

abt REPORT

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Why Litigators Should Care About Well-Governed AI



Benjamin Softness

Too often, articles about generative AI in litigation feature a lawyer facing sanctions for using AI to write a recently filed brief. That is risky, for sure, and you shouldn't use AI to write your briefs. (This isn't legal advice.) But AI also presents tremendous potential for litigators, if it is used correctly and

responsibly. The key is taking the right steps so that AI productivity can catch up to the already-healthy AI hype.

The first thing to do is to learn about AI—what it's good at, what it's bad at, and when it's likely to get you featured in Law360 (and not in a good way). But I've written that article before, and it's been suggested to me that once was enough.

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The Use of Verdict Forms to Test the Viability of Class Certification



Hon. Vince Chhabria

At a prior annual seminar, I had the privilege of moderating a panel of ABTL members with an unusual amount of class action trial experience. Jill Manning of The Manning Law Firm has tried two class actions on the plaintiff side in the past several years. Jessica Grant of Shook, Hardy & Bacon tried a class action on the defense side, but represented a plaintiff class a couple decades ago in a big wage-and-hour trial. And my Northern District colleague Edward Chen presided over three class action trials in a 12-month period!

The panelists covered a lot of ground, including why more class actions seem to be going to trial and the difficulties lawyers and judges encounter once trial is underway. But let's be honest—it's still rare for a class action to get to trial. Most lawyers will never be fortunate enough to get Jill and Jessica's experience; most judges will never be as unlucky as Judge Chen. So I was most interested in what the panelists would say about how their trial experience affected their perspective on class certification. Did it change the way they look at "commonality," "predominance,"

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Interview with the Hon.

Vincent I. Parrett

Interviewed by:

Andrew Hannemann



Hon. Vincent I. Parrett



Andrew Hannemann

Q: Judge Parrett, early in your career, you served as a lawyer in the U.S. Navy JAG Corps, correct? How did you decide to serve in the U.S. Navy?

A: I was at Hale and Dorr (which is now Wilmer Hale) at the time. One of the partners I worked with was Jack Regan, the chair of the IP litigation practice group at the time. I had become close with him, and I said to him in a lighthearted way, “I would love to become a trial attorney, what’s the path?” Regan had served in the U.S. Navy early in his career and thought that was a great way to gain trial experience. He encouraged me to join and said I could then come back to Hale and Dorr. I walked into a Navy recruiting office in Boston,

and within two months, I was in a Naval base in Newport, Rhode Island in the JAG Corps. I met my wife there, who was also serving in the JAG Corps. I was trying cases right off the bat when I joined, everything from criminal defense cases for violation of military orders to attempted murder. I tried over 80 jury trials in courts-martial.

Q: You eventually transitioned back to private practice, correct? How did you decide to make that transition?

A: After serving for three years in the JAG Corps, my wife and I decided to practice in Manhattan, and I joined the plaintiffs’ aviation law firm Kreindler & Kreindler LLP. Since it is an aviation law firm, many of the lawyers there were former military lawyers. Because 9/11 was aviation-based, the firm became co-liaison

counsel in the 9/11 wrongful death litigation. I was one of the lead associates put on the case and was involved in many depositions. I later joined the firm Motley Rice in South Carolina, which was the other co-liaison counsel in the 9/11 litigation. There, I handled mass tort, fraud, and toxic tort cases on behalf of plaintiffs. For instance, it was at Motley Rice where I tried my first case in the Complex Civil department at the Santa Clara County Superior Court before Judge James Kleinberg, where I was part of a trial team that won a \$1.15 billion judgment against lead paint manufacturers for creating a public nuisance.

Q: What was most impactful to you about serving as counsel for plaintiffs in the 9/11 wrongful death cases?

A: Meeting so many families of the victims and learning about the amazing lives of the individuals who worked in the towers and first responders.

Q: What motivated you to pursue a judicial appointment?

A: Around August 2013, after Ron Motley passed away, I joined litigation boutique Bergeson LLP and started doing a lot of civil defense cases in both state and federal court. I then applied to become a temporary judge in Santa Clara small claims court in 2018 and really enjoyed it. The work made me think that maybe one day, I could be a judge.

I was then recruited by Kilpatrick Townsend near the end of 2020, and because the COVID-19 pandemic had hit, I started doing lots of JAMS mediations and arbitrations. I really respected the work that the mediators and arbitrators did in these sessions. Because I was working with lots of excellent retired judges, I developed an appreciation for their skill in handling voluminous evidence and resolving disputes. Working with those former judges made me want to become a judge. I submitted an application, and it was crickets for a year. But I then got a call, and the process moved fast after that.

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The Properties of Fraud: Part II



Tim P. Crudo

A. Introduction

In Part I of “The Properties of Fraud,” we traced the evolution of the mail and wire fraud statutes, particularly the requirement that the fraud serve to acquire money or property. In Part II, we look at the what makes up “property” for purposes of these statutes and the strategic opportunities that that definition—or lack thereof—might offer defense counsel.



Mari S. Clifford

B. The Property Element: History and Economics

When the fraud’s alleged object is money or a physical object like a car or a Fabergé egg, the “property” prong is generally not a source of much dispute. But *see Kelly v. United States*, 590 U.S. 391 (2020) (rejecting government’s argument that object of scheme was to commandeer bridge—i.e., “property”—rather than political pay-back). The problems arise when the alleged property is intangible. Whether the government’s prosecution relies on intangible rather than tangible property can make all the difference, as was demonstrated in two First Circuit Varsity Blues prosecutions. In one, the government’s case failed when it couldn’t prove that a college’s intangible “admission slot” was property. *United States v. Abdelaziz*, 68 F.4th 1 (1st Cir. 2023). In the other, the same circuit had no difficulty sustaining a conviction where a “core” part of the scheme was to obtain the ACT “exam materials.” *United States v. McGlashan*, 78 F.4th 1 (1st Cir. 2023).

