UMKC Law Review

Volume 89
Number 4 *Multidistrict Litigation: Judicial and Practitioner Perspectives*

Article 14

June 2021

Bellwether Trials

Robert Adams
American College of Trial Lawyers

Brent Dwerlkotte
Shook, Hardy, & Bacon

Patrick Stueve
International Academy of Trial Lawyers

Abby McClellan
Stueve Siegel Hanson

BELLWETHER TRIALS

Robert Adams*, Brent Dwerlkotte**, Patrick Stueve*** and Abby McClellan****

INTRODUCTION

A bellwether trial is a pivotal time in Multidistrict Litigation (MDL). It allows the parties to put their theories to the test and dictate the future resolution of the MDL. For this article, we have come together to provide our shared experience with bellwether trials from the plaintiff and defense perspective. We reviewed dozens of articles written about the bellwether trial process and selected important aspects of a bellwether trial that have received little attention in literature. One or both side's view of these important bellwether topics is discussed, and we end with some notes and guidance. We hope this can be used as a practical guide for both parties and the MDL Court when faced with developing a bellwether trial plan.

I. CONSIDERATIONS FOR BELLWETHER SELECTION

We will not detail the numerous methods for bellwether pool selection as many before us have written on this issue.[1] We instead highlight some unique

* Rob is a fellow in the American College of Trial Lawyers and the International Academy of Trial Lawyers, and is listed in the Best Lawyers of America and Chambers USA. The Kansas City Metropolitan Bar Association named Rob a Dean of the Trial Bar, and Missouri Lawyers Weekly has honored him as "Missouri Lawyer of the Year." Rob practices in the areas of products liability, intellectual property litigation, and commercial litigation. He has first-chaired more than 30 jury trials in several different federal and state courts. He has also argued numerous cases in appellate courts throughout the country.

** Brent Dwerlkotte pronounced "Dwell-Kotte," (like the motorcycle Ducati) is a partner at Shook Hardy Bacon, where he often finds himself leading the defense in large MDLs and other complex litigations. Some have dubbed him the next Rob Adams for his trial work. Brent has worked in all areas of civil law, first for the plaintiff side, then as a federal law clerk, and finally as a dreaded defense lawyer. One of Brent's main hobbies is reading the Federal Rules of Civil Procedure and he puts this hobby to good use by serving as the Federal Rules Chair of the Western District of Missouri's Federal Practice Committee, and as a member of the Jury Instruction Committee of the United States Court of Appeals for the Eighth Circuit.

*** Patrick is a Fellow in the International Academy of Trial Lawyers, has been repeatedly listed in Best Lawyers of America for Complex Commercial, Bet the Company and Antitrust litigation and has been recognized as a *National Law Journal* "Elite Boutique Trailblazer" for his work in contingency fee business litigation. He has prosecuted complex commercial claims nationwide in federal and state courts and through arbitration against the largest companies in the world, including Merck, Bayer, Syngenta, Citigroup, UnitedHealthcare and AIG. Since founding Stueve Siegel Hanson in 2001, he has secured more than $2 billion in jury verdicts, arbitration awards and settlements. Patrick currently serves as co-lead counsel in the *Syngenta* MDL where he along with co-lead counsel secured a $217.7 million jury verdict on behalf of a state-wide class of farmers that led to a $1.51 billion global class settlement – believed to be the largest agricultural settlement in United States history.

**** Abby is an associate at the law firm of Stueve Siegel Hanson where she focuses on product liability cases. Abby is one of the youngest lawyers ever to be appointed to plaintiff leadership in large MDLs, including the Taxotere and 3M Products Liability MDLs. In 2019, Abby was named an "Up and Coming Lawyer" by Missouri Lawyers Weekly and has been recognized as a "Rising Star" since 2017 by Missouri/Kansas Super Lawyers. In her free time, she serves on the board for Lawyers

considerations for selection of bellwethers for initial discovery and trial selection. This is by no means exhaustive but is meant to provide practical insights into various issues attendant to the bellwether trial selection process that we have experienced in our practice. Our insights and recommendations below come from our collective experiences trying and litigating MDL cases.

