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1 them up if it helps you, that's fine. I don't mind
2 bringing the equipment up. On the other hand, Power Point
3 is what Power Point is. You can decide whether they're
4 useful to you. There are other ways to supply them to me.
5 You can submit them and I can put them up on my screen
6 here and then we don't need all the equipment, tell me
7 which slide you want to use. I have got the software.
8 But anyway.

9 MR. MAGAZINER: Thank you, Your Honor.

10 THE COURT: I don't want to tell you how to
11 practice law.

12 Okay. Let me hold off on the initial discovery
13 requests. And the formatting issues that looks like it's
14 going to be something to talk about in greater depth.

15 The papers you submitted suggest the absence of a
16 meeting of minds on the issue of pilot or Bell Weather
17 cases. Has there been any further discussion between
18 counsel on that?

19 MR. TRAMMELL: Fletch Trammell for plaintiffs.

20 At the last status conference we proposed the idea of
21 selecting some Bell Weather plaintiffs to do -- to take up
22 the issue of aggregation in context of the individual
23 cases. Court requested that the defendants come up with
24 counter proposal or our proposal, or at least answer our
25 proposal. They filed what they proposed a pilot program

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1 with several hundred cases. I suppose the most practical
2 thing to do, and we haven't had a chance to talk about it,
3 I suppose the most practical thing to do is make agreement
4 on that so the Judge doesn't have to necessarily decide an

5 adversarial position. I think it's possible to find some
6 common ground on that. We would at least like the
7 opportunity to do that and present our own competing
8 program if that's not going to happen.

9 THE COURT: Mr. Magaziner, the proposal from the
10 defendant struck me as outlandish. The notion of three
11 hundred pilot cases suggests to me a scattering of effort.
12 That does not serve the purposes of having a designation
13 of Bell Weather cases. I don't see them as an opportunity
14 to do statistically significant sampling of things. But
15 rather to the extent that you want issues to be presented
16 in the context of real live people, we can do a few of
17 them. But I understand the notion of doing 300 of them
18 and the protocol by which you wanted to select them would
19 be better off asking the BCS voters to choose plaintiffs
20 for us, it seems to me.

21 It just struck me as unduly cumbersome.

22 And as you noted in your slide, we have three Florida
23 cases. From a standpoint of judicial economy, even those,
24 using those as development cases would since they're going
25 to stay here presumably, if they go that far.

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1 MR. MAGAZINER: May I address that?

2 THE COURT: Yes.

3 MR. MAGAZINER: Notion of Bell Weather trials or
4 Bell Weather cases is one that has been much explored in
5 MDLs for many years. It gets complicated by the Lexicon
6 Doctrine. As you know in Lexicon, the United States
7 Supreme Court ruled that Judge Conway does not have
8 jurisdiction or authority to try any case if it's filed in

9 another district and transferred to this district. So the
10 only cases she could try under Lexicon are the three cases
11 that are filed in Florida. What plaintiffs typically do
12 in MDLs is, being aware of Lexicon, they select for filing
13 in the district where the MDL is eventually located, cases
14 that they think are particularly good for them, knowing
15 that the district court judge is going to be able to try cases
16 filed in that district.

17 That completely skews the purpose of a Bell Weather
18 trial. Because instead of having cases that are
19 representative of the cases in the inventory of 7,000 now
20 pending before the Court, we get cases hand selected by
21 the plaintiffs filed in this district, with the hope that
22 the Court will then focus its attention on those three and
23 treat them as representative of the 7,000 cases or almost
24 7,000 filed elsewhere.

25 Because of that, as the judicial -- as the Manual of
24
1 Complex Litigation points out, courts that have tried to
2 establish any kind of process for testing and sampling and
3 learning something about the cases in front of them have
4 thought that a random selection of cases not controlled by
5 the plaintiffs, not selected by AstraZeneca, but randomly
6 selected serves a purpose much better of informing the
7 Court and the parties of the attributes of the cases in
8 the Court's inventory.

9 To focus on the three Florida cases would be a gross
10 distortion of that principal because they're cases
11 selected by plaintiffs rather than cases that represent
12 the inventory.

13 We're not proposing of course, that this Court would

14 try the 300 cases that we propose being the pilot program.
15 By definition, the Court could not try those cases unless
16 one of the randomly selected cases happens to be one from
17 Florida. The odds against that are -- I'm not a
18 statistician -- the odds against that are pretty great.
19 If we selected 300 cases at random from 7,000, the odds
20 that it would be one of the three Florida cases is small.

