Complex Litigation Ethics Conference at UC Hastings Law

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

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INTRODUCTION

Ethical norms in litigation are policed through overlapping regulatory regimes. One of these regimes is internal to litigation and split into different components including Federal Rules of Civil Procedure 11, Rule 26(g), Rule 37, Federal Rule of Appellate Procedure 38, 28 USC § 1927 & 1447(c), as well as the courts' inherent authority. In the standard narrative these tools provide immediate corrections unlike bar sanctions or derivative malpractice actions that are delayed and uncertain. Together, these tools are aimed to effectuate Rule 1's goals to make sure "the parties" cooperate "to secure the just, speedy, and inexpensive determination of every action and proceeding." The aim of this paper is to assess the extent to which these litigation sanction devices work in "every action" or whether MDL cases are also idiosyncratic in this manner.

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

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

I. BACKGROUND & MOTIVATION

MLDs are a massive and currently essential feature of the federal civil litigation landscape. It is difficult to imagine the federal judiciary handling the existing civil caseload without the use of MDLs. Troubling, then, that MDLs are also fragile. The current doctrinal fabric recognizes that all efficiency gains that MDLs

promise and that justify their existence could easily be squandered. Endless motions, on many different tracks, with diverging and perhaps unethical aims will not "promote the just and efficient conduct of such actions."[1] Instead, doctrine and judges aim to shepherd cases towards efficient resolutions, often settlement. This can require a tight choreography between judges and attorneys, opposing counsel, and, alas, even counsel on the same side of the "v."

To accomplish this choreography MDL judges are empowered to "adopt[] special procedures."[2] Increasingly they have accepted the invitation and developed a broad spectrum of "unorthodox procedures."[3] Courts have, or at least think they have, broad leeway to use such procedures. For example, they can set tight schedules for discovery and motions, allocate common-work fees, or adopt short-form complaints, to name only a few.

But none of these unorthodox procedures would work efficiently if lawyers acted unethically, made unnecessary motions and arguments, or unduly pushed the boundaries of permissible and sensible discovery. All of this suggests a heightened importance of ethical checks and sanctions in MDL practice.[4]

Ethical norms in MDL litigation are policed through overlapping regulatory regimes. One of these regimes is internal to litigation. In the standard narrative in-litigation sanctions provide immediate corrections unlike bar sanctions or derivative malpractice actions that are delayed and uncertain. Furthermore, the attenuated and complex relationship between lawyers and clients in MDLs also raises the specter of less meaningful supervision and checks by clients. Part of the reason for this is the complexity and procedural quirkiness of many MDLs but part of the reason is also the simple fact of physical distance: §1407 is, after all, a transfer device that moves many actions for the brunt of meaningful litigation to a distant forum. Given these limitations of downstream sanctioning devices we would expect in-litigation sanctions to carry more weight. This paper will focus on in-litigation sanctioning devices, but I want to emphasize that a fuller account would also examine other regulatory regimes.[5]

MDL judges have numerous in-litigation sanctioning devices available to police ethical norms. I will briefly review them here to remind readers of the range of in-litigation sanctioning devices and to explain how they might take on added significance in the context of MDL practice. This doctrinal section thus creates the

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[1] 28 USC §1407 ("[MDL] transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.").

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

[3] *See* Abbe Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PENN. L. REV. 1669 (2017).

[4] *See generally* FJC MANUAL FOR COMPLEX LITIGATION 4th, 15 ("The rules and principles governing the imposition of sanctions in complex litigation require special care because misconduct may have more severe consequences").

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

context against which to understand the surprising finding that these devices are rarely invoked.

