UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: VIOXX PRODUCTS LIABILITY LITIGATION

MDL No. 1657
Section: "L"
New Orleans, Louisiana
Friday, March 18, 2005

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TRANSCRIPT OF MONTHLY STATUS CONFERENCE PROCEEDINGS
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(FRIDAY, MARCH 18, 2005)

(MONTHLY STATUS CONFERENCE)

THE COURT: Be seated, please. Good morning, ladies and gentlemen. For those of you who are not from the New Orleans area, I welcome you to the Eastern District. The purpose of this meeting is to discuss with you the logistics and some of the organizational aspects of this particular case.

In that regard I issued a court order directing anyone interested to give me suggestions for an agenda. I have received the suggestions and I met with the designated liaison counsel and discussed with them what I wanted to talk about today and also advised them of various suggestions that I had received. I directed them to prepare an agenda, which they have done, and I will discuss the agenda in order.

I also would like to tell you that we have a web site, it's vioxx.laed.uscourts.gov. That's vioxx.laed.uscourts.gov. I am going to post everything on the web site, all of the orders, all of the minute entries, transcripts, and things of that sort, hopefully to give everyone interested access to them.

I think one of the challenges in a case of this sort is making it transparent, and I feel strongly about that and I want you to have all of the information that you need. So please look at the web site.

I will take the items in the order that I have on the agenda. The first item is Service List of Counsel/Lexis-Nexis Electronic Service. One aspect of this particular case that is also challenging is to make sure that everybody receives all of the orders. I am going to post them on the web site, but I also want you to have them; so I have discussed some outside providers with the liaison counsel and put them in touch with them, and they have been talking to Lexis/Nexis electronic service. I will hear from the liaison.

MR. HERMAN: May it please the court, good morning, Judge Fallon. I am Russ Herman of the firm Herman, Herman Katz & Cotlar in New Orleans for plaintiffs. Mr. Wittmann, liaison counsel for defendants, will address the service list issue and I'll address the Lexis/Nexis electronic service application.

MR. WITTMANN: Good morning, your Honor, Phil Wittmann, liaison counsel for defendants. At the outset, your Honor, this morning I would like to introduce defendant's lead counsel to the court with me, I haven't had a chance to do that. Douglas Marvin with the firm of Williams Connolly, seated at the table next to me, will be our lead counsel.

THE COURT: Welcome to you, sir.

MR. WITTMANN: Next to him is John Beisner of the firm O'Melveny & Myers, who will be working with us also; and also Ted Mayer of Hughes, Hubbard & Reed.

Your Honor, with respect to the service list, we are in

the process of preparing a list that will reflect counsel as we have them that have been reported to us, and we will provide a service list to the court and to counsel. And we are working with Ms. Whyte to make sure we have everybody on that list, And so far I think we've come along well on it.

THE COURT: All right.

MR. HERMAN: Your Honor, with regards to electronic service, it's the intention that all matters be served electronically to the maximum extent possible. Verilaw, which was one of the few venders, has now been annexed or subsumed by Lexis/Nexis. The Defendants Liaison Counsel and our firm met on March 14th with representatives from Lexis/Nexis, there is a representative in the courtroom.

We had an additional meeting, we've negotiated costs and parameters. If Lexis/Nexis is selected and approved by the court, it will be available seven days a week, 24 hours a day, 365 days a year, and would provide instantaneous notification, as well as security measures and access through an individual code for each lawyer. Registration would have to be on court service list.

We've had other conversations, PTL 5 contains a counsel contact information, which all MDL attorneys have been instructed to fill out. That information has been coming in regularly, and we believe that we will be able to submit, that is the Plaintiffs and the Defendants Liaison Counsel, a proposal to your Honor very shortly.

THE COURT: That's fine. One of the important jobs of liaison counsel is to make sure that all counsel of record receive the information. So if you have any questions about the information, how you get it, how you can pull down the material, you need to talk to liaison counsel, one or the other, and they will handle that problem. Anything further on this?

MR. WITTMANN: Just one thing, Judge. I think that probably counsel present would like to know that in the negotiations so far with the Lexis/Nexis people that they have agreed to waive their initial one time set up licensing fee of $350 per firm, so I thought I should mention that to counsel present this morning.

MR. HERMAN: They have also reduced the filing fee per document.

THE COURT: Anything else on this particular topic?

Let's go to Trial Settings. I am interested in what's going on around the country with regard to any trial settings. In the federal system I stopped the trials and had the cases moved here. With regard to the cases in states, that's a different situation, but I need to know the trial situations in the states.

I've instructed defense counsel to give me a list of all of the cases that are pending in state court and where they're pending. I intend shortly to get in touch with every state court judge and keep them advised of what we're doing now and what we intend to do in the future. I hope that we can coordinate this project, both state and federal.

I think it'll be to the advantage of all of the litigants to have the proceeding proceed in some orderly fashion. So to that end, I instructed defense counsel to get me information regarding the trials set.

MR. WITTMANN: Your Honor, we are in the process of compiling a list of all of the cases that have been filed nationwide to furnish to the court. We have found that there are so far, in terms of being set for trial, only 11 cases actually set for trial. The first trial setting, according to our records, is in my home state of Alabama, the Rogers case which is set for trial on May 23rd of this year; that's followed by a couple of cases in Texas, the Ernst case which is set on May 31st, the Guerra case set on June the 6th. There are then a series of cases that are set in California, there are five case set in California on July the 7th of 2005, and I assume counsel from California know the names of those cases.

Then in Mississippi we have a case set, the Skinner case on September 28th, 2005; and another case in Texas the Zajicek case set on October 26, 2005; and in Alabama another case set on November 14th, 2005, the Darby case. That's our current list of trial settings, Judge.

THE COURT: All right. Thank you very much. Anything else on the trial settings?

Let me go to the next item on the agenda, the Plaintiff Steering Committee. Let me say something about this item before I hear from the parties.