21 But we're saying a random selection will actually
22 give Your Honor and Judge Conway a better opportunity to
23 appreciate the nature of these cases. It may well be that
24 300 is a wrong number. Maybe the number should be 250 or
25 200 or 150 because what we propose is to work up those

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1 cases, see what happens to them as the process unfolds,
2 and learn from that how to establish procedures to deal
3 with the remaining cases in the inventory. We're not
4 again talking about a trial. We're talking about pretrial
5 activities focused on those 300 or 200 cases.

6 Bearing in mind what Your Honor said about Power
7 Point, I'm not sure if I want to show you the other slides
8 we prepared about Bell Weather.

9 THE COURT: I'm just saying even if you want to
10 use Power Point, there's easier ways than this. You may
11 need to open your laptop.

12 MR. ROTH: Isn't there a new Middle District
13 rule that we get sort of advance notice of some of this
14 before we come to the hearings if there's going to be a
15 Power Point presentation?

16 THE COURT: Well, it's argument. I mean this
17 isn't evidence. Yeah, it would be nice if you would do

18 that. A lot of things would be nice if you do it.

19 MR. MAGAZINER: If we get our Bell Weather
20 program where the Court thinks that makes sense to have a
21 Bell Weather program, this is what experience shows is
22 likely going to happen. And our view is as we go through
23 the -- I'm sorry -- our pilot program. As we go through
24 the pilot program that we're proposing, something close to
25 it, this is what we think will happen if there were, for

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1 example, 300 cases chosen at random, 300 plaintiffs chosen
2 at random. We would expect that if those 300 plaintiffs
3 are required to provide fact sheets sooner rather than
4 later, some of them will fail to complete their fact
5 sheets. That always happens. We would then come back to
6 the Court and say those cases should be dismissed. Some
7 of them will fail to provide medical authorizations. As
8 always happened in every MDL we have been involved in, we
9 come back and see a plaintiff is not willing to provide
10 medical authorizations to get the records. Those cases
11 must be dismissed.

12 Failure to respond to other written discovery, for
13 example, we do not have it in the plaintiff fact sheet but
14 we think we would like to find out how many of these
15 plaintiffs actually have been adjudicated by some court
16 elsewhere to be incompetent to handle their own affairs
17 and have a guardian appointed for them. Because if so,
18 this Court's going to have to do something about those
19 cases. Substitute the guardian if the guardian is
20 interested in pursuing the case or dismiss it if the
21 guardian -- the person found by some other Court to be in
22 charge of the plaintiff's affairs, says it's not a case

23 that the guardian wants to pursue. We would expect cases
24 to disappear at that point.

25 Failure to appear for deposition. If we require

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1 plaintiffs to show up for a deposition after we collect
2 the medical records, experience teaches that some number
3 of plaintiffs will fail to show up. Despite counsel's
4 efforts plaintiffs just are not interested enough in
5 pursuing the case to show up.

6 So we're going from 300 cases to -- 250 to 200, maybe
7 100 left after we go through this process. If Your Honor
8 imposes a Lone Pine requirement, which is something we
9 briefed or mentioned in our pilot program, that is a
10 requirement that the plaintiffs at some point down the
11 road submit an expert report on causation from a qualified
12 physician. Experience teaches that many plaintiffs'
13 counsel as a focus on the case decides it's not worth
14 incurring the expense of obtaining an expert to prepare a
15 report because plaintiffs' counsel having focused on the
16 case realizes the case is not worth pursuing.

17 Beyond that, we would expect as we focus on these
18 cases with some of these other issues to develop. And
19 these are all what we would call case specific issues.
20 I'll explain what I mean by that. No Seroquel use of
21 course -- if a plaintiff says, "I took Seroquel, I got it
22 from the Rite-Aid Pharmacy." When we subpoenaed the
23 Rite-Aid Pharmacy's records, there is no record of ever
24 filling a prescription for Seroquel. We would expect the
25 plaintiffs' counsel would agree with us the case should be

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1 dropped.

2 No general causation. By that we don't mean a
3 generic question of whether Seroquel can cause diabetes,
4 which I know is going to be a hotly contested issue in
5 this case. But some of the plaintiffs have alleged other
6 medical conditions. So if a plaintiff alleges, for
7 example, a bladder problem caused by the use of Seroquel,
8 we will come back to the Court, I predict, and say there
9 is no scientific literature ever suggesting that the use
10 of Seroquel has been associated with, has been reported to
11 be associated with or can cause a bladder problem. And
12 that would be a Daubert issue, perhaps, for the Court.
13 But you would say, you agreed with us, or Judge Conway if
14 she agreed with us, that's right, there is no basis in
15 which a plaintiff with a bladder problem could go forward
16 claiming Seroquel was causing a bladder problem.

