



P R O C E E D I N G S

(Case called by Assistant Clerk of Court, Mr. Gene Smith.)

THE COURT: Will counsel make your appearances for the record, please?

(Microphones adjusted.)

THE COURT: In any event, let's have counsel make appearances for the record, and I'll speak up until we can get the mic on.

MR. HERMAN: May it please the Court. In MDL-1657, Russ Herman for the Plaintiffs' Committee.

MR. WITTMANN: Phil Wittmann for defendant Merck, Your Honor.

THE COURT: Okay. We're here today in connection with our monthly status report. We're meeting in Houston, Texas, because of Hurricane Katrina and the aftermath thereof. I must say that it's good to see you all, and it is also good to be seen by you. This has been an ordeal. And I want to begin by thanking my colleagues in Houston for all of the courtesies that they have shown to the Court in the Eastern District and to all of our staff.

I tell all of you, particularly my colleagues from Louisiana, that we've been thinking about you. We know the troubles and the difficulties that you have, but we know you're a tough breed and that you'll come through this and we'll all be, hopefully, better for the experience.

1 I have met with liaison counsel and received a  
2 joint report from them, and I'll take the matters in the order  
3 in which they have been presented to me, the Lexis/Nexis File &  
4 Serve. Any issues on that?

5 MR. WITTMANN: No issues, Your Honor. We had our  
6 service interrupted slightly during Hurricane Katrina. We were  
7 having a nightly pull on new filings, new MDL cases, that were  
8 filed that were uploaded every Monday, Wednesday and Friday,  
9 which gave quick access to people on File & Serve, but the  
10 Hurricane disrupted that. Lexis/Nexis says they're about to  
11 get that back on line in the next few days, so I could pull  
12 those cases up and put them on line now.

13 There's been some difficulty with respect to  
14 uploading of medical records. We're working with Lexis/Nexis  
15 on getting that done. I anticipate having no problem with it  
16 within the next week or so.

17 THE COURT: I think we have Lexis/Nexis on the line.  
18 Is that true? Hello.

19 TELECONFERENCE OPERATOR: Conversation mode is on.  
20 Everyone can now be heard.

21 MR. HELFRICH: Lexis/Nexis, and Dana Mercer is on the  
22 line as well.

23 THE COURT: All right. Let me hear from Lexis/Nexis  
24 on that particular issue. There was some question about  
25 uploading material. What's the issue there?

1 MR. HELFRICH: Sure. I'm not sure -- it sounds like  
2 they're two separate issues.

3 THE COURT: Who is speaking, sir?

4 MR. HELFRICH: This is Joe Helfrich, H-e-l-f-r-i-c-h,  
5 with Lexis/Nexis.

6 THE COURT: All right. Mr. Helfrich.

7 MR. HELFRICH: Sounded to me like there were two  
8 issues there: uploading of documents that might have been  
9 missed during interruption with the hurricane and then  
10 separately going forward, uploading the bulk of plaintiffs'  
11 medical records. Am I right, that that's the two issues?

12 MR. WITTMANN: That's correct.

13 MR. HELFRICH: Okay. And I may actually ask my  
14 colleague, Dana, to -- Dana Mercer, who's on the phone -- to  
15 address the first piece of that, uploading the documents that  
16 are behind as a result of the hurricane.

17 THE COURT: All right. I need to know from you two  
18 things. One is what the problem is and, two, how you're going  
19 to solve it.

20 MS. MERCER: Judge, this is Dana Mercer. I have been  
21 in contact with the clerk of the Eastern District Court of  
22 Lafayette. The reason for the disruption, obviously the  
23 hurricane, and the confusion as to where to file, we do have  
24 several locations where people are paper-filing their  
25 documents. The Court is gathering those, and we're working

1 with the Court to upload those as quickly as possible and would  
2 expect the automatic pull to begin once again by the end of  
3 this week.

4 THE COURT: Any issues that we need, any further  
5 issues on that? So you'll be able to get everything worked out  
6 by the end of this week? I've talked to the clerk's office,  
7 and they said that they felt by the end of this week or the  
8 beginning of next, they should be able to work with you on it.

9 MS. MERCER: Exactly. They had informed me they had  
10 several boxes of documents they had received. They're working  
11 on a skeleton staff. And we're going to be working as quickly  
12 as possible to input that information into the federal system,  
13 PACER, and then we will be able to do the automatic pull once  
14 that's done.

15 THE COURT: Okay.

16 MR. HERMAN: Your Honor, just one issue. There was a  
17 rumor that the Lafayette federal courthouse was closed and  
18 would remain closed. It is not closed. It's open. In the  
19 event folks have materials they need filed, they can file them  
20 in that courthouse.