Perhaps the most versatile in-litigation sanctioning tool is Federal Rules of Civil Procedure 11. It allows courts to impose sanctions for frivolous and improper pleadings, non-discovery motions, and other papers. Attorneys have an affirmative duty when filing such material with the court to certify that they conducted a reasonable inquiry and that the document is well-grounded in fact, legally tenable, and not presented for an improper purpose (such as causing unnecessary delay or needlessly increasing litigation cost.). When violated, courts have generally[6] broad discretion to impose a broad range of sanctions.[7] Put together, this would make it seem like an ideal device to police abuses in the context of MDL practice. The main purpose of Rule 11 is "to deter baseless filings and curb abuses"[8] and that is precisely what might endanger the smooth functioning of MDLs. However, there is also reason to doubt the effectiveness of Rule 11 in MDLs. Most notably, Rule 11 does not require sanctions. Instead, courts have broad discretion that violations do not warrant sanctions. Numerous courts have indicated a reluctance to use Rule 11 aggressively for fear of "chilling" important litigation. Given the limited availability of limited sanctions, Rule 11 might not be as broadly used in MDL practice as initially thought.[9]

Rule 16 is perhaps almost as versatile as Rule 11. On first sight it deceptively looks like a rule merely concerned with pretrial conferences and scheduling matters. However, in complex litigation in general and MDL practice in particular meaningful and respected deadlines are vital. Rule 16 authorizes and perhaps nudges courts toward active case management to "expedit[e] disposition of the action," prevent "protracted" and "wasteful pretrial activities," and facilitate settlement.[10] Without them all MDLs might become "black holes" from which actions never emerge. This would undermine the fundamental goal of determining actions within a meaningful time.[11] MDL judges must and routinely do use scheduling orders to ensure that litigation moves forward. One would imagine, then, that the sanctions authorized in Rule 16[12] are an important and often utilized tool to keep attorneys on track.

Discovery takes up a significant chunk of MDL activity. It has its own sanctioning regime sprinkled through Rules 26, 30, 32(d),33(b)(3)–(4), 34(b),

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[6] *But cf*. 15 U.S.C.A. §78u-4(c)(1); Thompson v. RelationServe Media, Inc., 610 F.3d 628 (11th Cir., 2010) (Rule 11 sanctions mandatory under the PSLRA).

[7] FED. R. CIV. P. 11(c)(1)-(4).

[8] Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991).

[9] At least in ways that reach the court and might show up on docket sheets. Rule 11 contains a safe harbor provision that grants potentially offending parties 21 days to withdraw or correct violations. This could mean that Rule 11 does important work in deterring and correcting abuse and mistake but all behind-the-scenes.

[10] FED. R. CIV. P. 16(a).

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

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

35(b)(1), 36(a), and 37. These Rules focus on different aspects of discovery practice ranging from initial disclosures, failure to preserve ESI, discovery requests and responses, to the use of specific discovery tools.[13] Put generally, these sanctioning devices mirror Rule 11's concern with abuse and waste. Again, one might be tempted to think that the breath and depth of these sanctioning devices, paired with the importance of discovery for MDL practice, would mean that such sanctioning is an important feature of MDLs.

Beyond the Rules there are also statutes that permit federal courts to impose sanctions in MDLs. For example, 28 U.S.C. § 1927 authorizes sanctions against attorneys who engage in conduct that is unreasonable and vexations or that multiplies proceedings. Attorneys who abuse the judicial process can be held accountable for unnecessary or excess costs, expenses, and fees. Some common grounds for 1927 sanctions are not applicable in many MDLs (e.g. ignoring evidentiary rulings at trial or refusing to leave sidebar when ordered).[14] However, many others are. For example, courts have sanctioned attorneys for advancing frivolous legal theories[15] and failing to comply with filing deadlines.[16] Detering such conduct is important in regular litigation and perhaps even more so in MDL practice. As with many other sanctioning tools, this might lead to the expectation that §1927 sanctions are a common feature of MDL practice.

In addition to the sanctions available under the Rules and statutes, courts also have the authority to impose sanctions based on their "inherent authority." As the name suggests, courts have inherent powers to sanction for bad faith, vexatious, wanton, and oppressive conduct. The availability of sanctions under a Rule or statute does not displace the court's inherent authority to impose sanctions.[17] Typical examples of sanctions imposed under a court's inherent authority include ignoring or violating a court order, abuse of the judicial process, delaying and disrupting litigation, raising bad faith objections, failing to attend and participate at court conferences, and bad-faith filings and misrepresentations. Unlike many other sanctioning devices, sanctions under a court's inherent authority are available for in-litigation activity and conduct leading up to litigation.[18] A court may sanction a party, attorney, law firm, and even nonparties. Again, the breath and scope of this sanctioning device suggests that it might be broadly used in MDLs.