II. STAGGERED PROCESS

A. Plaintiff Recommendation

The Manual for Complex Litigation advises if bellwether trials "are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases."[2] To ensure the trial pool is representative and stays representative, we recommend staggered selections: choose one discovery pool early on in the case, and once the case develops and more cases are filed, allow for one or more discovery pools to be added. The staggered process is recommended because what makes a case representative is often a moving target. New information from medical records, expert testimony, scientific studies, depositions, written discovery, and other sources may change what is considered representative. New information could add a representative factor that should go through discovery or could remove an important issue that is no longer representative or necessary for further discovery. In the *Taxotere* litigation, a staggered process was ordered, which allowed the parties to add cases to the pool of trial plaintiffs as the case progressed.[3] This proved helpful for several reasons. A large portion of cases were filed after the initial round of bellwethers were selected. The ability to add additional cases to the bellwether pool allowed the parties to review important factors discussed on the Plaintiff Fact Sheet and determine which percentage of the cases had these factors present and whether those percentages changed with the addition of cases. After a few rounds of bellwether pools, the court determined that trying a case with multiple cancers present was not representative and would not be helpful to try as

Encouraging Academic Performance (LEAP) where she runs the lawyer volunteer tutoring program at Operation Breakthrough, a facility which provides a safe educational environment for children in poverty.

[1] For a detailed discussion about plaintiff sections for bellwether pool discovery, see generally Eldon Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); *see also* Melissa J. Whitney, FED. JUDICIAL CTR. AND JUDICIAL PANEL ON MULTIDISTRICT LITIG., BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES (2019).

[2] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 (2004) (hereinafter "MCL").

[3] *In re* Taxotere (Docetaxel) Prod. Liab. Lit., (MDL No. 2740) (E.D. La.) Case Management Orders 3, 6, 8A (detailing the process for selection of the first two bellwether discovery pools).

a bellwether, so plaintiffs with multiple cancers were no longer added to the selection pool, even though they were present in the first bellwether round.

III. *LEXECON* ISSUES

A. Defense Recommendation

In *Lexecon Inc. v. Milberg Weiss*, the Supreme Court held that a transferee judge presiding over an MDL cannot hold a trial in a case transferred to the MDL without the parties' voluntary consent.[4] It is imperative that courts and parties anticipate and resolve as early as possible any *Lexecon*-related concerns. Parties should understand that the bellwether selection process and *Lexecon* waiver decisions can be used as both a shield and sword, allowing parties to prevent fewer desirable cases for each side to move forward in discovery. Courts have drawn on their collective case experiences to facilitate *Lexecon* waivers or workarounds, which prevent parties from making a deliberate *Lexecon* decision. For example, if a party declines to provide a *Lexecon* waiver, courts have issued pretrial orders indicating that the MDL judge would hold trials where the cases were initially filed utilizing intra-circuit or inter-circuit assignments.

In instances where *Lexecon* waivers are provided at the outset of litigation in order to establish a discovery pool of cases, courts should narrowly construe *Lexecon* waivers to only those cases initially selected. This allows both parties the opportunity to provide *Lexecon* waivers for subsequent discovery pool or trial cases. In addition, in cases where the transferee court determines that inter-or intra-circuit assignments under 28 U.S.C. § 292 are available, the parties should immediately raise the impropriety of this *Lexecon* workaround or other similar workarounds. The Ninth Circuit ruled out this option in *In re Motor Fuel Temperature Sales Practices Litigation*.[5] In that case, the presiding MDL judge requested that then-Chief Judge Alex Kozinski of the Ninth Circuit permit her to preside over three cases, which were subject to remand because they had originally been filed in California. Judge Kozinski denied her request, finding:

> [o]nly if the presiding judge is recused or unable to serve, and the local district is unable to reassign the case according to its local procedures, will the chief judge of the circuit be called upon to bring in a judge from outside the district. For me to sign a Certificate of Necessity in the absence of such circumstances would constitute a serious encroachment on the autonomy of the district courts and also interfere with the random assignment of cases.

Intra-circuit or inter-circuit assignments are not necessary because the bellwether process produces a large volume of materials that the parties and courts can then

[4] 523 U.S. 26 (1998).
[5] *In re* Motor Fuel Temperature Sales Practices Litigation (MDL No. 1840) (D.Kan.)

provide to originating courts after remand. The whole point of the bellwether process is to allow the parties and the court to develop pretrial materials from which future trials can be conducted in a streamlined manner. For example, establishing a common set of exhibits and deposition designations that could be used in any future trials would streamline pretrial proceedings.

B. Plaintiff Recommendation

If *Lexecon* is not waived by a bellwether plaintiff, it can be more efficient to have the MDL judge sit for an intra-circuit or inter-circuit assignment rather than have a case tried by a court unfamiliar with the litigation.