As a reminder, *McNally* did not rule that an intangible right or asset is not “property,” only that the intangible right in that case—the right to “honest and impartial government”—was not a property right. *McNally v. United States*, 483 U.S. 350, 355 (1987). Just six months after drawing a hard line on the property element in *McNally*, the justices

confirmed in *Carpenter v. United States* that at least some intangible assets could qualify as “property.” 484 U.S. 19, 25 (1987) (thing’s “intangible nature does not make it any less ‘property’ protected by the mail and wire fraud statutes”); *see also United States v. Hager*, 879 F.3d 550, 554-55 (5th Cir. 2018). In *Carpenter*, an insider trading conviction secured with the use of the mail and wire fraud statutes, the “property” at issue was the Wall Street Journal’s confidential business information, specifically the contents and publication schedule of its popular stock analysis column “Heard on the Street.” The column had the potential to move the market in stocks that it reviewed, and one of the reporters, in violation of the paper’s policy, gave a sneak peek of the column to several stock brokers, who profited by trading on the information and shared their proceeds with the reporter.

The Court rejected the defendants’ argument that they had not obtained “money or property” from the Journal as required by the statutes. 484 U.S. at 25. The object of the scheme was not simply to deprive the paper of its right to the honest and faithful service of its reporter (a theory *McNally* had just rejected) but to take the paper’s “confidential business information.” Looking to several cases from the early 1900s, the Court found that such information “has long been recognized as property.” *Id.* at 26. It didn’t matter that the defendants had not interfered with the Journal’s use of the information nor published it themselves. It was sufficient, the Court held, “that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter.” *Id.* at 26. Other than pointing to history, the Court did not explain why confidential business information was “property,” but economics seemed to be a consideration. The Court quoted from a 1918 case, noting that “news matter . . . is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise.” *Id.* at 26 (quoting *Int’l. News Svc. v. Ass’d. Press*, 248 U.S. 215, 236 (1918)).

Since then, the Supreme Court has offered no framework and little guidance to parties trying to determine whether something qualifies as “property”

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Letter from the President: Reflecting on 2025 and Looking Ahead



Hon. Elizabeth Laporte (Ret.)

Dear ABTL Members,

As we step into 2026, I am proud of the state of the ABTL Northern California Chapter. Thanks to your continued engagement and the diligent stewardship of our Board, I am pleased to report that the Chapter remains in a strong membership and financial position, allowing us to present excellent programming and networking opportunities.

2025: A Year of Growth and Excellence

In 2025, our membership reached 1,825 members—an increase of 103 members over the previous year.

We hosted five standout CLE programs that tackled some of the most pressing issues in our field in 2025:

- Feb. 26: **Implicit Bias and Post-Judgment Review** with Dr. David McGowan.
- May 22: **Navigating Infernos: Advanced Fire Litigation**, moderated by Hon. Nancy Fineman, with panelists Hon. Daniel Buckley (Ret.), Nicholas Fram, Frank Pitre, and Amanda Stevens.
- July 16: **Landmark Decisions of the U.S. Supreme Court '24-'25** with Professors Vikram Amar and Easha Anand.
- Sept. 16: **Trial of Former Autonomy Corp. CEO Dr. Mike Lynch**, moderated by Josh Cohen, with panelists Hon. Charles Breyer, Hon. Robert Leach, and Brian Heberlig.
- Dec. 4: **Jury Selection, Challenges to Eliminate Implicit Bias, 231.7 and Beyond**, moderated by Hon. Robert Foiles (Ret.), with panelists Hon. Beth Freeman, Hon. Brian Ferrall, Sonja Chopra, and Tara Trask.

Looking Forward to 2026

We are already hard at work curating a robust calendar for the coming year. Please mark your calendars for our five flagship dinner/CLE programs scheduled for:

- February 5th
- Spring (Date TBD)
- July (Date TBD)
- September 16th
- December 8th

Additionally, the Leadership Development Committee (LDC), led by Co-Chairs Andy Hannemann (Arnold & Porter) and Tomasene Knight (Sheppard Mullin), is planning a series of lunchtime CLE programs via Zoom and an upcoming social/networking gathering. Stay tuned for those dates.

2026 promises to be an interesting year for the legal community.

As the President of our distinguished group of lawyers and active and retired judges, I feel a particular responsibility to use our efforts to help protect the rule of law, which is essential to the orderly and fair administration of justice and thus the successful functioning of our economy and society. This requires respect for the role of judges and vigorous advocacy of all sides of legal disputes, not targeting law firms for advocating for their clients, including valuable pro bono work. I hope 2026 will see progress on this important front.

ABTL thrives on the input of its members. We welcome your feedback regarding the topics and formats you prefer—whether you enjoy our traditional dinners, cocktail receptions, or the convenience of some Zoom presentations.

Thank you for your continued dedication to the Northern California Chapter. I look forward to seeing you at our first event in February.

Sincerely,

Hon. Elizabeth Laporte (Ret.)

President, ABTL Northern California Chapter



The Importance of Mentoring Junior Trial Attorneys: Part Three



Hon. Marie S. Weiner (Ret.)

Stand Up

If you are appearing at court in person, then stand up when you speak. Lawyers are expected to stand when the jury comes into the courtroom, and when the judge comes into the courtroom. As a sign of respect, attorneys are supposed to stand when they speak to the judge in court – be it making an oral argument or making an objection.

There are also very practical reasons to stand up when you speak in court.

It really helps the court reporter take down what you are saying if they can see you and hear you, which is facilitated by you standing up. [Similarly, it is important that a court reporter can see your entire face (mouth) if you are appearing remotely.] The sound also carries better in the courtroom, and the judge can see you and hear you better.

Also, it is one thing if the trial attorney has never been taught to stand up in court; but it is another thing where the lawyers know that they are supposed to stand when speaking yet simply decide that they don't feel like it. There are both experienced and junior trial attorneys, appearing in person for a hearing or trial, who will say: "Is it okay if I sit? It is easier for me to read my notes." The judge will likely think: "Thanks for letting me know that you have no respect for the Court." What I generally say is: "No. It is much easier for the court reporter to see and hear you if you stand up." Typically this is reinforced by my court reporter nodding her head in agreement.

Standing also brings attention to YOU. You are the focus if you stand up. If you are sitting there, looking downward while speaking, you are simply a mumble in the room. Take charge, be an advocate, be the focus, be the trial attorney.

