2021

MDL Cartography: Mapping the Five Stages of a Federal MDL

Ryan Hudson

Rex Sharp

Nancy Levit
University of Missouri - Kansas City, School of Law

MDL CARTOGRAPHY: MAPPING THE FIVE STAGES OF A FEDERAL MDL

Ryan C. Hudson,* Rex Sharp,** & Nancy Levit***

I. INTRODUCTION

From afar, watching the transfer of tens, hundreds, or thousands of federal lawsuits into a single consolidated proceeding before one federal judge—known as an MDL (a multi-district litigation proceeding)—looks like chaos. It has been said to resemble a thundering herd of animals on another continent, like in the pages of *National Geographic*. We like this comparison. Exotic animal migrations and MDLs share many similarities. Take, for example, the annual wildebeest migration in East Africa. Every year, over a million wildebeest traverse hundreds of miles across Tanzania and Kenya in what "is often described as a set circuit."[1] Seeking rainfall and lush vegetation, the wildebeest (like MDL plaintiffs) travel across the Serengeti while crocodiles and lions (like MDL defendants) seek to cut their trip short.[2]

This Migration (as it is known) has countless variations depending on rainfall, vegetation, predators, and standing water.[3] As one wildebeest expert explains, it "is not a continuously forward motion. They go forwards, backwards, to the sides, they mill around, they split up, they join forces again, they walk in a line, they spread out, or they hang around together."[4] That sounds a lot like litigation, too. Indeed, when it comes to both wildebeest and MDLs: "You can never predict with certainty where they will be; the best you can do is suggest likely timing based on past experience, but you can never guarantee the Migration [or pattern of an MDL] one hundred percent."[5]

At the same time, there is a reliable pattern that the wildebeest follow every year. Despite variations, they travel the same clockwise circuit across East Africa.[6] The Migration is reliably charted, tracked, and mapped. As a result, scientists can offer increasingly accurate predictions about wildebeest behavior. They can spot trends. They can draw connections. They can see interrelationships. They can calculate how changes in one variable might make a significant difference in another. In other words, even though every Migration is different, there is a method to the madness. The Migration has a direction, a systematic pattern, and what aerial

---

* Ryan C. Hudson is a partner at Sharp Law, LLP, in Prairie Village, Kansas..

** Rex Sharp is the founding partner at Sharp Law, LLP, in Prairie Village, Kansas.

*** Nancy Levit is the Associate Dean for Faculty and Curators' and Edward D. Ellison Professor of Law at the University of Missouri-Kansas City School of Law.

[1] *A Beginner's Guide to Africa's Great Wildebeest Migration*, EXTRAORDINARY JOURNEYS, https://www.extraordinaryjourneys.com/blog/a-beginners-guide-to-africas-great-wildebeest-migration/ (last visited Apr. 4, 2020).

[2] Paul Steyn, *How Does the Great Wildebeest Migration Work?*, NATIONAL GEOGRAPHIC SOC'Y NEWSROOM (Feb. 8, 2017), https://blog.nationalgeographic.org/2017/02/08/how-does-the-great-wildebeest-migration-work/.

[3] *A Beginner's Guide to Africa's Great Wildebeest Migration*, *supra* note 1 (explaining that "every year is different, and, in fact, every week can be different.").

[4] *Id.*

[5] *Id.*

[6] *Id.*

photography reveals to be "a remarkable level of organization in the structure of the wildebeest herds."[7]

MDLs, too, have a standard structure, even though every MDL unfolds differently. Individual variations of MDLs do not prevent capturing their procedural framework or from charting, tracking, and mapping their overall structure. To date, however, the MDL process has been described only textually, not visually or graphically. Simply put, nobody has mapped this increasingly important process.

Cartography is the science or process of drawing maps.[8] Importing cartography into the study of MDLs, this article maps out the five procedural stages of a federal MDL. Through our MDL cartography, we aim to make the process of working on MDLs easier, faster, and more reliable—with less confusion, anxiety, and risk of error.

We begin in Section II with a general overview and a quick recap of trends of federal MDLs for those new to MDLs. In Section III, we then offer the actual cartography and provide a visual map of the five procedural stages of a federal MDL. Next, in Section IV, we discuss the five goals we seek to meet by applying cartography to MDLs. Finally, we conclude in Section V on a note of optimism about the prospects for applying the intellectual tools of cartography and systems thinking to make the migratory process of MDLs more transparent, understandable, and predictable.

II. OVERVIEW OF FEDERAL MDLs

In a federal MDL proceeding (usually, simply called an "MDL"),[9] all cases pending in all federal district courts with at least one common question of fact are transferred to a single federal district court judge for consolidated pretrial proceedings.[10] After coordinated discovery is completed, each case is supposed to be remanded back to its home court (the one that transferred it) for trial.

The MDL process is an ecosystem and a world of its own. Many lawyers—even those who practice regularly in federal court—have never experienced an MDL. Even more lawyers—including those who have already participated in an

---

[7] *How Does the Great Wildebeest Migration Work?*, *supra* note 2 (altered spelling of "organization").

[8] *Cartography*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/cartography (last visited Apr. 4, 2020).

