

Comment: Federal MCL Fourth and Suggestions for State Court Management of Mass Litigation*

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Introduction

Since the inaugural edition of the *Manual for Complex Litigation* (MCL), updated for the fourth time in 2004, trial judges in both state and federal courts have come to rely on its comprehensive and practical guidance on the topic of complex litigation management. Because a great deal of pretrial and trial management lies in the sound discretion of the trial judge, the fact that the MCL was developed primarily to assist the federal judiciary has not prevented it from being a valuable resource for state judges in most areas of complex litigation.

The MCL is not always a perfect fit in state courts, however. Pretrial and trial procedures can vary tremendously from state to state, especially with respect to intrastate coordination of multiple cases. Some states, such as Texas, New York, and California, have developed comprehensive procedures similar to the federal Multi-District Litigation (MDL) Panel to facilitate the coordination and consolidation of related cases on a statewide basis. In other states, the scope of authority granted to the court of last resort permits the transfer of multiple related cases to a single trial judge for pretrial management purposes, even absent a formal mechanism for doing so. But many states permit consolidation or coordination only for cases filed in the same local jurisdiction, if at all. Moreover, few states provide the level of support in terms of staffing and court resources as generally exists for federal judges assigned to MDL cases.

These types of variations make the sections of the MCL Fourth dealing with mass litigation less helpful to many state judges. In an effort to provide relevant information for state trial judges on these topics, the National Center for State Courts obtained a grant from the State Justice Institute to review and offer commentary on the MCL Fourth chapters dealing with multi-jurisdictional litigation, class action litigation, mass tort litigation, and expert scientific evidence. This commentary is not a comprehensive treatment of how judges in state courts should manage these types of cases in every jurisdiction. Instead, it is intended to provide general ideas and suggestions for caseload management in the context of the most common types of procedural environments in state courts. Particular attention is directed to how state trial judges may coordinate their cases with those in other states and in the federal courts.

To develop this commentary, staff from the NCSC Mass Tort Clearinghouse invited a select group of highly experienced mass tort judges and experts for a two-day forum in Philadelphia to advise on techniques and strategies that they found effective in their own jurisdictions. The judges were nominated by the chief justice of their respective state supreme courts, all of whom were members of the Conference of Chief

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Justices (CCJ) Standing Committee on Mass Torts.¹ These judges represented a diverse selection of procedural contexts with respect to mass litigation. In addition, the forum attendees included Judge Barbara J. Rothstein, Director of the Federal Judicial Center and the MDL judge for the Phenylpropanolamine (PPA) Litigation,² and Professors Francis McGovern (Duke Law School) and Judith Reznik (Yale Law School), both of whom have extensive experience and expertise on the topic of mass tort management.

Different types of mass litigation involve different strategies for effective case management. A case involving consumer fraud, for example, will raise different logistical, procedural, and evidentiary issues than a case involving widespread personal injury such as a toxic tort or pharmaceutical case. To tease out some of these differences, the Philadelphia Forum attendees were given one of three different hypothetical situations involving different types of mass litigation. The hypothetical situations included a consumer fraud case alleging failure of a financial services corporation to disclose user fees; a pharmaceutical case alleging kidney and liver damage after prolonged use by patients; and a mixed warranty and property damage case alleging a defective part in various models of HDTV television sets that have damaged the sets and, in some cases, caused house fires.³ Each of the hypothetical cases involved cases filed in multiple states and in federal court.

The attendees were then asked to break into small groups to discuss how they would manage their assigned litigation in the context of their own jurisdictions, with specific focus on the topics of case coordination, discovery, expert evidence, class certification, trial organization, and settlement. Those discussions were then compared against the guidance suggested in the MCL Fourth. This commentary describes the issues, techniques and strategies suggested by the forum attendees that were unique to state courts or that deviated in substantial part from those in the MCL Fourth due to variations in state law and procedure.