Remand to a new judge can lead to delays because the court has to get up to speed not only on the factual issues, but also the legal issues. Additionally, there is a vast difference in the time to trial across the federal districts. For example, in 2018, the average time to trial in the District of Massachusetts was 31.9 months compared to 12.4 months in the Eastern District of Virginia.[6] Cases that are sent for remand would likely get a shorter time since the majority of discovery is complete, but this data highlights that once a case is sent for remand, they do not automatically get a court date, which delays the ability to obtain a representative verdict.

Inter- and intra-circuit assignment enables the parties to take advantage of the knowledge the transferee judge acquired during the course of the MDL and prevents a "remaining case from languishing in the transferor court."[7]

IV. SELECTION PROCESS FOR MDLs WITH INDIVIDUAL CLAIMS AND PUTATIVE CLASSES

A. Plaintiff Recommendation

Much has been written about the creation of a bellwether pool for individual trials, but little has been written on how to proceed when the MDL has a large number of both individual and putative class claims. We recommend selecting a discovery pool similar to what was contemplated in the *Syngenta* MDL, which had a mix of both individual and class plaintiffs.[8] In *Syngenta,* Plaintiffs originally filed two master consolidated class action complaints; one complaint covered producer plaintiffs, with fifty-two named class representatives in twenty-two states asserting claims under the laws of each of those states. The other complaint covered non-producer plaintiffs, with four named class representatives, each asserting a number of state-law claims. Both complaints asserted class-action claims under federal law. There were also several hundred individual cases filed

---

[6] UNITED STATES DISTRICT COURTS, *National Judicial Caseload Profile*, 4, 68, https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2018/09/30-1 ("Data Table").

[7] *See* Duke Principles Best Practice 14C, at 112.

[8] *See generally, In re Syngenta AG MIR 162 Corn Litig.,* (MDL No. 2591) (D. Kan.), Scheduling Order #2: (Oct. 21, 2015) (ECF #1098).

in the MDL under various states' laws, and finally, there was a master complaint filed on behalf of two milo farmers. Judge John Lungstrum ordered a diverse initial bellwether discovery pool of at least sixty-three plaintiffs from the following groups:

- the five non-producer plaintiffs who filed suit;
- the two milo plaintiffs named in the milo master complaint;
- a sampling of six producer plaintiffs from eight of the twenty-two states at issue, with each side selecting four states on an alternating basis, with plaintiffs selecting first, and further with each side selecting three plaintiffs per state on a similar alternating basis; and
- the named class representative(s) in each of the eight selected states.

If a producer plaintiff was selected as a bellwether plaintiff (whether for discovery or later for trial) and voluntarily dismissed its case, the selecting party was able to identify a replacement. For the producer plaintiffs, Judge Lungstrum requested each party provide a report with "concise but reasonably detailed information about why the parties believe their selections are representative of the range of cases involved."[9] From this pool, a narrower pool was selected for the trials. This approach allowed for a variety of cases to be worked up for trial in a focused and efficient manner, and afforded counsel for the parties significant input into the trial selection process while the court had the final say. Importantly, even if the MDL court ultimately denied class certification (which it did not), there were several individual bellwethers from various states ready for trial. Because the court certified several state-wide classes of farmer claims, those cases were set for trial first in the MDL.

V. SETTLEMENT AND DISMISSAL BEFORE TRIAL

A. Plaintiff Recommendation

A large amount of time and expense goes into working up a bellwether case for trial. The massive effort is worth it if a verdict comes back in your side's favor, and even an unfavorable verdict can help move the litigation along and be good preparation for the next trial. The Manual for Complex Litigation states the goal of the MDL trial is to "produce a sufficient number of representative verdicts" and to "enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group

[9] *Id.* at 7.

basis."[10] This goal cannot be met if a case is worked up for trial but is settled before a verdict is obtained.

Because a settlement does not allow the parties to learn from the trial experience or gain valuable information from a jury verdict, the bellwether trial selection process should account for what happens if a settlement is reached on the eve of trial. In the *Actos* MDL, it was required that any case nominated for trial provide a certification by counsel that they intended to try the case and not settle or dismiss the case and certify they had no reason to believe the case would settle individually before trial.[11] We agree that once a case is picked for trial, the goal should be trial, but if the case is resolved prior to a verdict, the parties must agree to the disclosure of the settlement amount to all court designated settlement counsel and the settlement master or mediator to inform the relevant parties of the potential value of the cases.