21 On behalf of liaison counsel, I think we should  
22 notice, attorneys for the record, that despite the two  
23 hurricanes, and the Court has directed us, liaison counsel have  
24 had meet-and-confers on at least a half dozen occasions. There  
25 have been meet-and-confers in New York and elsewhere on various

1 issues. And on behalf of the defendants and the plaintiffs, we  
2 thank the judiciary in Houston and Your Honor and Your Honor's  
3 staff for moving this case without any lapse in time and with  
4 the Court's business moving on in a regular fashion.

5 THE COURT: It took cooperation from the attorneys,  
6 but we have been able to have several hearings in the meantime  
7 and I've been meeting almost daily with the lawyers since the  
8 hurricane, certainly several times a week in any event, to keep  
9 in touch with them. We've had hearings over cell phones and in  
10 cars and other manner, but we kept the case moving.

11 MR. HERMAN: Also, I want to thank Gene of the clerk's  
12 office for the job he's done.

13 THE COURT: Same here.

14 Let's see. The next item is orders issued as a  
15 result of Hurricane Katrina. There's an order issued by the  
16 governor of the State of Louisiana as well as by our chief  
17 judge of the Eastern District suspending prescription. The  
18 issue really is whether or not that order or those orders can  
19 have an effect outside of the state of Louisiana.

20 As you know, the MDL consists of not only  
21 Louisiana cases but all cases throughout the nation. There is  
22 some question, at least in my mind some question, as to whether  
23 a governor from one state can suspend the prescriptive period  
24 of other states. That is an issue that I would not suggest  
25 that if you have any way of avoiding it, that you confront that

1 particular issue. I suggest that you not take comfort in the  
2 fact that it can be suspended, but to file the necessary  
3 documents timely if that can at all be done.

4 MR. HERMAN: Your Honor, the Plaintiffs' Legal  
5 Committee, and particularly the Louisiana lawyers on that  
6 committee, are of the opinion that the Louisiana class action,  
7 which was filed in the first quarter of 2005, does interrupt  
8 prescription. However, nevertheless, a number of lawyers have  
9 been encouraged to file additionally their cases in a single  
10 complaint and to have that matter sorted out at some future  
11 date.

12 THE COURT: State court trial settings. In an MDL  
13 proceeding, we have the issue of federalism always present.  
14 The cases oftentimes proceed on dual tracks. In this  
15 particular case, it's been particularly challenging because the  
16 states have been out front, to some extent, in some three to  
17 four years before the case was filed in federal court before  
18 MDL was declared.

19 State courts have been very kind to me personally  
20 and have done what they could to coordinate it, coordinate  
21 their proceedings with the MDL, and I have extended my  
22 appreciation to each of them and do so, of course, publicly.  
23 But there are, nevertheless, some cases that are moving  
24 forward. I keep an eye on them. I talk to the judges involved  
25 so that if they find any particularly helpful matters, they can

1 share them with me as I will with them.

2 Any issue, any problems, any reports on the trial  
3 courts, state courts?

4 (Mr. Herman and Mr. Wittmann confer.)

5 MR. WITTMANN: Your Honor, on the state courts that  
6 are set, that I know of, we have the Zajicek case set for trial  
7 in Texas in Jackson County on March 20, 2006, and the Kozic  
8 case set for trial in Florida, in Hillsborough County Circuit  
9 Court, on May 1, 2006. And those are two state court cases I'm  
10 aware of.

11 THE COURT: The next item on the agenda is selection  
12 of cases for early federal court trial. We have one case, the  
13 Irvin case, that's scheduled for trial to commence November 28,  
14 2005. That case will proceed in Houston. I will be meeting  
15 tomorrow with trial counsel for that particular case. I'm  
16 interested in their views on which law is applicable, the  
17 selection or preparation of a jury questionnaire, issues of  
18 jury charges given in advance of the commencement of the case,  
19 and various logistical issues that might present themselves in  
20 that particular case. But that will be dealt with by a meeting  
21 with the trial counsel for that particular case.

22 Class action is the next item on the agenda.

23 MR. HERMAN: Excuse me, Your Honor. The plaintiffs  
24 and defendants have met and decided on four categories of  
25 cases. The most important matter from a PSC point of view is

1 which case will be tried next. Tom Kline, who is a member of  
2 your PSC, his office has been assigned by the PSC to brief that  
3 issue.

4 MR. WITTMANN: As I understand it, Your Honor, the  
5 Court asked us to provide letters to the Court saying which  
6 cases should be tried first. We have done that. I understand  
7 Mr. Herman will respond to that in the next few days.

8 THE COURT: The parties have met, and I suggested to  
9 them that they meet and first pick some categories, categories  
10 of cases that would be descriptive or would indicate a type of  
11 case, and then to see if they could within that category pick a  
12 particular case that would be both representative of a category  
13 as well as instructive. The purpose of that would be to see  
14 what a jury does with that particular issue or that particular  
15 category.

