

FRANCIS MCGOVERN: SPECIAL MASTER PAR EXCELLENCE

DAN POLSTER*

One of the best decisions I have made in my career as a federal judge was asking Francis McGovern if he would consider being one of my special masters in the Opioid Multidistrict Litigation (Opioid MDL).¹ The Opioid MDL has been described by many attorneys and commentators as the most complex litigation ever. While I don't know if that is the case, I can say with certainty that it is far and away the hardest matter I have handled in my 22 years as a federal judge and before then in my 22 years as a federal prosecutor.

What started with 200 cases in December 2017 has grown to approximately 3,000 cases, plus hundreds of related cases in the state courts. The plaintiffs in these cases are primarily cities and counties, but there are also more than 150 cases filed by Native American Tribes, cases brought by hospitals and insurers, and cases brought by children with Neonatal Abstinence Syndrome. The defendants are the manufacturers of prescription opioids, the nation's major drug distributors, and the national pharmacies.

The complaints are more than 200 pages long. The plaintiffs allege that the manufacturers aggressively marketed and sold prescription opioids as being safe and effective for treating long-term pain, when in fact they have known for years that these pills were highly addictive. The plaintiffs claim the distributors and pharmacies failed in their duty to monitor suspicious orders and prescriptions. The principal causes of action are RICO and public nuisance. The plaintiffs allege that the actions of these corporations contributed to the massive number of prescription opioids that flooded the country, leading to the addiction of millions and the overdose deaths of hundreds of thousands of Americans. The defendants counter that these pills were approved by the FDA for treating long-term pain, that the actual quantities were approved by the DEA, and that prescriptions were written by doctors who believed the pills would alleviate the pain and suffering of their patients.

I knew this would be a very difficult appointment when my colleagues on the Judicial Panel for Multidistrict Litigation asked me to oversee the Opioid MDL,

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* Senior United States District Judge for the Northern District of Ohio. Prior to my appointment, I served as a federal prosecutor in Cleveland for 22 years, first as a trial attorney with the Department of Justice, Antitrust Division, and then for 16 years as an Assistant U.S. Attorney, handling a wide variety of fraud and corruption cases. I am a graduate of Harvard College (A.B. cum laude, 1972) and Harvard Law School (J.D. cum laude, 1976). I and my wife, attorney Deborah Coleman, have three children and four grandchildren.

1. *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio).

but after a few months I realized how daunting a task I had. These were cutting edge legal theories that had not been tested before. There had never before been a large number of such cases brought by cities and counties, and there are more than 20,000 cities and counties in the country, each of which could potentially file a lawsuit. Plus, the State Attorneys General (AGs) were conducting a nationwide investigation, and individual AGs were beginning to file similar cases in state court.

Unlike many lawsuits, the cases in the Opioid MDL concern ongoing events and harms. When the cases before me were filed in 2017 and 2018, we were still in the middle of the crisis, and the cycle of addiction and death was continuing to escalate.

I voiced to the attorneys and parties at the very outset of the MDL that I didn't believe it was possible for plaintiffs, defendants, or the courts to try hundreds of these cases and that we all needed to work together to resolve the cases and to turn the curve of addiction and death downward. However, it soon became apparent that there needed to be an active litigation track in parallel with the settlement track. There were a number of potentially dispositive motions to dismiss that defendants wanted to file and have me decide. Further, I determined it was unlikely that there would be serious settlement discussions until the parties had engaged in discovery in a concrete case that was set for trial.

I also realized how complicated the settlement track would be, and that I needed someone very special to assist me. I sensed that Francis McGovern was the right person.

Francis became my right-hand man for two years. Hardly a day passed that I didn't communicate with Francis in person, on the phone, or via email. Francis was indefatigable, crisscrossing the country sometimes multiple times in a single week. I typically emailed Francis when I wanted to speak to him, as I never knew what time zone he was in.

I had come to know Francis over the years, but not intimately, as I had never worked closely with him on a case. The best course I have taken as a judge was Advanced Mediation for Judges; Francis hosted the class at Duke Law School, and he co-taught it with Ken Feinberg and Eric Green. Francis was also a regular speaker at the annual conference for federal judges who have MDLs. Almost any time a new attorney surfaced in the MDL, Francis would quip that he or she was a former student of his. It became a running joke of ours that there appeared to be few lawyers in the country who had not been a student of Francis' during his 40 years of teaching at more than 10 law schools.