[9] This article is particular to federal MDLs. A number of states have used informal mechanisms to consolidate litigation. *See generally* Martha Neil, *New Direction for Mass Torts Plaintiffs Lawyers Are Looking at State Courts as Forums for Complex Class Actions*, ABA J.E-REPORT, Mar. 22, 2002, at 6 ("Generally, state courts do not have the formal rules for class actions and multidistrict litigation that exist in the federal courts. As a result, more informal approaches have been used to get these cases consolidated in the state courts. Three different methods have been used: First, similar mass tort cases within a single state have been consolidated so they can be heard by a single judge. Second, there have been efforts among different states to work together to meld parallel litigation. And third, some federal court judges have cooperated with their colleagues on state benches on similar dockets."). It is likely that most state consolidated litigation follows the same basic structure as the federal system, but we do not undertake that exploration in this article.

[10] Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is not Possible*, 82 TUL. L. REV. 2205, 2205-06 (2008) (discussing origin of the federal MDL).

MDL—are mystified by the lingo, the process, and what often turns into a procedural maze. Law schools devote sparse attention to MDLs. In fact, as Yale Law School Professor Abbe Gluck has pointed out, "[t]he average number of pages devoted to MDLs in the leading first-year civil procedure casebooks is *two*."[11]

Despite this lack of attention, the number of federal MDLs has exploded.[12] So, too, has the number of federal cases swept into an MDL, as depicted in this chart showing the total number of cases that make up each of the top ten largest MDLs as of July 2019[13]:

Actions Pending	**Docket No.**	**MDL Name**
29,290	MDL-2592	IN RE: Xarelto (Rivaroxaban) Products Liability Litigation
12, 775	MDL-2789	IN RE: Proton-Pump Inhibitor Products Liability Litigation
12,641	MDL-2738	IN RE: Johnson & Johnson Talcum Powder Products
11,396	MDL-2740	IN RE: Taxotere (Docetaxel) Products Liability Litigation
9,893	MDL-2244	IN RE: Pinnacle Hip Implant
8,423	MDL-2641	IN RE: Bard IVC Filters Products Liability Litigation
5,627	MDL-2570	IN RE: Cook Medical, Inc., IVC Filters
5,438	MDL-2545	IN RE: Testosterone Replacement Therapy Products
5,145	MDL-2666	IN RE: Bair Hugger Forced Air Warming Devices Products
2,918	MDL-2179	IN RE: Oil Spill by the Oil Rig "Deepwater Horizon"

In total, the figures are stunning: more than 50% of federal civil cases are now part of an MDL.[14] For this reason alone, the MDL process must be discussed and understood by those who practice in federal court. This is all the more true because having a case swept into an MDL is usually an involuntary occurrence; a client or lawyer does not get to choose to opt out of an MDL.[15]

The MDL process was created in 1968 in reaction to nearly 2,000 antitrust civil actions all related to the same electrical equipment.[16] Congress realized this situation would be repeated in other areas, so it created a forum where all of the

---

[11] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multi-District Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1672 (2017) (emphasis in original).
[12] In July 2019, for example, there were 141,536 cases that were part of 199 MDLs in 46 district courts before 158 different transferee judges. *MDL Statistics Report--Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (July 16, 2019), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-July-16-2019.pdf.
[13] *Id.*
[14] Alan Fuchsberg & Alex Dang, *MDLs Are Redefining the US Legal Landscape*, LAW360 (Oct. 30, 2019), https://www.law360.com/articles/1214276/mdls-are-redefining-the-us-legal-landscape (emphasis in original).
[15] Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 GA. L. REV. 1375, 1390 (2019) (noting the absence of an opt-out provision in the MDL statute, 28 U.S.C. § 1407).
[16] *Id.* at 1375, 1375 n. 20.

similar civil claims could be coordinated and consolidated together in one federal district court for pre-trial proceedings (primarily to coordinate on discovery),[17] and then shipped back once pre-trial proceedings were completed. Others have explained the distinction between mass actions (individual cases accumulated) and class actions,[18] although MDLs can involve either or both mass actions and class actions. Also, "[i]n contrast to the stringent rules that govern class actions, [an] MDL is a looser and more flexible structure allowing for transfer and consolidation based on pragmatic considerations."[19]

Today, the entire MDL process is set forth in 28 U.S.C. § 1407, which explains the mechanics of how MDLs begin, operate, and conclude:

> Under the MDL statute, 28 U.S.C. § 1407, thousands of cases pending around the country that share a common question of fact can be transferred to a single district judge in any district for pretrial proceedings. The judge is chosen by a panel of judges selected by the Chief Justice of the United States called the Judicial Panel on Multidistrict Litigation (JPML). After such pretrial proceedings, the cases are to be remanded to the courts from which they came for trial, but this rarely happens--less than 3 percent of the cases ever exit the MDL court. Instead, most of the cases are either settled or resolved in the MDL proceeding, meaning that, as in most federal litigation, pretrial proceedings are the whole ballgame. While the cases are in the MDL court, the MDL judge has all of the powers that the transferor court would have, including the power to decide dispositive motions, and

[17] MDL courts have the power to decide some questions, such as whether to certify a class or compel arbitration, but the principal focus of MDL decisions are centralized and consolidated discovery. Also, it is rare that the federal appellate courts take up review of these issues. Gluck, *supra* note 10, at 1708-09.