Multiple Jurisdiction Litigation

Much of Chapter 20 of the MCL Fourth focuses on the procedures to transfer and consolidate cases filed in multiple federal jurisdictions through the federal MDL Panel. Approximately 10 states have enacted similar administrative procedures that provide a mechanism for transferring related cases within the state to a single judge for purposes of pretrial case management, and often for management of those cases to final disposition. Statewide coordination of related cases is the optimal arrangement insofar that it minimizes the potential for unnecessary duplication of efforts and provides a single point of communication with judges in other states and in the federal courts who are presiding over those cases in their respective jurisdictions. Most other states, however, provide specific procedures for transferring and consolidating related cases only within the same judicial jurisdiction or, at most, judicial administrative region. These states must rely on

¹ In 2006, this committee merged with the CCJ Working Group on Electronic Discovery to become the CCJ Standing Committee on Civil Justice.

² *In re Phenylpropanolamine (PPA) Products Liability Litigation*, MDL-1407 (D. W. Wa.).

³ The hypothetical situations are attached as Appendix A.

the inherent authority of their state supreme courts to accomplish this through administrative order.

Regardless of the procedural infrastructure in place in each jurisdiction, coordination of related cases takes place at two different levels: internal coordination of the cases filed in or transferred to the court, and external coordination with related cases filed in other state or federal courts. With respect to the former, the MCL Fourth provides substantial guidance on managing multi-party litigation.⁴ In the context of mass litigation in state courts, the more difficult issues involve communication and coordination among multiple state courts and between state and federal courts. These issues generally focus on three areas:

- Establishing constructive interstate and state-federal relationships among judges presiding in mass litigation;
- The ethical boundaries of judicial communication related to mass litigation management; and
- Logistical details related to interstate and state-federal management of mass litigation.

Constructive Interstate and State-Federal Relationships

A major concern of state court judges with respect to mass litigation involves a common perception that interstate and state-federal coordination interferes with the effective and timely disposition of cases filed in the judge's own jurisdiction. To a certain extent, this concern is legitimate. Interstate and state-federal coordination of cases necessarily requires judges to expend additional time learning about the status of cases in other jurisdictions and communicating with liaison counsel and state and federal judges in other jurisdictions. Moreover, effective interstate and state-federal coordination of cases often requires that judges adapt their case management schedule to coincide with other schedules, even if those cases are progressing at a slower pace than the judge would ordinarily accept. The point of multi-jurisdictional litigation is to manage the entire caseload in an effective and expeditious manner, not just each individual case. As a practical matter, this often means that individual judges must shoulder more work than they ordinarily would, so that the total workload – for litigants as well as judges – is more evenly distributed and discovery and case management tasks are completed more consistently.

A common issue of contention in multi-jurisdictional litigation is the question of which court should take the role of primary coordinator for the litigation. The federal courts have often assumed this role in multi-jurisdictional litigation, in part due to the preferences of the parties' steering committees and in part due to the resources that the federal courts can often bring to bear for this purpose. But as a general rule, the decision should be based on the volume and maturity of cases in each court. In many instances, cases filed in a state court may be well underway before the federal MDL Panel even considers a motion to transfer federal cases to a single court for pretrial management. If the state court has sufficient resources to serve as the primary coordinator for multi-jurisdiction litigation, there is no reason why it should concede that role to another state

⁴ FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH), Part I (2004)[hereinafter MCL4].

or federal court. If serving in this role, the state court should structure its case management and discovery orders in a way that will not only expedite the resolution of cases within its own jurisdiction, but can also be readily adopted by other jurisdictions if they so choose. For cases involving a large number of other jurisdictions, the coordinating court should develop a website on which to post information (case management orders, discovery schedules, contact information, etc.).

Courts that are not serving as the primary coordinating court for multi-jurisdictional litigation should still attempt to identify all related cases pending in other courts and either contact the coordinating court or ask counsel to provide information about case management including the current status of the litigation, the existence of a central depository for case documents and evidence, fees for access to the central depository, and discovery schedules and forms. These should be reviewed and used to make an informed decision about the feasibility of coordinating the in-state cases with those filed in the coordinating court.