B. Defense Recommendation

Defendants usually object to providing details of settlements before trial. That is because cases settle for any number of reasons, and settlements often do not show the actual value of a case. A defendant may settle simply to avoid the burden and expense of a trial. Requiring disclosure of settlements would dissuade parties from settling in many instances because neither side wants to be perceived as having capitulated in a large MDL.

While there are many good-faith reasons for settling or voluntarily dismissing a selected bellwether case before trial, there can be manipulation of the bellwether process if proper safeguards are not established early in the selection process. We have found that the bellwether selection process works more efficiently and fairly where the parties work together to select bellwether trial cases.

One criticism of MDL litigation is the filing of too many non-meritorious cases, which leads to a high percentage of bellwether cases being dismissed.[12] One way to curb such filings is to penalize plaintiffs who dismiss bellwether cases without good cause, by allowing the defendant to select the replacement bellwether case from among the entire case pool.[13]

VI. TYPES OF TRIALS

The most common bellwether trial discussed in the literature is a single plaintiff or single class trial. The single bellwether trial may not always be the most

---

[10] MCL at 19.

[11] *In re* Actos (Pioglitazone) Prod's. Liab. Litig. (MDL No. 2299) (W.D. La.)

[12] *See In re* Mentor Corp. Obtape Trans. Sling Prods. Liab. Litig., 2016 WL 4705807 (MDL No. 2004) (M.D. Ga. 2016) (noting that MDL products liability actions "have the unintended consequence of producing more new case filings of marginal merit, many of which would not have been filed otherwise.").

[13] *See generally*, DUKE L. CENTER FOR JUDICIAL STUDIES, *Guidelines and Best Practices for Large and Mass-Tort MDLs* (2014).

effective or efficient trial type for the MDL, particularly when there is a large number of case types or classes. Other options are potentially available, so we briefly discuss the other bellwether trial options.

A. Consolidated Class Trials

1. Plaintiff Recommendation

In a case with putative classes from multiple states, we recommend trying more than one class at a time to efficiently obtain multiple representative verdicts. A common opposition by defendants is that class claims should not be combined for trial because of differences in the law of each state and the likelihood of confusing the jury. Plaintiffs do not believe any prejudice exists because jury confusion can be mitigated by jury instructions.

The issue of consolidating class trials occurred in the *Syngenta* litigation. That MDL was comprised of class cases from twenty-two states with seven class cases remaining in the bellwether pool after the trial of the Kansas class. Plaintiffs urged the court to consolidate the class trials and Defendants objected that they would be prejudiced because combining the classes would confuse the jury due to the differences in state law claims. Judge Lungstrum relied on Federal Rule 42(a) and 42(b) to weigh interests of convenience, expedition, and economy against the potential for prejudice or confusion in deciding whether and how to combine the classes' claims for trial.[14] The Court concluded that the potential for prejudice or confusion did not require seven separate class trials, and the efficiency achieved in combining multiple state-wide classes in a single trial outweighed the potential problems. The court elected to try no more than two statewide classes at a time, grouping the states based on the similarity in state law and the type of claims asserted.[15] Multistate-wide class trials provide an efficient method to try several types of claims that can inform both the settlement value of similar claims, including the likelihood and settlement value of punitive damages.[16]

Individual plaintiff claims can also be consolidated, and, similar to class trial consolidation, can be an effective means to test claims and allow for several representative verdicts at a time rather than waiting months or years to receive such verdicts. Consolidation can be appropriate when common evidence dominates (MCL § 11.631) and has been done in a number of product cases.[17]

2. Defense Recommendation

Cases should not be consolidated for trial as part of the bellwether process. The goal of the bellwether process is to achieve valid results for the parties to

[14] *See In re Syngenta*, Memorandum and Order (July 6, 2017) (ECF #3319) (court may order separate trials "[f]or convenience, to avoid prejudice, or to expedite and economize").
[15] *Id.* at 4.
[16] *Id.* at 7.
[17] *See*, e.g., Order Consolidating Bellwether Cases For Trial, *In re* DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig., MDL 2244, (N.D. Tex., January 18, 2016) (consolidating five cases

assess strengths and weaknesses, not to resolve a large number of cases. Courts have recognized that consolidated trials are generally inappropriate until (if at all) enough individual trials have been conducted and various case-specific issues determined.[18]

