies have found that tort litigants' fairness judgments and court satisfaction "showed remarkably little relation" to litigation costs and attorneys' contingency fees.[293] Because MDL settlements are confidential, we were unable to correlate respondents' fairness judgments directly with their assessments of contingent fees and costs, but we did ask whether they were satisfied with both—most were satisfied with neither as we show in this section and the next.

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290 Participant 50.

291 Moore, *supra* note 101, at 3269; MODEL RULES PRO. CONDUCT r. 1.16 (AM. BAR. ASS'N 2021); *e.g.*, Erichson & Zipursky, *supra* note 21, at 284–89 (discussing ethical constraints on withdrawal provisions); *In re* Petition for Distribution of Attorney's Fees, 870 N.W.2d 755, 766 (Minn. 2015) (finding that client refusal to accept settlement offer in civil case does not constitute good cause for attorney to withdraw); Nehad v. Mukasey, 535 F.3d 962, 971 (9th Cir. 2008) (stating it is improper for an attorney to threaten to withdraw if client refuses to settle); DeFlumer v. LeSchack & Grodensky, P.C., No. 99-cv-1650(NAM/DRH), 2000 WL 654608, at *1 (N.D.N.Y. May 19, 2000) (finding that an attorney and client disagreement over proposed settlement will not establish good cause for withdrawal); *see* Estate of Falco v. Decker, 188 Cal. App. 3d. 1004, 1018 (Cal. Ct. App. 1987) (discussing client's right to reject settlement as absolute); *see, e.g.*, ABA Comm. on Ethics & Pro. Resp., Informal Op. C-455 (1961) ("The mere fact that the plaintiff's attorney feels the settlement proposal should be accepted . . . does not justify his withdrawal."). *But see* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1962 (2017) (defending the practice of withdrawing).

292 Contingency Fee Retainer Agreement between Jerri Plummer, Alpha Law LLP, and McSweeney/Langevin LLC ¶ IX, First Amended Complaint at Ex. A, Plummer v. McSweeney, No. 4:18-CV-00063-JM, 2018 WL 6442953 (E.D. Ark. Aug. 27, 2018) [hereinafter Alpha Law Retainer]; *see also* Contract for Representation and Fee Agreement between Blasingame, Burch, Garrard & Ashley, P.C., Morgan & Morgan, and Danna Morrison ¶ 6, Complaint at Ex. 1, Morrison v. Blasingame, Burch, Garrard & Ashley, P.C., No. 2:17-CV-04133, 2017 WL 6001503 (S.D. W. Va. Dec. 4, 2017)) [hereinafter Blasingame Retainer]; CLH Retainer, *supra* note 196, ¶ 5.

293 LIND ET AL., *supra* note 56, at 77.

An overwhelming 60% felt their attorneys' fees were unreasonable, as Table 11 demonstrates.[294] Contingent fees make tort suits possible. They nevertheless drive a wedge between the lawyer and the client that is exacerbated in mass torts, where the lawyer's stake in the whole proceeding is far greater than any one client's.[295] Nevertheless, ethics rules provide few hard-and-fast principles, preferring a flexible standard that prohibits lawyers from charging "an unreasonable fee or an unreasonable amount for expenses" based on factors like the time and skill required, opportunity costs, the typical fee charged, and the attorney's reputation and experience.[296]

Table 11. Reasonableness of Attorney's Fee

Considering what had to be done in your lawsuit, how reasonable did you find your lawyer's attorney's fee?	**Frequency**	**Percentage N=168 (represented)**
Extremely reasonable	6	3.6%
Somewhat reasonable	11	6.5%
Neither reasonable nor unreasonable	32	19.0%
Somewhat unreasonable	33	19.6%
Extremely unreasonable	68	40.5%
Did not indicate hiring an attorney	67	

Participants had much to say about fees. Although one "negotiated a lower fee than many women paid,"[297] many felt their payouts paled when compared with attorneys' fees and costs: "They ended up getting more than I did after 'costs' were factored in yet they did nothing to my knowledge—I provided my medical records, they didn't go to court, [n]o depositions, nothing other than throw me in with others to mass settle."[298] "[I] wish i had never even pursued the lawsuit. . . . I got less than [one-third of my settlement award]. . . . [My lawyers] got [the] majority of it . . . and im the one who still suffers today because of the sling."[299] "I feel like I wa[s] used by my law firm.

294 Past surveys on all types of lawyers show similarly low satisfaction rates. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 459 (1998) (summarizing a study in which only 29% of respondents agreed that lawyers' fees were "quite reasonable").

295 Weinstein, *supra* note 234, at 527. To be sure, other billing arrangements create perverse incentives, too. Hourly billing incentivizes attorneys to work slowly and prolong the lawsuit, for example.

296 MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR. ASS'N 2021).

297 Participant 164.

298 Participant 61; *see also* Participant 217 ("Attorney did very little and got more money than I did.").

299 Participant 21.

My original attorney [name] [died] during the case and then everything was rushed to settle with the law firm getting more than 50% of settlement."[300] "It took 6 years to even go to court not to mention my shady greedy lawyer went with the mass and did not ask me and they took over half of my money . . . ."[301]

As Table 8 previously showed, not explaining costs and fees seemed to account for only part of the problem: about 45% strongly or somewhat *agreed* that the lawyer explained fees and costs to them. Instead, some were frustrated by stonewalling and inattention to detail: "They were offended when I wanted an explanation of their billing. I had to point out that the report they paid a doctor to write on my behalf had another woman's name in the conclusion paragraph."[302] Others were angry over costs—"It's taken 7 yrs, I was treated as a group and not an individual and I thought the 40% fee was the total I'd owe them. . . . I just found out that the 40% they charged does not cover the expenses of my case."[303]

One plaintiff who was supposed to be deposed and examined by the defendant's doctors described how she spent thousands of dollars to fly to Chicago and then Nashville the following weekend because of the doctor's plane delays. Examining her expense sheet, she remarked:

> My attys got 86,000, the outsourced people who did the footwork apparently, got 30,000 plus I was charged 10,000 for the trips I made!! . . . The attys have been paid over and over and over for each action they made. They had over 1000 of us women. So for my case alone they made 86,000 but I also pd 30,000 for who? I thought the attys were doing the work! I was told that at this point if I didn't accept the offer I would get nothing.[304]

As this comment insinuates, attorneys outsource, which can drive up costs. Using third parties to fill out fact sheets and obtain medical records means those expenses come out of clients' proceeds, whereas if attorneys did the work themselves, it would fall under their contingent fees.

Quite a few participants also felt outraged over common-benefit fees. Those fees are not supposed to affect plaintiffs' settlement awards; they are designed to split fees between individual attorneys and lead lawyers. But that did not always

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300 Participant 170.
301 Participant 201; *see also* Participant 40 ("The Attorney gets the Gold Mine and the pla[i]ntiff gets the SHAFT.").
302 Participant 184.
303 Participant 24.
304 Participant 125.

happen, as two respondents reported: "[Lawyer name] seemed to be greedy and selfish. The fact that he took 40% plus 5% for the MDL is ludicrous."[305] "Paying all of the 5% common benefit fee out of my proceeds rather than the law firm paying it. I ended up with 36.7% of my award. . . . I feel taken advantage of by the system because Im just another number for the firm to earn a buck off of."[306]

IV
LITIGANTS' EXPERIENCE WITH THE COURTS

Most plaintiffs experience courts through their attorneys, which does not bode well. Nevertheless, Justice Breyer recognized that "[t]he Court itself must help maintain the public's trust in the Court, the public's confidence in the Constitution, and the public's commitment to the rule of law."[307] Public confidence in the courts is critical: courts' power depends on it and flows from it.

As Justice Sotomayor observed, "I can't control the outcomes of cases," but "I can live with that if I perceive the process to be fair. Has someone been given a fair chance within the legal system?"[308] Many of our plaintiffs felt they had not: "We need help[;] we are not receiving justice. We are being taken by the same people and system that is here to help us."[309] "Justice has absolutely nothing to do with how this MDL is being handled."[310] "I feel used by the medical world and now by the judicial system that I thought was here to protect us."[311]

Some recognized the Herculean task facing MDL judges—"Although[ ] this was a massive case and the judge did an awesome job, there needs to be more oversight concerning the attorneys."[312] But others reported, "I NEVER EVEN SAW A JUDGE."[313]

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305 Participant 198.

306 Participant 98. Plaintiffs did not just misunderstand how fees work, most likely. One retainer agreement charged 40% to resolve the dispute before even filing a complaint, and a hefty 45% after filing in addition to taking all common-benefit fees and expenses out of the *client*'s share. Alpha Law Retainer, *supra* note 292, ¶ II(A).

307 STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW xiii (2010).

308 Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J. F. 375, 376 (2014).

309 Participant 9.

310 Participant 83.

311 Participant 187.

312 Participant 133.

313 Participant 160.

In many ways, the clash between what people want and expect from courts and what MDL can offer them is inevitable. Although individual suits give MDLs their constitutional mooring, MDLs prioritize commonalities, not individuals.[314] Take the pelvic-mesh litigation, for instance: one district judge, one magistrate judge, and over 108,000 plaintiffs.[315] The judge-to-litigant ratio suggests few opportunities will arise to interact directly. Even the bellwether trials that sometimes take place within MDLs identify representative examples that help develop the whole proceeding. But some aspects of procedural justice aren't just cathartic niceties—they are constitutional entitlements. This Part thus considers expediency, participation, opportunities to be heard, and respectful and even-handed treatment that demonstrates judges' neutrality.

A. Delay: MDLs Take Too Long

MDLs are engineered for efficiency. Yet, when compared with average civil cases that last just over a year,[316] products liability MDLs last significantly longer—an average of 4.7 years—largely because of the complexity and number of cases.[317] Participants with resolved cases illustrate the variety in longevity, as Figure 2 below shows in years.

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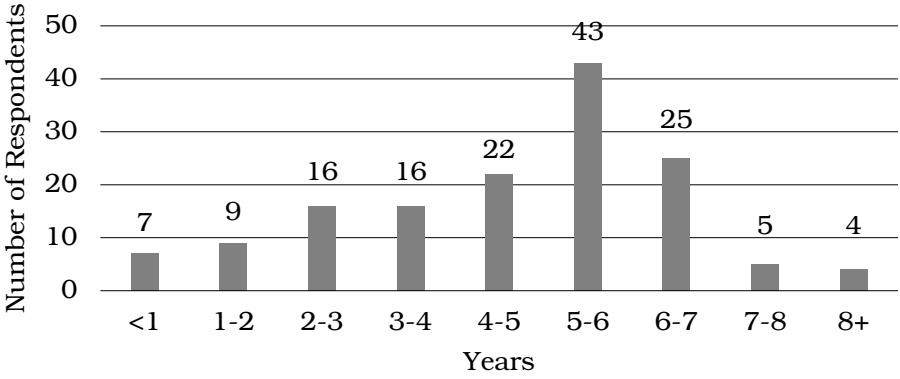
314 Burch & Williams, *supra* note 24, at Part I.