The sanctioning devices discussed thus far are perhaps the most common in regular litigation and likely the ones of most consequences in MDLs. However, there are others: Federal Rules of Civil Procedure 56(h) (sanctions for filing affidavit or declaration in bad faith or solely for delay in the context of summary judgment),[19]

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

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

[15] *See, e.g.*, Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 53-54 (2d Cir. 2018).

[16] *See, e.g.*, Siu Ching Ha v. Baumgart Cafe of Livingston, 2018 WL 1981478 (D.N.J. Apr. 26, 2018).

[17] Chambers v. NASCO, Inc., 501 U.S. 32, 48-49 (1991).

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

[19] FED. R. CIV. P. 16(h) ("If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the

41 (involuntary dismissal for failure to comply with rules or a court order), Federal Rule of Appellate Procedure 38 (sanctions for frivolous appeal), & 28 USC §1447(c) (sanctions for improper removal), and, rarely, sanctions authorized under local rules.

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

II. DATA & METHODS

To learn more about litigation behavior in MDLs I examined the docket sheets of MDLs filed between [] and []. Docket sheets provide a better, though not perfect, way to track litigation behavior than, say, reported opinions. Many of the litigation devices studied here might never result in opinions. Even if each produced an opinion, they might not be reported in the databases of the main commercial providers. Furthermore, while many MDLs are well-known and their dockets easily retrievable, many other MDLs have labored in relative obscurity. This is a reminder to speak with caution when it comes to MDLs and be clear when we discuss all MDLs (large and small, well-known and obscure) and when we are focused on a handful of superstar cases (e.g. opioids).[20] These MDLs might and likely function in fundamentally different ways. This piece is focused on all MDLs. I examined each MDL for the presence of in-litigation ethical sanction requests.

A. From the JPML to the Districts

I began the data collection by constructing a database of all MDL cases.[21] To do so I accessed every case brought to the JPML.[22] All applications are sequentially

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submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.").

[20] MDL 2804.

[21] To my knowledge no such database exists though some databases have focused on segments of MDL practice. *See, e.g.*, Judicial Panel on Multidistrict Litigation Statistical Analysis of Multidistrict Litigation, Pending MDLs as of September 15, 2022 (available at: https://www.jpml.uscourts.gov/pending-mdls-0) (last accessed September 20, 2022); Judicial Panel on Multidistrict Litigation Statistical Analysis of Multidistrict Litigation 2000, Index to Transferee Districts with Multidistrict Litigation Pending as of September 30, 2000, or Dismissed since October 1, 1999 (available at: https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2000.pdf); *See also* Elizabeth Chamblee Burch, MDL Database (available at: https://mdl.law.uga.edu/).

numbered. For example, JPML docket number 2501[23] was filed on Oct 08, 2013 and JPML docket number 2502[24] is the next case filed 2 days later on Oct 10, 2013. For each case I collected the JPML docket number, name, and date filed with the JPML.

Of course, not every application to create an MDL is successful. The JPML routinely denies such requests. Here, out of the [] applications to the JPML to create and MDL [] were granted ([]%) and [] were denied ([]%). I did not collect docket sheets for cases were MDL transfers were denied.[25] For the cases where the JPML granted transfers I collected the name of the federal district where the MDL cases will be transferred to, the name of the assigned judge, the current status of the case (open or closed), the date of termination (if any), and most importantly, the so-called master docket id[26] that distinguishes it from the docket ids of all MDL member cases.[27] The master docket id allows then for retrieval of docket sheets for individual MDLs that the JPML created.