B. Bench Trial/Mini Trials

1. Defense Recommendations

Alternative approaches to bellwether trials that are less expensive exist that can help develop critical information for litigants. The bench trial is one alternative approach. In class actions, the parties can consent to a bench trial on certified issues, resolving liability and damages issues separately. If a certified issue is resolved in the defendant's favor, it would be necessary for the court (or other courts from which the cases were transferred) to try any of the other issues raised by individual class members' claims. The potential savings in terms of time and resources could entice the parties to negotiate a settlement. Bench trials serve several other advantages. First, they allow the parties and the judicial system to benefit fully from the court's knowledge of, and familiarity with, the certified issues. Second, they conserve the considerable resources necessary to empanel and educate a jury on the issues to be tried. Third, they afford the court maximum flexibility to resolve the certified issues on the facts, on the law, or a combination of the two. Given the United States Supreme Court's recent decision in *Merck Sharp & Dohme Corp. v. Albrecht*,[19] which required that judges, not juries, decide for preemption purposes whether clear evidence shows that the FDA would not have approved of a drug label change, preemption is a potential issue an MDL court could try.[20]

Parties could similarly agree to conduct mini-trials or summary trials, conducted either by the MDL judge or by consenting to a federal magistrate

---

for bellwether trial where the common issues of law and fact prenominated); see also *In re* Boston Scientific Corp. Pelvic Repair System Prods. Liab. Litig., (MDL No. 2326) (S.D. W. VA) (consolidating four plaintiffs' claims in *Campbell* and consolidating four plaintiffs' claims in *Eghnayem*).

[18] *See In re* Levaquin Prods. Liab. Litig., No. 08-1943, 2009 U.S. Dist. LEXIS 116344, at *9–11 (D. Minn. Dec. 14, 2009) (internal quotation marks and citations omitted); see also Pretrial Order # 71 at 2, *In re* C.R. Bard Inc., Pelvic Repair Sys. Prods. Liab. Litig., (MDL No. 2187) (S.D. W. Va.) (Mar. 7, 2013) (denying plaintiffs' motion to consolidate three plaintiffs' cases or, in the alternative, "seat three juries in a single trial but deliberate separately and render separate verdicts" as the first bellwether trial in product-liability litigation involving pelvic implant surgery).We note that issues have developed involving multi-plaintiff trials *after* the bellwether trials have occurred. Issues attendant to courts conducting multi-plaintiff trials are beyond the scope of this article. From the defense perspective, we believe that consolidated multi-plaintiff trials are unfair and prejudicial to defendants. *See*, *e.g.*, Guenther v. Novartis Pharm. Corp., No. 6:08-cv-456-Orl-31DAB, 2012 WL 5398219, at *2 (M.D. Fla. Oct. 12, 2012) ("[The MDL] Panel has repeatedly rejected attempts to consolidate cases for trial and has ordered multi-plaintiff case complaints to be severed because the claims of individuals plaintiffs were not suited for consolidation").

[19] 139 S. Ct. 1668 (May 20, 2019).

[20] *See In re* Zofran (Ondansetron) Prods. Liab. Litig., 368 F.Supp.3d 94, 116-17 (D. Mass. 2019)

judge.[21] Mini-trials are nonbinding trials on single issues. Summary trials involve impaneling a jury from the federal jury pool to hear an abbreviated presentation of evidence. Summary trials often last no more than a day and are non-binding. Summary trials may be conducted by the lawyers where they provide a presentation of the key evidence that would be heard at trial, or they may involve live testimony from the most critical witnesses. Because "real juries" are involved, parties may walk away with an accurate sense for how their claims will be received.

C. Trial Logistics: Timed Trials

1. Plaintiff Recommendation

Plaintiffs' counsel cautions against timed trials and recommends instead a detailed trial plan with estimates of time based on likely live and videotaped depositions and committing to a number of days in which plaintiffs will complete their case. The time allotted to plaintiffs should be more than for defendants because: (1) plaintiff bears the burden of proof and essentially has the responsibility to present any background or foundational evidence for the jury's comprehension of the subject matter; and (2) defendants attempt to introduce their own favorable evidence into the plaintiffs' case, which inevitably makes their case shorter. Further, the use of a time clock presents plaintiffs with difficult choices regarding how much time to leave themselves for defendants' case-in-chief, and would give defendants the ability to game the system. For example, defendants can literally wait to call a key witness until they *know* plaintiffs have little or no time left for cross-examination.