Get Dressed Before You Appear in Court

I can't believe I have to say this, but I do: Finish getting dressed before you come into the courtroom. It is one thing to adjust your tie or fix your lipstick, but I am talking about putting on clothing. Honestly, I have had lawyers who rush into the courtroom for an appearance so that they are not late, and then proceed to finish getting dressed—including changing into a dress shirt, putting on a tie, combing hair, etc. More commonly, with the metal detectors at the courthouse, it is men putting their belts back on their pants. Please do it in the restroom, or at the very least outside of the courtroom.

Second, dress professionally, *i.e.*, look like a professional who commands respect. Present the aura of a trial attorney. Don't come into court dressed like you are going grocery shopping. This applies whether you are appearing in person or appearing remotely. Making an appearance in court isn't about you; it is about your client and the interests of your client.

Judge Ira Brown of the San Francisco Superior Court was infamous for his refusal to "hear" attorneys appearing in his courtroom who were not properly dressed in a professional manner. He took it as disrespect for the Court. If your attire did not meet his standards, he would feign inability to hear anything that you said—no matter how loudly you raised your voice—until the attorney realized that a change of appearance was required first. The most common "mistake" was that the attorney would rush into the courtroom from a rainy day, and come up to the podium still wearing a raincoat or hat. Although Judge Brown's approach was excessive, it did get the point across.

While an attorney, I appeared before a judge in the Santa Clara County Superior Court who also called out attorneys who had not been properly mentored in this regard. Once a junior trial attorney approached the podium in shirt and tie, but no suitcoat. He was told by the judge that no oral argument would be accepted until he went back to his seat and put on a suit jacket, and that shirt sleeves were unacceptable for a professional appearance. That he did.

As a consequence of the COVID-19 pandemic, things got worse. Attorneys started appearing for

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The Judicial Panel on Multidistrict Litigation (JPML): What It Is and What It Does



Hon. Roger T. Benitez

The Judicial Panel on Multidistrict Litigation (JPML) is a little-known but significant body within the federal judiciary. Though it operates mostly behind the scenes, its decisions often determine the course of some of the most complex and high-stakes litigation in the United States—ranging from antitrust disputes and trademark infringement cases to nationwide

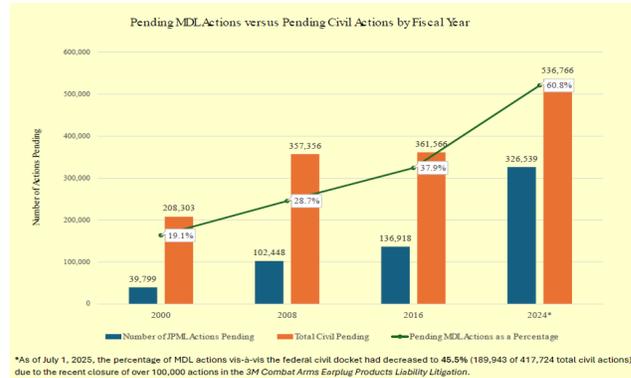
product liability suits. With limited time and space, this article explains what the JPML is, why it exists, and what it does in practice.

1. Origins and Purpose of the JPML

In 1968, Congress enacted 28 U.S.C. § 1407, thereby creating the JPML. In the years prior, the federal judiciary faced an unprecedented wave of litigation, particularly in antitrust cases against major industries like electrical equipment manufacturers. Dozens of nearly identical lawsuits were filed in federal courts around the country, which created the risk of inconsistent rulings and duplicative discovery. Voluntary coordination among the judges assigned to the cases across the country worked for the electrical antitrust cases, but the shortcomings of collective, voluntary efforts quickly became apparent. To address the problem of duplicative litigation in a formal way, Congress empowered a special judicial panel to decide whether related cases should be centralized in a single court for coordinated or consolidated pretrial proceedings.

2. Impact of the JPML

As demonstrated in the graph, which reflects the recent trend of JPML cases within the federal civil case inventory, MDL cases play a prominent role in our federal system.



In particular, the JPML plays a key role in shaping modern mass tort and complex litigation. Its decisions can:

- Channel the cases to one court — A single judge may suddenly oversee thousands of lawsuits affecting billions of dollars in potential damages.
- Influence settlement dynamics — Centralization often fosters global settlement negotiations, as parties can resolve disputes in one forum rather than litigating across the country.
- Shape nationwide commercial conduct — While transferee judges apply the substantive law of the cases' original jurisdictions, their rulings often substantially impact the marketing and sale of products nationwide.
- Manage judicial resources — Centralization frees district courts from duplicating efforts and helps maintain consistency in rulings.

3. Structure of the JPML

The Panel is composed of seven sitting federal judges, appointed by the Chief Justice of the United States. They come from different circuits and districts to ensure geographic and institutional diversity. No two judges on the Panel may come from the same circuit. Although there is no specified term, by tradition the judges sit for seven years, unless extended. Currently, the Panel is chaired by the Hon. Karen K. Caldwell. Other judges on the panel currently are: Hon. Nathaniel M. Gorton, Hon. Mathew F. Kennelly, Hon. David C. Norton, Hon. Dale A. Kimball, Hon. Madeline Cox Arleo, and myself. The Panel is supported by its Executive Officer, staff attorneys, its Clerk of the Panel, and a small staff. It maintains its offices in Washington, D.C.

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Every two months the Panel meets and holds hearings. The Panel does not sit in one permanent location but holds hearings in different districts throughout the country. This traveling schedule underscores the national scope of its work and ensures access for attorneys from different regions. The Panel also has its own Panel Rules of Procedure which may be found at <https://www.jpml.uscourts.gov/>.

4. What the JPML Does

The JPML's primary responsibility is to decide whether civil cases pending in multiple federal courts should be centralized. Centralized cases are generally known as Multidistrict Litigation dockets or MDLs.

Key functions of the Panel include:

- Centralization decisions — Determining whether cases involving one or more common questions of fact should be centralized under 28 U.S.C. § 1407.
- Selecting the transferee district — Choosing which federal district court and judge will be selected to preside over pretrial proceedings.
- Monitoring — Periodically verifying that an MDL is progressing consistent with the demands of the cases.
- Managing remands—Sending cases back to their original courts once pretrial proceedings are complete.