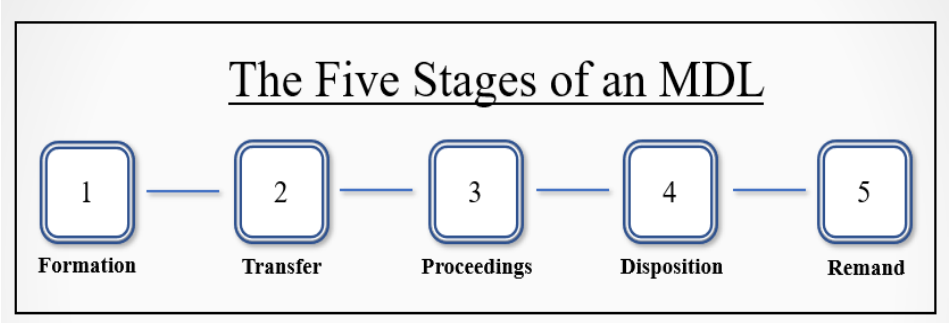
[18] *See, e.g.*, Aimee Lewis, *Limiting Justice*, 31 REV. LITIG. 209, 215 (2012) ("MDLs are not class actions. One key difference between class actions and MDL cases is that in MDL cases, all of the cases transferred to a MDL court are already pending in federal courts. This is not the case in class actions, which cover all members of a class regardless of filing.").

[19] Sherman, *supra* note 10, at 2209.

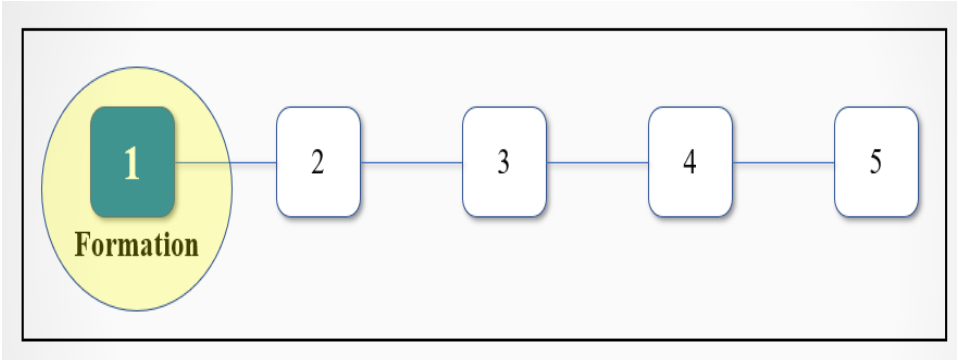
typically, the litigation is resolved by a mass-settlement agreement reached within the MDL.[20]

III. MAPPING THE FIVE STAGES OF AN MDL

There are five essential stages of an MDL:



Not every MDL will reach all five stages, but some variation of these five stages will occur in every MDL.[21]Let's take a look at each of the five stages. The first stage is **formation** of the MDL.



As set forth in 28 U.S.C. § 1407, an MDL proceeding can be formed either by a motion of a party or by the JPML. A motion to create an MDL can be filed by either a plaintiff or a defendant in one of the underlying cases. It is a common misconception that only a defendant can seek to have an MDL created.

At a minimum, there must be two or more cases in more than one federal judicial district in order for the provisions of 28 U.S.C. § 1407 to apply. If there

---

[20] Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168–69 (2018).

[21] As with the wildebeest migration patterns, we are not guaranteeing either 100% accuracy or a 100% prediction. Again, as with galloping wildebeest, the cases in an MDL rarely travel in a "continuously forward motion. They go forwards, backwards, to the sides, they mill around, they split up, they join forces again, they walk in a line, they spread out, or they hang around together." *A Beginner's Guide to Africa's Great Wildebeest Migration*, *supra* note 1.

are, and these cases involve "one or more common questions of fact," then an MDL proceeding might be formed to coordinate the pre-trial matters of all the cases at once. That is the essential role of an MDL—to streamline, harmonize, and expedite in one forum the discovery of multiple different cases pending in multiple federal district courts.[22] This avoids duplication of efforts in cases across the country. All the cases that are transferred from their home courts (known as the transferor courts) to the MDL court (known as the transferee or MDL court) remain open; they are stayed pending either disposition or remand back from the MDL court.

Every MDL proceeding is formed upon the review and decision of the JPML, which sits in Washington D.C. and is comprised of seven federal judges (both district court and circuit court) who each serve staggered seven-year terms.[23] The seven judges on the JPML also travel to hold hearings at locations around the country, seemingly about every two months. At these hearings, the parties have a few minutes of oral argument, following on the heels of briefing, in which they seek to persuade the JPML either to create or deny an MDL. The term "MDL" really refers to the assignment of the MDL case (given a separate case number, e.g., 19-md-3292) to a federal district court judge who receives all of the transferred cases and manages the pre-trial and discovery matters of all the transferred cases. The MDL judge might not even have one of the existing federal cases that are transferred to the MDL, and there is no requirement that the cases being transferred could be properly filed (based on personal jurisdiction or venue rules) in the MDL transferee court. (Based on comments made by judges, the JPML typically inquires whether the judge who receives the MDL cases is interested in serving as the MDL judge; the receipt of an MDL case is considered an honor reserved for the most sophisticated judges.)