Ethical Issues in Interstate and State-Federal Communication

One concern to state judges is the extent to which they can ethically communicate with judges in other jurisdictions about cases pending in their own courts. Under the Code of Judicial Conduct, “judges may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities”⁵ without violating *ex parte* communication rules. The current draft of revisions to the Model Code of Judicial Conduct, which is under consideration by the ABA, introduces a new requirement to the exception for consultation with judges or court personnel – that the judge “not abrogate the responsibility to decide the case and takes all reasonable steps to avoid receiving information that is not part of the record.”⁶ Neither the commentary for the 1990 Model Code nor for the proposed revisions indicates whether consultation with other judges extends to judges outside the jurisdiction of the court, much less what the appropriate scope of this communication among judges should be. Ethics advisory opinions are equally silent on the issue. It is precisely this ambiguity in the judicial canons that concerns many state judges and acts a deterrent to their participation in interstate and state-federal coordination of multi-jurisdictional litigation.

As a practical matter, many litigants would encourage judges to participate in coordination efforts as it simplifies the litigation process. For those judges whose judicial canons are very narrowly construed with respect to *ex parte* communications, there are two possible solutions, both of which simply involve the parties in those communications to one degree or another. Canon 3(B)(7)(b) provides that “[a] judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.” This provision would appear to permit judges to consult with one another about litigation coordination provided that they provide notice to the parties that they have done so, a summary of the substance of the communication, and an opportunity for the parties to respond if they object to plans

⁵ AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT, Canon 3(B)(7)(c).

⁶ AMERICAN BAR ASSOCIATION, JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, FINAL REPORT, Proposed Rule 2.10(A)(2).

to coordinate the in-state litigation with cases pending in other state and federal courts. A second, less direct, way to accomplish the same end is to request counsel to provide information about the case management orders in place in the coordinating court and suggestions as to how best to manage the in-state cases given the current status of cases pending in other courts. This latter approach complies with all restrictions on *ex parte* contact, but still provides the judge with information on which to base case management decisions for in-state cases.

With respect to the scope of communications, it is important to keep in mind the purpose of *ex parte* prohibitions – namely, to prevent judges from acquiring information about disputed evidentiary facts that would influence their opinion of the substantive merits of the case. The nature of judge-to-judge communication in multi-jurisdiction litigation focuses on procedural issues related to case management, over which judges typically exercise broad discretion. Provided that judges are careful to avoid discussions of dispositive matters, these discussions should be ethically permissible.

Logistics of Interstate and State-Federal Coordination

Many of the logistic details of coordinating multi-jurisdiction litigation are covered by the MCL Fourth.⁷ For the purpose of state court coordination, the most important point is to take advantage of as much of the litigation infrastructure established by the coordinating court as possible. One major area of contention that occasionally arises is the issue of access to document depositories established by the coordinating court. These depositories are established with a fee-for-access structure to reimburse the attorneys who generated the discovery documents housed in the depository. Generally, the fee consists of a percentage of any settlement or judgment obtained in the case, regardless of whether the case is filed in the coordinating court or in another state or federal court. Depending on the number of cases involved in multi-jurisdiction litigation, however, the accumulated fees often greatly exceed the actual costs involved in generating those documents, in essence becoming a profit center for the litigation. Judges presiding over cases filed in state courts must therefore confront the problem that plaintiffs' attorneys may not be willing to pay the required fee to gain access to the document depository if they can obtain discovery themselves at the same or lower cost, and particularly if they believe that their discovery efforts would yield better information. When the document depositories have been established as part of a federal MDL litigation, state court judges report mixed results in negotiating access for plaintiffs' attorneys. Many federal judges understand the dilemma and make every effort to facilitate access to these documents, both in terms of fees and physical access to the documents. But not all are so accommodating.

Even when interrogatories, depositions, and other discovery documents generated in another court are accessible to litigants in state courts, the trial judge invariably will be asked to supplement discovery on issues unique to the cases filed in each individual court. It will be necessary to consider how much additional discovery is appropriate to cover those issues and impose appropriate restrictions accordingly (e.g., number and scope of interrogatories, amount of time for depositions, etc.). Judges should not permit

⁷ See especially MCL4, *supra* note 4, at § 20.313 (Specific Forms of Coordination).

litigants to duplicate discovery that has already been done as that would defeat the purpose of multi-jurisdiction coordination.