315 *See Multidistrict Litigation Terminated Through September 30, 2020*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., https://www.jpml.uscourts.gov/sites/jpml/files/Cumulative%20Terminated%202020_0.pdf [https://perma.cc/XNY2-WA4D] (last visited Nov. 23, 2022) (providing case totals for all concluded pelvic-mesh proceedings); *MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., (Jan. 19, 2021), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-January-19-2021.pdf [https://perma.cc/FUU2-WEZ6] (providing totals for ongoing pelvic-mesh proceedings).

316 Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1271 (2019). Note that it is not possible to compare non-MDL tort suits in federal court with products liability MDLs because case-level data is not available for both duration and MDL status.

317 *See id.*; Burch & Williams, *Judicial Adjuncts*, *supra* note 10, at 2148–49.

Figure 2. Case Duration, in Years, for Participants with Closed Cases



Most of the 147 participants with closed cases concluded them between four and seven years after filing. Cases lasted an average of 1,694 days or 4.6 years. Some took less than a year, but others were open for *11 years*. One lamented, "My case has been ongoing for over 10 years now. My mesh was placed . . . 18 years ago."[318] Another echoed, "I'm tired of waiting for my day in court!"[319] Even Judge Goodwin, who handled the seven pelvic-mesh MDLs, observed that "delay may deny the parties timely justice and is rightly considered by many as a major failure of the MDL paradigm."[320]

Litigation continued for 34 participants, some of whom sued back in 2011, meaning that they have been litigating for over nine years and are still waiting. Although previous studies on non-MDL tort litigants suggest that delay does not play a significant role in how plaintiffs perceive fairness,[321] waiting a little over a year for the average civil case differs substantially from up to 11 years in an MDL. "I was on an assembly line and just waited for years," one participant remarked.[322]

In many respects, filing a complaint is an artificial beginning. We report information from filing dates, but many participants' pain and suffering began sooner. Asked when they (or their loved one) first experienced harm, most gave us

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318 Participant 105.

319 Participant 210.

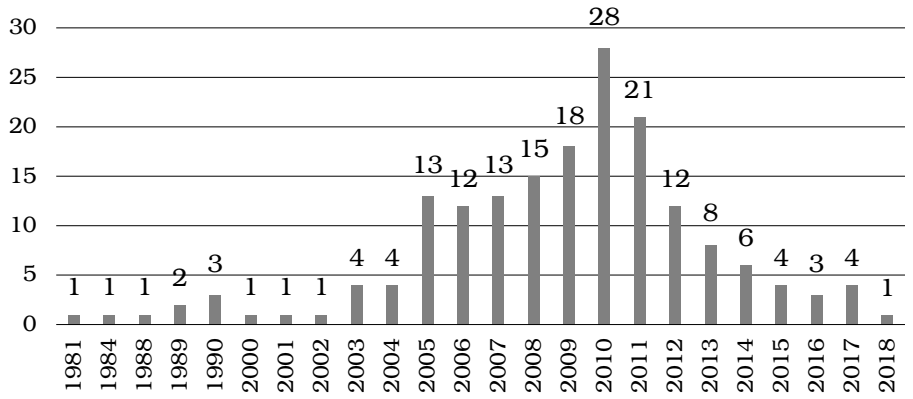
320 Joseph R. Goodwin, *Remand: The Final Step in the MDL Process—Sooner Rather than Later*, 89 UMKC L. REV. 991, 995 (2021).

321 *See, e.g.*, LIND & TYLER, *supra* note 57, at 55–59 (highlighting the results of five different studies on procedural justice research to show that the perception of justice is affected by a litigant's control over the procedural process).

322 Participant 61.

an approximate year.[323] Setting aside those who did not, Figure 3 below shows that of 177 respondents, most began experiencing harm in 2010, with 85% between 2005 and 2015. Recall from Table 3 that most respondents' cases ended between 2018 and 2019, which means that the lag between harm and case resolution was often substantially more than 4.6 years.

Figure 3. Year Participants' First Experienced Harm



Was this delay reasonable under the circumstances? The substantial majority—nearly 75%—thought not, as Table 12 indicates.

Table 12. Was MDL Delay Reasonable?

Considering what had to be done, do you think the time it took (or is taking) to resolve your case is:	**Number of Respondents**	**Percentage N=217**
Extremely reasonable	5	2.3%
Somewhat reasonable	7	3.2%
Neither reasonable nor unreasonable	6	2.8%
Somewhat unreasonable	28	12.9%
Extremely unreasonable	132	60.8%
No answer[324]	39	18.0%

[323] Nine respondents reported experiencing ill effects "immediately," "right away," or "the day of surgery," and another nine noted symptoms between two days and eight weeks after first using the product.

[324] Though one might think people who did not answer the question were those whose litigation was ongoing, we found only 3 of 39 respondents who did answer were in pending litigation.

In the open-ended comments, quite a few commented on delay: "My suit has been filed for 7 years. I am 15 years injured."[326] "These cases take way too long to be [remanded] back to the state the attorneys the plaintiffs everybody gets [sick] and tired of waiting and that's the name of the game make them get worn down so they will fold."[327] "In the over 5 years that have transpired since we file[d] our lawsuit, we have NOT received a trial date."[328] "This litigation process is simply broken. The pain and suffering of the many lives trapped in this maw deserve justice and yet, we wait. Justice Delayed, Justice Denied."[329] "Nothing seems to be happening except it's filed and I wait."[330] "It has been 8 long yrs. and I have not received anything . . . ."[331] "I have received no closure in a decade and dangerous product [i]s still harming other women."[332]

B. Voice: But Many Would Wait Longer to Tell Their Story

Despite reacting strongly to delay, a surprising 59.9% of participants would have been willing to wait even longer if it gave them a chance to tell their story. As one remarked, "I think the wors[t] part is being left in the dark by the lawyers and not being able to have a say."[333] Only 4.1% said telling their story would not be worth waiting.[334] Those who indicated they might be willing to wait longer[335] were willing to wait, on average, 17.5 months longer—more time, in other words, than it takes for an average civil suit to begin and end. As Figure 4 shows by collapsing months into years, participants were willing to wait between one and five years longer, with 20% prepared to wait more than *five* additional years to tell their story.[336]

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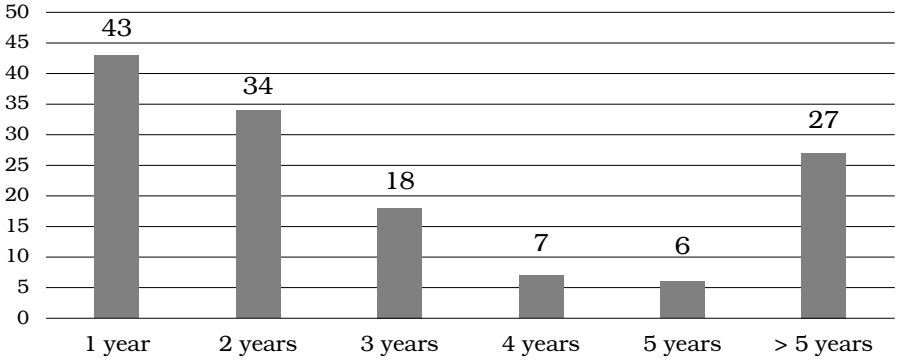
326 Participant 179.
327 Participant 50.
328 Participant 58.
329 *Id.*
330 Participant 9.
331 Participant 178.
332 Participant 162.
333 Participant 141.
334 Seventeen and a half percent responded "maybe." Of the 217 respondents, 177 (82%) answered the question.
335 Aside from the 9 respondents who already noted they would not wait any longer and the 65 respondents who provided no estimate, the remaining 152 respondents provided a range of answers.
336 *See* Thomas P. Cartmell, *MDL Remand: Plaintiffs' Perspective*, 89 UMKC L. REV. 983, 987 (2021) ("[S]ome . . . do not seem concerned about the possibility of waiting another several years for a final resolution.").

Figure 4. How Much Longer Participants Would Be Willing to Wait to Tell Their Story



As Tom Tyler and Hulda Thorisdottir explained of asbestos plaintiffs whose cases were sometimes determined without a hearing, "[I]nstead of gratefully receiving their rapid settlements, injured parties have been angered by the denial of their 'day in court.'"[337] Our participants did not receive quick compensation, but they were "[d]esperate to speak."[338] As one explained, "The ability to be able to look someone in the eye who has wronged you and to be able to convict them by telling them is Justice. I was robbed of an opportunity to ever feel redemption after battling defeat for so many years."[339]

The chance to participate in one's own dispute, to present evidence, observe the proceedings, and hear the judge's reasoning aren't just about satisfying litigants—they also help produce substantively accurate outcomes.[340] Without the right information going in, how could we expect the right result?

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337 Tyler & Thorisdottir, *supra* note 177, at 378.

338 Participant 194.

339 Participant 71.

340 Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1015–16 (2010) (arguing that procedure's "primary value lies in the decisions, judgments, and settlements it generates"); Lind et al., *supra* note 198, at 982 (demonstrating how litigants feel more vindicated with disposition by trial than disposition by settlement); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 160 (2002); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCH. 72, 79–80 (1985); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 119 (2000).

C. Due Process: Scarce Opportunities to Participate and Be Heard

Words empower and have power, before judges and juries alike. When told in court, narratives can document wrongdoing and immortalize accounts in public records.[341] Until now, however, no literature has existed on voice and aggregation.[342] And yet, in study after study on individual litigants, people who have voice opportunities view procedures as more neutral, place more trust in the decisionmaker, and feel as if they have been treated with dignity and respect.[343] Even without trials, some studies show that people feel heard as long as they can watch their lawyers advocate on their behalf, whereas others suggest that the more chances people have to speak directly to the decisionmaker, the better.[344] Dignitary theories aside, without giving plaintiffs opportunities to present facts and evidence, judges will be hard pressed to issue accurate decisions and ensure just outcomes.[345]

Constitutional due process supports these goals, to a degree. Demanding simply that litigants have notice and "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" due process jurisprudence takes a minimalist approach.[346] It seems, however, that even these barebones requirements are sometimes lacking: "Nobody got to hear from me or my husband and children who all suffered as a

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341 *See* Mindi Miller, "I Want My Story Told": An Anthropological Analysis of Malpractice Plaintiffs' Discourse, at 133 (Mar. 2, 1986) (Ph.D. dissertation, Rice University) ("Plaintiffs in this sample were suing because of the principle of the thing: the carelessness of health care-givers needed to be documented."), https://scholarship.rice.edu/bitstream/handle/1911/15999/8617471.PDF?sequence=1 [https://perma.cc/3S4A-UTN4].