16 I appreciate the parties getting together and  
17 selecting categories because they know this particular case,  
18 and they can pick the categories better than the Court can do  
19 so. But they have not been able to select the cases. Each of  
20 them feel separate cases in that particular category should be  
21 the ones that go forward. So, I directed them to write a  
22 letter to the Court giving me the name of the case and the  
23 reason why they pick that particular case. Each side will be  
24 given -- will write a letter. I received a letter from the  
25 defendants today. The plaintiffs will have until Wednesday

1 to -- will have until Wednesday to respond.

2 Anything further on that issue?

3 MR. HERMAN: No, Your Honor.

4 THE COURT: What about class actions? Any response  
5 from any?

6 MR. WITTMANN: Your Honor, Mr. Levin may want to say  
7 something, so I'll let him speak first.

8 MR. LEVIN: Your Honor, the responses of the  
9 plaintiffs to the Rule 12 motions in two of the master  
10 complaints is due in about 30 days, and we have a motion to  
11 stay pending with regard to briefing of the class action and  
12 issues in the personal injury and wrongful death and, when  
13 responded to, Your Honor is going to set argument.

14 THE COURT: All right. Is that the way the defendants  
15 see it?

16 MR. BEISNER: Yes, Your Honor, we see it the same way.

17 THE COURT: All right. The next item on the agenda is  
18 the discovery directed to Merck.

19 MR. HERMAN: Your Honor, on September 15th, the  
20 defendants did file their responses and objections to  
21 interrogatories and requests for production. We do not  
22 anticipate filing a motion to compel with regard to  
23 interrogatories. We are looking at requests for production of  
24 August 22nd in New York.

25 Representatives of the plaintiff, Mr. Rafferty

1 and Mr. Irpino -- I'm sorry -- Mr. Arsenault, Mr. Irpino, met  
2 with Mr. Wittmann and another representative of the defendants.  
3 We will have an additional meet-and-confer in order to pick  
4 categories and see if we can resolve as many of the privileged  
5 matters as we can. We will select samples of issues that are  
6 outstanding. And we would appreciate Your Honor giving us some  
7 due dates for whatever our work product should be in that  
8 regard.

9 THE COURT: All right.

10 MR. WITTMANN: I understand Mr. Arsenault, and I will  
11 report to Your Honor by next Wednesday as to what we want to  
12 do.

13 THE COURT: The issue, really, in this situation is  
14 that there are a large number of documents that the defendants  
15 take the position that they are privileged. I have reviewed  
16 the transcript of that meeting, and there's reference to some  
17 50,000 documents that there is a claim asserted are privileged,  
18 either the attorney-client privilege or the work product  
19 privilege.

20 Work product is not really a privilege, but it's  
21 quasi-privilege, developed subsequent to the attorney-client  
22 privilege, which is, as all of us know, a sacred privilege.  
23 It's one of the earliest privileges ever recognized by any  
24 court of law in any jurisdiction. It proceeds back to the  
25 Codes of the Hammurabi and even prior to that. It's a

1 significant privilege. But the person or the party who asserts  
2 that privilege has a substantial burden because of the type of  
3 privilege it is.

4 In any event, the number of documents make it  
5 challenging, to say the least, for a court to look at. I could  
6 give it throughout the country to all of my colleagues and ask  
7 for their help. That wouldn't help matters, because you would  
8 get a number of different views on this issue. And you need  
9 some consistency. So that means that I'm going to have to do  
10 it.

11 The way that I see it, at least being done  
12 manageably, is to select categories that these documents fall  
13 into and then to give me a sampling of the documents from those  
14 categories, a random, statistically-accurate sampling of those  
15 documents. And I'll look at that sampling and make the  
16 decision. I'll be particularly conscious of the fact that  
17 there's some overriding issues that present themselves in each  
18 of that particular -- each of those categories, legal issues.  
19 And I will focus on those legal issues and try to resolve them  
20 and, in doing so, will resolve the documents for that  
21 particular category and move onto the next category.

22 I directed counsel for each side to meet and  
23 report to the Court by Wednesday as to the categories and  
24 issues that they see that I could begin focusing on and also  
25 come up with some timetable. We have to move fast on this, so

1 the timetable has to be expedited, but I'll give them an  
2 opportunity to agree on a timetable and, if not, then I'll set  
3 the timetable.