In deciding whether to form an MDL, the JPML follows the statutory factors set forth in 28 U.S.C. § 1407, including "the convenience of parties and witnesses" and whether the formation of an MDL "will promote the just and efficient conduct" of the underlying cases.[24] The JPML has an extensive website that includes the rules, procedures, and other important information, such as the calendar of JPML hearings and dockets. It also issues case law that sheds light on what factors it considers when deciding whether to form an MDL. There is a definite MDL bar of attorneys who focus and specialize in this area of the law.[25]

---

[22] Sherman, *supra* note 10, at 2206 ("Coordinated discovery was the principal benefit, insuring that all the cases could share discovery that would be rationally scheduled and avoid wasteful repetition.").

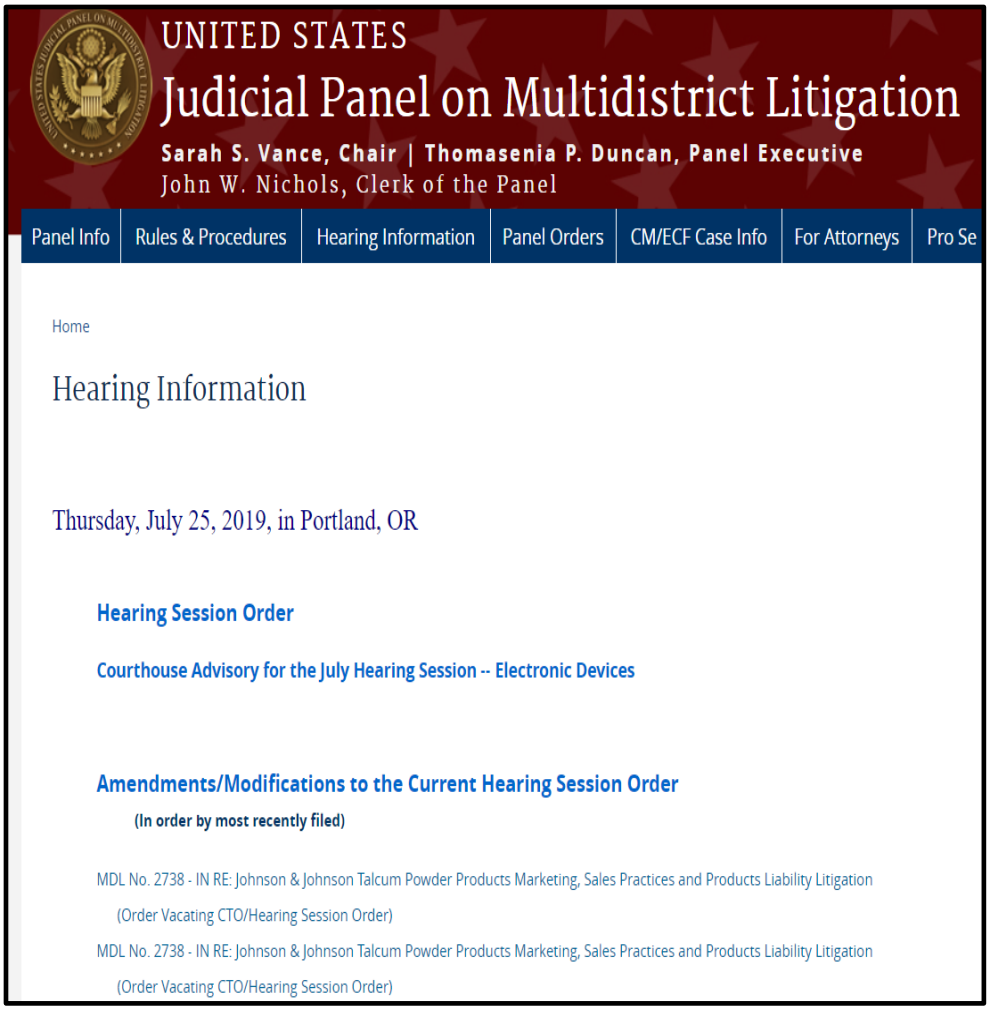
[23] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2226-27 (2008).

[24] 28 U.S.C. § 1407 (2020).

[25] See, for example, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974), which is a classic article, in which Professor Marc Galanter described the systemic disadvantages faced by individual plaintiffs without resources ("one-shotters") facing off against well-funded and experienced defendants ("repeat players"); Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019).

Here is a snapshot of the JPML website[26]:

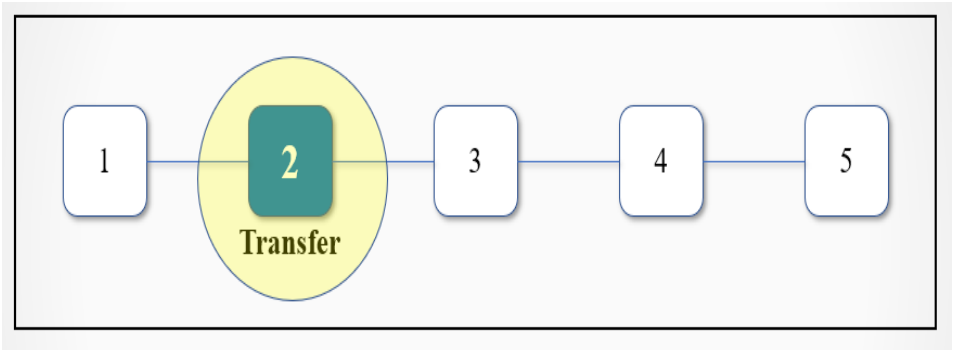
FIGURE 1: the JPML Website



The second stage is **transfer** of the cases into the MDL.