342 Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 199, 200 (1990).

343 Zimerman & Tyler, *supra* note 134, at 488–89. Psychologists have shown that voice is not simply an instrumental means to influence the court's decision as first thought, but that it has its own interpersonal or "value-expressive" importance even if it has little influence on the final decision. *E.g.*, E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCH. 952, 952 (1990); Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCH. 333, 333 (1987).

344 Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 447–50 (2010).

345 *See* Bone, *supra* note 23, at 510.

346 Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975).

result of my injuries,"[347] reported one. Said another: "I just feel like my voice was not heard and that I was lumped into a group of people that were just given X amount of dollars."[348] Without the voice opportunities that the public has come to expect, one put it bluntly: "I feel that the judicial system is treating this serious matter just like a mass production of a product and not as legal human suffering cases where people's lives are at stake."[349] Another simply said, "We never got to appear in court."[350]

Commentators have long mourned the "vanishing trial" along with its democratizing traditions and accountability.[351] Despite their rarity across the board, and particularly in MDLs where even bellwether trials are infrequent,[352] studies show that litigants like trials—they value the ample participation trials afford and perceive them as dignified and careful.[353] And although we did not ask participants about their desire for a trial, the message came through anyway: "My story was never told! . . . I have always said I wanted a trial. Going anywhere is not a problem for me. We will be there."[354] Another said, "[I] feel that we all have the right to state our case to a judge and jury. . . . [I] am in pain all the time and [I] miss work all the time and [I] have no personal life left[.] [I] think the jury should see and hear that."[355] Other remarks reflected difficult tradeoffs: "I would rather risk losing the case to be able to tell the impacts this MESH has done by ruining my life and my family."[356] And

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347 Participant 78.
348 Participant 7.
349 Participant 55.
350 Participant 89.
351 *E.g.*, Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 101 (2010); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2132–33 (2018) (noting that trials are not just vanishing, the ones that occur are even shorter); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL & LEGAL STUD. 459, 459 (2004); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 306–07 (2013); Patricia Lee Refo, *The Vanishing Trial*, J. EMPIRICAL LEGAL STUD. v (2004).
352 BURCH, *supra* note 10, at 110. In 2020, across all federal courts, only 0.4% of civil cases reached trial. *Table C-4—U.S. District Courts?Civil Statistical Tables for the Federal Judiciary (December 31, 2020)*, U.S. CTS. (2020), https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2020/12/31 [https://perma.cc/7FFR-GMXK].
353 Lind et al., *supra* note 198, at 967.
354 Participant 17.
355 Participant 121.
356 Participant 71; Participant 50 ("I felt I should have had a chance to go to court and tell my story to a jury of my peers.").

finally, outrage: "This MDL lawsuit is absolutely unbelievable. . . . I will not settle without a trial. I told [attorney name] I could not give her a number I would accept. How do I put a number on the loss of my health, my marriage and my career?"[357]

Nor were participants able to engage voyeuristically by watching their attorneys advocate on their behalf in hearings. Courthouses are supposed to be open,[358] but only *three* (1.4%) of our respondents ever attended a court hearing related to their case.[359] When asked why, one said, "[I] never have been told [I] could go or asked."[360]

Overwhelmingly, plaintiffs' attorneys failed to mention that hearings occurred or that parties could watch, thereby undermining basic notice principles: "I was never made aware of any hearing. I only found out by searching online that my lawyers went on my behalf."[361] I "was never told of any hearings,"[362] and "I'm not sure if the hearings were open to the [plaintiffs]"[363] were common responses. For the 179 respondents who answered and did not attend a hearing, we asked them why; 174 provided at least one reason, and some selected up to five. Table 13 tabulates their responses.[364]

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357 Participant 184.

358 *See, e.g.*, Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 785–88 (2008) (tracing the history of open courts).

359 Of the 217 survey respondents, 182 answered the question (84%). The three that attended represented 1% of all respondents and 2% of those answering the question.

360 Participant 121; *see also* Participant 154 ("I didn't know I could attend a hearing.").

361 Participant 186.

362 Participant 179.

363 Participant 134.

364 Table 13 includes information provided in the "other" response option, either coding into an existing category if it applied, creating a new category, or leaving it as other if it simply defied categorization.

Table 13. Why Participants Did Not Attend a Court Hearing

Reason Plaintiff Did Not Attend Hearing	**Number of Respondents**	**Percentage (N=179)**
I did not know when the hearings occurred/Had no information about a hearing.	115	64.2%
The hearings were too far away for me to travel to them.	58	32.4%
Attending a hearing would have cost me too much money.	47	26.3%
The hearings were not open to plaintiffs.	27	15.1%
My lawyer attended on my behalf.	19	10.6%
The litigation hasn't reached the hearing stage yet.	9	5.0%
Other	8	4.5%
Medical prevent me attending/traveling for a hearing.	4	2.2%
There is a problem with my litigation.	3	1.7%
I was discouraged from attending.	2	1.1%
I trusted my lawyer to handle this.	1	0.6%
My job prevented me attending.	1	0.6%
No Answer	5	2.8%

Most participants (64.2%) had no idea when hearings occurred. Both distant forums (32.4%) and travel costs (26.3%) made attendance harder. As Table 13 shows, others were told hearings were not open to them,[365] were discouraged from attending, or could not attend for personal reasons such as medical issues (often related to the litigation)[366] or an inability to take time off work. Other reasons varied: some saw their lawyer attending on their behalf, one trusted her lawyer to do so, and a final group cited issues with the litigation (cases being "accidentally dropped," etc.) or thought the case had not yet reached the hearing stage. Rather cryptically, one noted she did not attend because "it was a mdl case," as if that was sufficient explanation by itself.[367]

D. Dignity: Courts' Treatment of Plaintiffs

Although few participants watched court proceedings, they could still respond to our questions about how the court treated them as litigants. Forty-nine of the 53 settling

365 *E.g.*, Participant 226 ("I was told that living in [west coast state] made it impossible for me to have a court hearing.").

366 Participant 71 ("I have never known about any hearings . . . and would not have been able to travel to attend due to financial needs and [p]hysical limitations. However, if there were hearings regarding my case, then I would like to be informed of the process.").

367 Participant 64.

respondents answered, and they viewed the courts more favorably than their attorneys. Unfortunately, that's not saying much. As Table 14 below indicates, though 20% strongly or somewhat agreed that the judge had the necessary case information to make informed decisions, 51% strongly or somewhat disagreed—possibly because they felt their stories were not told. One respondent even took the step of firing her attorney and proceeding pro se when her lawyer "refused to amend [the] Short Form Complaint with all facts before settlement."[368] Although 26.3% strongly or somewhat agreed that the court relied on accurate information pre-settlement, 40.6% strongly or somewhat disagreed—the "why" was not apparent from their comments.

Table 14. Court's Treatment of Settling Participants

N = 49	Strongly Agree	Somewhat Agree	Neither Agree nor Disagree	Somewhat Disagree	Strongly Disagree	No Response
Before my case settled, the judge had the information necessary to make informed decisions about how to handle my case.	9 18.3%	2 4%	13 26.5%	5 10.2%	20 40.8%	4 8%
Before my case settled, the judge relied on accurate information.	9 18.3%	4 8%	15 30.6%	4 8%	16 32.6%	5 10.2%
Before my case settled, the judge explained rulings and opinions.	4 8%	4 8%	16 32.6%	5 10.2%	19 38.7%	5 10.2%
Before my case settled, the judge treated me with respect.	1 2%	0 0%	27 55%	0 0%	18 36.7%	7 14.2%
Before my case settled, the judge encouraged me to settle.	5 10.2%	4 8%	19 38.7%	1 2%	17 34.6%	7 14.2%

368 Participant 93.

Table 14 likewise considers a broad range of additional topics: whether judges explained their rulings, treated plaintiffs with dignity, and encouraged them to settle. Nearly half disagreed that judges explained their rulings and opinions. One said simply that there should be "more transparency"[369] and another complained, "My husband['s case] was denied. It was like a slap in the face."[370]

People want authorities to treat them with dignity and respect, and for courts to take their concerns seriously.[371] Self-esteem, community standing, equality before the law, and simple humanity demand this much.[372] "[I]t is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons," observes Jerry Mashaw.[373] In these MDLs, most participants (55%) felt neutral about whether the judge treated them with dignity before settling, but 36.7% felt disrespected.[374] One said, "[P]laintiffs were not dealt with equally or fairly."[375] "I felt that I was treated like just another number. No empathy whatsoever," lamented another.[376] Said a third: "When i realized it was a mass tort I felt it was just a cattle call and no one even cared about the plaintiffs."[377]

Finally, we considered the link between judicial nudges toward settlement and consent by asking whether respondents felt the judge encouraged them to settle. Thirty-eight percent did not feel strongly either way, and 36% thought not. Only 18% felt like the judge encouraged settlement, but this minority was vocal: "I feel under pressure from my lawyer and the judge to take a settlement and no trial, but I want a trial by my peers."[378] "Judges being for the most part Attorneys, force people into Global Settlements for the convenience of Attorneys,"[379] accused another. Someone else said, "Judge

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369 Participant 204.
370 Participant 11.
371 Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525, 536 (2014).
372 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666–67 (2d ed. 1988) (describing due process as a "valued human interaction" that is "analytically distinct from the right to secure a different outcome"); Tyler, *supra* note 23, at 830–31 (describing a psychological model to explain why individuals care about procedural justice).
373 Mashaw, *supra* note 23, at 888.
374 *Infra* Table 14.
375 Participant 166.
376 Participant 27.
377 Participant 169.
378 Participant 168.
379 Participant 40.

statements regarding settlement of MDL cases indicated that he wanted them closed because of large volume and negative press related to MDL."[380] Less directly, a fourth noted, "The amount of debt I had and the fear the judge would not issue awards to those who wish to go to trial made me feel [settlement was] forced."[381]

V
PLAINTIFFS' SATISFACTION WITH OUTCOMES

No one likes losing. Outcomes remain important. Yet people's feelings about a loss are strongly linked to whether they felt courts handled their case fairly, with decades of studies linking the two.[382] When it exists, fair process (as explored by the factors already considered: participation, opportunity to be heard, and respect from authorities) can "provide a cushion of support" such that those with negative outcomes still feel good about their court experience.[383] Logically, unfair procedures leading to adverse or poor outcomes mean even greater litigant dissatisfaction.[384] Nevertheless and somewhat conversely, fair outcomes can influence how recipients feel about the procedures used to produce them even when they're in the dark about what those procedures were.[385]

Table 15 shows how participants' cases ended, excluding those with ongoing cases or unknown outcomes. As cases progress toward trial, they receive greater attention and process, thus we consider litigant satisfaction with the two primary outcomes—dismissal and settlement—separately in the sections that follow.[386] We then examine litigants' overall dissatisfaction with outcomes of all types through the lens of plaintiffs' litigation goals.