4 MR. HERMAN: Your Honor, with respect to priorities in  
5 production of documents, I've had an additional chance or  
6 opportunity to meet and confer with defense counsel. The first  
7 priority in MDL remains the same for the sales information.  
8 The second priority is the PIRs, and defendants will let me  
9 know some time next week as to whether they're going to produce  
10 all of them or select the ones. The defendants have a  
11 particular problem, as do plaintiffs, in the MDL because the  
12 defendants have met with various requests for priorities in  
13 state cases. I have agreed that all priority requests, the  
14 defendants will send to me and I will treat those in light of  
15 what's best for the MDL. I will report to the defendants and  
16 to Your Honor. But this way, there will not be any conflict  
17 among priorities, and the defendants will be relieved of the  
18 burden of having to pick and choose and also vexatious or  
19 potentially vexatious motions brought in other courts.

20 THE COURT: Okay. One of the reasons that I've  
21 appointed a state liaison committee is to allow the state  
22 liaison committee to have access to all of the documents in an  
23 easy fashion and to not be giving up any rights in doing so.  
24 And that is, hopefully, helpful to the states. And if they  
25 have any particular problems -- any of the states have any

1 particular problems, I would hope that the state liaison  
2 counsel would feel comfortable talking to the Court about it  
3 because I do want to make sure that the states have whatever  
4 access they need in this particular matter.

5           It doesn't seem to me helpful to have the same  
6 trail gone over and over and over. It's not good for the  
7 litigants and it's not good for the system. So, hopefully,  
8 everybody can get on board and do it one time. But I also need  
9 cooperation from the states in doing that. So I do assure you  
10 that I'm sensitive to your issues. I'll do whatever I can to  
11 make life easy for you, but I also ask that you keep that in  
12 mind from the MDL standpoint.

13           Any PSC requests for production?

14           MR. HERMAN: Yes. I'm advised by defense counsel of  
15 the production of the fax data base in light of the order  
16 governing that is ongoing, Your Honor.

17           MR. WITTMANN: That's correct, Your Honor.

18           THE COURT: The next item is Vioxx professional  
19 representatives. The plaintiffs made a motion to allow the  
20 entire PSC to view the material. I've convened a conference  
21 with the parties. I heard oral argument from the parties. I  
22 also received help in the form of briefs. I read the briefs,  
23 the documents, the documentation cited in the briefs. I met  
24 with them and I've ruled and issued a ruling allowing the  
25 entire committee to look at the matter. I discussed it with

1 the committee prior to this. They understand that they'll have  
2 access to it.

3 The question is how to have access. I want it  
4 done as easily as possible. I suggest that you meet with the  
5 defendants and see whether or not there can be several  
6 locations or some way of doing it even on line, if that's  
7 possible. But it is a certain -- it is still under seal, and I  
8 am restricting it to the plaintiffs' committee.

9 MR. HERMAN: Your Honor, I do have a recommendation.  
10 I'm concerned about an electronic issue because of security.  
11 My suggestion, Your Honor, is that the document, each page of  
12 it, be stamped "Absolutely Confidential, Under Seal" subject to  
13 your order and that each member of the PSC receive a copy. Our  
14 office in Houston will undertake to have it delivered and we  
15 will assign each PCS member particular pages of the document  
16 rather than the whole document. And I think that should  
17 satisfy the confidentiality of it and also provide the  
18 defendants and the Court a way to monitor this situation.

19 THE COURT: Fine.

20 MR. WITTMANN: We are concerned, Your Honor, that we  
21 keep it under seal.

22 THE COURT: I understand. I understand. Talk with  
23 counsel, weigh that, and let's get it to me by Monday. If you  
24 have any difficulty, let me know and I'll resolve it.

25 MR. WITTMANN: Yes, Your Honor.

1 THE COURT: If you can agree, fine.

2 Depositions scheduling is the next item on the  
3 agenda.

4 MR. WITTMANN: We have depositions ongoing in the  
5 Irvin case right now, Your Honor, and will be finished up, I  
6 think, by the end of next week. I'm told the plaintiffs plan  
7 to schedule some additional depositions. I'm not sure what  
8 their plans are in that respect. I don't think it's in Irvin.  
9 It may be generally in the MDL.

10 MR. HERMAN: I received a communication from the PSC  
11 discovery committee listing the depositions which the MDL  
12 wishes to proceed with. We'll be filing something in that  
13 regard by next Wednesday.

14 THE COURT: Plaintiff profile forms, Merck profile  
15 forms.

16 MR. WITTMANN: Your Honor, we're starting to receive  
17 plaintiff profile forms now. As I indicated to you earlier, in  
18 many cases the profile forms are not being accurately filled  
19 out or being improperly filled out. I received some profile  
20 forms in the office that were actually meant to be sent to  
21 plaintiffs' lawyers and not to us, and I've arranged to give  
22 those back to plaintiffs' liaison counsel. But if we just  
23 could encourage the plaintiffs' lawyers to make sure they're  
24 filled out properly and accurately, it would be a big help  
25 because we can't begin to fill out the Merck profile form

1 unless we have an accurately filled out plaintiff profile form  
2 giving us the name and address of the prescribing physician, et  
3 cetera, et cetera.