5. The Process of MDL Centralization

The Panel's primary task is to decide whether there are one or more common questions of fact that relate the cases. Depending on the complexity of the cases, the Panel then considers whether centralizing the cases (creating an MDL) would “serve the convenience of the parties and witnesses” and whether centralization would “promote the just and efficient conduct of such actions.”

In deciding whether to centralize, the Panel considers:

- The number of pending actions. As few as two actions may be sufficient if the issue or issues are sufficiently complex and the likelihood of inconsistent rulings is great.

- The nature and complexity of the common question or questions.
- Judicial efficiency. In particular, centralization may be appropriate if actions are likely to involve overlapping discovery and motion practice.
- Fairness to the parties.

The process begins when a party files a motion asking the Panel to centralize related cases. The Panel then schedules the matter for a hearing. After considering the written briefs, staff recommendations, and oral arguments, the Panel meets in conference and, usually within a week or two, issues a transfer order or denies centralization. If centralization is ordered, all related cases are transferred to the chosen transferee district for coordinated pretrial management. Cases not part of the motion but which involve the same factual questions may later be brought into the MDL by subsequent motion or by the Panel sua sponte through its conditional transfer order process, which conditionally transfers cases filed in other districts unless a party objects to such transfer (in which case, those objections will be heard at the next hearing session).

6. Selecting the Transferee Court

Once centralization is decided, the Panel must then choose the district to which the MDL will be transferred (the transferee court) and to which judge (the transferee judge). In reaching its decision, the Panel generally will consider:

- Location of evidence.
- Progress of related cases.
- Convenience of the parties and witnesses.
- Whether a given judge is assigned a related case, as well as that judge's experience and expertise.
- The transferee district's caseload as well as the transferee judge's individual caseload.
- Other factors that may make centralization in a district or before a given judge more likely to result in the “just and efficient” conduct of the case.

7. Impact of Centralization

Once an MDL has been centralized, the transferee

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The Use of Verdict Forms to Test the Viability of Class Certification

and “manageability” at the class cert stage? Given the amount of time I spend adjudicating class certification motions, this promised to be the most helpful portion of the discussion for me.

Some of the lessons: pick your named plaintiffs carefully; put together a trial plan early; think about whether an issues class might be more workable; and really confront the question of how damages issues could affect trial manageability, rather than simply intoning that individualized damages questions are not fatal to class certification. And then there was one tip for judges that everyone agreed on: require the plaintiffs to submit a proposed verdict form in connection with their class certification motion.

I figured, how could these experts all be wrong? So shortly after our conference I amended my standing order to impose this requirement. And now let me give you my early impression: it was a great suggestion. I’ve had cases where the verdict form helped confirm that class certification would be appropriate, and cases where the verdict form highlighted the obstacles to class treatment.

An example of the former is *In re Vaxart*—a securities fraud class action alleging that a company’s press release was misleading to the investing public. In the typical securities fraud case, the plaintiff alleges that a defendant’s misleading statement artificially inflated the stock price until “the truth was revealed” to the market some time later. This case was different—the plaintiffs’ damages expert opined that the truth gradually “leaked” back into the market after the press release was issued. This naturally raised the question of how the jury is supposed to measure damages for class members who might have sold their shares on different dates following the press release. But the plaintiffs pointed to case law providing a basis for a jury to find the amount of price inflation that remained on any given day, and they submitted a proposed

verdict form that helped show how it would work. This helped alleviate some of my concerns about whether a class action trial would be manageable. See *In re Vaxart, Inc. Securities Litigation*, 759 F. Supp. 3d 1015 (N.D. Cal. 2024).

A contrary example was *Hale v. Brinker*, a wage-and-hour class action where the named plaintiffs alleged that servers and kitchen staff were being denied meal breaks at the defendant’s restaurants throughout California. At class certification, although the plaintiffs presented evidence that some workers may have been coerced into foregoing their unpaid meal breaks, there was also significant evidence that some workers did not want to take meal breaks at all, preferring instead to maintain rapport with their customers to get better tips, and to end their shifts half an hour earlier. This raised the concern that common issues would not predominate at trial. On the question of whether workers were coerced into foregoing meal breaks, the jury might not be able to give the same answer for all the class members. That concern was underscored by the verdict form submitted by the plaintiffs. The form asked whether, for each shift, the defendant proved that “it provided a meal period that complies with the law.” I explained:

To phrase the question this way is to pretty much concede that individualized questions will predominate. The plaintiffs, with their proposed verdict form, seem to be proposing one giant trial that will adjudicate every shift ever worked by any Chili’s employee to determine which shifts involved the denial of a reasonable opportunity to take a meal break. That’s not how class action trials work.

Of course, the plaintiffs could have done a better job of drafting a verdict form that fits their theory of the case. For example, they could have asked, “Do you find: (1) that Brinker denied the class a reasonable opportunity to take unpaid meal breaks; or (2) that the class voluntarily chose not to take unpaid meal breaks despite having a reasonable opportunity to do so?” But that formulation would similarly have underscored the mismatch between the plaintiffs’ theory of the case and the

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The Use of Verdict Forms to Test the Viability of Class Certification

actual evidence submitted in connection with class certification, since it's so unlikely, given that evidence, that those questions could be answered on a classwide basis.

Hale v. Brinker International, Inc., 765 F. Supp. 3d 904 (N.D. Cal. 2025).

I'm not suggesting, of course, that these class certification motions would have come out differently but for the verdict forms. What really matters when you evaluate common questions, predominance, and manageability is the actual

evidence submitted. But the verdict forms had a sort of confirmatory power, showing how a class action trial could work in one case while underscoring concerns in another. I would recommend that judges adopt the practice, suggested by my three panelists, of requiring counsel to submit a verdict form with their class certification motion. And even if the judge doesn't require it, the attorneys may wish to undertake the exercise to get a better handle on how a class action trial would (or would not) work.

The Hon. Vince Chhabria is a U.S. district judge of the U.S. District Court for the Northern District of California.