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

Docket entries are a testament to endless human ingenuity: The same act can be described in innumerable ways. Alas, the docket entries in these MDLs come from a rotating cast of many clerks at many courts. Each court and clerk has slightly different ways of entering court proceedings. Take for example a reference to a Federal Rule of Civil Procedure, for example in a motion for summary judgment under Rule 56 or, closer at hand, a motion for sanctions under Rule 11. Clerks reference the Rules sometimes with the full name (with various capitalizations),

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[22] Data collection is ongoing and currently limited to between August 2002 (for MDL 1500) and October 2013 (for MDL 2500).

[23] IN RE: Lloyds Bank plc International Mortgage Service Loan Litigation, Docket No. 2501 (U.S.J.P.M.L. Oct 08, 2013).

[24] IN RE: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (No. II), Docket No. 2502 (U.S.J.P.M.L. Oct 10, 2013).

[25] Though, perhaps, some future researcher might find it useful to have access to the list of all cases that reached the JPML.

[26] Mindful of the complicated history of the term "master" some fields have renamed commonly used terms that incorporate that word. For example, many real-estate agents no longer refer to the biggest bedroom in the house as the "master bedroom." See, e.g., NY TIMES, *The Biggest Bedroom Is No Longer a 'Master'* (Aug. 5, 2020) ("The term's racist and sexist undertones lead New York's real estate community and others to rethink outdated industry jargon."). Similarly, many tech people have reevaluated use of the term. *See, e.g.*, Wired, *Tech Confronts Its Use of the Labels 'Master' and 'Slave'* (Jul 6, 2020). However, elsewhere the term seems to be less controversial (see, e.g. UC Hastings Law Masters Programs, available at: https://www.uchastings.edu/academics/graduate-programs/). I use the old term here for lack of a currently commonly agreed-upon alternative that communicates the special status of this docket id in a sea of other docket ids that are not of interest.

[27] *See* THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION & THE FEDERAL JUDICIAL CENTER, TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE COURT CLERKS, 2 ("Every MDL must have a master docket sheet to represent activity in the centralized action, which is referred to as the lead, coordinated, master, or main case.").

abbreviate in part or full, using Bluebook conventions or not. They might introduce spaces between words (sometimes one and sometimes more), use periods, or just smush everything together. On top of that there are endless opportunities for typos. And all of that just for the most quotidian act of referencing the FederalRules (sic). Searches for motions, rulings, and opinions are more complex and varied still.

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

Those people must develop robust tools to search for entries of interest that can be fine-tuned and that are sensitive to endless variation. The tool chosen for this piece is a battery of search algorithms built on messy regular expressions ("regex"). Regex searches can achieve a complexity and sensitivity difficult to match with, say, Boolean searches.[28] Regex expressions are a bit like discovery requests: broad searches can return too much material, burring the needle in a mountain of hay. Errors can also occur on the other side of the spectrum where a too narrow search misses most of the needles. Finding the right balance is more art than science and built on experimentation and learning from mistakes. Generally it is better to start broadly and develop algorithms that are increasingly precise.

I ran the resulting algorithms over the MDL dockets. But the results are difficult to interpret without a meaningful comparison category. There are numerous candidates but perhaps the most obvious one is simply a random sample of federal dockets from non-MDL cases. These cases provide a baseline against which to measure MDL cases. Here, I applied the same algorithms I used for the MDL cases to 10,000 non-MDL cases selected from the same years as the MDL cases to account for as many intervening variables as possible, for example doctrine changes that made use of some of these devices easier/harder, likelier/unlikelier.[29]

Beyond detecting the presence of ethical sanction requests and impositions, I also collected from each data sheet information about the overall number of cases contained in the MDL, the number of docket entries, the subject matter of the suit,[30] and the number of attorney appearances.

B. Caveats and Limitations

This approach has numerous strengths and improves upon the current state of the literature. However, it is important to interpret all findings with numerous large caveats and limitations in mind.