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380 Participant 183.

381 Participant 32.

382 *See, e.g.*, Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. PERSONALITY & SOC. PSYCH. 296, 301 (1986) (describing a study analyzing participants' goals in the allocation of resources for interpersonal relationships); Tyler, *supra* note 43, at 883 (describing a study analyzing litigants' perception of the case's fairness and the litigants' corresponding reactions to case outcomes).

383 Tyler, *supra* note 43, at 885–86.

384 *Id.* at 886.

385 Steven L. Blader, *What Determines People's Fairness Judgments? Identification and Outcomes Influence Procedural Justice Evaluations Under Uncertainty*, 43 J. EXPERIMENTAL SOC. PSYCH. 986, 987 (2007).

386 Three participants indicated that their case went to trial, but we were unable to verify the information.

Table 15. Participants' Individual Outcomes

Outcome	Respondents	Percentage of Total
Dismissed	82	55.4%
With prejudice	40	27.0%
Without prejudice	36	24.3%
On motion for summary judgment	2	1.4%
On appeal	1	0.7%
No detail	3	2.0%
Settled	61	41.2%
Unknown	5	3.4%
Total	**148**	**100.0%**

A. Dismissals

Courts dismissed more than half of respondents' cases. Yet, these numbers may overrepresent dismissals relative to all MDL litigants for three reasons: (1) some judges dismissed cases without prejudice when plaintiffs did not have the product in question removed;[387] (2) some of those without surgical removal may have been refiled and settled if surgery occurred later; and (3) with some dockets simply stating "dismissed" without giving a reason, dismissal may include things like settlement or may not best describe the case's outcome. Nonetheless, as Table 15 showed, courts dismissed more of respondents' cases with prejudice than without, which meant their lawsuit ended.

Seven dismissed respondents provided additional information, with five sharing that their attorney explained the reason the court dismissed their case and two saying they received no explanation.[388] Those given a reason were told courts dismissed their case because they did not have removal surgery, did not have a second surgery to remove the device, did not accept the settlement offer, or the statute of limitations expired.

Some participants were particularly upset about courts dismissing their case for failing to have their pelvic mesh removed: "[O]ut of no where I had to dismiss my case without prejudice because I had not had the removal surgery yet. I HAVE BEEN TRYING TO GET THIS REMOVED SINCE I GOT IT! I NEED COMPENTENT REPRESENTATION."[389] Another

387 *E.g.*, Pretrial Order No. 293, *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., No. 2:12-MD-02327 (S.D. W. Va. Apr. 11, 2018).

388 One asked for a reason but received no answer.

389 Participant 67; *see also* Participant 54 ("Was told the only way to get compensation was to have another operation to take out the mesh.").

explained, "I've been implanted both [v]aginal[ly] and abdominally, and my mesh cannot be removed, too embedded in my organs. Cleveland Clinic tried to remove and partial removal would result in colostomy bag."[390] A third offered a different rationale: "Some people didn't get their sling removed due to no insurance or other issues and they still have it and are suffering. It's not their fault. They shouldn't be put in the lowest tier for those reasons."[391] Removal surgeries likewise impeded one participant's ability to find counsel: "I have yet to find a removal physician in my area[.] I contacted a law firm and was told until I have mesh removed I can't file a suit."[392]

In asking the seven respondents with dismissals how they felt about the litigation overall, six strongly disagreed they had a chance to tell their story, with one somewhat agreeing. Six also strongly disagreed they had an opportunity to present evidence before dismissal, that the judge relied on accurate information in deciding the case, that the judge explained his or her ruling, and that the judge treated them with respect. All seven felt the judge did not consider what they said when deciding their case and all seven felt the judicial procedures were very unfair.

Yet only two actually appealed the judge's dismissal. Five of the seven felt they exercised more influence over whether to appeal than their attorney, while two felt the opposite. Of those who did not appeal, one actively sought an attorney to take the appeal, and one said she was never given a chance to appeal. In comparing their court treatment with other litigants, four of the seven felt they were treated worse than others, and two felt they were treated about the same (which is not to say they felt treated well).

B. Settlements and Claims Administration

Data on substantive outcomes—who gets what and why—is notoriously unavailable in MDLs but sorely needed.[393]

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390 Participant 82.

391 Participant 8.

392 Participant 126.

393 NYU School of Law's Center on Civil Justice has been seeking to collect substantive data for years, but a tremendous data vacuum exists. *See Aggregate Litigation Data Project*, CTR. ON CIV. JUST. NYU SCH. L., https://www.law.nyu.edu/centers/civiljustice/projects [https://perma.cc/9ADD-UFRD] (last visited Sept. 16, 2022); Alison Frankel, *In Class Action Policy War, Data Backs Big Business*, REUTERS (Oct. 25, 2017), https://www.reuters.com/article/us-usa-consumers-arbitration-data/in-class-action-policy-war-data-backs-big-business-frankel-idUSKBN1CU348 [https://perma.cc/NA8V-5L82]. To be sure, data on substantive outcomes is needed in other areas of the law too.

Settlements are confidential and lawyers' letters often warn clients in dire terms that breaching confidentiality will have monetary and legal repercussions. Consequently, we did not seek specifics from settling participants.[394] Instead, as this section details, we asked them things like whether they were satisfied with the process, what information they had before settling, and how claims administrators treated them. Consistent with our previous findings, 81% were extremely or somewhat dissatisfied with the settlement process's fairness, as Table 16 shows.

Table 16. Participants' Overall Satisfaction with the Settlement Process

Satisfaction with Fairness of the Settlement Process	**Number of Respondents**	**Percentage N=99**
Extremely satisfied	3	3.0%
Somewhat satisfied	2	2.0%
Neither satisfied nor dissatisfied	6	6.1%
Somewhat dissatisfied	7	7.1%
Extremely dissatisfied	74	74.7%
No answer	7	7.1%
Total	**99**	**100.0%**

1. *Ethics and Informed Consent*

As subpart I.B explained, mass-tort settlements differ from typical settlements. Plaintiffs must often dismiss their case to enter into a settlement program without knowing what, if anything, they will receive in return.[395] Yet, ethics rules require lawyers to disclose (1) the aggregate settlement's total amount; (2) the existence and nature of all the claims involved; (3) other clients' participation and amounts; and (4) lawyers' total fees and costs and how they apportioned them among clients.[396]

In addition to the 53 respondents whose cases settled before trial, 46 settled before they filed a suit. We asked both groups what details their attorneys gave them before they agreed to settle, allowing them to select multiple options from a list of eight possibilities.

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394 *Supra* Table 15.

395 Burch, *supra* note 77, at 126–29.

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

Table 17. Pre-settlement Information Provided to Respondents by Attorneys

Before you agreed to settle or agreed to enter into a settlement program did you (check all that apply):	**Number of Respondents**	**Percentage N=99**
Have an estimate of your approximate monetary award based on the settlement program's tiers, allocation formula, or points	46	46.5%
Know that your claim would qualify for settlement money	44	44.4%
Know what your lawyer's fees would be	44	44.4%
Know how much money you would receive from the settlement	30	30.3%
Know how the litigation costs would affect your award	21	21.2%
Know what your lawyer's other clients would receive	14	14.1%
Know how litigation costs would be shared among your lawyer's other clients	13	13.1%
Participate in a mediation	3	3.0%
No Answer	21	21.2%
Total	99	100.0%

Table 17 reveals how little respondents understood before they agreed to settle. Less than half appears to have received the information required by ethics rules, which raises troubling questions about informed consent.[397] Most had no estimate of their approximate award and did not know whether their claims would qualify for settlement money or what their lawyer's fees would be beforehand. Fewer still knew how much money they would receive, what other clients in the aggregate settlement would get, or how costs would be shared among them.

One participant said, "[M]y attorney told me that I was only entitled to know my settlement as proposed by the Special Master, not the settlement amounts of the other plaintiffs that my attorney represents."[398] Another, who was part of an aggregate settlement, said, "[I] was told i did not need to know where [the] money was distributed."[399]

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397 *See* MODEL RULES OF PRO. CONDUCT r. 1.0(e), 1.8(g). Violating Rule 1.8(g) can lead to various consequences, depending on the state, including fee forfeiture and suspension. *E.g.*, *In re* Hoffman, 883 So. 2d 425, 432, 435 (La. 2004) (suspending an attorney for violating Rule 1.8(g)).

398 Participant 31.

399 Participant 127.

2. *Voice, Accuracy, and Distributive Justice*

To avoid the ethical conundrums inherent in divvying up settlement proceeds among their clients, some lawyers ask judges to designate settlement masters or special masters to perform this task for them.[400] Although this avoids importing bias and favoritism into allocations,[401] it also means (if the person is not a magistrate judge) that clients must pay—as a separate cost—for something that would otherwise fall within the attorney's contingent fee. And, because the attorneys hire special masters and tend to appoint the same people, it risks making that master beholden to the attorney for future income.[402] In inventory settlements, special masters often allocate funds directly, whereas in global deals, a special master may work alongside a claims administrator and act as the final decisionmaker or appellate "body."[403]

Importantly, for this study, these additional people can add another player who affects plaintiffs' perceptions of justice. Given the centrality of settlement administration, we explained that "attorneys often employ a claims administrator or special master ('administrator') to: (1) decide whether a claim meets the criteria for a monetary payout under a settlement program and (2) allocate money among multiple plaintiffs," then asked settling respondents about their experiences with the claims process, as Table 18 reflects.

400 "[P]laintiffs' counsel arguably has simply delegated the allocation problem." Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1169–70 (2020).