17 No specific causation. That would be a doctor
18 saying, for example, this plaintiff is claiming that her
19 diabetes was caused by the use of Seroquel. Her diabetes
20 was diagnosed eight years, 15 years before she ever took
21 Seroquel. And the plaintiff will find that no doctor is
22 willing to say Seroquel caused the diabetes in someone who
23 had previously been diagnosed with it.

24 Your Honor mentioned this next one: Estoppel or
25 double recovery. We may find not only that people took

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1 other atypical antipsychotics like Zyprexa and Risperdal,
2 but they in fact have filed lawsuits against the
3 manufacturers of those other antipsychotics claiming the
4 exact same injuries, and perhaps have even participated in
5 a settlement to be compensated for injuries which they're

6 now claiming we'd cause.

7 Continued use after filing suit. We think that's
8 going to be a threshold issue for many cases. If a
9 plaintiff having filed a lawsuit identifying all the side
10 effects that he alleges Seroquel caused continues to use
11 Seroquel, we would think as a matter of law there could be
12 no failure to warn claim left because once the doctor
13 knows everything about all the things plaintiff says can
14 happen, and the doctor says, please continue to use
15 Seroquel, that claim is gone we believe as a matter of
16 law.

17 Learned intermediary. Law in most states and as
18 Your Honor correctly observed, even though most of these
19 claims were filed in the District of Massachusetts, the
20 substantive law will be the law of about 46 other states
21 where these plaintiffs reside. The law of most states,
22 not all, but most, says that if the doctor was given
23 adequate warnings of the side effects or if the doctor
24 understood the side effects without regard to anything the
25 pharmaceutical company told him or her, and the doctor in
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1 light of that understanding or those warnings opted to
2 prescribe Seroquel, then that case has no merit, cannot
3 proceed to trial.

4 We would expect to be able to raise issues like that
5 out of these 300 cases.

6 Statute of limitations Your Honor understands. And
7 preemption. If we have cases of people who first do
8 Seroquel after the January 2004 label change, whose claim
9 is that the label was inadequate to warn them of the risks
10 of Seroquel, we would believe that those cases are

11 preempted. We don't know how many there are.

12 As you saw from one of my previous slides, our
13 testing of the eight first filed complaints revealed only
14 two people who alleged that they first used Seroquel after
15 the label change. But there are 103 plaintiffs who told
16 us nothing. It could be that all of them are post label
17 change plaintiffs. We don't know.

18 Our experience. Several of us were involved in some
19 other litigations where pilot programs of this nature were
20 adopted. The one that comes to mind most readily is
21 Baycol. The Sidley firm and we were involved in that
22 case. In Baycol, Judge Davis created a 238 plaintiff
23 pilot program. It was 200 cases transferred to his
24 courtroom by means of MDL transfer. And the 38 cases
25 filed in the District of Minnesota which is where that MDL

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1 is located.

2 So if we were to analogize here, that would be 200
3 cases filed elsewhere plus the three cases in Florida. Of
4 those 238 cases, Your Honor, after they went through this
5 kind of pilot program, the number was reduced to not 100,
6 not 50, not 25, not 10, zero. Zero cases went forward.
7 Zero.

8 That's what the history of these sorts of pilot
9 programs has proven to be. That when there is some
10 testing, some focus, some analysis of these claims not
11 only by us, but by the plaintiffs' lawyers who quite
12 frankly have not had the ability, I'm sure, to really look
13 deeply into some of these claims, because the Bailey firm
14 I think has eight lawyers in it, according to its web site

15 and they have almost 6500 plaintiffs. So I'm sure they're
16 doing their very best, but I'm sure that as we focus on
17 these claims, they will learn more about the claims than
18 what they now know. Experience teaches that when that
19 focus is applied, a pilot program of 300 may be reduced to
20 100 or 50 or zero. And we urge the Court to adopt that
21 kind of pilot program.

22 MR. TRAMMELL: Brief response.

23 In listening to the explanation of the pilot program
24 some things were made clear. I think that we're maybe not
25 as clear in reading about it which -- the purpose is to

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1 identify cases that they think have a basis for being
2 dismissed and try to dismiss those cases, which of course
3 is not the reason that the Court might entertain a pilot
4 program of any type. The reason that the Court might do
5 it is that it wants to identify whether there's general
6 issues that affect a majority of cases and try to decide
7 those issues that those rulings apply to the majority of
8 the cases.