---

[26] *Judicial Panel on Multidistrict Litigation*, https://www.jpml.uscourts.gov/hearing-information (last visited Jan. 18, 2020).



If the JPML decides there is a sufficient need to form an MDL to handle a docket of cases, it next has to make two decisions: where to send the case (which federal district court), and to which judge to assign it. This is a mysterious process that ultimately occurs behind the scenes knowable only to the judges involved. Much speculation goes into predicting where cases will go and who will be assigned as the judge. An empirical study of all MDL court assignments over a five-year period (2012-2016) indicates that the JPML tends to follow the preferences of the parties when they agree on where to consolidate the cases.[27] When the parties disagree, the study found that "the Panel sides with plaintiffs and defendants roughly equally."[28]

Once the MDL has a federal district court (e.g., the District of Kansas) and a judge (e.g., the Honorable John Lungstrum), the transferor courts transfer their cases to the MDL court (the transferee court). The underlying cases are stayed—not dismissed—in their home courts. Remand back to the home court following the pretrial MDL proceedings is mandatory under the 1998 Supreme Court case known as *Lexecon*.[29] Or, if a party consents to not being remanded (i.e., through a "*Lexecon* waiver") the MDL judge can adjudicate the cases in full.

Later filed cases are known as "tag-alongs." If it looks like a later filed case relates to or falls within the defined scope of the MDL, then the JPML will issue a Conditional Transfer Order ("CTO"), and these cases will be transferred into the MDL unless a party objects, in which case a briefing schedule will follow to determine whether the case should tag along and join the MDL. Another option is to "direct file" a case in the venue of the MDL court (e.g., the District of Kansas). This sometimes draws a motion to dismiss for lack of personal jurisdiction or for improper venue, depending on the zealousness of the defendant and the underlying facts (e.g., whether the case could be filed in the MDL court aside from the fact the MDL is there).[30]

---

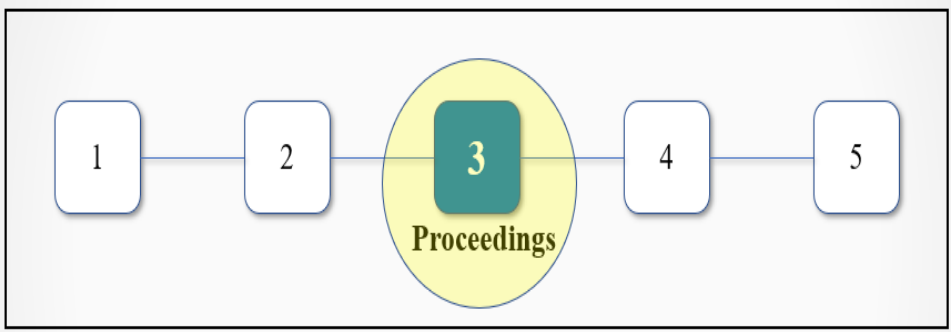
[27] Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. 1713 (2019).

[28] *Id.* at 1745.

[29] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

[30] *See, e.g.*, *In re* Takata Airbag Prod. Liab. Litig., 379 F. Supp. 3d 1333, 1338 (S.D. Fla. 2019) (declining to dismiss direct file complaints to promote judicial efficiency). *See generally* Philip S. Goldberg et al., *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 DUKE J. CONST. L. & PUB. POL'Y 51, 78 (2019) ("The MDL statute itself does not confer

The third stage is the MDL **proceedings** in the transferor court.



Once the MDL lands in the hands of the MDL judge, the MDL case actually ramps up and begins. The process usually begins with a Preliminary Practice and Procedure Order, in which the district court will set a hearing. The initial hearing can sometimes draw hundreds of participants as the parties and their counsel try to figure out the dynamics, who will be involved, and who will take a passive role.

The selection of leadership counsel for the plaintiffs and defendants is critical for operational reasons—both funding and staffing. The defendants get to choose their own counsel and local liaison counsel, but plaintiffs' counsel engage in a competitive selection process with the MDL court. In nearly every MDL, there is fierce competition among the various plaintiffs' counsel to decide upon lead counsel, the steering or executive committee, and the liaison counsel.[31] These roles often fluctuate and sometimes go by different names, but the functional point is that the leadership roles are critically important and determine how the case will be pursued. The leadership lawyers run the case. On top of that, if the cases later settle, the leadership group will be able to obtain a "common benefit fund" fee out of the fees awarded to every case that was part of the MDL.[32] For these reasons, the leadership battle among plaintiffs' counsel is often dramatic.

Plaintiffs' counsel in the various cases to an MDL begin jockeying for position early, as soon as each has a case on file. Plaintiffs' counsel seek to form teams or slates comprised of many cases from many states to appear to have the most plaintiffs, damages, and law firms that support their leadership request. Due to the small pool of MDL plaintiffs' lawyers, most of the competing MDL plaintiffs' lawyers know one another, often working together on other MDLs at the time. Horse-trading positions in already pending MDLs, the MDL at issue, or future

---

jurisdiction for direct MDL filings, but does provide the MDL judge or 'transferee court' with extra-jurisdictional authority to 'exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions' which could, in theory, imply broader jurisdictional authority.").