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conflict so they can move
on with their lives.”

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The Properties of Fraud: Part II

under the fraud statutes, but two factors, both hinted at in *Carpenter*, have emerged as significant. The first is history. The interest at stake must be one “that has long been recognized as property.” *Cleveland v. United States*, 531 U.S. 12, 23 (2000); see also *Ciminelli v. United States*, 598 U.S. 306, 316 (2023) (requiring a “traditional property interest[.]”). In holding in *Pasquantino v. United States*, 544 U.S. 349, 356 (2005), that Canada’s right to uncollected excise taxes on imported liquor was “property” under section 1343, the Court cited 18th and 19th century authority for the proposition that “the right to be paid money has long been thought to be a species of property.”

The other factor is economics. *Pasquantino’s* historical review, for example, merely confirmed the Court’s primary analysis, which focused on economics. “[V]aluable entitlements” like Canada’s right to collect money are “something of value” to Canada and therefore “‘property’ as that term ordinarily is employed.” 544 U.S. at 356-57. The defendants’ conduct—smuggling booze into Canada to avoid paying taxes—deprived Canada of money the defendants otherwise would have paid, “inflicting an economic injury no less than had they embezzled funds from the Canadian treasury.” *Id.* at 356 (noting “economic equivalence between money in hand and money legally due”); see also, e.g., *United States v. Ali*, 620 F.3d 1062, 1067-68 (9th Cir. 2010) (victim manufacturer had property right to payment of full purchase price where defendant’s fraud secured an improper discount). Canada’s entitlement to tax revenue was a “straightforward ‘economic’ interest,” which seemed to be the decisive factor. 544 U.S. at 357; see also *Kelly v. United States*, 590 U.S. 391, 401 (2020) (where scheme uses on-the-clock municipal workers to perform manual labor for political contributor, “the cost of those employees’ services would qualify as an economic loss to a city, sufficient to meet the federal fraud statutes’ property requirement”). The Court in *Pasquantino* contrasted Canada’s direct economic interest with Louisiana’s lack thereof in *Cleveland*. While Louisiana had a “substantial economic stake” in the video poker industry, including through

the license fees it collected, those licenses had no economic value to the state as long as they remained in the government’s hands. 531 U.S. at 22. (Nor was it disputed that the state had received all of the revenue to which it was entitled once the tainted licenses were issued.) Even if the licenses were “property” once in the licensee’s hands, because “section 1341 requires the object of the fraud to be ‘property’ in the victim’s hands,” prosecutors were out of luck. *Id.* at 27.

The *Cleveland* Court also relied on economics in rejecting the government’s alternative argument that Louisiana’s right to control the issuance of the licenses (rather than the licenses themselves) constituted “property.” After noting that those “intangible rights of allocation, exclusion, and control” were not long-recognized property rights but rather regulatory rights, the Court returned to economics in contrasting the state’s right to select licensees with a hypothetical franchisor’s right to select franchisees: “A franchisor’s right to select its franchisees typically derives from its ownership of a trademark, brand name, business strategy or other product that it may trade or sell in the open market. Louisiana’s authority to select video poker licensees rests on no similar asset” but rather on the state’s sovereign right to regulate. 531 U.S. at 23-24. Louisiana had not “put its labor or capital at risk” by “ventur[ing] into the video poker business; it decided typically to permit, regulate, and tax private operators of the games.” *Id.* at 24.

C. Property or Not? The Post-Carpenter “Information” Debate

Carpenter doesn’t mean that all information, even information important to a victim, is “property” for purposes of the fraud statutes. Courts post-*Carpenter* have determined that a seller’s “ethereal” right to accurate information about the identity of a buyer or to control “the destination of [its] products after sale” are not traditional property rights covered by the fraud statutes. See *United States v. Sadler*, 750 F.3d 585, 590-91 (6th Cir. 2014); *United States v. Bruchhausen*, 977 F.2d 464, 467-68 (9th Cir. 1992). Nor is a bank’s interest in having accurate books and records. *United States v. Yates*, 16 F.4th 256, 265 (9th Cir. 2021). And in 2023, the Supreme Court rejected the so-called

The Properties of Fraud: Part II

right-to-control theory: “[T]he right to information necessary to make informed economic decisions, while perhaps useful for protecting and making use of one’s property, has not itself traditionally been recognized as a property interest.” *Ciminelli v. United States*, 598 U.S. 306, n. 4 (2023). Were “mere information” a protected interest then “almost any deceptive act could be criminal.” *Id.* at 315; *see also Yates*, 16 F.4th at 265 (“Recognizing accurate information as property would transform all deception into fraud.”).

The divide between information that is or is not “property”—and the difficulty in determining where that line is and how to draw it—were on display in the Second Circuit in *United States v. Blaszczyk*, 56 F.4th 230 (2d Cir. 2022). In that case, the defendants were convicted of wire fraud and securities fraud under 18 U.S.C. § 1348 (which also has a “money or property” requirement) in connection with a scheme to misappropriate from the Centers for Medicare & Medicaid Services (“CMS”) confidential information about the “timing and substance” of proposed reimbursement rates and then profit from stock trades in companies that would be affected by the new rates. The case, which was remanded to the Second Circuit following the Supreme Court’s decision in *Kelly*, had an added twist: the government confessed error and agreed with the defendants that the CMS information was not “property” under section 1343. *Id.* at 232. There was a passionate dissent nevertheless.

Citing *Cleveland and Kelly*, the majority found that the information reflecting CMS’s planned regulation and the timing of the disclosure of that information was “regulatory in character” and did not constitute CMS’s property. 56 F.4th at 244. The majority contrasted the information in *Carpenter*—which bore obvious similarities to that in *Blaszczyk*—as “property of a commercial entity . . . to be sold to those who would pay money for it.” *Id.* at 243 (cleaned up). CMS on the other hand is “not a commercial entity; it does not sell, or offer for sale, a service or a product,” including the pilfered information. *Id.* at 243-44 (“the disclosure has no direct impact on the government’s fisc”). Nor did the premature disclosure “constitute a deprivation of government

property.” *Id.* at 244. This position aligned with the government’s assertion, consistent with *Cleveland*, that “information typically must have economic value in the hands of the relevant government entity to constitute ‘property’” for purposes of sections 1343 and 1348. *Id.* at 236.