401 For example, lawyers might allocate more to their direct clients and less to referred clients to increase their attorneys' fees. Paul H. Edelman, Richard A. Nagareda & Charles Silver, *The Allocation Problem in Multiple-Claimant Representations*, 14 SUP. CT. ECON. REV. 95, 99–100 (2006); *e.g.*, Huber v. Taylor, 469 F.3d 67, 70–71 (3d Cir. 2006) (alleging that defendant-lawyers allocated a greater percentage of the aggregate settlements to increase their take of the attorneys' fees).

402 Burch & Williams, *Judicial Adjuncts*, *supra* note 10, at 2166, 2206–10.

403 *E.g.*, Master Settlement Agreement § 7.02(G), *In re* Actos (Pioglitazone) Prods. Liab. Litig., No. 6:11-md-2299 (W.D. La. Apr. 28, 2015) ("The Special Master's resolution of all appeals relating to EI Payments shall be final, binding and Non-Appealable.").

Table 18. Settling Participants' Experience with Claims Administrators and Special Masters

N = 99	**Strongly Agree**	**Somewhat Agree**	**Neither Agree nor Disagree**	**Somewhat Disagree**	**Strongly Disagree**	**No Response**
I had a chance to tell my side of the story during the settlement process.	8 8%	8 8%	10 10.1%	12 12.1%	53 53.5%	8 8%
The administrator had the information necessary to make informed decisions about how to handle my claim.	18 18.1%	7 7%	21 21.2%	10 10.1%	32 32.3%	11 11.1%
The administrator relied on accurate information.	13 13.1%	8 8%	28 28.2%	8 8%	30 30.3%	12 12.1%
The administrator applied rules consistently.	4 4%	5 5%	43 43.4%	6 6%	26 26.2%	15 15.1%
The administrator explained decisions.	13 13.1%	8 8%	28 28.2%	8 8%	30 30.3%	12 12.1%
The administrator treated me with respect.	7 7%	7 7%	38 38.3%	5 5%	28 28.2%	15 15.1%

Table 18 reports that 65% strongly or somewhat disagreed that they had a chance to tell their story during settlement, 42% strongly or somewhat disagreed that the administrator had the information necessary to make informed allocation decisions, and 38% strongly or somewhat disagreed that the administrator relied on accurate information. The link between diminished voice opportunities and accuracy is pronounced here, and it surfaced in several participants' open-ended comments: "[N]o one really wanted to take the time to confirm my story."[404] "Over 500 claimants were given a formula for

404 Participant 133.

settlement not taking into account any variables."[405] "Individual cases were never presented. Current health issues and future issues due to mesh complications were never considered. Actual physical health didn't matter. Only the number of mesh removal surgeries mattered . . . ."[406]

Asking participants whether the administrator consistently applied allocation rules goes to the heart of distributive justice—the idea that people are just as concerned about whether they receive an equitable amount vis-à-vis those similarly situated as they are about how much they receive overall.[407] Transparent processes and criteria for awarding payouts can give claimants a clear sense as to basic principles of entitlement and how much their situation merits.[408]

But as judges diffuse responsibility to additional actors, MDL settlements suffer from transparency and accountability problems: only 21% of settling respondents strongly or somewhat agreed that the administrator explained decisions and only 9% strongly or somewhat agreed that the claims administrator applied rules consistently. Many had no idea either way and felt confused and frustrated: "[My attorney] initially had me as level 2 then when they brought in a 'Special Master' they changed it to a non revision case for less money although I had a second surgery 6 months later."[409]

Several of our participants raised explicit distributive-justice concerns:

> I have read in the news of judges considering every possible loss, not just physical, emmotional, financial, etc[.] Plaintiffs were awarded millions of dollars, I believe the highest award was for a woman in Florida, I believe for $36 million dollars. This law firm offered [less than 1% of that] after their fees to settle. My loss and suffering was about the same or it could

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405 Participant 163; *see also* Participant 85 ("I had severe injuries and those injuries were not even considered in the compensation with the settlement . . . . I was put into a category with other women who had no injuries or complications. I was not fairly compensated for my injuries, my suffering, or medical costs.").

406 Participant 75; *see also* Participant 8 ("[My] case is unique and the settlement process just looked at the base criteria and your settlement offer was based on that and not the additional expenses, loss, pain and suffering.").

407 *See* Karen A. Hegtvedt & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 93, 93–94 (Joseph Sanders & V. Lee Hamilton eds., 2001); *see also* David Miller, *Distributive Justice: What the People Think*, 102 ETHICS 555, 588–91 (1992) (taking a philosophical approach to distributive justice); Laurens Walker, E. Allan Lind & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1401–07 (1979) (linking procedural and distributive justice).

408 Tyler & Thorisdottir, *supra* note 177, at 369–70.

409 Participant 124.

> be even more extensive than of the woman in Florida and the amount for the two cases can not be compered. There are huge differences for cases that are basically the same. . . . Therefore, the judicial system is not treating the cases at the same level as it should.[410]

Others said things like, "It is disturbing to me that some women who suffered [similar] complication received 10 times the amount I received,"[411] and "My attorneys clients were given a sum, I was in tier 5; yet tier 6 received almost twice as much."[412]

Using statistical tables for wages, life expectancy, and work-life expectancy, past research has demonstrated the many ways in which tort-damage calculations and tort reform discriminate against women and minorities.[413] Feelings about gender and race factored into respondents' comments, too. "I firmly believe that if a man's sexual organ was caused lifelong pain and inability to have a normal sex life they would have been compensated far more than the $72,000 I received," one said.[414] Another observed, "I really wonder if the monetary judgments and the FDA response would be different if it was men who are harmed. Men who are losing their ability to have a sexual life."[415] Finally, a third said, "I am Black. . . . [T]here is always an added layer for me, when dealing with any aspect of our systems."[416]

Participants felt somewhat less strongly about the other questions in Table 18, but settlement administration fared no better overall. Only 14% strongly or somewhat felt like the claims administrator treated them with respect, with 38.3% feeling neutrally and 33% strongly or somewhat disagreeing. Overall, when placed alongside our findings about the justice system—including both participants' relationships with

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410 Participant 55.

411 Participant 133.

412 Participant 80.

413 *See* Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 670–77 (2017); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 (2004); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 1 (1995); Sherri R. Lamb, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299, 338 (1996); Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages*, 96 NOTRE DAME L. REV. 1479, 1485–90 (2021).

414 Participant 78.

415 Participant 151.

416 Email from Participant 173 to Elizabeth Chamblee Burch (Jan. 5, 2021) (on file with author).

attorneys and courts—our findings on claims administration are unsurprising. When people lack reliable data and know only snippets about others' outcomes or about how administrators allocate settlement money, they rely more on whether the procedures used to generate those outcomes were fair.[417] And we have already seen that, by and large, MDL plaintiffs in our study judge those procedures unfair.

3. *Appeals and Error Correction*

Everyone makes mistakes—judges, juries, and claims administrators alike. That's why basic fairness concerns dictate that those risks do not fall principally on one side, why courts adhere to precedent, and why procedures to correct mistakes like new trials, motions for rehearing, and appeals exist.[418] For plaintiffs, fair treatment is likewise the driving force behind appeals: some research shows that appellants' primary motivation for appealing isn't losing—it's a desire to be treated fairly and a feeling that the trial court had not listened to their arguments.[419]

Some of the publicly available settlement programs in the study's proceedings contained "appellate" opportunities. For an extra $2,000, some pelvic-mesh plaintiffs could appeal their award to the same settlement master who made the initial award, thereby incentivizing settlement masters to lowball early offers. One participant observed, "[T]he special master told me my case was very bad and that she would take care of me. That did not happen. . . . I feel like she lied just to get me to appeal and made me believe she would take care of me."[420]

Asked whether their settlement program gave them an opportunity to appeal, 57 participants responded: 29 (51%) said yes and 28 (49%) said no. Of those with appellate options, 69% (13 participants) exercised them,[421] and 61% (17 participants) felt like they had more influence in deciding

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417 *See* Kees van den Bos, E. Allan Lind, Riël Vermunt & Henk A.M. Wilke, *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCH. 1034, 1042–44 (1997).

418 *See* R.A. Macdonald, *A Theory of Procedural Fairness*, *in* 1 WINDSOR Y.B. ACCESS TO JUST. 3, 19 (1981); Solum, *supra* note 23, at 257.

419 *See* SCOTT BARCLAY, AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES 84, 119–22 (1999). *See also* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 126 (2009) (analyzing the selection effects that Barclay identifies).

420 Participant 92.

421 Twenty-eight percent did not, and one respondent did not answer the question.

whether to appeal than their lawyer, with 11 (39%) participants feeling like their lawyer had more influence. One remarked, "It was also implied that if I tried to get more through the [s]pecial masters I could end up with nothing."[422]

C. Outcome Dissatisfaction

When people are relatively uncertain about the procedures used to reach an outcome (as is the case in MDL), but nonetheless have moral clarity about what that outcome should be, they can revise their procedural fairness assessments if the lawsuit does not turn out as they thought it should.[423] As subpart II.B explored, our participants had multiple litigation goals—some with clear moral overtones. Yet, they overwhelmingly felt like their goals had not been met: a mere 1.8% of *all* participants indicated that their lawsuit achieved what they hoped it would, with 67.2% saying it had not and 10.6% saying "maybe."[424] This bears repeating: *two thirds of all respondents* did not feel their suit achieved what it should. Of the 146 who felt that way, 112 explained why (most provided between one and four reasons), which we coded into seven categories.

Table 19. Why Didn't Your Lawsuit Achieve What You Hoped?

Reasons	**Number of Respondents**	**Percentage N=146**
Poor Quality of Life	48	32.9%
Compensation	43	29.5%
Lack of Representation	31	21.2%
Mistreated by the System	31	21.2%
Product Still on the Market	20	13.7%
Long Litigation	18	12.3%
Unclear	8	5.5%
No Answer	34	23.3%

As Table 19 demonstrates, most (32.9%) cited their poor quality of life as the reason their lawsuit was unsuccessful. They continued to suffer injuries, visit doctors, and felt they would never be well again: "I will never get my former self back and I will never be normal," explained one.[425] Many respondents (29.5%) mentioned receiving insufficient or no

422 Participant 199.
423 *See* Blader, *supra* note 385, at 987.
424 Forty-four (20%) of the participants did not respond.
425 Participant 212.

money for the harm they suffered—"[a] few thousand dollars will not compensate me for the years of discomfort . . . ."[426] Over one-fifth also cited mistreatment by the litigation process and poor representation by their lawyers—"Nothing was fair[,] they broke every law[,] took all my rights away."[427] Over 13% were angry that the product was still on the market, and said things like: "[T]here is no accountability and no justice. [T]here is nothing but a brick wall,"[428] and "My case was sent for settlement and my attitude was shove your $20,000 where ever you would like. I will not sell other women into this darkness and be silenced."[429] Finally, 12.3% cited lengthy litigation delays.