9 I don't know whether there's a Seroquel bladder case.
10 I know that I don't have one. But truth is that the
11 majority of these cases are people who are very ill with
12 diabetes or diabetes-related illnesses. To the extent
13 that there is a pilot program, it needs to be identifying
14 people who the Court first of all can consider under
15 Lexicon.

16 Second, people who reflect the majority of the
17 plaintiffs in the MDL. Otherwise, this Court will rule
18 for years on individual case-based motions to dismiss or
19 motions for summary judgment where multiple depositions

20 have to take place and where the Court gets bogged down
21 not deciding the things that affect the majority of
22 plaintiffs. So if there's a pilot program we would
23 propose that it would be plaintiffs that satisfy the
24 requirements of Lexicon, the requirements of the mult-
25 district litigation scheme. The plaintiffs reflect the

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1 majority of the plaintiff populations, I think that's the
2 only way that pilot program makes sense, helps the Court
3 conduct an efficient MDL.

4 With respect to the facts represented to the
5 individual cases filed here in the Middle District, I
6 think Mr. Roth has more information to the extent the
7 Court is interested in that.

8 MR. ROTH: I was just going to say, maybe I
9 misunderstood his argument from the first Power Point, but
10 the Florida cases were filed here in Florida because the
11 plaintiffs were Florida residents. And I thought that was
12 part of the criticism of the initial presentation was
13 because all those folks in Massachusetts whoever they are
14 weren't Massachusetts residents. Since my name went on --

15 THE COURT: I didn't hear any criticisms. He
16 was just recounting a fact.

17 MR. ROTH: I just wanted --

18 THE COURT: It may be implied, but I didn't hear
19 any.

20 MR. ROTH: I just wanted to point out that since
21 my name went on those complaints, they were filed in
22 Florida because the plaintiffs resided in Florida.

23 MR. MAGAZINER: I didn't intend any criticism,

24 Your Honor. I would expect that plaintiffs' counsel would
25 file their cases in the venue where it's most advantageous
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1 to them. They have a responsibility to do that on behalf
2 of their clients.

3 And what I was trying to point out to the Court,
4 however, is that a pilot program that focuses only on
5 those cases --

6 THE COURT: I understand.

7 MR. MAGAZINER: -- Your Honor can try under
8 Lexicon as a three case program.

9 THE COURT: I understand.

10 I keep half waiting for Congress to repeal the
11 Lexicon or overrule it. They haven't done it yet. Maybe
12 they never will. They talked about it some.

13 MR. MAGAZINER: That might fall into be careful
14 what you ask for.

15 THE COURT: I didn't say I wanted it. I'm
16 anticipating it and I don't think Judge Conway -- It's an
17 abstract matter.

18 When Lexicon was decided there was, as you know, a
19 lot of discussions in judicial circles and academic
20 circles, I'm sure bar circles about it. And there were a
21 lot of courts that thought it should have gone the other
22 way. It's more efficient. I haven't studied it in any
23 detail. It seemed to me to be clearly correct on the
24 statute, and based on something that Congress can change.
25 But that's neither here nor there.

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1 I'll ponder what you said. I have got to say, Mr.
2 Magaziner, most of the issues that you put up there may be

3 reasons why cases may not go to trial, but that doesn't
4 strike me as for most of them why it's advantageous to
5 have a pilot program. There are a couple of them that may
6 help.

7 MR. MAGAZINER: Mr. Trammell said that if
8 there's going to be a pilot program it ought to be a
9 representative sample, which, of course, we say is
10 correct. That's why we say let's randomly select them.
11 It's not a representative sample if plaintiffs' counsel
12 selects the cases that are going to be in the sample.

13 THE COURT: No. I understand.

14 MR. MAGAZINER: And what I was trying to say and
15 I think Mr. Trammell may have pointed out a failure of
16 communication on my part, we're not trying to use this
17 pilot program to get rid of cases. We're trying to use a
18 pilot program to educate the parties and the Court on what
19 sorts of cases these are so the Court can say, you know,
20 if it turns out that 60 percent of these cases there is no
21 actual Seroquel use -- I'm making that figure up, of
22 course. I wouldn't expect it to be that high -- that
23 would then inform the Court on entering some orders maybe
24 to quickly deal with the Seroquel use issue before
25 anything else is dealt with to determine whether this is a

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1 case that is actually going to be adjudicated.