The dissent (written by a former federal prosecutor) was blistering. It is “well[]established . . . that government entities can and do have property rights,” and “[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” *Id.* at 254, 255 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). Asserting that there was no meaningful distinction between the CMS information and that in *Carpenter*, it distinguished *Cleveland* and *Kelly* by arguing that the goal of the fraud in those cases was to influence a governmental decision exercising the government’s right as a sovereign whereas the goal for the defendants in *Blaszczyk* was to misappropriate confidential government information in which the government stood as a property holder. CMS’s “right to exclude the public from accessing its confidential information . . . squarely implicates its role as a property holder, not as sovereign.” *Id.* at 254 (citations omitted).

The dissent also countered the majority’s focus on CMS as a non-commercial entity. It rejected the majority’s “impli[cation] that entities cannot have a property interest in confidential information unless the confidential information constitutes their ‘stock in trade’” and cited various mail- and wire-fraud cases where the information in question—including information taken from pre-publication press and earnings releases—was not part of the victim’s stock in trade. *Id.* at 256. “In short, the ability to monetize property does not define property rights.” *Id.* at 257.

Given the unusual posture of the case, there was no cert petition, so *Blaszczyk* stands as law in the Second Circuit. The government’s confession of error would suggest that the DOJ won’t take a different position in other circuits, which effectively makes *Blaszczyk* the law of the land, although that is a matter of policy that could change with a new administration.

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The dissent’s concern that the decision “effectively permits sophisticated insiders to leverage their access to confidential government information and sell it to the highest bidders,” *id.* at 250, seems a real one. The FTC’s or SEC’s decision to sue or settle, the Fed’s decision to move interest rates, the FDA’s decision to approve a drug or not—all information of great interest to stock traders—would seem to fall outside of the fraud statutes’ “property” box. While the government has other statutes at its disposal, there is no assurance it will succeed in using them: the same jury that convicted the *Blaszczak* defendants of wire fraud acquitted them of securities fraud under 15 U.S.C. § 78j(b), which has no “property” requirement.

Does *Blaszczak* have limited effect given that the victim in that case was a non-commercial government entity subject to the argument that it was exercising its regulatory powers? Perhaps, but perhaps not. Take information in the San Francisco 49ers’ injury report, which NFL rules require to be published two days before a game. That report is certainly not the Niners’ stock-in-trade; it has no economic value for the team, which does not sell or otherwise monetize the information. But it could have significant value if leaked to someone three days before the Super Bowl. Likewise other corporate information, like earnings reports or news of the CEO’s resignation or the loss of a factory. *Cf.*, e.g., *United States v. Khalupsky*, 5 F.4th 279 (2d Cir. 2021) (affirming wire-fraud conspiracy conviction based on defendants’ theft of information stolen from public companies’ pre-publication press releases). Will the DOJ decline to prosecute these cases because this information doesn’t have “economic value” in the victims’ hands?

A Second Circuit opinion from last year may answer that question. In *United States v. Chastain*, 145 F.4th 282 (2d Cir. 2025), the defendant was convicted of wire fraud for trading in advance on non-fungible tokens that he knew his employer, an online NFT marketplace, would be featuring on its website. At least some evidence at trial showed that knowledge of what NFTs would be featured—which tended to increase an NFT’s price—was confidential. In overturning the conviction, the Second Circuit

ruled that the district court had erred by failing to instruct the jury that confidential information “must have commercial value to a company to qualify as its property under the wire fraud statute.” *Id.* at 292-93. Information that is confidential or constitutes a trade secret “cannot qualify as a traditional property interest if its holder has no economic interest in its exclusive use or in otherwise keeping the information confidential.” *Id.* at 294. The dissent disagreed, arguing that *Carpenter* had determined that confidential business information—as opposed to the “confidential government information” at issue in *Blaszczak*—on its own and without a separate showing of commercial value constituted “property” under the wire fraud statute. *Id.* at 303 n.15 (Cabranes, J., dissenting) (emphasis in original).

D. A (Potential) Framework for Navigating the Property Maze

So how’s a defense lawyer supposed to sort out what is “property” and what is not? One court recently tried to take the Supreme Court’s general “history” and “economics” factors and build out a framework, or at least a series of factors to consider, to analyze whether an intangible interest is “property” under the fraud statutes. In *Abdelaziz, supra*, a parent was convicted of mail and wire fraud for paying a consultant to submit a college application package falsely portraying his child as a varsity athlete. In overturning the conviction, the First Circuit shot down the government’s argument that a college “admission slot” was property. But it did so not because it determined that admissions slots were not property but rather because the government had failed to offer evidence sufficient to establish that they were: the government’s “fail[ure] to describe the purported property interest in anything other than highly general, abstract terms le[ft] us no firm basis on which to [make that] assess[ment].” 68 F.4th at 35-36.

The court then pondered what evidence might decide that question. On the history factor, the court noted that, while “traditional notions of property” were a start, it is not enough that the interest in question “may bear some hallmarks of traditionally recognized forms of property.” *Id.* at 35. “[P]otentially relevant guideposts” include whether the interest falls within a dictionary definition of “property,” whether it has been recognized as property in case law or other

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legal sources, and whether it “exhibits traditional attributes of property.” *Id.*; see also *United States v. Hager*, 879 F.3d 550, 555 (5th Cir. 2018) (state law may help define scope of property rights covered by fraud statutes).

As for economics, exclusivity and economic value, two factors that the government argued establish that college admissions slots were “property,” were relevant but not sufficient. *Id.* at 36. The court seemed to reject the government’s argument that economic value alone was enough to establish that an interest was “property.” *Id.* at 37 (“A test looking only at whether the purported property interest has economic value would also sweep too broadly”). Expert testimony in the areas of economics as well as on the nature of the interest may also be relevant. *Id.* at 34. And although not mentioned, prior Supreme Court cases suggest specific questions relevant to the economic prong: Was the asset the victim’s “stock in trade”? Was it “gathered [by the victim] at the cost of enterprise, organization, skill, labor, and money”? Did the conduct result in “economic injury” to the victim? Did the interest “derive from” some intellectual property, like a “trademark, brand name, business strategy or other product that it may trade or sell”? Can the asset “be distributed and sold to those who will pay money for it”? The court offered no further guidance. In fact, it could not even say whether the question of “property” is one of law for the judge or one of fact for the jury. *Id.* at 39.