Francis was always the smartest person in the room, but he never acted like it. Everyone liked him, because he was so interesting and engaging. He was truly a Renaissance man. He was a teacher, scholar, and thinker, and he was particularly attuned to using that knowledge to solve complex problems. He was an accomplished swimmer, boater, horseman, and hunter. Because Francis travelled in so many different circles, he could speak anyone's language, and

immediately put them at ease. He was an extraordinary listener, and every time he spoke to someone he learned and remembered something useful.

One of Francis' best suggestions was to set aside days during which all the lawyers and I could be educated on different aspects of the industry. Francis understood that unless we had a common base of knowledge, we would never be able to come up with good ideas for systemic change. We all took the time to learn about drug addiction, drug treatment, health insurance, and prescription benefit managers.

Francis understood early on that the challenge to accomplishing anything in the settlement track was to devise a structure other than bankruptcy that could achieve something close to global peace for any defendant that desired to pursue settlement. The structure had to accommodate not only the close to 3,000 cities and counties that have filed cases, but also the 20,000 other cities and counties that potentially could file lawsuits. Any such structure also had to mesh with the lawsuits being filed in state court by the AGs. Francis spent untold hours meeting with attorneys and academics, including Harvard Law School Professor William Rubenstein. The challenge was to develop something new but not something radical, as the structure had to draw upon existing principles and practices that were familiar to practitioners and courts so that it could gain judicial approval.

The fruit of Francis' labor was the Negotiation Class, which I conditionally approved as a vehicle that a defendant could use. It was, of course, not mandatory, and a defendant was free to utilize any other settlement vehicle. Though the Negotiation Class has been reversed on appeal, the work creating it has proven invaluable, because nearly all of the 23,000 cities and counties have approved a formula for allocating among them any settlement proceeds that might become available. Francis was able to accomplish this because he was able to communicate with everyone, and he treated them all well. Francis was also meeting regularly with numerous First Assistant Attorneys General to make sure that their efforts in state court were well coordinated with everything happening in the MDL.

One of the primary reasons for Francis' success was that everyone liked him. It was impossible not to like Francis. He was always kind and considerate. He never raised his voice. He always wanted to know what you were thinking or how you were feeling. While the Opioid MDL is a highly contentious and adversarial process, Francis kept emphasizing that this is a problem to be solved, not a fight to be won or lost. Everyone's opinion mattered to Francis. He understood that the more time he took and the more people with whom he spoke, and to whom he listened, the greater the likelihood of finding agreement.

Francis was always several steps ahead of everyone, including me. I often needed to ask him to slow down and explain the steps and he was always glad to do so. Having solved so many complex problems over the course of his career, no task was too difficult; and, to Francis, no challenge was too great. Francis truly came alive when he confronted big challenges, as they caused him to fully engage all of his skills and talent.

But perhaps Francis' greatest accomplishment in the Opioid MDL is not something that anyone can read about. Francis kept me focused, and he wouldn't let me get demoralized or discouraged. As I mentioned earlier, this has been far and away the biggest professional challenge I have faced. I had very little guidance in how to proceed, because this MDL was so novel. Every decision I made was challenged or attacked by someone. And, of course, it was all being done in the glare of constant media attention. I had very little experience in being such a constant public figure. While I am an optimist by nature, there have been plenty of setbacks, and plenty of times when I questioned the whole enterprise.

Francis always knew how to pick up my spirits. While I am sure there were plenty of times when he was discouraged at the slow pace of things, or with various obstacles and impediments, he kept that to himself. He immediately knew what to say to me and when to say it. As a result, I have been able to concentrate my efforts on making the key decisions to move the MDL forward. And whatever challenges remain, I will remember Francis when the going gets particularly rough.

I will be eternally grateful for Francis' support and friendship. As I said at his memorial, my only regret is that I took him away so much from his beloved Katy during what turned out to be the last two years of his life. I am also glad that so many who knew him well were able to gather in the magnificent Cathedral of Saint Matthew in Washington, D.C. on March 9th to remember him. Had the memorial been scheduled just a few days later, the shelter-in-place orders issued to contain the coronavirus pandemic would have prevented our gathering.

In the Jewish tradition, when we lose someone dear to us we say "*Zichrono L'vracha*": May his memory be for a blessing. It was a blessing for me to have known Francis. I am a far better judge and person for having been able to work with him so closely. And I hope that when we remember Francis, we will each be inspired to live life and to love life like Francis did, and to look at each day as a new opportunity to make the world a better place. In this way, Francis' memory will always be for a blessing.