2 THE COURT: By the same token, you're going to
3 have these plaintiffs' fact sheet, PFSSs, and I'm sure you
4 will be doing your own analysis. If you think whatever
5 sample you draw, if there's an issue like that, I would
6 expect you to raise those things.

7 Anyway, I'll make a determination on that and make a

8 recommendation to Judge Conway.

9 MR. MAGAZINER: May I address that last issue
10 you raised, if I haven't outstayed my welcome about --

11 THE COURT: I want to move on. I have got
12 criminal defendants coming in here. Unless you want to
13 end up representing them or joining them, you got to move
14 forward.

15 MR. MAGAZINER: I don't think a criminal
16 defendant would want to have me represent them.

17 THE COURT: You would be surprised.

18 MR. TRAMMELL: Your Honor, the plaintiffs would
19 like to have a competing program to present to the Court
20 if --

21 THE COURT: You better move pretty quickly.

22 I tried to impress upon you the need to -- because I
23 have noticed now we have had several of these hearings,
24 and we talk about some things and we leave things for the
25 next agenda and sometimes -- I don't know how many hours

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1 you've spent talking to each other. Some issues sound
2 like you talk immediately and make a lot of progress and
3 others doesn't seem like there's been much discussion
4 until we get pretty close to the hearing date, and some
5 you come to agreements on and some you don't get very far.
6 So --

7 All right. I didn't see anything in anybody's
8 papers, but I may have missed it, on thoughts about
9 setting up an ADR program. Any thoughts about having a
10 mediator appointed and having them on standby, whether
11 it's for pilot cases or Bell Weather cases or special

12 referrals or just to have somebody on board that you would
13 then refer to when you get to that point?

14 MR. CAMP BAILEY: We talked informally after the
15 last hearing here in the jury room and welcomed anyone to
16 be involved with the ADR process. I think Mr. Pennock had
17 someone in mind or we were happy with whoever the Court
18 would suggest down here in the Middle District.

19 THE COURT: What occurs to me is we get a
20 mediator appointed for the case, it may be multiple
21 mediators, but go ahead and get them on board and require
22 that you meet with them to, for want of a better word,
23 educate that mediator a little bit and then decide whether
24 to make use of the mediator services as the case goes
25 forward. Now, we talked about mediators. We're

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1 comfortable with it here in Florida. It's a concept
2 that's worked very well both in state court here and the
3 federal court. But it's not the only way to do ADRs. We
4 can do shadow juries. We can do test trials. We can do
5 any number of other things that we can do. I'm open to
6 that. My inclination is to -- we have got some really
7 excellent local mediators who have proven success in
8 various fields. If you get one of them involved, even
9 invite the mediator to attend our next hearing or the
10 hearing after that, bounce some ideas off that mediator
11 about how best to structure it, it might do some good. As
12 I say, Mr. Magaziner, that's one of the reasons to have a
13 more robust pilot program than some of your other reasons.

14 MR. MAGAZINER: Well, to some extent I agree
15 with what Your Honor said. I should preface my remarks by
16 making clear to the Court that at this moment in history,

17 we don't have any reason to think we're going to want to
18 settle any of these cases.

19 THE COURT: I'm sure of that.

20 MR. MAGAZINER: So --

21 THE COURT: History has a way of teaching us
22 things.

23 MR. MAGAZINER: To be sure. But at the moment,
24 based on what we understand about what happened to the
25 company, we don't think there was any negligence on the

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1 company's part. So --

2 THE COURT: If we had a mediation today you
3 would say your offer is zero and you would stick to it.

4 MR. MAGAZINER: So all I'm suggesting is if
5 there ever comes a time when we are in a position to
6 reconsider that because we think that would be the proper
7 way to go, I'd think some sort of mediation might be
8 something to be considered at that time. I think at this
9 point it would just be a waste of time because at this
10 point we will be saying we're not offering anything and to
11 have a bunch of mediations where our consistent offer is
12 zero is sort of a waste of time.

13 THE COURT: Next issue I wanted to get settled
14 before it got lost, the frequency of future hearings in
15 front of me. It's obviously expensive to bring all of you
16 down here. And we had a lot to talk about. We continue
17 to have a lot to talk about. Do you have a sense, once
18 every three weeks or once a month, two weeks?

19 MR. MAGAZINER: We proposed in the case
20 management order that we submitted --