Of the 145 people who said their lawsuit didn't accomplish what they hoped, we considered the correlation between why they sued and why they were dissatisfied. Table 20 denotes statistically significant relationships with asterisks.

Table 20. Correlation Between the Reason for Suing and Dissatisfaction with Outcomes

		Dissatisfaction with Outcome						
		Compensation	Long Litigation	Lack of Representation	Poor Quality of Life	Product Still on the Market	No Accountability	Mistreatment by the System
Reason for Suing	Accountability	0.21	0.24	0.42**	0.17	0.42*	0.43	0.32
	Acknowledge Harm	0.16	0.29	0.19	0.21	0.00	0.43	0.26
	Be Heard	0.02	0.00	0.00	0.00	0.05	0.14	0.06
	Compensation	0.42	0.29	0.29	0.23	0.37	0.29	0.32
	Medical Compensation	0.37	0.29	0.23	0.42	0.16	0.43	0.32
	Never Again	0.26	0.24	0.19	0.35	0.68**	0.14	0.26
	Retribution	0.00	0.06	0.03	0.06	0.05	0.14	0.06
	* p<0.05 ** p<0.01							

Though most relationships were not statistically significant, a few stand out. By far, the strongest correlation was between women who sued so women "never again" had to be harmed by the product and anger over that product's continued availability. Additionally, participants who wanted

426 Participant 124.
427 Participant 196.
428 Participant 65.
429 Participant 110.

to hold corporations accountable were more likely to be dissatisfied with their attorneys and frustrated by products still being sold.

Past researchers have documented "system conditioning" by lawyers: when clients sue to take products off the market, pursue emotional or moral vindication, or demand accountability, their attorneys persuade them to pursue what they see as a more legally realistic goal—money.[430] But given how rarely MDL attorneys communicate with their clients, it would seem that this reorienting (dubious though it may be) did not occur. To dig further into outcome dissatisfaction and compensation, however, we used a scale similar to the census's income ladder and asked settling participants how much they expected to recover (not what they actually recovered) based on things like hospital bills and medical costs. Table 21 below tabulates participants' economic expectations.

Table 21. Settling Participants' Expected Recoveries Based on Damages

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

430 Meili, *supra* note 138, at 111–12; Relis, *supra* note 140, at 733–34.

Even setting aside participants' "extra-legal" objectives and focusing on what the tort system primarily provides—money—Table 22 demonstrates that 74% of settling plaintiffs were still somewhat or extremely dissatisfied overall.

Table 22. Settling Participants' Satisfaction with Outcomes

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

Of the 99 settling respondents, 77 (78%) found their actual recovery to be slightly or much lower than they expected. On the other hand, 5% reported that their recovery exceeded their expectation, and 4% said recovery was about what they thought it would be. Table 23 compares participants' economic expectations with how they felt about what they actually received.

Table 23. Settling Participants' Economic Outcomes and Case Satisfaction

N= 86[431]	**Compensation Expectations vs. Actual Awards**				
Outcome satisfaction	Much lower	Slightly lower	About the same	Slightly higher	Much higher
Extremely dissatisfied	65	2	1	0	1
Somewhat dissatisfied	4	1	1	0	1
Neither satisfied nor dissatisfied	2	1	1	0	1
Somewhat satisfied	0	1	0	0	1
Extremely satisfied	1	0	1	0	1

Not surprisingly, participants were more likely to be dissatisfied with their outcomes when their recovery was much lower than expected. Several elaborated: "I disagree with the amount because it doesn't even reimburse the costs of the surger[ies], missed days without pay [due] to pain, missed days while off from surgery. . . . None of that seems to be considered."[432] "Loss of consortium disallowed (by attorney or

431 Of the 99 settling respondents, 86 answered both questions. Respondents who left either question blank are removed from the table to make it easier to read.
432 Participant 8.

judge, I never got an answer). . . . [M]y settlement was miniscule compared to $40,000 average given. . . . I am anxious that additional bills will come in and I can't afford them."[433]

As their comments reflect, participants were not expecting to get rich, but they did want to be treated fairly by the courts and their attorneys, and to be compensated for the losses they suffered. One participant's plight is particularly instructive:

> I was basic[al]ly forced to settle fo[ ]r a small amount or my lawyer was going to drop my case. . . . I was offered 67,000 and after all the Lawyer fees and Court Costs they estimated I would get about 1,200 dollars. . . . I really feel I was used by these law firms to make money off of me. It should be illegal for law firms to gain more money than the victim as is in my case. . . . My medical costs alone were near 38,000. . . . This whole ordeal did not help me financially like I anticipated. It robbed me.[434]

VI
DISCUSSION, IMPLICATIONS, AND LESSONS

In some sense, our findings are not surprising—MDL's efficiency-centered world places it on a collision course with the procedure-heavy, litigant-centered model advanced by procedural justice scholars. Attorneys stockpile clients and afford them few of the luxuries associated with individual counsel. Managing thousands of cases with ad hoc procedures curtails voice and participation, and yet resolving cases still takes four times as long as the average civil suit. Outcomes disappoint across the board, with lawsuits falling short even on conventional tort goals like compensation—at least in participants' eyes. In sum, MDLs fail on nearly every fairness metric posed by existing research.

Still, all of this asks: what do we expect of courts when dealing with mass harms? Scholars suggest that courts exist to either resolve conflicts by peacefully reconciling disputes (and thus avoiding violence) or alter future behavior by imposing costs on defendants.[435] Some might contend that MDLs end disputes and, in the aggregate, modify behavior,

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433 Participant 183.

434 Participant 200; *see also* Participant 1 ("Manufacturer doesn't have to admit guilt, lawyers made more than i did. I didn't even receive enough money to continue going to a doctor, let alone take care of me for more than a couple of years.").

435 Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–38 (1975).

thus the system needs no change. As our findings show, however, neither conclusion is so clear. Modifying behavior demands consistently applying substantive law, ensuring accurate inputs, clarifying the law through legal precedent, and imposing the full costs of legal violations.[436] Behavior modification thus breaks down as the lawyer-client relationship disintegrates and as attorneys push clients into accepting low-ball settlements.[437] Even focusing solely on conflict resolution requires parties to view procedures as fair to accept the outcomes.[438] As participants report, that is not the case.

As MDL numbers steadily rise, the system cannot turn a blind eye to concerns over legitimacy, dignity, accuracy, and due process. As MDL Judge Jack Weinstein warned, "We would be reckless were we to ignore litigant satisfaction. Public confidence in our system of justice depends on the system's responsiveness to people's needs."[439] Although our study's normative and theoretical implications stretch well beyond what we can hope to address in this first exposition, this Part plants a few seeds for change.[440]

A. Lawyers' Ethics and Fees: Lessons for the Bench and Bar

Our findings suggest that the statutory ideal of individual representation upon which MDL was built is just a convenient fiction.[441] Law firms' Costco-type warehousing seems to leave clients feeling deeply dissatisfied with nearly all aspects of their attorney-client relationship. Yet, without MDL, damage caps push trial lawyers to decline cases they would otherwise accept;[442] lead generators, which specialize in advertising and

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436 *Id.* at 938–39 (noting that civil sanctions incentivize behavior modification).

437 MDL has widespread effects on substantive development and can suppress information that may be crucial to public health and regulators. *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 62–67 (2021) (noting that information is easier to suppress in centralized proceedings).

438 Scott, *supra* note 435, at 937.

439 Weinstein, *supra* note 234, at 497 (footnotes omitted).

440 For further ideas addressing different aspects of this study, see Burch & Williams, *supra* note 24.

441 Aggregation occurs in many different forms—from bankruptcy to class actions to informal case collection by attorneys. Despite its formal codification, MDLs lack built-in safeguards. *See generally* sections I.A.1–2 (discussing organizing representation and fees and judicial outsourcing).

442 *See* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 48 (2017) (describing how damage caps prevented lawyers in some states from pursuing early suits over the GM ignition-switch defects); Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice*

selling potential client leads to attorneys, may not alert the public to faulty products and connect potential clients with willing counsel;[443] and volume lawyering, which opens courts to those who may not meet the stringent criteria set by traditional trial lawyers, may not be possible.[444] But once clients enter the litigation arena, things go downhill quickly: amassing clients detrimentally affects lawyers' communication and appears to violate ethics rules that require attorneys to control their work load "so that each matter can be handled competently."[445]

The Model Rules of Professional Conduct are simply not designed for mass representation.[446] Nor is an estranged attorney relationship what the public expects. As agents, lawyers owe their clients duties of competence and diligence, which means that they should not represent someone if they do not have time to pursue a case or investigate the facts.[447] But,

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System, 55 DEPAUL L. REV. 635, 657 (2006) ("[T]he percentage of calls signed to a contract by medical malpractice specialists is very low (11.1% for firms and 13.0% for individuals) . . . .").

443 In 2014, two of the top five TV mass-tort advertisers were lead generators. Amanda Bronstad, *Advertising Spending Up; Defense Bar Irked*, LEGAL INTELLIGENCER, May 4, 2015 (citing The Silverstein group, a Washington crisis-management and communications firm).

444 *See* Daniels & Martin, *supra* note 442, at 657 (noting that medical malpractice specialists take a small percentage of malpractice matters because the cases are hard to prove and expensive to prepare); Aff. of Herbert M. Kritzer ¶¶ 9–10, 20, *In re* Vioxx Prods. Liab. Litig., No. 2:05-MD-01657-EEF-DEK (E.D. La. Mar. 31, 2009) (citing the Daniels & Martin study and noting "[m]y own work shows that the criteria for acceptance of a medical malpractice case is much more stringent").

445 MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 2 (AM. BAR. ASS'N 2021).

446 *E.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 85 (1995) ("Even if attorneys in these situations are not clearly violating the Model Rules of ethics, their conduct falls short of the ideal of the loyal advocate for an individual client envisioned by the traditional model of ethics."); Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services when Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 433–34 (1998); Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1188 (1995); Georgene M. Vairo, *Reinventing Civil Procedure: Will the New Procedural Regime Help Resolve Mass Torts?*, 59 BROOK. L. REV. 1065, 1067 (1993). *But see* Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 152 (1999) ("[T]he traditional rules are already more flexible than is often suggested and . . . this flexibility can do much to accommodate the legitimate needs of [mass tort] clients.").