4 THE COURT: Well, sometimes we're going to get some  
5 confusion in the number -- in the cases that we're dealing with  
6 for potentially 100,000 claims. So that is to be expected.  
7 But it's important that the plaintiffs fill out the forms  
8 accurately and fully. The forms have been discussed,  
9 negotiated, set after discussions by and between counsel, and  
10 also viewed by the Court. So there's no hidden agendas in it.  
11 It's what's necessary for each side to react to the case to  
12 discover some information. So I urge the plaintiffs to take  
13 care in filling it out. If they have any questions, ask  
14 questions. Don't just leave blanks or fill it in with  
15 inaccurate or incomplete information.

16 We're not there yet, but we're going to  
17 potentially get to a point where, notwithstanding several  
18 communications, some people won't fill out or can't fill out or  
19 haven't filled out their necessary profile forms. At that  
20 point, the Court then is going to have to instruct counsel to  
21 file a motion to dismiss the case on the basis of insufficient  
22 prosecution or lack of prosecution. I'm not saying we're going  
23 to do that willy-nilly. And I want to give everybody an  
24 opportunity to ask questions and to be advised of any problems  
25 that they have. But the point is, is that the Court is going

1 to step in if there's some -- after a period of time when this  
2 material is not received, notwithstanding several requests.

3 MR. HERMAN: Your Honor, it just occurred to me, and I  
4 apologize, that from sundown Monday to sundown Tuesday is the  
5 Jewish New Year and the Wednesday dates, if we could have until  
6 Thursday.

7 THE COURT: That's fine.

8 MR. HERMAN: On these various issues.

9 THE COURT: That's fine.

10 MR. WITTMANN: One other point on the profile forms.  
11 Just a reminder to everybody, that the first waive, I think  
12 it's A through G of the plaintiff profile forms are due  
13 November 15th. It's not very far away.

14 THE COURT: Okay.

15 MR. HERMAN: Your Honor, on remand, I was advised by  
16 Ms. Snapka, who is here, who argued with co-counsel on the  
17 Garza case, that that matter is still under consideration.

18 THE COURT: Yes. We've had a little interruption  
19 because of two hurricanes, but I'm mindful of that and I'm not  
20 going to put that on a slow track. I'm moving on it. Thank  
21 you for being here. I appreciate it.

22 MS. SNAPKA: Thank you, Judge.

23 THE COURT: Tolling agreements.

24 MR. WITTMANN: Yes, Your Honor. By minute entry dated  
25 September 19th, the Court granted defendants a 30-day extension

1 of time in which to respond to tolling agreements, which gives  
2 us a total of 60 days to respond. That was occasioned by  
3 delays resulting from the hurricane. We have -- we've been  
4 receiving tolling agreements right along. We're having some  
5 problems with tolling agreements, again, not being properly  
6 filled out, but we are -- when we receive a tolling agreement,  
7 we are notifying counsel, acknowledging that we received it.  
8 If there's any problem with what they've filed, if Exhibit C  
9 isn't accurate, we let them know that. So we are in  
10 communication with those who are filing tolling agreements,  
11 and, hopefully, that will not be a problem in the future.

12 THE COURT: In a case of this sort, I really do urge  
13 counsel to consider the significance and the use of tolling  
14 agreements. As I see it, a tolling agreement sometimes is a  
15 way of handling a number of types of cases. There's some cases  
16 that may be not significant cases, let's put it that way. At  
17 least at the beginning, someone thinks that they might be, and  
18 they don't develop that way. Or that maybe, for some reason,  
19 the case is considered a case; later on, facts reveal that it  
20 is not.

21 I know there's oftentimes an issue of tolling  
22 agreements where when the plaintiffs want to toll everything,  
23 the defendants only want to toll significant cases. Somewhere  
24 in between is the way to go, I suggest to you. But that  
25 doesn't mean that when you toll the case, it's just going to

1 sit there. We just need to take off the table the immediate  
2 "sword of Damocles" prescription. And once that's off the  
3 table, then it shakes out to where there are going to be some  
4 cases that ought to be dealt with summarily. The fact that  
5 they're tolled does not mean that the Court is never going to  
6 deal with them or that they're going to go into a black hole.  
7 I just see that as you're able to group those cases because  
8 they're before the Court.

9           If they're not here, I'm not going to be able to  
10 deal with them. Tolling agreements allow me to handle them.  
11 If they're not tolled here, then they're going to be filed in  
12 other jurisdictions. And it's a problem for me then to deal  
13 with them. Rather than have them filed in other jurisdictions,  
14 I'd rather have them tolled so that I can look at them at  
15 another time. So I think it's to everybody's advantage that  
16 tolling agreements at least be considered.