The way that I am beginning to see the case, now, I don't have all of the cases in, the cases are coming in and we get them in every day or two, and they are coming in the hundreds. So I am not, I don't have all of the cases in and I haven't looked at all of the records yet. But it seems to me that all of the cases are falling into several categories. And you can make different groupings of them, but if you look at the theory of liability and focus only on the theory of liability, it seems to me that the groupings are at least two.

First, there are tort claims. Tort claims include personal injury claims, death claims and also third-party payor claims; that is to say, third parties such as Blue Cross and pension plans and so forth that have paid moneys to reimburse recipients for medical care that these individuals have received. The individuals claim that they took Vioxx and they claim that as a result of the Vioxx they have required certain treatment for other maladies allegedly caused by Vioxx, and they turned to their medical benefits group and received pay for that cost or reimbursement for their total cost or a portion of their expenses.

Those latter groups, those latter organizations are now seeking recompense for the moneys paid. But that's the tort theory basically, the damages are different, theories of liability may be different from the standpoint of damages and proof in certain areas are certainly different.

But in addition to that group of tort claims, I am

beginning to see a second group namely consumer claims. Consumer claims are based on a different concept, different theory. They are not based, they are not tort based claims, they are based on state consumer laws. And their position is that they purchased Vioxx and that either it caused them some concern or they weren't told of all of the problems or all of the things that they say they now know, and, therefore, they feel that they were mislead, they feel that there was some action under the consumer laws.

Those cases are different in the sense that plaintiffs are not urging that they were injured, they are not urging that anything happened to them, they're urging that they were mislead into buying Vioxx or continuing to buy Vioxx, they want their money back for the amount that they spent for Vioxx. They also want triple damages or double damages or whatever damages based on the amount that they expended. Also attorneys fees and court costs.

Those are the broad groupings that I am beginning to see. I mentioned the groupings because in the Plaintiff Steering Committee, I am going to make an effort to have the various groups properly represented on that committee. To that end I invited anyone who is interested in being on the Plaintiff Steering Committee to submit to me an application. I am certain that with the talent that I see out there you could each write a book about your past experiences and your past achievements. I don't have the time to read War and Peace over and over and over, so I need you to be conscious of the three page double space limit, don't tell me

what your mother says about you, just tell me what you feel is the essence of your experience and I assure you that I will read it.

It is also helpful to me if you focus me also on the area of your expertise, particularly if you've had the experience in the consumer area or in the tort area or whatever other area, third party pay out area, things of that sort. I am interested in it, I invite you to apply.

But in doing so, let me say a couple of things. I am going to be appointing the committee. I will appoint the committee before we meet again next time, and it's my practice and will be my practice to meet at least once a month with the committees in open court, so anyone who wishes to attend will feel free to do so. I will post the meeting dates and the locations of the meeting on the web site and you can pick it up.

But before you apply or if you have applied, please keep in mind the following: First, the court will appoint a person, not a law firm. I am interested in that person's efforts, not the law firm's efforts. And I need that person to participate. I don't need the law firm in place of that person to participate. I expect the people who are on the committee to be present and I expect them to be working.

I remind you that this is a case that will take considerable time and considerable resources. You have to go in this position with your eyes open and be willing to commit both time and resources into a project of this type. It's not going to be

interminable, but it's not going to end in six months or a year, it will take a considerable period of time that you'll need to know.

Also, if you're on the committee, you're on the committee as long as the court declares that you're on the committee. No side agreements to get off of the committee for any reasons will be accepted. I'll consider those side agreements as contra bonos mores, I'll consider penalties on both the maker and the receiver of the side agreement, and I will declare them null and void if such an agreement comes to my attention. It also may result in the expulsion from the committee and forfeiture of any fees or costs that have thus far been expended.

Also I mention to you to be conscious of the potential for conflicts of interest. Many of you undoubtedly will have both state and federal cases. I expect the people on the committee to have their cases in this court. I can see a potential, and you will see it quicker than I, but I can see a potential for a conflict for someone handling cases with the right hand on the committee and with the left hand in state court.

Oftentimes, there is a conflict between time requirements, procedure or even law; there can be a conflict between effort and there are various potential conflicts that are presented in matters of this sort. So I suggest that you be conscious of them. Again, if it comes to my attention and there is a conflict, you may have to leave this committee and all that you have done will not be recognized.

So with all of that in mind, let me hear from counsel on the Plaintiff Steering Committee.

MR. HERMAN: May it please the court, your Honor, the clerk of court has received more than 30 applications for consideration for the Plaintiffs Steering Committee and they're coming in daily. As your Honor has directed, the cutoff date is March 28 and April 4 is this the date for any objections to anyone that's submitted an application. The applications are three pages, double spaced and they are to be sent, the original and one copy are to be sent to the clerk of court.

Your Honor, we have had several meetings among, between liaison counsel, nothing definitive has been agreed to pending the appointment by you of the Plaintiff Steering Committee so that the steering committee has the full input on such issues as deposition guidelines, et cetera.

THE COURT: That's my thinking. I think that the committee not only serves a purpose to do the work, but they also serve a purpose of thinking about what's needed from their aspect of the case. And so it's essential that they have input. Anything further from the plaintiff?

MR. HERMAN: Not at this point.

THE COURT: Defendant Steering Committee. I also intend to appoint a Defendant Steering Committee, and at this point it's not clear to me, at least from the record, whether I am dealing with, in this case, with one defendant or more than one defendant.

So let me hear from defendant liaison counsel.

MR. WITTMANN: Your Honor, I've introduced Doug and John and Ted to you this morning, and they certainly will be on the Defendants Steering Committee. And in addition, if your Honor would approve, I would anticipate that my colleague Rick Stanley would be on that committee as well.

We haven't made any firm decision yet as to the size of the committee, the number of lawyers on the committee. As we told your Honor back in chambers that we will work on that and have a recommendation to you before our next meeting.

And I think that pretty well covers the question of the Defendants Steering Committee.

THE COURT: I will need to hear from you in 21 days as to recommendations or applications or anything regarding the committee. I need to appoint a committee, we need to get started with the case.