This very uncertainty, however, may offer defense counsel another avenue. In *McNally*, *Cleveland*, *Skilling v. United States*, 561 U.S. 358 (2010), *Kelly*, and *Ciminelli*—each reversing a conviction—the Court expressed concern that the lack of clarity in the fraud statutes gave defendants too little notice and federal prosecutors too free a hand. See, e.g., *Ciminelli*, 598 U.S. at 316 (government’s fraud theory “criminalizes traditionally civil matters and federalizes traditionally state matters”); *Cleveland*, 531 U.S. at 24 (government’s theory “invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress”). And so due process arguments and

the rule of lenity may provide a legal defense where litigation on the “property” question fails. As the Court said in *Cleveland*, “To the extent that the word “property” is ambiguous as placed in § 1341, we have instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity In deciding what is “property” under § 1341, we think it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *Cleveland*, 531 U.S. at 25 (cleaned up).

Defense counsel navigating the ambiguity of “property” under the fraud statutes need to remain vigilant, adaptive, and creative. This issue is still developing as courts grapple with these questions, and a clearer framework for defining property may emerge over time. In the meantime, don’t forget to embrace the ambiguity. It could turn out to be the best argument you have.

Timothy P. Crudo is a partner at Coblenz Patch Duffy & Bass LLP. Mari S. Clifford is a former associate at Coblenz Patch Duffy & Bass LLP.



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Interview with the Hon. Vincent I. Parrett

Q: What do you enjoy about being a judge?

A: I love being in court listening to the arguments on both sides. You really don't make up your mind until you hear the arguments from both sides. It's that dialectic that I enjoy.

Q: How would you describe your approach to decision making on the bench and your judicial philosophy?

A: I read everything I can and gather all the facts from the cases and the papers from both sides. I look at the case law to pin down the state of the law now. I really do want to hear from both sides, which helps me arrive at the truth and my decisions. In terms of judicial philosophy, I might describe myself as a pragmatic textualist. Language must be the starting point, but you have to assume that legislatures want the laws to work for society and have to think about what the fairest reading of the text is.

Q: What kinds of cases did you first handle on the bench at the Santa Clara Superior Court?

A: I used to do criminal misdemeanor and felony cases, including felony arraignments, pleas, preliminary hearings, and sentencing. Misdemeanor calendars can include over 80 cases during a single 9 am – 12 pm time slot, which gives the judge less than 2 minutes per case. People often don't realize the sheer number of criminal cases that have to be handled in these departments.

Q: What advice would you give to lawyers preparing for trial in your court?

A: I would advise them to focus on the themes they want to present to the jury. Try to anticipate what the other side will do and try to focus in on the information that the jury will need to decide the case. A mistake I see is that the lawyers want to tell everything about the events in question, which can overwhelm and confuse the jury. Streamline your case. I highly encourage lawyers to meet and confer

about jury instructions in advance of the trial. It is helpful for the lawyers to have a good sense of what the jury instructions will be. Focus on themes and focus on the jury instructions.

Q: I understand you've transitioned to a new role at the Santa Clara Superior Court. What is your new position?

A: I am in Department 16, serving as a Civil Case Manager. I am responsible for cases from initiation until trial, handling discovery motions and dispositive motions. The trial judge will then decide motions in limine and oversee the trial.

Q: Do you have a perspective on case management that would be helpful for litigants to know?

A: I think it is important to not just go through the required case management form but to map out the case: When do we plan to get through fact discovery, expert discovery, etc., and try to reach agreement with the other side. Plaintiffs can't expect to ask for everything. Work together on search terms so that relevant, non-privileged information can be discovered. I think it is incumbent on both sides to meet and confer about how discovery will proceed in advance of the first CMC.

Q: *Any dos and don'ts for discovery motions?*

A: In my court, not only will the parties be required to meet and confer before bringing a discovery motion, but they will have to engage in their best good-faith efforts to resolve the dispute before bringing a motion. I have seen just about every kind of discovery motion, and in most cases, the sides can work it out. Subject to privilege and other objections, there usually are responsive documents that should be turned over. I expect plaintiffs to propound discovery requests that are targeted at the production of responsive information, and there should not be hundreds of discovery requests. This helps make the entire system more efficient.

The Honorable Vincent I. Parrett serves as a judge for the Santa Clara County Superior Court. Andrew Hannemann is a senior associate with Arnold & Porter Kaye Scholer LLP.



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Why Litigators Should Care About Well-Governed AI

Write about something more exciting, they said.

This one is about data compliance. (Hold your applause.)

One of the most powerful things about AI is that it's always learning. Large language models are first "trained" by the manufacturer on a trove of language data (blogs, academic papers, everything in between). They're then "fine-tuned" to serve a particular purpose, either by the lab that built the model or by a downstream company deploying the model in their own tool. For example, chatbots are tuned to be more conversational than writing assistants, than legal-specific tools, etc. And then the model is deployed.

But the learning doesn't stop there. Models continue to learn as they are used. The interactions they have—the content they spit out and the prompts and responses they receive—themselves constitute linguistic content that continues to supply a training source. Feedback on the model's performance also contributes to the model's evolving capabilities. The feedback can be as simple as a user clicking a 'thumbs up' icon to reinforce the model's latest response, or as intensive as employees at the AI lab reviewing inputs and outputs and effectively telling the model what it did well, or didn't (a process known as "human review").

These so-called "reinforcement learning" processes help models get better over time. But they also raise confidentiality issues you've likely already spotted: if a lawyer uses a generative AI tool to summarize pages of privileged notes from a client interview, exposing that summary to human review at an AI lab raises (for example) hairy questions about the attorney-client privilege. Relatedly, a model that continues to train, post-deployment, on all the inputs it receives risks "regurgitating" (so goes the term) that training data in an answer it provides to someone else.