447 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (AM. L. INST. 2000) ("The lawyer must be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications."); Moore, *supra* note 101, at 3250 ("If there are viable means to obtain the benefits of group representation without forming a single group of unlimited size, then it is

reportedly, they do. Shanin Specter, a plaintiffs' lawyer involved in the pelvic-mesh MDLs, noted that "several [mesh] attorneys represented in excess of 5,000 clients," which meant that "[t]hey were unable to discover—much less try—all of these cases."[448] That, in turn, led them "to recommend and obtain inadequate settlements for their clients."[449]

Both state bar associations and, less directly, MDL judges (through their inherent powers) bear regulatory responsibilities for lawyers. Despite the powerful connections that some mass-tort plaintiffs' attorneys have forged with state bar regulators,[450] those associations must address the vast ethical implications that volume lawyering poses—either by enforcing the ethics rules on the books and actively disciplining the attorneys who violate them or by considering what ethics and access require in mass representation.[451] "The excuse cannot be that 'there is no way I can handle so many cases and deal with these people other than as numbers,'" explains plaintiffs' attorney Paul Rheingold, because "[n]o one, after all, asked the plaintiffs' firm to take on so many cases."[452]

To address overcharging for little work, some MDL judges have capped individual attorneys' contingent fees at 20–35%.[453] Reducing contingent percentages, which often range from 40–45%, may help in the short term, but over the long haul it may prompt attorneys to run up costs instead. Our findings, exchanges with participants, and review of some of their retainer agreements suggested three ways this may occur.

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arguably unreasonable for a single lawyer or law firm to represent a limitless number of clients in a single mass tort.").

448 Letter from Shanin Specter to the Committee on Rules of Practice and Procedure, at 3 (Dec. 18, 2020), https://www.uscourts.gov/sites/default/files/20-cv-hh_suggestion_from_shanin_specter_-_mdls_0.pdf [https://perma.cc/CEU3-DHPK].

449 *Id.*

450 *E.g.*, Ryan & Hamilton, *supra* note 35 (noting that a mass tort plaintiff's attorney "cultivated close relationships with bar officials").

451 In some ways, the harms are not new—padding bills, not returning client calls, and not updating clients. These problems have been written about extensively. *E.g.*, Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 709, 738–40 (1990). Yet, these old problems have taken on a new intensity in a volume practice.

452 RHEINGOLD, *supra* note 93, § 14:15.

453 *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05–1708 (DWF/AJB), 2008 WL 682174, at *19 (D. Minn. Mar. 7, 2008); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 497 (E.D.N.Y. 2006); *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 607 (E.D. La. 2008); *In re* San Juan Dupont Plaza Hotel Fire Litig., 768 F. Supp. 912, 922 (D.P.R. 1991); *see also In re* A.H. Robins Co., 182 B.R. 128, 139 (E.D. Va. 1995) (minimizing fees in the Dalkon Shield Claimants Trust).

First, some lawyers use traditional tactics like charging clients for extravagant expenses. In one cost statement, for instance, the attorney charged a participant $575 for his steak dinner, $5,000 for his private plane, and $6,630 in interest.[454] Second, as this suggests, lawyers have started charging clients interest on costs—a dubious ethical practice.[455] Four retainer agreements spiked costs by charging between 7 and 14 percent interest annually, which adds up over the life of an MDL.[456] Third, attorneys outsource. Instead of filling out plaintiff fact sheets and collecting medical records themselves, they hire third parties. The charge is then collected as a cost instead of part of their contingent fee. One lead MDL firm even created its own "separate" medical records company and had clients waive conflicts in the retainer agreement.[457]

Allowing attorneys to subtract their contingencies from plaintiffs' gross awards (e.g., the amount before liens and costs are extracted) and then get reimbursed for costs means that lawyers have no self-interested reason to be frugal—they are spending other people's money and, when they charge interest on those costs, making more money the more they spend.[458] One straightforward proposal to encourage fiscal responsibility would be to first subtract and reimburse costs and expenses from plaintiffs' gross settlement amount, then award individual attorneys' contingency and leaders' common-benefit fees out of the remainder.[459]

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454 Cost statement of Participant 37 (on file with authors).

455 ABA Comm. on Ethics & Pro. Resp., Formal Op. 451 (2008) (discussing lawyers' obligations when outsourcing legal and nonlegal support services and stating "[i]f the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted. . . . [T]he lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead . . . ."); ABA Comm. on Ethics & Pro. Resp., Formal Op. 379 (1993) ("A lawyer may not charge a client more than her disbursements for services provided by third parties . . . .").

456 Authority to Represent Agreement, Osborne & Associates (2015) (charging interest without specifying a rate); Aylstock Retainer, *supra* note 196, ¶ 3 (charging 12% per year); Alpha Law Retainer, *supra* note 292, ¶ II.B (allowing "reasonable interest on all expenses"); Blasingame Retainer, *supra* note 292, ¶ 4 (charging 7%).

457 CLH Retainer, *supra* note 196, ¶ 4.

458 *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 642 n. 1 (E.D. La. 2010) (ordering the reimbursement of common benefit costs); Pretrial Order No. 51(A), *In re* Vioxx Prods. Liab. Litig., No. 2:05-md-01657-EEF-DEK (E.D. La. Sept. 11, 2013) (listing reimbursements of common benefit expenses).

459 For a detailed proposal along these lines, see BURCH, *supra* note 10, at 190–200; *cf.* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 557–58 (1978) (arguing that "the lawyer should have to deduct from the gross settlement all his disbursements chargeable to the client *before* he calculates his fee"); Nora Freeman Engstrom, *Lawyer Lending: Costs*

As Nora Engstrom has recommended in the settlement-mill context, transparency in the form of mandatory public closing statements on fees and recoveries would be a substantial and worthwhile step—for access, regulation, and distributive justice.[460] Not only could public closing statements help promote equality of outcomes for those similarly situated, but they may also create a more competitive market for the opaque pricing structure of MDL settlement services.

The settlement industry is a big business. To help disburse inventory deals in just one of the seven pelvic-mesh proceedings, for instance, the lawyers asked the MDL judge to appoint over 40 private entities to help them: special masters, claims administrators, escrow agents, external review specialists, and lien-resolution groups.[461] But costs were rarely disclosed. Of all the appointments, only one special master's fee was sporadically divulged, and it varied, which meant that some mesh plaintiffs had to pay more for the same person to perform the same service than others.[462] As Justice Louis Brandeis famously quipped, "Sunlight is said to be the best of disinfectants."[463]

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and Consequences, 63 DEPAUL L. REV. 377, 443 (2014) (arguing that the "net approach . . . reduce[s] moral hazard); David A. Hyman, Bernard Black & Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1598 (2015) (noting that "[i]f expenses are large relative to the recovery, a contingency fee based on gross recovery (rather than net recovery) can leave the plaintiff with little or nothing to show for their trouble. Indeed, the plaintiff might even owe money to the lawyer!").

460 Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 813 (2011) (proposing that "state supreme courts require contingency fee practitioners to file closing statements at the conclusion of each representation where personal injury or wrongful death claims are asserted"); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1514 (2009). New York already requires contingent-fee lawyers to file closing statements, though the statements are not widely available, which limits their usefulness. Eric Helland, Daniel Klerman, Brendan Dowling & Alexander Kappner, *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1972, 1976 (2017) (noting that "[r]etainer and closing statements are considered 'confidential'").

461 Orders are available at https://www.wvsd.uscourts.gov/MDL/ethicon/orders.html [https://perma.cc/53W4-ZFYF]. Tallies calculated by the authors.

462 To "appeal" whatever amount Cathy Yanni first awarded, a plaintiff always had to pay $2,000, but her initial review in one settlement cost $300 per claim plus $10,000 per calendar quarter; in another she charged $350 per claim; and in yet a third, claim review cost a flat $300. *Id.*

463 Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10.

B. Due Process and Procedural Fairness: Implications for Courts

Our participants' open-ended remarks made it plain that their issues with MDL extend well beyond their lawyers and to the very core of MDL's legitimacy. One said simply, "Our judicial process is very broken."[464] Another remarked, "It was a total failure of the system. I lost faith in the legal system and feel these multi district lawsuits do not help the[ ]individual in any way."[465] A third declared, "The system is bought and sold[,] victims are revictimized[,] it's a shame on all those puppets who profit from these harmed ladies."[466]

Others felt like the system was biased against them, either in favor of the defendants or the lawyers: "Very corporate sided. I felt like victims [were] not given the chance to be heard and that the court in New Jersey was protecting its businesses."[467] "What good are the MDL's? It just seems like a stall tactic for the defense. Nothing gets resolved. . . . Only the lawyers and manufacturers win. Majority of plaintiff victims lose."[468]

As our study suggests, reducing voice and excluding parties from hearings makes them feel like the process is less fair. Unlike participating in a trial, they cannot see the evidence presented on their behalf, evaluate counsel, or observe the judge's demeanor and impartiality.[469] That, in turn, affects the court's legitimacy, as may the procedural shortcuts that judges and attorneys employ to make "claims processing" easier for them.

Of course, plaintiffs will not win every case, nor will settlements always be sufficient—as products of compromise, sometimes settlements mean settling. But the why and how are important to people. And changes are needed to better incorporate the shared values of due process and procedural justice: notice, an opportunity to be heard (voice) at a meaningful time and place, and a neutral decisionmaker.[470] We outline four potential changes to start.

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464 Participant 228.

465 Participant 200.

466 Participant 47.

467 Participant 89.

468 Participant 187; *see also* Participant 80 ("I think the entire process is unfair and biased toward the manufacturers."); Participant 159 ("Very disheartening experience over all. . . . MDL's only benefit attorneys, and not the victims.").

469 Shestowsky, *supra* note 53, at 182; Hensler, *supra* note 58, at 81.

470 Hollander-Blumoff, *supra* note 53, at 142.

First, judicial commitments to technology, transparency, and open access may fundamentally alter plaintiffs' judicial experience by giving them a front-row seat to distant hearings.[471] To be sure, technology cannot replicate a day in court and could reduce the interpersonal quality that only live attendance can provide, but it has the potential to promote access, allow plaintiffs to hear the judge's reasoning in real time, and see firsthand whether the judge acts impartially.

Procedural justice studies focus on face-to-face settings, and little is known about how remote voice opportunities or viewing hearings from afar might affect those feelings.[472] Nevertheless, the pandemic has changed so much of how we interact online. Forced into isolation, courts responded with online trials and hearings. California communities tried both opioid and talc suits by video conference during the pandemic, and the State of Oklahoma televised its bench trial against Johnson & Johnson long before COVID hit.[473] For a time, the Judicial Panel on Multidistrict Litigation posted its hearing information in advance and provided the public with live, one-way telephonic access.[474] Even the U.S. Supreme Court—a longtime stalwart against livestreaming or videoing oral arguments—started posting audio recordings at the end of each week as the pandemic shuttered its courthouse doors.[475]

Today's technology as well as the general public's familiarity with it can open courts in more extensive and inclusive ways. It can eliminate the many miles that MDL places between plaintiffs and their lawsuits, and it can even allow access for plaintiffs with disabilities who are unable to travel. In the wake of COVID's livestreamed hearings, pro se

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471 Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 970–71 (2020).