MR. WITTMANN: I can get that as quickly as your Honor would like. If you would like it sooner than that, Judge, we can do that.

THE COURT: No later than 21 days.

MR. WITTMANN: Okay.

THE COURT: Thank you. At the next meeting I intend to have the committees in place and I would intend at that time to be able to focus on some schedule of discovery, even though you know your cases better than I at this point and I will look to you for suggestions, I want it to move forward and I want it to move forward

in a way that is consistent with everybody's position on the committees; and I look to you for suggestions as to the deposition and the discovery of documents and production of documents and things of that sort.

The next item on the agenda is the Master Complaint or master answers. Again, let me hear from counsel. In a case of this sort, occasionally there are amendments that are necessary as the case proceeds and there are other matters that come in to focus that need to be cleared up. Rather than have 90,000 petitions that need to be amended, it's often more expeditious to have a master complaint.

Now, in a case of this sort we have a mixture of not only individual cases but also class actions as well as individual cases. So you need to focus on whether or not there is need for a master complaint for the class action, a master complaint for the individual cases or perhaps one for all. But you need to give all of that some thought. Let me hear from the parties on the master complaint.

MR. HERMAN: Your Honor, Plaintiffs Liaison Counsel and the Defense Liaison Counsel have discussed this matter face to face. We've exchanged some views, we are deferring consideration of a master complaint and class issues until the Plaintiff Steering Committee and the Defense Steering Committee are appointed, because we both, we feel that those are issues that should be addressed by the steering committees rather than liaison counsel.

THE COURT: All right. I just wanted you to focus on it, and that's one of the things that I will be visiting with you when you get your committees in place. Anything on the master complaint?

MR. WITTMANN: Just briefly, your Honor. In this case, as you know, there are numerous overlapping and conflicting class actions, competing class actions, different lawyers who are asserting similar claims on behalf of similar groups of people. Obviously we are going to have to work together, Mr. Herman and I, to develop a means of reconciling these various class action claims that are out there so that everybody has a clear idea about classes, what they are and the claims that are being asserted in those classes.

And I guess the bottom line is the court needs a clear idea of what the target here is for purposes of assessing the class certification issues and a myriad of other issues that are inherent on in those complaints.

I think Russ is correct, we've discussed it, it's high on our agenda to talk about, and hopefully we will have a better report for you next time.

MR. HERMAN: Your Honor, if I might I would just like to make one comment for the record. Some of the complaints are equitable in nature, and it will be necessary at least from point advantage of liaison counsel to perhaps have several master complaints. And I just wanted to point that out for the record.

THE COURT: I don't have any problem with it. The purpose

of the master complaint is just to recognize that during the course of litigation complaints need to be changed for various reasons, and to have everybody to have to file an amendment in a case of this sort doesn't make much sense for the litigants. It's not good for either side, for the plaintiffs to have to amend each of their petitions separately or to have the defendants answer each of those petitions. It is expensive and it's time consuming and it doesn't make any sense. So shrinking that down and consolidating it makes more sense.

If you can do it in one complaint, that's fine. But in a case like this it may not be able to be done, but we can do a lot better than having separate complaints.

Another item on the agenda is Tolling Agreements. Tolling agreements, of course, depend to a great extent on the law of the state and the people who have tolling agreements have to know and to understand the appropriate state law; that is to say, whether or not you can toll.

Tolling agreements focus on whether a claim needs to be filed or whether it can be held off without prejudicing the person with a claim, in essence tolling the statute of limitations to allow that individual to not file but at the same time not be prejudiced by it.

It's obviously an advantage to the parties who have the claim, they don't have to expend the money to file the necessary complaints. But it is also sometimes helpful to the defendants to

have tolling agreements also for various strategic and other reasons. They don't have to answer each claim, which is expensive and time consuming, and they can deal with it in a different fashion.

I've asked the parties to at least consider this, look at it, and let me hear from them at this time.

MR. WITTMANN: Your Honor, we have several concerns about the use of a tolling agreement in this proceeding. For one thing, I think that a tolling agreement is going to prevent us from having a clear picture of what's out there. We know there a lot of cases just based on what's happened to date and there are a lot more that we have been told about that are in the pipeline. And a tolling agreement would prevent us from really getting a clear picture, a master tolling agreement, not giving us a clear picture of what is out there.

The capacity from taking discovery from the plaintiffs who have got claims diminishes as the days go by, and we think it's important that claims be asserted as lawsuits so that the discovery and investigatory process can go forward.

But having said all of that, I don't stand to reject anything today, we are still considering the tolling agreement. I think preliminarily, to be candid with the court, that a master tolling agreement is not in my client's best interest, but we are still discussing it and we will be prepared to discuss it further with the court at our next meeting.

THE COURT: All right. Anything from the plaintiffs?

MR. HERMAN: Your Honor, I am going to reserve comment on tolling agreements, except to say that I believe that the defendants need to discover and tolling agreements are not inconsistent and perhaps we can work towards a point of agreement.

THE COURT: I don't see tolling agreements as a preventive for discovery and I don't see tolling agreements as an opportunity for a person not to express themselves as to the fact that they have a claim. It's just an issue of economics practicality.

Oftentimes a person who is willing to step forward and file a lawsuit is in it for the long run. Occasionally when they look at it from a tolling agreement viewpoint, they are not in it for the long run. But that's something that the parties have to think about, consider, but I need you to at least view it and consider it from your standpoint.

The next item is Deposition Guidelines. I firmly believe that the committees need to be consulted with regard to the substantive aspects of the case, such as which depositions are to be taken and who is to take them and things of that nature.

But with regard to deposition guidelines, this is again one of the housekeeping matters as I see it, and so I directed liaison counsel to begin discussing and fashioning or attempting to fashion the various guidelines.

My approach is to get them focused on it and to see if they can agree on the whole guidelines. If they can, that's fine.