[31] *See, e.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1460-62 (2017) (describing selection methods for leadership counsel).

[32] *See* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 381-86 (2014).

MDLs are common to get more law firms supporting a leadership slate. Of late, those slates have resulted in competitors combining into Co-Lead Counsel groups, sometimes as many as five Co-Leads and many other "executive committee" members.[33] In an effort to tip the scales, Co-Lead slates often hire local liaison counsel who may know the judge or at least local rules. The Co-Leads slates then go head-to-head vying for the appointment by the MDL court. To the winner goes the entire case, and to the loser, no part of the case: they contribute their clients from various states but rarely have any further involvement in the case.

Notably, there has been a move to diversify the Co-Lead roles to make way for younger attorneys, female attorneys, and attorneys that reflect ethnic diversity. But the duty to fund the litigation for some of those attorneys leaves them subject to having the financial strings and decisions actually being made by non-diverse repeat players, thus disserving the entire interest in diversifying leadership. Litigation funding might help solve that problem until some of these attorneys can gain the necessary experience and financial resources to compete on equal footing.

Once the leadership roles are clarified, the court will typically issue a series of scheduling orders and ask for input regarding the filing of a Consolidated Complaint or Master Complaint (under which all the plaintiffs will proceed) and the ultimate plan for how the pre-trial proceedings will occur. The defendant(s) usually will file a motion to dismiss and seek to stay discovery pending a ruling on that dispositive motion, and the plaintiffs will nearly always oppose the stay of discovery and seek to conduct full-blown discovery as soon as possible. If there are competing or similar state court cases, the court might ask the parties to enter a coordination order.

Discovery rarely begins without a discovery protective order being entered. Although discovery protective orders have been routine for decades in civil litigation, the MDL discovery protective orders tend to be longer and more complex. Defendants seek to keep most of the discovery secret by flagging almost every document as "confidential," tens of thousands documents as "highly confidential," and thousands as "privileged"—veiling these documents with a privilege log, which generates multiple briefs and hearings. Even the process of marking documents as "confidential" and "highly confidential" has developed into a cottage industry of attorney coding because "sealing" the documents from the public domain has become increasingly contentious—and scrutinized.

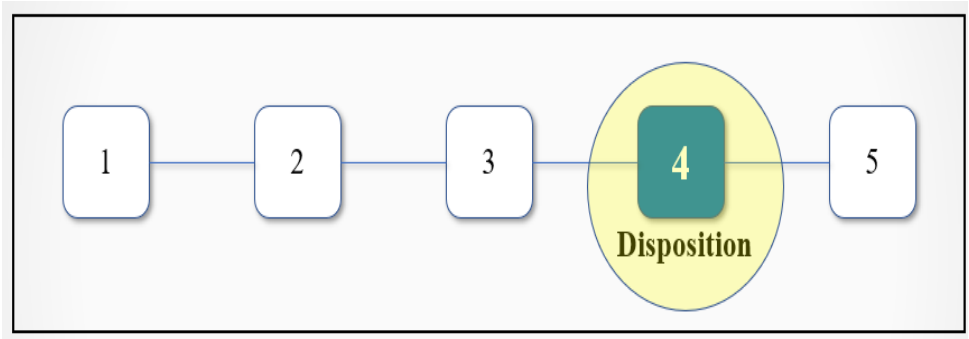
---

[33] As with most things, too many "leaders" can lead to inefficiency. Much of the "layering" of plaintiffs lawyers is directly attributable to fees being awarded on a lodestar basis, so that hours of inefficiency is rewarded both in the total fee awarded (or as a cross-check), and once awarded, split among leadership based on the "hours" invested. Because most MDLs are on the East or West Coast that are the hold-outs to inefficient lodestar fee model, see generally Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, *Contingent Fees in Mass Tort Litigation*, 42 TORT TRIAL & INS. PRAC. L. J. 105, 124-28 (2006), many of the big MDL plaintiffs' firms are built on the same defense counsel pyramid structure to generate maximum lodestar and hammer out the time even in circuits that award fees on a percentage of the common fund basis—if for no other reason than to trot out the hours-invested argument at the time fees are split among leadership. Some MDL courts are appalled at the inefficiency and appoint only one Lead Counsel.

The modern-day explosion of electronically stored information (ESI) usually requires the entry of an ESI order and complex negotiations regarding how the parties will engage in discovery that involves ESI.[34] In MDLs, the most time-consuming part is the production of documents (subject, of course, to assertions of privilege and elaborate privilege logs) and the taking of depositions with these piles of documents in hand. It is common to see dozens of depositions taken, millions of pages of documents produced, and countless disputes over the scope and burdens of discovery. The district court judge and the magistrate judge both nearly always fully engage in the case, holding multiple (sometimes, dozens) of conferences and hearings either in person or by telephone.

Because of the complexity involved, many MDL judges begin the process of mediation early and add a special master to the mix to help facilitate settlement. A special master can serve many different roles, ranging from assistance in technically complex matters, to ESI and discovery issues, to settlement. Or the court might simply help the parties select a mediator.

The fourth stage is **disposition** of the MDL consolidated proceeding.