You can limit some of the riskiest aspects of reinforcement learning with an appropriately governed AI tool.

First, choose the right settings. Enterprise-level tools often disable—or at least offer you the option to disable—the underlying model's ability to train on your data. If you're having a tool custom-built, you can negotiate how data is treated directly with the AI vendor.

Separate from whether the tool is secured vis à vis outsiders is the issue of internal access control. The ability of a colleague to see your interactions with an internal AI tool is appropriate (and maybe even helpful) in some cases but inappropriate in others. Many tools offer options here as well, and selecting the right options can matter.

Second, once you've made good choices, make sure the tool does what you tell it to do. This is where data governance comes in. Effective governance and compliance programs ensure that internal data and internal tools behave, and are used and accessed, appropriately. They do this by, for example:

- publishing policies to govern that use and access inside the organization
- establishing processes to monitor how the tools are used
- offering (or requiring) trainings so internal users know how to use tools safely, responsibly, ethically, and lawfully
- deploying controls that detect and prevent misuse

(This incomplete list of examples is not legal advice.)

With appropriate governance in place, AI can become very powerful, especially in litigation. You can reformat notes from an interview into more polished bullets. You can summarize tomes of briefs, rulings, memos, and documents into a preliminary briefing to get up to speed on a new matter. You can scan confidential deposition transcripts for frequent issues, inconsistencies, names, dates, or details. And you can attempt those tasks in a way

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Why Litigators Should Care About Well-Governed AI

that—again, say it with me, not legal advice—is less likely to waive attorney-client privilege, test an ethical rule, or violate a protective order. Plus, if something does go wrong, a good compliance program is a helpful artifact: evidence that your gaffe was a fluke and not a pattern.

None of this is to say litigators should place blind faith in AI once their data hygiene is sorted. Data security, smart AI use, and legal accuracy are all distinct. But AI can make us better at what we do if we use it sensibly. And good data governance, sexy as it isn't, is as sensible as it gets.

Benjamin S. Softness is a partner at King & Spalding LLP.



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The Importance of Mentoring Junior Trial Attorneys: Part Three

hearings and trials remotely, and decided that they no longer had to look professional. It got to the point that the Los Angeles County Superior Court announced that effective January 1, 2022 it would be enforcing its Local Rule 3.43 (now Local Rule 2.28) for all remote and in-person appearances. That Local Rule states: “Persons in the courtroom or appearing in court by remote video may not dress in an inappropriate manner so as to be distracting to others of usual sensibilities. Attorneys appearing in court in person or by remote video should be dressed in accordance with current customs for appropriate business attire.” At the time, the LA Bar Association President publicly stated her support for requiring professional dress. She reported that it had gotten to the point that attorneys were making court appearances (remotely) wearing T-shirts, tank tops, and other inappropriately casual attire.

Times being what they are, I personally do not comment on lawyers' attire, or refuse to hear them if they are not professionally dressed. But I sure do notice. It reflects a lack of understanding by the attorneys that they are in court to represent the interests of their clients, and reflects no concern as to whether or not they be taken seriously as a professional. I am sincerely mystified as to how an attorney can appear for a hearing wearing sweatpants.

I suggest that you please save your individuality for a more receptive audience. Judges (and jurors) get enough variety in the courtroom without the attorneys contributing to the wardrobe maelstrom.

Prior to retirement, the Hon. Marie S. Weiner served as Civil Supervising Judge and Complex Civil Litigation Judge for the San Mateo County Superior Court. She now serves as Neutral for ADR Services Inc. Judge Weiner is a member, and former Board member, of the ABTL Northern California Chapter.



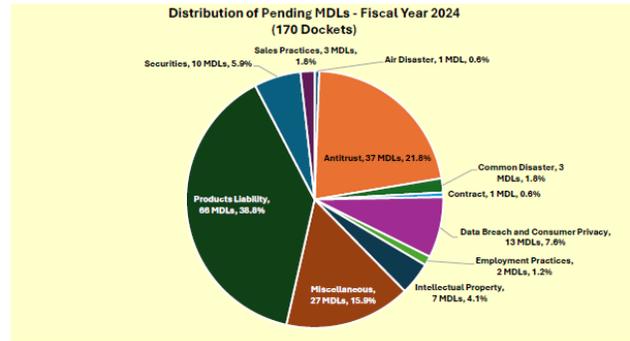
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The Judicial Panel on Multidistrict Litigation (JPML): What It Is and What It Does

judge handles all pretrial matters, such as: discovery, pretrial motions including motions to dismiss, claim construction, Daubert rulings, and motions for summary judgment. In some instances, the transferee judge may schedule bellwether trials. The transferee judge may also take steps to promote settlement negotiations. Cases not resolved return to their original districts for trial—though in practice most MDL cases settle.

While its origins lie in electrical equipment antitrust cases scattered across the country, throughout its history, the Panel has centralized cases involving many areas of the law including securities, data breach, product liability, employment, patent, and intellectual property.

The graph shows the current distribution of types of cases within the Panel’s case inventory.



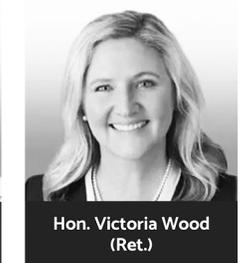
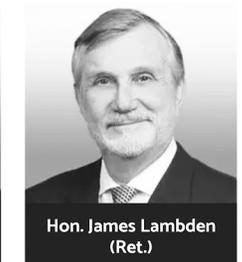
8. Conclusion

The Judicial Panel on Multidistrict Litigation itself does not decide the substantive merits of cases, but as the “traffic cop” of the federal civil justice system, it profoundly influences how those cases are litigated and oftentimes settled. By determining whether and where complex federal litigation is centralized, the JPML ensures efficiency and consistency in the handling of disputes that span the country. For both young and experienced lawyers alike, understanding the JPML’s role is essential for effective advocacy.

The Hon. Roger T. Benitez is a senior U.S. district judge of the U.S. District Court for the Southern District of California. He also serves as a panel judge for the U.S. Judicial Panel on Multidistrict Litigation.



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