It's their depositions and it's their deposition guidelines, so it's for them, not for the court. But I want to have some understanding of just the mechanics of the depositions. If they can't agree on all of the specifics, then they can agree on what they can agree on and then I will make the decision on what they can't agree on. But I've asked them to focus at least on deposition guidelines. I will hear from the parties on that issue.

MR. HERMAN: Your Honor, Plaintiffs Liaison Counsel and Defense Liaison Counsel have met face to face on at least two occasions to discuss potential guidelines. We've exchanged thoughts. From a plaintiff's perspective we are sort of faced with a Holmesian dichotomy as to form and substance. And until the PSC is formed, Plaintiffs Liaison Counsel is not comfortable in agreeing to all of the guidelines that have been suggested.

I will say that there are at least 50 percent of the proposed guidelines which seem that we can agree on, but there are many more that we have not been able to reach agreement. I will say this, I know that the lawyers that you choose will work in good faith to present defense counsel and try to resolve the guideline issue.

THE COURT: We don't have time to worry about the size of the table and things of that nature. I am interested in more of how many people ask questions and mechanics of that nature.

Also, with depositions when we get further along you need to be considering whether or not internet depositions can and should

be used. There are various providers which provide access for internet depositions. During internet depositions, each side has at least two people, one with a laptop and the other asking questions. They go to the depositions, any interested party may log on to the deposition and pull it up on their computer screen in their office.

On the right-hand side of the page is real time, on the left-hand side is voice and image. The plaintiffs have their chat rooms and the defendants have their chat rooms, the experts have their chat rooms.

If they have some input, they simply type it in and send it to the individual next to the questioner. It appears on that individual's laptop and he or she at the appropriate time meets with the questioner and says, New Orleans wants this question or San Francisco wants this one or Hawaii wants this one or so forth. So everybody has an opportunity to input there.

There are, as I say, several providers, and I suggest when we get with them and begin focussing on that tool.

MR. HERMAN: Your Honor, I can make one short statement. Mr. Seeger invited me to New York to meet with the court reporters that have been reporting depositions in the coordinated New Jersey action and other actions, and the technology is available to do what your Honor suggested. And beyond that, things can be fully digitized and edited from a lawyer's law office very easily for whatever purpose they have.

THE COURT: It can also be looked at by me during the

deposition, and in a particularly problematic deposition I can monitor it and I'll rule on those objections immediately so that you can continue onward.

MR. HERMAN: Your Honor, when the PSC is formed we will immediately make available whatever vendor the PSC desires to use for your Honor to meet with. Thank you.

THE COURT: Anything further on deposition guidelines?

MR. WITTMANN: Just a couple of things, Judge. I may be more optimistic than Russ as to where we are in the deposition guidelines. We met a couple of times and I don't think we are going to have any significant problems on the deposition guidelines. We've agreed to provide the PLC at their cost copies of all of the depositions that have been taken in other litigation so that they can maintain a separate depository for the depositions. The deposition copy would also include exhibits and will be provided in electronic and video format, subject to compliance with any applicable confidentiality orders in other courts. So I think that'll be a big start toward the deposition guidelines having the depositions there.

Probably the biggest for us will be over redeposing people. We've had some people deposed half a dozen times already, and that's something that Russ and I are going to have to work with; but I know many of the counsel in this room on the plaintiff side, I've had cases with them before, and usually we are able to resolve that to our mutual satisfaction and I think we will do that in this

case here.

THE COURT: I urge counsel to try to do that. I also tell you that if you can't do that, I will do it. I want the deposition guidelines in place before the next meeting. I will be meeting with liaison counsel weekly on that and focussing on that, but we will have them in place before the next meeting.

MR. HERMAN: Just one more comment about the providing of depositions. Your Honor, I am optimistic by nature after having my head beat in by Mr. Wittmann for many years. I could not stand before you unless I was optimistic.

May it please the court, what we've decided is they will provide a log, the defense will provide a log of depositions that have been taken, we will get them to Mr. Seeger, he will compare them. If there is something we don't have, we will order it at our expense.

But it really does lead into the plaintiff's document depository issue.

THE COURT: Let me have a word on that. With this number of documents, and I know that the case has been going on in various state courts and also a couple of federal courts, so a lot of discovery have been rendered and made. I don't want to reinvent the wheel or redo the discovery. We need to be able to migrate that discovery into the plaintiff's depository in this case.

And I also urge counsel to henceforth, if you haven't done it thus far, to produce documents in CD ROM or some electronic

format. It's easier to access and it's easier to research. And organize. So I would be looking for you to do that.

One of these days, one of these case are going to find that it's helpful to have a common depository. The last time I focused on that there was some question as to security. There may still be security potential problems, but it seems to me that a common depository with common numbers, that's the essential part in a production, you've got to have the same numbers and you're migrating the documents, let's not renumber them, let's try to use the same numbers so that your depositions make sense so that we don't have to tell the jury you've heard him say Plaintiff 5, well, it's now Plaintiff 8, it's no longer -- it just doesn't work. So think about the trial aspect of the case when you begin to collect information and see if you can keep it uniform.

But also I will be talking to you about some common depository, it just makes more sense, it's more efficient, but that is something that is in the lawyers realm and not the judge's realm as I see it. It's for your use, not mine. Let me hear from the plaintiffs on the document depository.

MR. HERMAN: Your Honor, to date in state court coordinated action between 6,000,000 and 7,000,000 pages of documents have been produced serially. They will produced electronically, they are fully searchable, and that depository is housed at the Seeger Weiss office in New York with satellite depositories in Alabama, California, Pennsylvania and New York and

New Jersey.

It's contemplated that there would be a plaintiffs' depository which can be accessed electronically by all plaintiffs counsel. It's contemplated that the same numbering system that's already been used be used, as your Honor in other cases has requested so that we don't have double Bates numbers, for example. We expect that within 30 days of the PSC being selected by your Honor, that we will have a plaintiffs depository with availability nationwide for MDL plaintiff registrants to access. We appreciate defense counsel's willingness to provide us with a list of depositions that have been taken in cases.

