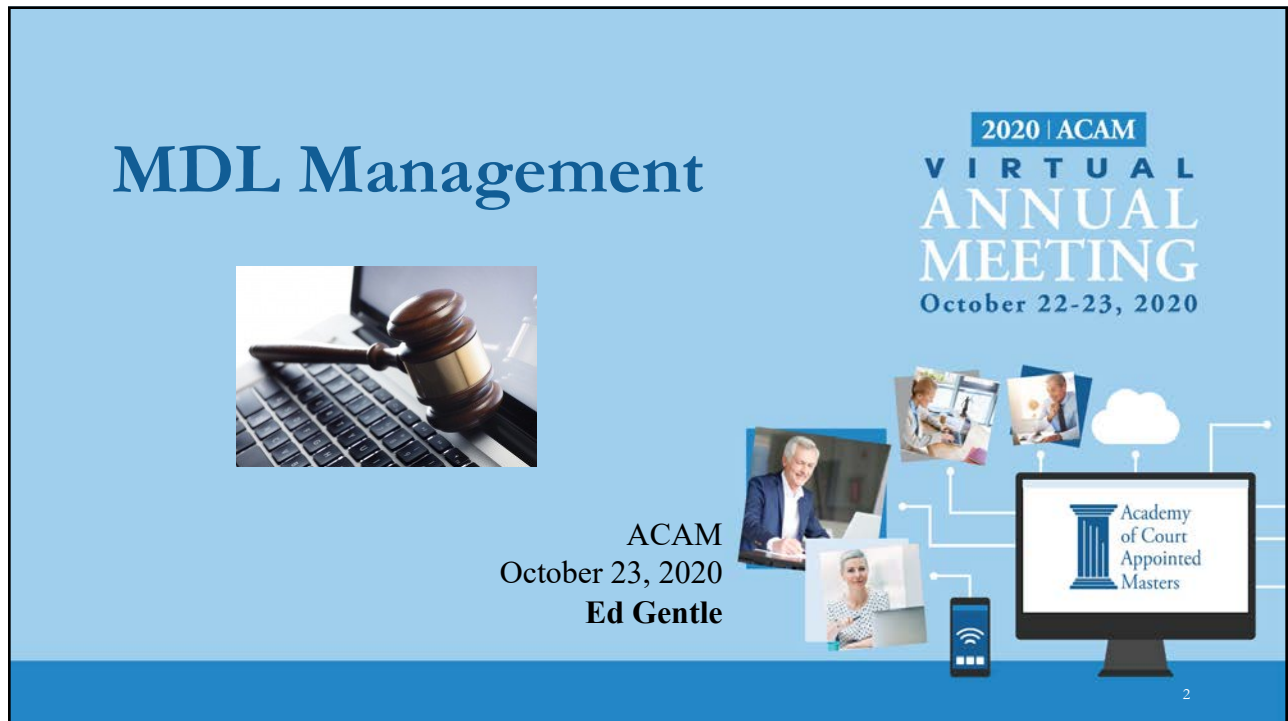




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## I. Early Vetting in Mass Cases: Pros and Cons\*

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### A. Statement of the Issue.

- FRCPI: the goal of the Court is to “secure the just, speedy and inexpensive determination of each action and proceeding.” Is this goal being fulfilled with MDL product liability and personal injury cases?
- Half of the 300,000 pending federal lawsuits are in Multidistrict Litigation (“MDL”) proceedings.
- MDLs are product liability and personal injury case magnets, facilitating the filing not only of cases with merit but, without proper vetting, those without merit.
- Lawyer advertising to recruit mass numbers of cases seems to increase the problem.



\*Based on *Managing MDL Mania: A Modest Early Vetting Proposal*, Alan Rothman, Arnold & Porter (October 16, 2019) and Emory Complex Litigation & Mass Claims Institute Seminars, Professor Jamie Dodge.

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## B. In a Products or Personal Injury Case, Who Should be on the Bus?

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- Symptoms of the problem: - numerous cases being voluntarily dismissed once they are on the path to trial or added once there is a settlement:
  - a) Vanish before case settles:
    - Fosamax MDL, 50% of the cases set for trial were dismissed and 30% selected for discovery were dismissed. In re Fosamax Products Liability Litigation, No. 06MD1789 (SDNY 2012).
    - Vioxx Litigation one-third of the 45,000 claimants failed to prove the alleged heart attacks or ischemic strokes related to the product at the settlement stage. In re Vioxx Products Liability Litigation, Tr. At 23 (ED La 2010) (Claims Administrator Court Report No. 29).
    - MDL consolidation for products liability actions has the unintended consequence of producing more new case filings of marginal merit in Federal Court. In re Mentor Corp. Obliap Transobrotator Sling Products Liability Litigation, 2016 WL 4705827, (\*2 M.D.Ga. 2016).
  - b) Added after case settles:
    - Tolbert PCB Settlement and Benicar Settlement – each had 3,000 late claimants denied access to the deal.
    - Always a claimant sign-up tail after a settlement is announced.
    - Defendant wants to buy peace and Lead Plaintiffs want the settlement math still to work, but there is often a surplus of cases at the end.
- How do we solve the problem without depriving Plaintiffs of their rights?