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

[29] Perhaps future researchers would like to improve upon this strategy and switch from random sampling to weighted sampling based on the location of MDLs to account for the possibility that MDLs are not randomly distributed and that applicable law in MDL jurisdictions might tilt one way or the other. *But cf*. Brad's article on CoL in MDLs.

[30] Not always perfectly reliable and thus to be treated with caution.

First and foremost, a methodology based on docket entries can only detect what is in the dockets. Likely most of the activity related to in-litigation sanctioning regimes shows up in the dockets.[31] For example, a motion for sanctions under Rule 11 must show up on the docket sheet. Similarly, it would be unusual if a court imposing sanctions would not be docketed. However, the Rule explicitly contemplates a motion that is served on the other party but never filed with the court.[32] Such non-filed motions would ordinarily not show up on the docket. Similarly, and perhaps more significant, a judge admonishing an attorney during a hearing might not leave a trace on the docket. Such events could only be detected by pulling the transcripts for individual hearings.[33] That is a worthy area of inquiry of a more qualitative nature that I hope future researchers will pursue, but it is beyond the scope of this paper.

The second important limitation of the data and chosen methodology arises because the dockets were downloaded only once. There is no easy way to continuously update dockets (unless one uses scrappers that are explicitly prohibited by the terms-of-use).[34] As such, the dockets are static as of the date of download. They are a snapshot in time rather than an up-to-date account of all litigation activity. Only cases that are terminated are as complete now as they were when the dockets were downloaded. This is one of the reasons why this study focuses on MDLs initiated many years ago rather than those initiated more recently in the last few years. Most of the MDLs in the dataset are indicated as terminated or are likely terminated even though that is not clearly indicated on the docket.[35]

This is connected to the third major limitation of this study: the MDL dockets used in the analysis below do not include all MDLs. Old MDLs were excluded.[36] Similarly, very new MDLs were not included. They simply did not have enough time to develop mature dockets. For example, we would not expect an MDL created last week to feature discovery sanctions because there has not been sufficient time for discovery. The lack of discovery sanctions tells us only about time not having passed and nothing about legal ethics. Still, while perhaps unavoidable, the use of a time-window that excludes recent MDLs could potentially mean that all that is described

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[31] *See generally* FJC MANUAL FOR COMPLEX LITIGATION 4th, 22 ("Unless the sanction is minor and the misconduct obvious, it is advisable to put findings and reasons on the record or issue a written order.").

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

[33] As a matter of data collection that would be very time-consuming. And once collected, many transcript are poorly formatted pdfs that might not be machine-readable without significant work.

[34] *See, e.g.*, Thomson Reuters, Terms of use (available at: https://legal.thomsonreuters.com/en/legal-notices/terms-of-use) ("[Y]ou will not use any robot, spider, other automatic software or device, or manual process to monitor or copy our website or the content, information, or services on this website").

[35] As indicated, for example, by the lack of any docket activity in the last 10 years.

[36] Arguably MDLs pre-2000 are of another era that has little to do with modern practice.

in this paper is passé, overtaken by more recent developments. There is no way to prove or disprove that assertion.[37]

A fourth and final caveat is that some MDL dockets are not separate from non-MDL cases. Typically clerks create new docket ids for MDLs (e.g. 4:08-md-2004). However, it seems for some MDLs, often smaller ones with fewer actual or anticipated member cases, clerks have used the docket id of one of the founding cases of the MDL. This means that those dockets feature pre-MDL litigation activity, MDL activity, and sometimes post-MDL activity. The approach used in this paper includes all those docket entries and is thus overinclusive. A more precise approach would cut pre- and post-MDL docket entries.[38] The chosen approach is unlikely to constitute a big problem because of the rarity of non-original docket ids and because it could only bias against the findings of this article, not strengthen them.

Fifth, the study is limited to the presence of sanctions; it does not examine the nature or extent of the sanction.[39] I encourage future researchers to dive into transcripts, motions, and orders to uncover a more detailed account of sanctioning in MDLs but this study is limited to providing initial findings to provide an initial framework for more detailed work.