With respect to a single depository, your Honor, we have been discussing and suggested that as regards medical records and pharmaceutical records that we may very well be able to establish a uniform depository with enough security that only the attorney for plaintiff whose client's records are registered may access it and comply with HIPA, because as your Honor is aware because of the new HIPA procedures we are going to have to go through some hoops that we haven't had to go through before.

THE COURT: Any input from the defendants on that?

MR. WITTMANN: Only this, your Honor. We obviously have copies of documents that defendants have produced during the course of other discovery, and we will, of course, make available to the Plaintiffs Liaison Counsel any documents that they don't have. As I understand it they are all electronic, in electronic form and fully

searchable. So that should not be a problem.

I would not anticipate a joint depository because we've got our documents already and they've got theirs and just if they need something let us know. And Russ is correct, we are working to try to figure out a way to deal with these healthcare forms we will be getting from the plaintiffs and we will continue to work on that.

THE COURT: Bring the court into that if that's a potential problem because I can cut some of that red tape. The Plaintiff Profile Form, this is either the plaintiff, probably the defendant should speak on that.

MR. WITTMANN: Yes, your Honor. We provided Mr. Herman with a suggested plaintiff profile form, we call it a fact sheet, but it's the same thing. It was based largely on a profile form that was used, as I understand it, in the state of New Jersey. Mr. Herman is looking at it, he's obviously got to wait for his committee to get formed to come to some agreement on it, and we will continue to work on that between now and the next meeting.

THE COURT: With regard to plaintiff profile forms let me say a word. You have a right to have information, so when you get to the point where the form is agreed upon and it's been sent out, you need to keep a record of who gets them and who doesn't send them back. After an appropriate period of time and effort for those individuals who haven't sent back completed plaintiff profile forms, I'll entertain a motion from you to dismiss their case.

Everyone has to know at the outset that they have a right

to file a suit, but they also have a duty to respond to discovery. And if they decide not to respond to discovery, they need to be out of the lawsuit and people who are willing to respond need to be in the lawsuit.

MR. HERMAN: Your Honor, with respect, most respectfully to the court, the Defendants Liaison Counsel would make an objection the first time this comes up to any dismissal for prejudice for failure to timely file a patient profile form.

THE COURT: I understand and I would expect you to do that and I would overrule the objection. I am not going to willy-nilly dismiss cases. I am going to give an opportunity to the person to respond, I am going to do everything I can to urge that person to respond. But after a number of requests, if they do not respond over the objection of Plaintiff Liaison Counsel or Plaintiff Steering Committee, I will dismiss those cases with prejudice.

MR. HERMAN: Your Honor, I have a comment about the patient profile forms.

THE COURT: All right.

MR. HERMAN: We are going, I predict, being the optimist that I am, that we are going to need the court's supervision in this matter. We have already many, many members of plaintiff firms have objected to the overly burdensome and intrusive patient profile forms which have been suggested or utilized. And Mr. Wittmann and I and his defense committee and the PSC will work diligently to reach some common ground, but I fear this is an area where the court's

attention is going to be needed.

THE COURT: You need to get me involved in it and I will get in that area as quickly as I can. I don't see a plaintiff profile form as a substitute for a deposition; therefore, you can't send out an encyclopedic form and expect the plaintiffs to fill them in, they are just not able to do that, especially the pro se plaintiffs. But a reasonable attempt to get information you're entitled to.

But bring any discussion, any disputes to me and I will resolve them promptly and we will have a profile form for sure.

Plaintiff's Time and Billing Guidelines is the next agenda item. One of the duties that an MDL judge has is to keep an eye on the work as it's being processed, both from the defendant and the plaintiff standpoint. Particularly duty some to look at the plaintiffs because the court has input and must approve any fees or disbursements. So I do that by basing it on information. I need information.

And so I've asked the plaintiff liaison to deal with this particular problem and come up with some way of handling it. I'll ask them to comment on it at this time.

MR. HERMAN: Your Honor, we have endeavored to interview certified public accountants familiar with this activity who are not employed as accountants for our firm or any firm that has submitted a PSC application. We will at your Honor's convenience have that CPA meet with your Honor so that your Honor can direct the CPA as to

the form and type of substance your Honor requires.

THE COURT: These are my initial, this is my initial thoughts on it. I would like to see the forms generally on a two month basis. I would like to see time, as well as expenditures from the plaintiff committee members. I will treat that confidential, I will put that under seal, I will not disclose that to the defendant. I feel that that's a plaintiff work product and, therefore, it's privileged and they have a right not to disclose it.

They will disclose it to the court, but only to the court. It will help me in keeping up with who is doing what and when I get to the point of having, if it gets to that point, if I am called upon to look at fees or costs I will be able to intelligently make those decisions. But I will meet with the accountants and discuss that further with them.

MR. HERMAN: There is one comment, if your Honor would permit. There are an extraordinary number of experienced and talented firms who thus far have sent in applications for PSC, and as liaison counsel I am advised there will be a number more. It's anticipated that liaison counsel will recommend to the PSC in accordance with Complex Manual 4 and 3 that committees will be formed subject to the PSC for common benefit work, and that they, too, would submit but that they would have to be authorized by the PSC. This seems to have worked well in MDL-1355 and I am hopeful that the PSC in this case will do that.

We are going to, at least in this lawyer's judgment, need

every bit of talent and experience that we can muster against these formidable firms.

THE COURT: The way that I see it is that the Plaintiff Steering Committee is going to have to be a manageable number. No disrespect to anyone who is not on the Plaintiff Steering Committee. I know that there will be a lot of talented people who are not on the plaintiffs committee, and that doesn't mean that they are not talented, it doesn't mean that they're not first rate. There are other aspects to the committee that the court will consider, and so everybody will not be on it.

But that doesn't mean that they will not have the opportunity to do the work. I would encourage the plaintiffs' committee to utilize any person who is interested in working and that person will also be accounted for in time and effort and that will help me making any decisions, if I am called upon or if it is necessary for me to make those decisions at the termination of the litigation.