The discovery period can last roughly a year to upwards of three years (but this can be subject to far more extreme variations either way), depending on the interests and diligence of the parties. It is difficult to forecast how long discovery will take given the extreme complexity of MDL matters and the likelihood of new issues (or additional claims, defenses, or parties) popping up in the midst of discovery.

Once discovery ends, the MDL judge has the option of remanding the case or conducting summary judgment and/or holding a pretrial conference. In a mass action MDL, the summary judgment and *Daubert* motions are usually the most important point in the MDL process. In a class action MDL, the motion for class certification will also be a significant event. Whether at summary judgment or at class certification, the losing party will often approach the table for settlement once

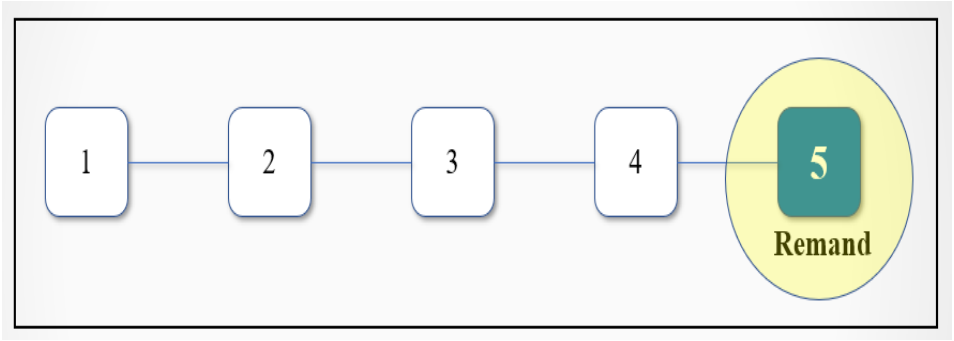
---

[34] *See, e.g.*, *In re* Actos Prods. Liab. Litig., MDL No. 11-md-2299 (July 27, 2012), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/MDL_2299_Court_Orders.pdf (detailing an ESI search and production protocol).

the court has made its ruling. Even though the loser can appeal, it is common to see the case settle as a result of either the decision on class certification or summary judgment. However, if this window of opportunity for settlement is not taken, more of the MDLs have been going to trial with billion-dollar verdicts.[35]

In other words, disposition means one of two things: (1) settlement (usually as a result of the MDL court ruling on summary judgment or class certification) or (2) trial (or, more accurately, trials: one or more class action trials if the MDL is a class action or series of class actions, or, for an MDL involving mass actions, a series of bellwether trials).

The fifth, and final, stage is **remand** back to the transferee courts.



If summary judgment is denied and the cases do not all settle, then the MDL judge has one final step: to remand the cases back to their home courts. With discovery completed, the *Lexecon* rule requires that the cases must return to their home courts for trial.

But this happens less than 3% of the time.[36] One reason for this, known as a *Lexecon* waiver, involves the parties consenting to trial before the MDL judge.[37] In mass action MDLs, the MDL judge will hold test case trials—known as a bellwether (note the spelling) trial – to help the parties gauge the relative strength of their cases.[38] For example, in a mass tort involving hundreds or thousands of cases filed over an allegedly defective medical device, the parties will choose two or three cases to take to trial. From those trial results, they will see, with actual jury verdicts, how their cases will be assessed by juries, not by lawyers. From there, settlement often occurs rapidly because the losing party does not want to risk losing

---

[35] *See, e.g.*, Casey Sullivan, *Judge Orders Dow Chemical to Pay $1.2 Billion in Price-Fixing Case*, REUTERS (May 15, 2013), https://www.reuters.com/article/us-dowchemical-urethane-judgment/judge-orders-dow-chemical-to-pay-1-2-billion-in-price-fixing-case-idUSBRE94F03R20130516.

[36] *See* Bradt, *supra* note 18, at 1169.

[37] *See, e.g.*, Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 799 n.139 (2019) (detailing some impediments to obtaining a *Lexecon* waiver).

[38] *See, e.g.*, Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2341 (2008); Melissa J. Whitney, *Bellwether Trials in MDL Proceedings, A Guide for Transferee Judges*, FEDERAL JUDICIAL CENTER (2019), https://www.fjc.gov/content/338847/bellwether-trials-mdl-proceedings-guide-transferee-judges.

hundreds or thousands of cases at trial.[39] Of course, that does not always happen. And settlement negotiations can take months or even years to resolve. Defendants can choose with whom to settle, when, and for how much. Complicating this, plaintiffs can choose to not settle—demanding their day in court, even if there are tens of thousands of plaintiffs.

But if remand does occur, then the cases are all transferred back to their home courts. The case numbers remain the same because the cases were stayed. Upon arrival back in their home courts, the cases resume their active status and proceed to trial.

IV. BENEFITS OF AN MDL CARTOGRAPHY

Through this MDL cartography, we try to provide several intellectual tools to the MDL bar, to MDL judges, to litigants, and to others in the public who might be interested in MDLs. To be more specific, we have five goals we seek to accomplish with MDL cartography.