A time clock was contemplated in *Syngenta*, and the court sided with Plaintiffs' recommendation that a time clock was not needed. Judge Lungstrum explained that "[b]ased on its 25 years of experience trying cases, the Court agrees with plaintiffs that in the normal course, the plaintiff's case-in-chief exceeds that of the defendant." The court then provided a detailed plan that contemplated the number of days for trial testimony (giving the plaintiffs an extra day) rather than using a time clock.[22] The class trial finished right on time.

2. Defense Recommendation

Timed trials can provide, in appropriate cases, speedy and fair justice for the parties, witnesses, juries, and the courts. Lawyers who have participated in timed trials no doubt appreciated the discipline it requires to plan who will actually

(pre-*Albrecht* decision; noting that it was unclear if the court should conduct an evidentiary hearing or "what amounts to a lengthy bench trial" to resolve factual issues relevant to preemption), *vacated in part* (July 15, 2019). As a general matter, affirmative defenses like statute of limitations, laches, and estoppel would be prime candidates for bench trials or mini-trials and could provide valuable insight that would apply to a large set of similar cases.

[21] Mini-trials and summary trials also present the opportunity for younger lawyers to get on their feet and obtain trial experience in front of federal judges.

[22] *See Syngenta* "Order Concerning Time Limits" (May 24, 2017) (ECF #3182).

testify and for how long. Without time limits, the most complex cases last the longest and are tried to the least qualified jurors. Timed trials would therefore provide corporate clients with greater comfort in a jury pool. The most important benefit of timed trials is that they focus the parties, witnesses, and the court on the real issues in the case. Even where the judge does not explicitly agree to time the trial, if the judge allocates a fixed number of days for trial, we are often able to agree with our adversary to keep time and divide it between the two sides. This is just as practical to facilitate timely completion of the trial in an efficient and focused manner. A good example of this is Judge Matthew Kennelly's order allocating a total of seventy hours for the parties to try the first Auxilium-only bellwether trial in *In re Testosterone Replacement Therapy Products Liability Litigation.*[23] After developing a "good deal of familiarity with the cases from presiding over extended pretrial proceedings," the court rejected the parties' request for three weeks, finding that the estimate "assumes unnecessary repetition of points and presentation of unnecessarily cumulative evidence."[24]

D. Expert/*Daubert*

1. Defense Recommendation

It is critical for litigants and courts to design the bellwether selection pool of trial cases toward producing beneficial results for the entire set of cases. Essential to the MDL process is the goal of consistency, particularly as it relates to expert and *Daubert* issues.[25] *Daubert* rulings have a critical impact on MDLs, because these rulings can help defendants avoid large numbers of non-meritorious cases.[26] If one of the ultimate goals of bellwether trials is to help inform the parties of the estimated value of the litigation, *Daubert* rulings at an early stage in the MDL and before the first bellwether trials begin will give litigants a strong sense for which types of claims will reach a jury and, accordingly, ballpark valuations if settlement is contemplated.[27]

One method of ensuring that bellwether trials operate efficiently is to limit expert testimony to actual opinions, rather than allowing the parties to build up an expert's credibility with long, unnecessary background questions. We have tried cases where the court has required the parties to submit a one-page narrative with the expert's background that will be read to the jury, leaving only the substantive opinions for the expert to testify about during trial. This is very effective, particularly in product liability cases where complex scientific expert testimony is necessary to prove causation. Jurors are much more receptive to expert testimony

---

[23] (MDL No. 2545) ECF #2183, CMO No. 72 (N.D. Ill. 2017).
[24] *Id.*
[25] *See generally*, Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993).
[26] *See generally*, Christopher Gramling, et al., Early Assessment of Claims Can Help Reduce the MDL Tax, Critical Legal Issues: Working Paper, No. 216 (March 2020).
[27] *See In re* Genetically Modified Rice Litig., (MDL No. 1811) (E.D. Mo.) (As part of the first bellwether trial, the court issued a detailed opinion on summary judgment and *Daubert* motions, which were applicable to a large part of subsequent cases).

when they do not have to endure hours of listening to an expert's educational and research background.