So I do encourage the use of committees. That does not mean that the Plaintiff Steering Committee will be shirking responsibility. They will have the ultimate responsibility.

And also I will be interested in a state committee. I do feel that it's helpful for a state, for all of the cases in the states to at least know what's going on here; and so I would invite them eventually to give me some liaison with the states so that a person or persons can participate in these meetings, such as we're

having here, and to report on any problems that their state cases are having so that the court can be aware of them. And if I can assist them in any way I will do so.

The next item is Position Papers. I have received position papers from a number of people in addition to the Plaintiff Liaison Counsel.

MR. HERMAN: May it please the court, on behalf of the plaintiffs, I want to particularly thank Mr. Seeger, Mr. Birchfield and Mr. Davis who have participated in the submission of position papers. As Plaintiff Liaison Counsel, we would like to reserve the right when the PSC is formulated for the PSC to supplement the position paper in the event that the PSC feels it's necessary.

There has been on-going litigation in cases in California, New Jersey, New York, Texas, Alabama, as Mr. Wittmann indicated. And once the PSC is formed, there may be positions that we need to alert the court to and defense counsel which have not been heretofore expressed.

THE COURT: I don't have any problem with either one of you all supplementing. It's helpful to me, I need to know all of the aspects of the litigation. I look to you to educate me. If I need any information, I will conduct a seminar and have your experts talk to me about it. I need to know what's going on in the cases to at least make some intelligent judgments, and I will do that.

The next item is the Third-party Payor Claims.

MR. HERMAN: Your Honor has described the third-party

payor claims as distinct, some are tort claims, third-party payor claims are actually tort claims, and then the consumer claims.

THE COURT: And there are some third party consumer claims. There are some groups that have purchased in bulk and expended money for Vioxx and they feel they have a claim based, solely on the consumer laws, and so I recognize that that is also an aspect of this case and I would like represented on the committee.

MR. HERMAN: I've been remiss, as I am sitting there recall receiving at least one letter from a law firm indicating in New England they had a RICO claim pending, which I assume is a tort claim, not a consumer claim. But I am sure when that matter is transferred down here, we can alert the court to it.

THE COURT: All right. On this matter, is there anybody else in the audience which has any view of this, any comment that they would like to make?

MR. HERMAN: I know that Mr. Dugan and Mr. Sobol called me yesterday and came in and said they would like to address this issue.

THE COURT: Okay. I don't mean to shut out anybody in the audience from speaking, I just need it organized somewhat and that's why I have a liaison counsel to at least spearhead it. I like Athenian democracy, but it doesn't work if everybody talks at the same time.

THE DEPUTY CLERK: Put your appearance on the record.

MR. DUGAN: James Dugan with the Dugan and Browne law firm

here in New Orleans. Good morning, your Honor. I would like to first commend you on your appointment of liaison counsel of Mr. Herman and Mr. Wittmann. If anybody can corral the lawyers out there, it's these two gentlemen.

I was asked to report to you on the consumer and third-party payor cases that are filed out there. According to my knowledge, there are approximately 11 cases, all class actions, filed around the country.

THE COURT: They're in 11 states?

MR. DUGAN: They're in about nine different states, your Honor. Of those eleven, nine are in the federal system and two are in state court in New Jersey. Seven out of the eleven are filed on behalf of third-party payors only, two on behalf of consumers only, and two are filed on behalf of consumers and third-party payors.

There are three cases filed in front of your Honor here in the Eastern District of Louisiana, which I have filed. One on behalf of third-party payors only, which was originally filed in New York, has been transferred to your Honor by way of the judicial panel's initial transfer order. There are approximately five other in the federal system that should be making their way to your Honor in the very near future.

I have been organizing, along with Mr. Sobol, the lawyers that have filed these types of cases, and I expect that there will be several other lawsuits filed around the country. That's the report on the cases.

In addition, Mr. Sobol had transmitted to your Honor an additional agenda item that he would like to speak to.

THE COURT: That's fine. Okay, Mr. Sobol.

MR. DUGAN: Thank you, your Honor.

THE COURT: Thank you very much.

MR. SOBOL: Good morning, your Honor.

THE COURT: Good morning, Mr. Sobol.

MR. SOBOL: May it please the court, Tom Sobol, Hagens Berman Sobol and Shapiro. I will be brief because you've already addressed the essential issue which we wanted to make sure that the court was aware of, which was fundamental difference between these two kind of cases and the court has addressed that.

And I also just want to say, although I am standing before the court, there are quite capable other counsel that could have been making this presentation and that kind of thing, as well as my colleagues Mr. Landon and Ms. Hart who are behind me.

I want to address, I think then your comments are raised what I would just suggest are two issues that we might at least want to flag. The first is this. Your Honor contemplates a single Plaintiff Steering Committee. Obviously then the members of the steering committee, some constituents will be on the, what I will call, if you will, the mass tort side and others will be on the consumer side. Either the committee itself will have to organize itself as to how it handles that, either with or without the direction of the court. But that's something that would perhaps be

nice to have at least in some way in place by the next time that counsel are before you.

The second thing that I want to address to you, your Honor, is you obviously noticed from the submission that my firm and other counsel made, we laid out, we were optimistic like Mr. Herman we set out a schedule, of course we haven't had an opportunity to review it with defense counsel. It's not clear to me whether there will be enough time, hopefully there will, between the time that you form the Plaintiff Steering Committee and the time that we have the next meeting here whether at least members from the group that I work with, the consumer claims, as you've called it, will have time to confer with defense counsel to see whether they can, we can make a joint recommendation on scheduling aspects of that claim or not. Obviously it would be expeditious in the interest of justice if we did have that amount of time. Those are the only two comments I want to make.

THE COURT: I will be responsive to that. I am aware of the differences, I am aware of the problems, and I will make an effort to do that. And I can always supplement case management orders to take that into consideration. So I am aware of that and I appreciate the submission you made. It was helpful to me.