> 1. **Visual Learning**. To ensure the benefits of visual learning and graphic design, so that MDL participants (everyone) can see how the stages of an MDL operate, interconnect, and unfold sequentially. Humans learn best not by text but through visual images (pictures), and people much more rapidly learn, retain, and recall pictures.[40]
>
> 2. **Categories and Information Design**. To create categories (each of the five MDL stages is a category) that function as mental "buckets" or "file folders" for storing existing information and adding new information. Proper categorization allows us to break things down into smaller parts, and to focus element by element, while still retaining the ability to zoom out and see the big picture.
>
> 3. **Systems Thinking**. To facilitate systems thinking,[41] in which the MDL system is viewed both holistically and in parts and stages.

---

[39] Sherman, *supra* note 10, at 2208–09 (discussing the successful use of bellwether trials in Vioxx to drive resolution through a global settlement).

[40] *See, e.g.*, Robert F. DiCello, *Are You Doing It Wrong*, TRIAL, at 21-22 (July 2019) (discussing the importance of using demonstrative exhibits because research demonstrates that "visual communication" heightens jury comprehension and recall); Haig Kouyoumdjian, *Learning Through Visuals*, PSYCHOL. TODAY, July 20, 2012 ("There are countless studies that have confirmed the power of visual imagery in learning…. Various types of visuals can be effective learning tools: photos, illustrations, icons, symbols, sketches, figures, and concept maps.").

[41] Systems theory or systems thinking focuses on "a shift in attention from the part to the whole" and seeks to analyze "interacting elements" by considering the "whole" and not "simply the sum of the elementary parts." Cristina Mele, Jacqueline Pels, & Francesco Polese, *A Brief Review of Systems Theories and Their Managerial Applications*, 2(1-2) SERV. SCI. 126, 126-27 (2010). A system is "an assemblage of objects united by some form of regular interaction or interdependence." A system can be "natural (e.g., lake) or built (e.g., government), physical (e.g., space shuttle) or conceptual (e.g., plan)" and can be "closed" or "open." *Id.* at 129. Systems thinking looks to the elements, parts, or structures that make up the system. *Id.* Systems thinking is particularly applicable to law because it emphasizes that outcomes are the product of interconnected structures. *See* Tomar Pierson-Brown,

> Systems thinking allows the MDL bar, judges, and others to isolate specific stages, or multiple stages taken together, with clarity based on the standard structure and design provided.
>
> 4. **Patterns and Analytics**. To make it easier to spot patterns and trends in MDLs based on the same comparisons (e.g., stage 1 or stage 4) of each MDL. These categories will enhance data analytics that flow out of cartography and consistent design from the stages and parts of MDLs.[42]
>
> 5. **Cross-Disciplinary Comparisons**. To facilitate comparisons to other systems and dynamics (like wildebeest migration patterns, but also within law), leading to greater insights and connections across areas of knowledge.

V. CONCLUSION

If the MDL process seems dizzying, that is because it is. The dollars at stake are massive, the procedural complexities are unmapped (at least until now), the starts and stops can seem endless, and the schedule can start to proceed at a breakneck pace. This rapid pace has been especially true in recent years; MDL judges have been more proactive in an attempt to shake the label that the MDL is a "black hole" from which cases never emerge.[43]

Another perspective is this: the "black hole" of MDLs is not that they drag on forever, but that the procedural ambiguity of MDLs is so baffling that a clear understanding of the proceeding never emerges. Many great lawyers have been trapped by the confusion and anxiety of not understanding what was coming next in an MDL. They suffered because they did not have a map that outlined this increasingly common process.

(Systems) Thinking Like a Lawyer, 26 CLINICAL L. REV. 515 (2020). It has been applied to, among other areas, alternative dispute resolution, *see* Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 2, family law, *see* Rebecca A. Meyer. *Systems Thinking: A Practical Lens for Understanding Enterprising Families*, 58 TR. & EST. 37 (Aug. 2019), and environmental advocacy, *see* J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933 (1997).

[42] Liz Stinson, *8 Stunning Maps That Changed Cartography*, WIRED (Oct. 6, 2015), https://www.wired.com/2015/10/8-stunning-maps-changed-cartography/ (explaining that "maps are simply a way to visually present a set of data. In that way, cartography, once a highly specialized trade, is now more akin to information design. 'The lines are beginning to blur between what is big data analysis and what is cartography.'").

[43] The term "black hole" is often used in MDLs. *See, e.g.*, Gaito v. A-C Prod. Liab. Tr., 542 B.R. 155, 166 (E.D. Pa. 2015); George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. TEX. L. REV. 71, 72 (2014) ("With 281 MDLs active today, a large portion of the country's federal civil cases are conducted through MDLs. With the small number of MDL judges managing such a large share of active cases, there is a tendency for some of these cases to become stagnant. When this happens, the MDL can become the proverbial 'black hole,' taking in cases with virtually no hope of fair and efficient resolution."); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*,23 WIDENER L.J. 97, 144 (2013).

Through this article, we hope to provide a map that solves the problems that come with not knowing how things work: for law students, lawyers, clients, litigants, judges, law clerks, media reporters, and anyone else who has to grapple with an MDL. After all, MDLs are supposed to make litigation more efficient, but with efficiency must come predictable process and real transparency. The legitimacy of courts and our civil litigation system depends on everyone (not just the insiders who have done it before) being able to participate and to know what to expect. Mapping the process and approaching MDLs through the framework of MDL Cartography can make MDLs more visual, trackable, manageable, predictable, and—ultimately—understandable.

To those who are set to face the galloping thunder of an MDL for the first time, we say: Hooves up.