III. FINDINGS

This sections presents the main finding of this paper: in-litigation sanctioning devices are rarely used in MDL practice. They are rare in absolute terms and rare in relative terms. Compared to non-MDL cases, in-litigation sanctions are more rarely requested and more rarely granted in MDL cases.

A. Low Rates of Invocation

True whether measured by case or by docket entries.

B. Low Rates of Success

Also true whether measured by case or by docket entries.

C. Not enough instances to facet by District, types of suit, size of MDL, etc.

[37] Yet! In, say, 10 years these dockets will have developed enough to be testable. However, whatever we figure out then will still not tell us anything, again, about more recently filed cases.

[38] Doing so can be time-consuming. I encourage future researchers to iterate and improve upon my approach.

[39] E.g. reprimand, cost shifting, waiver, striking, dismissal, etc.

IV. DISCUSSION & IMPLICATIONS

The previous sections present an apparent mystery: MDLs need vibrant ethical sanctions (Section 1) yet they do not use them broadly (Section 3). There are numerous possible explanations. The most likely explanation is that ethical norms are policed not through sanctioning regimes but through the MDL leadership appointment process.

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

A. Appointments Influence Litigation Behavior

MDL leadership appointments can influence litigation behavior, including ethical compliance. MDL judges control who is initially appointed to MDL leadership positions, who is replaced, who is appointed again in subsequent MDLs, and who is amply compensated. These tools allow judges to influence the behavior of the key players in MDL litigation. The attorneys in MDLs vying for leadership positions know that competition for one of the few available spots is fierce and comes with significant prestige, money, and opportunities to litigate in impactful cases. One way to compete for an available spot is to have a spotless ethical record, litigation experience that is far above the ethical floor, and, perhaps, a willingness to make tradeoffs between zealous advocacy for all the clients in the MDL and the desires of the MDL judge for speedy and efficient resolution. Each MDL is an opportunity to audition for the next MDL. Given the number of repeat-players, this process seems to work efficiently. Judges routinely cite prior ethical issues as a reason to not appoint attorneys in MDL leadership roles. Similarly, judges justify appointments with reference to spotless ethical records. It is unclear whether these processes select more competent and more ethical lawyers, more experienced lawyers, or simply more compliant attorneys who might not litigate as fiercely and confrontationally than attorneys who do not have to periodically be selected by judges for litigation roles.

B. Implications for MDLs

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

First, the in-litigation sanctioning devices discussed in section 1 strike a balance between competing procedural values. They are mindful of the need for the "just, speedy, and inexpensive determination" but they also provide for ample leeway for adversarial norms and for attorneys to represent their clients aggressively, and try

out new arguments and strategies. An ethics by appointment approach sidesteps this balance inherent in the sanctioning devices and in decades of caselaw that interprets them. Instead, it allows judges to strike their own balance. Perhaps even worse, because not always openly discussed and explained, attorneys might self-censor their litigation behavior in MDLs in fear of not being appointed to another MDL. That could be true even if a future judge would not look adversely upon contemplated litigation behavior. The absence of clear standards like in, say Rule 56(h) and accompanying case law makes it difficult for attorneys to calculate the true costs and benefits of their planned course of action. Risk-adverse attorneys who hope for MDL appointments and re-appointments might strike a balance that is optimal for their careers but suboptimal for overall litigation activity.

Second, numerous academics and some judges have pointed out the need to broaden the pool of attorneys in MDL leadership positions. This could have the unintended effect of weakening the ethical compliance function of the appointment process. If attorneys think it is less likely that they will get appointed again in the future to another MDL leadership slot, perhaps because of a renewed focus on bringing in more voices into the conversation, they might find it less urgent and profitable to comply with ethical norms in the current litigation. Insofar as the ethics by appointment process breaks down, this might restore the need to fall back to the myriad in-litigation sanctioning devices discussed in section 1 with the unintended effect of slower, more cumbersome, more expensive, more contentious MDL proceedings.

C. Implications for non-MDLs

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

CONCLUSION

[[Beyond the dockets]]