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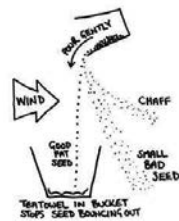
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## C. Before Settlement, should MDL cases be culled and, if so, how and when?

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### a) Up Front Culling:

- Plaintiff Fact Sheet ("PFS") negotiated by the Parties with Court oversight. It is a good discovery tool, but its contents are often litigated.
- Defendants argue that proof of exposure to the product and resulting injury is a basic PFS requirement, while Plaintiffs contend that necessary ingredients for a successful case evolve with the case. Focus on causation first?
- Is the Plaintiffs' lawyer's "one off" argument valid and if so, could an early vetting rule allow enough judicial discretion to avoid one off injustice?
- Design an MDL early vetting rule or are the incumbent rules sufficient? FRCP 11(b) requires supporting evidence and law for a lawsuit.
- Rule 26 initial disclosure requirement being applied to MDL cases where personal injury is alleged so that basic information is required to be disclosed at the beginning. Requiring a standard PFS and compiling a plaintiff database will identify and quantify the potential problem while also facilitating fair bellwether selection and settlement facilitation.
- Instead of a one size fits all, should judicial discretion be retained to tailor what is required for a case to survive based on the particular MDL, with a rule of practice to be addressed through judicial education and training instead of having a concrete rule?
- Will this lead to judicial inconsistencies so that meritless cases may not necessarily be dismissed short of settlement?



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### b) At Settlement: Defending the Fort

- Lawsuit filed date and/or claimant Engagement Agreement date cut-off
- Plavix Order: Solid causation proof required for future filed or opt-out cases
- Wholesale dismissal of cases coming in over the wire or without Plavix proof.



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## D. Should a Parachuting “Neutral” Plaintiffs Lawyer be Required?

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- Is a parachuting plaintiff lawyer without any clients needed to avoid the inherent conflict between a Plaintiffs’ Steering Committee who represent the lawyers possibly responsible for filing bad cases and the PSC’s case management duties? Is there an inherent conflict between being a lead lawyer and having individual plaintiffs? Lawyers Suing GM are Now Fighting Each Other, Bari Meier N.Y. Times P. B1(February 5, 2016).



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## II. Magistrate or Special Master: When do you use each, and how do you ensure good cost/benefit?\*

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### A. A comparison of Special Master and Magistrate powers

- Rule 53. Masters
  - a) Appointment.
    - Scope. Unless a statute provides otherwise, a court may appoint a master only to:
      - Perform duties consented to by the parties;
      - Hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
        - Some exceptional condition; or
        - The need to perform an accounting or resolve a difficult computation of damages; or
      - Address pretrial and post trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.
- Magistrates Act Section 636 (a), (b) and (c): trials, any pretrial matter other than dispositive motions, conduct hearings, appointed as a Special Master under Rule 53, or “such additional duties not inconsistent with the Constitution and laws of the United States.”, by consent of the Parties handle any proceeding.



The scope of potential duties of each is sweeping.

\*Based on Use of Special Masters in Connection with Class Proceedings, F.A. Little, Jr. and Ed Gentle, A Practitioner’s Guide to Class Actions (ABA) and Judicial Adjuncts in Multidistrict Litigation, Elizabeth Chamblee Burch and Margaret S. Williams (draft Feb. 24, 2020).

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## B. The initial cost question: Should the Judge appoint a Magistrate, a Special Master or both?

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- A no brainer? First, select a Magistrate?
- The Magistrate is paid from the general tax fisc while a Special Master is paid by some or all of the Parties. There are 547 Magistrates and almost many as the 677 Federal Judges.
- To address the “cost” concern, should the Special Master have a concrete budget for review and approval of the Court and the Parties, and bill against that budget in a “speaking” way, comparing services rendered with amounts incurred to obtain them?
- What is the relative “cost” equation for choosing between a Magistrate and a Special Master?

(Cost savings to the Parties from a Special Master) minus (Special Master bill) versus (Cost savings to the Parties from a Magistrate)?

- Are Special Master advocates correct in asserting that they reduce costs and delays?
- Under Rule 53, the Special Master’s compensation rate and who pays it needs to be fixed. Should such compensation be publicly known?

### Budgeting Basics



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## C. Considering Case Resolution and Other “Human” Factors in the Appointment

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- A Special Master’s specialized expertise and abilities may allow him or her to operate behind the scenes, nip disputes in the bud, and work collaboratively with the litigants in ways that would otherwise endanger a Judge’s or Magistrate’s neutrality.
- Special Masters can indeed be “special”, having expertise uniquely required for a case, such as auditing, medical monitoring, remediation of a toxic chemical site, making sense of a 1,000,000 document privilege log, etc.
- Is the timing of Magistrate appointment or Special Master selection important in the case?
- Can there be too many cooks in the kitchen?



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## D. Do Special Masters often come in two flavors, or don't be that guy?

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- A lawyer well connected but not overly busy who sees a Special Master appointment as a financial opportunity or a lawyer who is well connected but very busy and doesn't have time to do the Special Master work?
- Magistrates, on the other hand, are motivated to end the case and keep it off the Court's docket, but are they less sensitive to lawyers because they're connected with the Judge?