MR. SOBOL: Thank you, your Honor.

MR. HERMAN: I have a question, your Honor. Go ahead, Phil, excuse me.

MR. WITTMANN: Just a few comments on the consumer

actions, Judge. These cases seek basically compensation or refund of money expended in purchasing Vioxx. Really the third-party claims and consumer claims are essentially seeking the same type of recovery. And I think it's important that the third-party payor cases be coordinated closely with the economic loss claims because we have other class actions asserting this economic loss. So that certainly needs to be done as Mr. Dugan and Mr. Sobol pointed out.

But I am concerned that the basic discovery in those cases is going to overlap with the other cases that will be going forward.

THE COURT: I understand that. And we are not going to have double discovery. The areas that are overlapping, the people have to recognize that one discovery is fine. But there are some areas that may not overlap and that's where I think some discovery and some attention needs to be placed.

MR. WITTMANN: We've thought about this a lot. We would propose to the court and to Mr. Herman that the better approach would be to have the third-party payors and the economic class people have a spot on the Plaintiffs Steering Committee, but that there be one steering committee rather than separate steering committees.

THE COURT: There is no question about that. I am making one steering committee, I will make them have a representation on it. But I need to have something that's manageable. That doesn't mean that there are not going to be other people working, but I need a manageable committee that I can meet with in one room and not this

type of room.

MR. WITTMANN: Finally, Judge, on the defense side, we will be working with the counsel for the other defendants. And to the extent there is any difference in what they're presenting to the court, we will coordinate closely with them and convey that to the court. But we will stay on top of that situation.

THE COURT: My interest in all of the aspects, I want plaintiff and defendant's counsel to meet before they come to me. To meet and confer. I want them to legitimately look at a problem and to see if they can find some commonality in that particular problem.

Now, those of us who walk in these corridors whether the plaintiff or defendant lawyer or judge, know that there are going to be areas that you can't agree on, notwithstanding good faith efforts. That's where I need to come in. But I don't need to come in on areas that you folks can agree on.

Let me make this point, too. Most of the time, most of the time a decision that you make that's agreeable to you is going to be a better decision than the one that I impose on each side. It's going to be better for you to see if you can agree on something than for me to have to impose it. If I do, it's not going to be as good or convenient of a decision as you yourself have been able to make, but I can assure you that I have no reticence about imposing decisions.

MR. WITTMANN: Thank you, Judge.

THE COURT: Thank you very much. One thing that I should comment on, too, with regard to the class actions. I had not made a decision as to whether I will handle class certification in all class actions or whether I will send them back to the states. I want to take a look at that. I can do either and I haven't made any decision as to whether or not I will handle all of the certifications applying the appropriate law, myself doing it either in this courthouse or in the local courthouse, because an MDL judge sits throughout the country and has the capacity to sit throughout the country. So I haven't made that decision yet.

I saw someone standing up. Yes, sir.

MR. JOHNSON: Thank you, your Honor. My name is Dennis Johnson, I am with Johnson and Perkinson in South Burlington, Vermont.

THE COURT: Welcome to you, Mr. Johnson.

MR. JOHNSON: Thank you. I am one of the firms that also made a submission to you.

THE COURT: Yes, and I appreciate your submission, I noticed that.

MR. JOHNSON: I would also ask your Honor just to keep an open mind to whether or not there may be separate groups within the economic set of classes that may have differing claims and defenses. In particular, states that may have consideration paid statutes, whereby you are not seeking to demonstrate the amount of overpayment that might have incurred as a result of the misrepresentation, but

rather simply need to prove deception in order to tap into the statutory rights. Which may eliminate and may expedite a lot of the discovery that might be necessary. If you look at the types of discovery that Mr. Sobol set forth for an overpayment claim, many of those things will simply be unnecessary in states that have consideration paid statutes.

THE COURT: Which are most states, right?

MR. JOHNSON: Well, many of them do, many of them have statutory rights to consideration pay, others have the right to possible equitable relief. That creates differences between claims and defenses. So we will address some of that in our papers seeking a position, but I just wanted to ask your Honor to keep that in mind.

THE COURT: I understand. I look upon that mostly as damages as opposed to theories of liability. I see a difference in damages and in each of the states there is some tweak on the damage aspect depending upon who is pushing the law. But that's what happens.

MR. JOHNSON: I agree with that. And with that in mind, you will see that in my papers as well, Vermont is one of those states that actually been termed the fourth category of consumer fraud having probably the most liberal statute out there. Thank you, your Honor.

THE COURT: Thank you very much. I thought I someone.

MS. HART: Your Honor, Barbara Hart with Goddkind Labaton.

THE COURT: Welcome to you.

MS. HART: I'm well, your Honor. Defense counsel has suggested that it might be appropriate to have one position on the Plaintiff Steering Committee for economic injury cases, and I would just beg to differ as to whether that is the correct composition. Actually, you have not only the consumers but then a panoply of third-party payors ranging from the private insurers to the union benefit funds and also self-insured government entities such as counties and various cities across the nation.

So there may be the need to have, I tend not to agree that the legal theories are different but you do have plaintiffs that have different voices that should be represented at that committee.

THE COURT: I understand that. And also I would say that it's not inconsistent with what we've been talking about to have people who are not on the committee at least doing some of the work and coordinating it. So I would expect that whoever or however many there are on the committee represent that aspect of the case, I don't think those individuals are going to be the only ones who work. I would expect those individuals to coordinate the work throughout the states with other people and also to keep me up-to-date on who is doing what.

MS. HART: Thank you, your Honor.

THE COURT: Thank you. Anyone else that would like to address this point, or for that matter any other point?

MR. WITTMANN: Let me just rise to say that I never meant

to suggest a number of people from the consumer class being on the Plaintiff Steering Committee. I do not have a dog in that hunt on the Plaintiff Steering Committee and I would never even begin to suggest who should be on that committee, your Honor.