17           Louisiana joint complaints.

18           MR. HERMAN: I've addressed that briefly, Your Honor,  
19 previously.

20           MR. WITTMANN: I would just say, Your Honor, with  
21 respect to joint complaints, that we have a procedure for the  
22 filing of cardiovascular event cases that we've talked to Mr.  
23 Herman about, and that's ongoing and in the process. To the  
24 extent that any other type of joint complaint is contemplated  
25 for injuries other than cardiovascular event cases, we have

1 worked out a process with the plaintiffs filing joint  
2 complaints which envisioned filing of a short form, not a real  
3 full-blown profile form but a short form notice, so we'd know  
4 what the case was about and then putting those cases on ice  
5 with Merck not being required to answer or file a Merck profile  
6 form, something like that. If those cases get filed, we would  
7 ask the Court to consider something like that to deal with that  
8 particular category of cases.

9 THE COURT: That's fine. Then the point that I make,  
10 though, is just don't forget those cases. Eventually, we've  
11 got to get them and deal with them one way or the other. And  
12 it allows me to do that, as opposed to having them in 50  
13 states.

14 MR. WITTMANN: I understand.

15 MR. HERMAN: I think that we'll see the defendant  
16 served with a large number of those types of cases in the next  
17 two weeks and we'll get together with Mr. Wittmann and we'll  
18 try to work out some procedure to deal with the issues that  
19 Your Honor has talked to us about.

20 THE COURT: State/Federal coordination. Anything from  
21 the state liaison?

22 MS. BARRIOS: Yes, Your Honor.

23 THE COURT: We'll hear from Ms. Barrios.

24 MS. BARRIOS: Good afternoon, Your Honor. Although  
25 we're in Houston, I feel at home when I stand before you and I

1 welcome the opportunity. I hope that you and your family and  
2 your staff turned out well with the hurricane.

3 We do have a lot to report, although it's been a  
4 short time since we met before and we've had those two  
5 interruptions. I communicate on a regular basis with Mr.  
6 Wittmann's office and with the PSC, particularly Ms. Wimberly  
7 and Mr. Arsenault. Their both offices have been incredibly  
8 gracious to the State Liaison Committee, and we appreciate  
9 that.

10 I understand that there was a meeting prior to  
11 the status conference today and I apologize for not being  
12 present but I wasn't aware that it was an open meeting. And I  
13 understand that various issues were discussed with regard to  
14 the states, and I'd like to raise those with you.

15 Before I do that, I'd like you to know that a  
16 newsletter went out to over a thousand plaintiffs' attorneys  
17 across the country even after the Katrina. I need to publicly  
18 thank Aylstock, Witkin & Sasser of Florida. They took the lead  
19 in preparing the newsletter and getting it out when we in  
20 Louisiana couldn't get it out.

21 We also had an issue, an open issue, with the  
22 Court on the remand order that you gave us. We had given you  
23 at the last status conference a disk just listing all of the  
24 remand cases by state and listing all of the cases in which  
25 remand has been either granted or denied. As promised, but

1 although tardy, I present to you a CD-ROM that includes all  
2 those cases and the underlying pleadings so that when you click  
3 on any case, you will see the actual motion for remand and the  
4 memorandums in support and in opposition.

5 THE COURT: Are they grouped by states?

6 MS. BARRIOS: Yes, Your Honor. And I have to  
7 apologize to both Merck and the PSC because of the difficulties  
8 with Louisiana electronic equipment. We have not been able to  
9 access some cases because of PACER. And I need to publicly  
10 thank the law firm of O'Quinn, Laminack & Pirtle, who actually  
11 did this for me this morning and hand-delivered it to me right  
12 before the start of court. My apologies go to both plaintiffs  
13 and defense liaison counsel because we don't have copies of it  
14 yet. I'd like to present this to the Court. And I've spoken  
15 with the PSC and tell Mr. Wittmann now that we'll get a copy to  
16 them either Friday or Monday of exactly what I'm giving to the  
17 Court.

18 THE COURT: Okay.

19 MS. BARRIOS: Our next project that you had asked us  
20 to do, which because of -- sorry, gentlemen. I'm a little  
21 long-winded today. I haven't gotten to talk in front of a  
22 court in three weeks.

23 THE COURT: You've been saving up.

24 MS. BARRIOS: I've been saving up. I'm so excited to  
25 be here.

1                   Our last project that we talked about was the  
2 State Liaison Committee would group by states the various  
3 issues with regard to remand. And I apologize that we were not  
4 able to get that complete, but we will have that done by next  
5 status conference. I understand, Your Honor, in the meeting  
6 before the status conference that there was some discussion  
7 about learned intermediary law in each of the states. When we  
8 do the remand grouping, we'll be happy to look at the learned  
9 intermediary and be able to tie that all together for you, if  
10 you so desire.