E. Witness Testimony

1. Plaintiff Recommendation

There is no doubt that jurors and courts prefer live testimony over video depositions (or worse, reading deposition testimony). If bellwether trials are supposed to be the forum in which litigants present their best evidence before a jury, it is imperative that critical witnesses appear live absent extraordinary circumstances. For this reason, we favor allowing live testimony via contemporaneous transmission under Federal Rule of Civil Procedure 43 in instances where critical witnesses refuse to appear in person for no good reason. For example, in *In re Actos (Pioglitazone) Products Liability Litigation*, the court instructed the parties in its scheduling order that it "expect[ed] the parties to make significant efforts to produce witnesses for trial rather than relying on deposition testimony."[28] Although the parties recognized that Rule 45 placed the witnesses outside the court's subpoena power, the court nonetheless ordered those witnesses to testify via contemporaneous transmission by appearing at a federal courthouse within 100 miles of their location for videotaping.[29]

2. Defense Recommendation

Defendants generally oppose permitting remote transmission of video depositions where appropriate and the need for and unavailability of witnesses may be anticipated. The advisory committee notes of Federal Rule of Civil Procedure 43 make clear that remote transmissions are a rare exception when prior deposition testimony is not available, not a go-to procedure to be used whenever the plaintiff already has deposition testimony but simply desires a more polished presentation.[30]

---

[28] *In re* Actos (Pioglitazone) Prods. Liab. Litig., 2014 WL 107153, at *4 (W.D. La. Jan. 8, 2014).

[29] *Id.* at *10-11; *see also*, *In re* DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig., 206 WL 9776572 (N.D. Tex. Sept. 20, 2016).

[30] *See, e.g.,* Roundtree v. Chase Bank USA, 2014 WL 2480259, at *2 (W.D. Wash. 2014) (finding "no reason . . . to consider whether this situation merits the *exceptional* use of video transmission of testimony") (emphasis added); *In re* Prograf Antitrust Litig., 2014 WL 7641156, at *5 (D. Mass. 2014).

Rule 43 makes it clear that remote transmissions should be only be ordered in exceptional circumstances.

F. Jury Feedback

1. Plaintiff Recommendation

Feedback from the jury can be immensely helpful for assessing the strengths and weaknesses of a case for purposes of resolution and to prepare for future trials. We encourage both sides to request and recommend the court allow the parties to speak to the jury after the verdict. In *Syngenta,* the court allowed both parties to question the jury after the Plaintiff verdict of $217.7 million. One of the questions Plaintiffs posed was why the jury gave the full compensatory damages requested but neglected to assess punitive damages. Jurors also were allowed to independently speak to lawyers if they wished, which allowed for more detailed questions about specific key issues. After the chance to discuss the result with the jury, both sides used the information to alter their strategy for the next trial.

The discussion with the jury can also be helpful in a scenario where the jury verdict form asks a specific causation question prior to general causation. If a jury finds for the defendant on the first question of specific causation, then plaintiffs do not know if the jury had issue with the general causation evidence. The ability to question the jury after the verdict can be helpful to determine the strength of the causation evidence.

2. Defense Recommendation

Jury feedback can provide some of the greatest insight into a case's strengths and weaknesses. As Bill Gates has said, "We all need people who will give us feedback. That's how we improve."[31] We agree with our colleagues that the parties should request and recommend that the court allow the parties to speak to the jury after a verdict. The best research we can do relating to experts is jury feedback. You can watch an expert testify at trial or read trial transcripts, but you still do not know how they are perceived by the jury. Over the years, we have been amazed that we went through an entire trial certain of an issue or piece of evidence only to have the jury surprise us with something completely different.

CONCLUSION

When faced with developing a bellwether trial plan we hope the recommendations provided in this article will be of good use. The bellwether selection plan will determine the number of cases and causes of actions to be tried, which will in turn dictate which type of trial should be chosen. The logistics of the trial cannot wait until the months leading up to trial and should instead be

[31] Bill Gates, *Teachers Need Real Feedback*, TED (May 2013).

determined early so the parties can appropriately plan. Adjustments to the bellwether pool should occur based on developments during discovery. After the first bellwether trial is complete, the parties and the court should assess how well the trial plan worked and should make changes and tweaks to the plan as needed.

The number of MDLs has increased immensely over the past decade and we foresee this trend will continue. The proliferation of MDLs increases the likelihood of bellwether trials. These future bellwether trials will provide plenty of opportunities to further test and assess the recommendations set forth in this article. Our hope is that more literature can be written on these topics in the coming years as these theories and recommendations are put to the test.