472 *Id.* at 971.

473 Craig Clough, *LA Jury Hits Talc Supplier with $4.8 Million Asbestos Verdict*, LAW360 (Apr. 19, 2021), https://www.law360.com/trials/articles/1376512/la-jury-hits-talc-supplier-with-4-8-million-asbestos-verdict [https://perma.cc/3Y7K-5NHA]; Hoffman, *supra* note 2; Sara Randazzo, *Drugmakers Accused of Causing Opioid Addiction in Trial*, WALL ST. J. (Apr. 19, 2021), https://www.wsj.com/articles/drugmakers-accused-of-causing-opioid-addiction-in-trial-11618866747 [https://perma.cc/6SXP-4ZN8].

474 *E.g.*, Supplemental Notice of Hearing Session, MDL No. 2978, at 2 (J.P.M.L. Jan. 11, 2021) (providing call-in access for up to 1,000 members of the general public).

475 Lysette Romero Córdova, *Will SCOTUS Continue to Livestream Oral Arguments and are Cameras Next? Let's Hope So.*, ABA (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/6KZF-HY4E].

objectors and mass-tort litigants have been able to voice concerns directly to judges, and some, like Judge James Donato, consider that a "complete plus."[476] He noted he had not experienced any issues with participants "grabbing the mic" or "speaking out of turn"; rather, "[it] was the best thing ever."[477]

Remarking on the California wildfire victims who "were burnt out of their homes, with no solid replacement over their heads," Judge Donato said, "yet they were able to dial in and see the proceedings. Could there be anything better than that? It's revolutionary. We should have done it a long time ago."[478] With party convenience and efficiency as MDL's statutory mandate and enhancing access to justice and harnessing technology's potential as two key components of the federal judiciary's strategic plan,[479] allowing the parties to keep up with their case without cross-country travel should be standard practice for MDL judges even in "ordinary" times.

Second, technology can help courts disseminate reliable information.[480] To their credit, some MDL judges create websites chock full of lead lawyers' contact information, judicial orders, forms, court contacts, case lists, upcoming court proceedings, bellwether trials, transcripts, and general FAQs.[481] But not all are updated regularly[482] and none that we have seen allow plaintiffs to listen to or observe hearings—to watch the judge interact with lead lawyers and to see what those attorneys are saying on their behalf.

The other problem is that plaintiffs seem to have little idea that these websites exist. And it's no wonder: Google "pelvic

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476 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/G8BM-62T7].

477 *Id.*

478 *Id.*

479 28 U.S.C. § 1407(a); STRATEGIC PLAN FOR THE FEDERAL JUDICIARY SEPTEMBER 2020, JUD. CONF. U.S. 19–23 (2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf [https://perma.cc/ZF7B-ZKUF].

480 *See* BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES 8 (2011), https://www.fjc.gov/sites/default/files/2012/MDLGdePL.pdf [https://perma.cc/PQH2-25FN].

481 *E.g.*, *In re* Atrium Medical Corp. C-Qur Mesh Prods. Liab. Litig., No. 16-md-2753 LM, https://www.nhd.uscourts.gov/atrium-medical-corp-c-qur-mesh-products-liability-litigation [https://perma.cc/2E7D-559G] (last visited Sept. 16, 2022) (providing parties with frequently updated information via a website).

482 *E.g.*, *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., No. 12-md-02327, https://www.wvsd.uscourts.gov/MDL/ethicon/proceedings.html [https://perma.cc/8EHE-62SG] (last visited Sept. 16, 2022) (failing to update website since July 2016).

mesh litigation" and the MDL court's seven websites, one devoted to each proceeding, appear nowhere in the first twelve pages of results. Only upon stumbling upon the right, legally technical search term—"In re Ethicon pelvic repair"—does the court's website materialize at the top of the list. It's not that plaintiffs want for information, as the reams of attorney advertisements and news items in the search results attest—it's that they lack *reliable* information. Of course, judges are not search engine optimization experts. But when plaintiffs cannot find the signals for the noise, they will rely on those (perhaps less dependable) sources available to them.

Courts need not go it alone. Judges regularly appoint lead lawyers to serve as liaisons to nonlead attorneys; why not extend their duties to ensuring accurate information is available to all plaintiffs?

Third, technology can provide a window into lead lawyers' work on plaintiffs' behalf. Watching attorneys rake the corporate executives they feel wronged them over the hot coals of a deposition isn't the same as watching CEOs squirm before a judge on a witness stand, but it's better than nothing. In the year after ProPublica posted the deposition where attorneys grilled Richard Sackler over Purdue Pharma's role in the opioid crisis, it received over 10,000 views.[483] As MDL Judge Jack Weinstein wrote, "[D]emocratization techniques using modern technology do not solve the fundamental problems of mass litigation. They do, however, begin to return the affected individuals to the center of massive litigation."[484]

Livestreaming depositions to a limited but highly interested audience could help plaintiffs feel that corporate decisionmakers are being held accountable as well as bolster plaintiffs' trust in lead attorneys. Doubt in both was readily apparent in our study. One participant fumed, "[Lead law firm] Is CORRUPT[.] They Are A Back Handed Law Firm, Deceitful In Everything They Did."[485] Another said, "There is extreme underlying corruption not being addressed with the pharma companies. [T]here is no accountability for completely and permanently ruining our lives."[486]

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483 ProPublica, *Watch Richard Sackler Deny Purdue Pharma Caused Increase in Opioid Addiction in Kentucky*, YOUTUBE (Sept. 12, 2019), https://www.youtube.com/watch?v=W327H5VNT9A [https://perma.cc/23Z6-NJMK].

484 Jack B. Weinstein, *Notes on Uniformity and Individuality in Mass Litigation*, 64 DEPAUL L. REV. 251, 276 (2015).

485 Participant 107.

486 Participant 65; *see also* Participant 171 ("Dow and the FDA were in cahoots together, as well as the Plastic Surgeons.").

Some might object that opening depositions up in this way would raise privacy concerns or risk revealing sensitive information. But, to the extent those concerns are concrete, those portions could take place off-camera. In fact, anyone can come to a deposition; even though depositions usually include only the person being questioned, the lawyers from both sides, and the court reporter, there is no Federal Rule of Civil Procedure that bars nonparties from attending. Until December of 1980, Federal Rule of Civil Procedure 5(d) created a presumption of *public* access—not just party access—to discovery documents themselves.[487]

Fourth, the myth of individual representation and the many attorney-client problems participants identified suggests that judges and the Advisory Committee on Federal Rules should import certain class-action safeguards. There, due process requires that courts appoint separate counsel to adequately represent class members with conflicting interests.[488] MDL judges should likewise consider conflicts between plaintiffs in designating lead attorneys, as *The Manual for Complex Litigation* has long suggested.[489]

Lawyers are the face of justice for MDL plaintiffs, much as prosecutors are for criminal defendants in plea bargaining. But many plaintiffs reported feeling abused by their attorneys, not helped. Building in added safeguards that would clarify leaders' fiduciary duties toward nonclients and appointing a contact for disgruntled plaintiffs could help MDL judges directly address conflicts and dereliction-of-duty concerns as well as issues of attorney overreaching in settlement.[490]

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487 FED. R. CIV. P. 5(d) advisory committee's note to 1980 amendment ("[D]iscovery materials must be promptly filed . . . ."). Since then, the duty to file discovery materials has been curtailed to save court costs. FED. R. CIV. P. 5(d) advisory committee's note to 2000 amendment.

488 Hansberry v. Lee, 311 U.S. 32, 44 (1940); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997).

489 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004). For a proposal on appointing leaders based on adequate representation, see Burch, *supra* note 77, at 143–45; Bough & Burch, *supra* note 45, at 2–11; Gluck & Burch, *supra* note 437, at 67–71.

490 Only a handful of courts have considered leaders' fiduciary obligations to nonclients and have reached different outcomes. *Compare In re* General Motors LLC Ignition Switch Litig., No. 14-MD-2543 (JMF), 2016 WL 1441804, at *7 (S.D.N.Y. Apr. 12, 2016) (placing the onus of protecting clients on individual counsel because leaders' "significant" duties to nonclients were not "as strong" as those class counsel owes to a class), *with* Casey v. Denton, No. 3:17-cv-00521, 2018 WL 4205153, at *5–6 (S.D. Ill. Sept. 4, 2018) (noting that "lead and liaison counsel should put the common and collective interests of all plaintiffs first" and make "tradeoffs that are reasonably 'likely to maximize the value of all claims in

CONCLUSION

Courts have an independent obligation to ensure fair treatment for those appearing before them. As Tracey Meares and Tom Tyler explain, "[J]udges need to both *be* fair and to *be seen as* being fair."[491] Mass cases can be handled with dignity. Even in a more "analog" world, leading mass-tort judges like Jack Weinstein and Alvin Hellerstein took time to meet with veterans impacted by Agent Orange, groups of women affected by DES birth-control, and New York City's clean-up workers suffering serious health effects from 9/11.[492]

MDL contributes court access and cost savings (perhaps principally for attorneys), but exacts a steep toll on legitimacy, dignity, accuracy, and due process. Plaintiffs too often feel forgotten. "Thank you for asking me about my experience. It is nice to know it matters to someone,"[493] one participant told us. "I hate being a victim but the legal system screwed us just as bad as the doctors and mesh manufacturers," she continued.[494] MDL's legitimacy hangs in the balance. Both the courts and the public need an efficient process for resolving mass harms, but MDL cannot thrive on efficiency alone, and it is not enough to simply let people into courts. MDLs must bend to serve the needs of the people forced to rely upon it—not just the demands of the judiciary and repeat players.

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the group'" (quoting Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1989 (2011))).

491 Meares & Tyler, *supra* note 371, at 535.

492 WEINSTEIN, *supra* note 446, at 95–98; Transcript of Status Conference, *In re* World Trade Center Disaster Site Litig., No. 1:21-mc-100-AKH (S.D.N.Y. Mar. 19, 2010); Hellerstein, *supra* note 45, at 477 ("I also organized hearings at sites convenient to the plaintiffs . . . .").

493 Participant 75.

494 *Id.*