11                   THE COURT: Yeah. Really, I just mention it. It  
12 wasn't brought up by either side. I just saw the issue of the  
13 -- some of these issues of discovery that I dealt with the  
14 professional representatives as having some connection, some  
15 relevance, to the defense of learned intermediary. It seems to  
16 me that it's a defense. In a case of this sort, some states  
17 have greater emphasis on it than others. And some states have  
18 various issues with whether there's any advertisement or so  
19 forth and so on. So it's different in each state, but the  
20 point is is that it's relevant. The representatives and  
21 disclosure representatives is relevant to that issue;  
22 therefore, I think it's discoverable because it is relevant to  
23 a defense in a lawsuit under the federal rules. And that's how  
24 it came up.

25                   MS. BARRIOS: Yes, Your Honor. And I agree, it is

1 going to be relevant and tied into the sales representatives.

2           You issued an invitation to the State Liaison  
3 Committee to raise issues that we hear about, and I'd like to  
4 take you up on that invitation. We have had numerous calls for  
5 disclosure of information with regard to the sales  
6 representatives. I have not been privy to the negotiations  
7 between Merck and the PSC and discussions with Your Honor, but  
8 there are attorneys from virtually every corner of the country  
9 who have called all members of the SLC and myself seeking that  
10 information for their cases. Their points are that they could  
11 have statute of limitations run against people who may be  
12 liable in some respect, and they'll never know the identity of  
13 those people.

14           Other issues that have come up, cross-noticing of  
15 depositions in state court cases and the use of the MDL work  
16 product, we'd like to work through those issues with Your  
17 Honor's permission. The state that has had the most activity  
18 since our last meeting has been Texas. Ms. Snapka has brought  
19 me up to date on several of the occurrences. There has been  
20 appointment of one judge now, Judge Randy Wilson of the 157th  
21 District Court of Harris County, who will be the Texas MDL  
22 judge. And he has had one hearing. It was on September 16th.  
23 It was basically an organizational meeting. And I understand  
24 that Ms. Snapka and Mr. Fibich will be the leadership for that  
25 MDL.

1           There are approximately 132 cases pending before  
2 Judge Wilson. He did issue an order quashing all the  
3 cross-notice of depositions in the Texas cases basically  
4 because the issue of the different procedural rules with regard  
5 to objections during depositions, and there was a small issue  
6 of the division of time between the attorneys. With Your  
7 Honor's permission, I'd like to work with the MDL Texas judge  
8 and Ms. Snapka to try to work out those issues so that those  
9 depositions don't just get routinely quashed because of those  
10 issues.

11           THE COURT: I don't -- I would hope that that would be  
12 able to be worked out because I don't see a court quashing an  
13 MDL deposition. I don't see that happening. But I would hope  
14 that for the benefit of the litigants and benefit of counsel,  
15 that they would be able to work this out so that it's not an  
16 issue of injunction or things of that nature. I don't want to  
17 deal with that.

18           MS. BARRIOS: And, Your Honor, I'm sorry for  
19 interrupting, but the sense I get is that they are reaching  
20 out. Ms. Snapka and I have agreed that before every status  
21 conference, I'll come over a day early and meet with them to  
22 see what the issues are.

23           THE COURT: Good.

24           MS. BARRIOS: Thank you, Your Honor.

25           THE COURT: Thank you very much.

1                   Anything further from anybody from the State  
2 Liaison counsel? Any issue?

3                   MR. ALLEN: Your Honor, I don't know if it's time for  
4 me to be heard. Scott Allen, on the motion to quash for the  
5 doctors. I have an agreement.

6                   THE COURT: All right. Why don't you come forward.

7                   This Court received a motion of counsel  
8 representing a number of doctors seeking to quash depositions  
9 that were noticed of these particular doctors. I convened an  
10 emergency hearing. I heard from counsel and was ready to rule.  
11 Counsel for both sides indicated that they were perched on an  
12 agreement and that if I would just delay a day or two, they  
13 would be able to work it out. I understand they have been able  
14 to work something out.

15                  MR. ALLEN: Yes, Your Honor. Scott Allen from  
16 Houston. On behalf of the doctors I represent, we filed a  
17 motion to quash. I saw as early -- as late as today, other  
18 doctors' counsel across the country have joined me in that  
19 motion. We have reached an agreement. I have on behalf of my  
20 clients that I represent with Merck -- which I'd like to make  
21 part of the record, if it's okay with the Court?

22                  THE COURT: Sure.

23                  MR. ALLEN: Your Honor, that agreement, I think,  
24 handles most of my issues on behalf of the doctors I represent  
25 on notices and cross-notices by Merck of Merck employees as

1 it's defined in that agreement. I want to tell the Court so  
2 the Court -- in case I may have to file future motions to quash  
3 if it is on witnesses that are not as defined in that  
4 agreement.