THE COURT: I am interested in suggestions, but everybody needs to know that it is my decision and not your decision. So I respect your input, I look at it, I invite your input, but it will be my decision and I will make it considering various factors. Yes, sir.

MR. BECNEL: May it please the court. Good morning, your Honor. I have some people that sent things to me unsolicited that I do not represent that I told I would bring to the attention of the court. One deals with an issue of remand, which I gave to your clerk and I've given counsel a copy of it. And I think the issue is self-explanatory as to how remands where cases are removed but then there is a stay in place that they can't file the remand how that's going to be handled. So I would like to make the court aware of that.

Another person sent a submission and said he could not be here because of illness in his family and so I think the court has been served, and that is a Mr. Zonas, Z-O-N-A-S, who submitted something to you. The young lady who submitted something is a Sherry L. Tarr, T-A-R-R, by letter, which she gave to me yesterday in New York. So I brought it to the court's attention.

THE COURT: Thank you very much.

MR. BECNEL: Two other things I would ask in reference to class certification I sent to Mr. Herman and others for consideration because of Louisiana peculiar statute that you have to file within 90 days a motion for class cert. He's held it in abeyance pending some decision by this court of how it is to be handled. I would like to ask the court to waive that 90 day requirement until the court decides it wants those motions filed.

The other thing I would ask the court to do in reference to its future meetings here, we have been able to, as you can see the number of lawyers that have come, to negotiate special rates at the Windsor Court Hotel, the W and the Ritz-Carlton for people in the $200 range as opposed to their usual three or $400. And the general managers of those hotels had asked if they could reserve those rooms in advance if the court could give us some lead time because many times there is conventions and people are scrambling. I had literally 15 or 20 people calling trying to find out where they could stay, and if the court could do that with some advance schedule five, six months in advance of when it wants to meet and how many rooms we can reserve. Thank you, your Honor.

THE COURT: Thank you very much. Anything else?

MR. HERMAN: If there is no other comment from any attorneys, I have several matters, your Honor.

First of all, does your Honor wish to have those folks that want to apply for a state liaison committee submit papers by the March 28th date? And the folks that have consumer claims who

haven't submitted any papers submit papers, or would your Honor --

THE COURT: The latter for certain, I need the people from the consumer claims or anyone else who is interested in submitting, wishing to be on the Plaintiff Steering Committee to give me the information. Those of you who have done it, fine. If you haven't, you have an opportunity to do it until that period of time.

With regard to the state liaison, I will talk with you about that at the next meeting. I don't need that before. My first responsibility and obligation is to this case. But I also feel that if I can be of service to the state cases, I want to be able to do that and have them have access to it.

I think it's best for this MDL, too, that we have some coordinated effort so it helps the MDL by coordinating states. But I will get to that after I've taken care of the housekeeping aspects of the MDL before me.

MR. HERMAN: Thank you, Judge. There is one other issue I know that the court's aware of the cases which have MDL which have both a Pfizer Celebrex drug and a Merck Vioxx drug alleged to have been prescribed or taken by a single claimant and that there is a severance issue out there. I don't know whether your Honor has made a recommendation yet or not, but I did want to call it to the court's attention.

THE COURT: Yes, sir. There is a severance, those cases are going to New York, I will be severing those and sending them along at the appropriate time.

MR. HERMAN: Your Honor, as one of the most important piece of business before this court, and I know Mr. Wittmann joins me in this. We want to thank Loretta Whyte, the honorable clerk, and her staff and your staff for a very large burden that recently has been put on them with all of the transfers, et cetera. And as usual, they have done a wonderful job.

THE COURT: I will second that. We have an outstanding clerk's office and they've been working overtime and helping me greatly in getting a handle on this particular case.

MR. HERMAN: I have one last short comment. Your Honor mentioned Athenian democracy. In Pericles funeral oration, he said: "We differ from other states in regarding the person who holds aloof from public life not as merely as quiet but as useless; and we discuss all matters of state, carefully and in person, holding not that words and deeds go ill together, but that an act is foredoomed to failure when undertaken undiscussed."

To that end, I can commit your Honor that the PSC will have very vocal internal discussions, and we will have discussions with defense counsel also.

THE COURT: That's fine. The next meeting will be April the 28th, April the 28th at nine o'clock.

Anything from anybody that I haven't covered, anything you would like me to cover, anything you would like me to talk about?

MR. BECNEL: Judge, those people, if I may stand here and not take time, that have submitted applications without the

knowledge of what you wanted in terms of different aspects, should they resubmit? And some people I've noticed have done single spaced, others have double spaced. What is the court's pleasure?

THE COURT: My pleasure is double spaced. I have enough to read folks and I am trying to do the best I can with it. So give me something that I can look at.

I know most of the people that I have gotten applications from. I am not a stranger to them, I know them. So you don't have to tell me about yourself in as much detail as you would somebody who is from another planet. Keep that in mind.

But I don't need a letter from everybody, but if there is somebody who is focussing on specifically on the consumer cases that is not presently discoverable in the material that you've sent, you've got to know that I will read it. So if it's in there, I don't need another letter telling me in paragraph 6 I said such and such. I will read paragraph 6.

But if there is something there that you feel that you haven't said, this is where my peak interest is, bring it to my attention with a short two line letter. I don't need anything more extensive than that.

Finally, I take the opportunity to express my appreciation to all of the lawyers who are present here today, and I look upon these cases as workable only because of the high caliber of lawyers who handle this particular case. I look to you for suggestions and I expect you, as you've always done, to handle yourself in a very

professional way.

We have an opportunity in this case, as in other cases, to make our society proud of lawyers. We have a long tradition in our profession of helping our country in times of adversity, and I know that whoever participates in this litigation will rise to that challenge and will handle themselves in an appropriate professional way.

So I thank you for being here, I thank those of you who have given me written suggestions, and I thank those who have spoken here today. The court will stand in recess.

THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

I, Karen A. Ibos, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

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Karen A. Ibos, CCR, RPR

Official Court Reporter