5           Also, Your Honor, it does not take care of my  
6 problems as of this time. In case the plaintiffs notice or  
7 cross-notice the deposition, I have some issues I need to  
8 address with them. I've talked to Mr. Davis and Mr. Herman,  
9 and I think we can work that out. But I know the Court  
10 understands, at least at this point, doctors' counsel in the  
11 MDL does not have the representation at the depositions,  
12 doesn't have a steering committee, or liaison counsel. And so,  
13 I need to protect the record on behalf of my clients. I  
14 appreciate the Court's indulgence in giving us this time, but  
15 we still have a few issues left and I think we can work them  
16 out.

17           THE COURT: Okay. Try to work them out. If you  
18 can't, I will.

19           MR. ALLEN: All right. Thank you.

20           MR. HERMAN: Your Honor, we've had discussions. I  
21 don't think we're going to have any problem working out that  
22 issue with Mr. Allen. And this is an open forum. There's a  
23 transcript. If other attorneys who represent physicians have  
24 the same problem, we'll be willing to work it out with them on  
25 the same basis.

1 THE COURT: Okay. The next item on the agenda is pro  
2 se claimants. Any report on that?

3 MR. HERMAN: Yes, Your Honor. We've continued to  
4 communicate with the pro se claimants. We've recommended  
5 attorneys to them. With Lexis/Nexis down, there's been some  
6 interruption of communication, and we'll have a full report for  
7 you at the next status meeting.

8 THE COURT: Anything further from anyone on the agenda  
9 or have any issues?

10 MR. HERMAN: No, Your Honor.

11 MR. WITTMANN: No, Your Honor.

12 THE COURT: Anybody from either state or anybody on  
13 the phone wishes to raise anything? I have these conferences  
14 in open court. At this time, it looks like we have about 50 or  
15 so individuals here and I understand about 50 or so on the  
16 phone. So if there's anyone that needs to say anything, now is  
17 the time to do it.

18 MR. HERMAN: I do have an apology to make to the Court  
19 and to the marshal. Evidently, my phone, which has been  
20 inactive, became active during this hearing and I'm a little  
21 embarrassed by it. I know the rule, and I'm sorry it was my  
22 phone.

23 THE COURT: The next meeting I have is October 27th.  
24 Is that 9:00 o'clock? Yeah, 9:30 in New Orleans, hopefully.  
25 But you'll be hearing from me soon on that. October 27th,

1 9:30. I'll meet with liaison counsel earlier.

2 MR. WITTMANN: October 27th?

3 THE COURT: Did I say October or November?

4 THE LAW CLERK: October, Thursday.

5 MR. HELFRICH: Judge, Joe Helfrich with Lexis/Nexis.

6 Just before losing everyone, I wanted to make sure that on the  
7 issue of uploading medical records, there was a concern about  
8 the voluminous number of documents in the uploading, and I just  
9 want liaison counsel to know that we have automated processes  
10 available to make that very streamlined. I think Phil  
11 mentioned that we would confer together. I just want to make  
12 sure that we underline that point, and we'll work out a  
13 streamlined process to make that a success.

14 MR. WITTMANN: Joe, either Dorothy or I will call you  
15 about that after this conference and see exactly how that's  
16 going to work.

17 MR. HELFRICH: Thank you, Phil.

18 THE COURT: All right. The clerk of court here or the  
19 assistant clerk of court, he wants to say something about  
20 filing.

21 MR. SMITH: I just want to let everybody know, we are  
22 up and running in a number of locations, accepting filings.  
23 The courthouse in Houma on Main Street and the courthouse in  
24 Baton Rouge are accepting filings in person there.

25 If you are in Lafayette, we're actually moved out

1 of the federal courthouse in Lafayette. We're across the  
2 street in the Midsouth Bank Building on the fifth floor, so if  
3 you can bring filings in person there. If you would like to --  
4 what we actually prefer, given our skeleton staff we have right  
5 now, if you're going to mail pleadings to us, if you could mail  
6 them to the Lafayette location at 102 Versailles Street, Suite  
7 500, in Lafayette, and we'll get those and we'll process those  
8 there. That would be the easiest for us if you want to mail  
9 your pleadings or Fed-Ex or overnight them to that location as  
10 well.

11 THE COURT: Any questions from anyone on the filing?

12 All right. Thank you. I'll see you next time.

13 (Concluding at 3:30 p.m.)

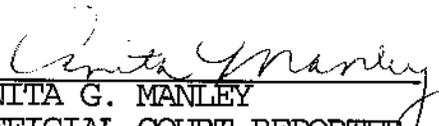
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16 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
17 RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER, TO THE BEST  
OF MY ABILITY.

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19

  
ANITA G. MANLEY  
OFFICIAL COURT REPORTER

10/13/05

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