Class Action Certification

On February 18, 2005, Congress enacted the Class Action Fairness Act, which provides federal courts with original jurisdiction and removal jurisdiction over multi-state class action cases. Although the legislation grants some discretion to the federal courts to remand multi-state class action cases back to state courts under certain limited circumstances, the explicit purpose of the legislation was to circumscribe the ability of state courts to certify national class action cases, ostensibly because the class certification criteria in state courts were considerably more lenient than those required by federal courts. At the present time, it is not clear how this legislation has affected caseloads in either state or federal courts. In most instances, the guidance offered in the MCL Fourth applies equally well for cases seeking state class certification, over which state courts retain jurisdiction under the CAFA. For the most part, the procedural rules governing class certification in state court are identical to federal Rule 23 and the case law interpreting class certification tends to be fairly consistent from state to state.

Mass Torts

Case management for mass tort litigation, or any type of mass litigation (e.g., consumer fraud), can potentially involve multi-jurisdiction coordination, class action management, and judicial evaluation of expert scientific evidence. Each of these topics is discussed separately in the MCL Fourth and in this commentary. In addition to these specific issues, state judges presiding in mass litigation must also confront the logistical challenges of managing multiple related cases. The ability to do so presupposes that judges have the inherent authority to aggregate cases, even if informally, for the purpose of pretrial management. Several key steps will help create an effective management structure for the litigation.

First and foremost, the trial judge should delineate all of the court's expectations with respect to the role of liaison counsel, the role of steering committees, fees to support common benefit funds, etc. It is helpful in this regard to identify and include all of the key lawyers and law firms in the litigation. The court should also establish a mechanism to provide public notice to the parties regarding hearings and substantive decisions. E-mail and Internet technologies can support these functions as well as an online database of case management orders, memoranda, decisions and other pretrial orders that the parties can easily access. Early in the litigation, the judge should ascertain that these technologies are compatible with all parties' systems. Some courts may have sufficient resources to appoint a special master to handle certain pretrial tasks. If so, the court should ensure that the special master has adequate training and support to manage those tasks.

The timing and structure of discovery depends on the maturity of the litigation both in the home court and in other jurisdictions. If the litigation is relatively mature, and discovery is well underway in other jurisdictions, the judge should structure the process

to coincide as closely as possible with pre-existing discovery schedules and formats. However, if the litigation is very new in the home court and elsewhere, discovery should be structured to narrow the key issues for decision (e.g., potential classes for settlement or trial, general causation, etc.). Once these key issues have been identified and determined, supplemental discovery can proceed on contingent issues.

The trial judge should firmly establish all expectations concerning the discovery process. Some recommended techniques include setting deadlines for witness disclosure, requiring that depositions be conducted either by stipulation of counsel or by court order, requiring the immediate filing of discovery documents in the court, establishing a rule that counsel may not file discovery motions unless they have discussed the matter and attempted to work out an amicable agreement, and calling for a moratorium on certain types of motions (e.g., motion to compel discovery, work product productions, etc.).

Even if discovery is being coordinated with other jurisdictions, the court should establish a strict timetable for the resolution of pretrial matters and set a date for trial. All dispositive motions should be filed and decided before trial, including motions related to trial procedure (e.g., bifurcation). The court should also pre-mark all exhibits using the numbering system outlined in the court's Case Management Order. Counsel should file all motions in limine prior to trial and all exhibits not objected to should be deemed admitted. Jury instructions should be drafted early and provided to the court and opposing counsel in electronic format for ease of modification.

As a practical matter, mass tort cases rarely go to trial except occasionally to establish a range of damage awards for settlement purposes. Judicial opinions differ with respect to the appropriate role of the trial judge in settlement negotiations. If the judge chooses not to be actively involved in settlement discussions, he or she may order the parties to engage in any alternative dispute resolution (ADR) that may be appropriate. Whatever the judge's role in substantive discussions about settlement, the judge should establish basic expectations concerning any matters likely to affect settlement. For example, the judge should decide on the appropriate method for calculating attorneys fees, place necessary restrictions on the terms of settlement (e.g., use of coupons, valuation methods, public disclosure of settlement terms, etc.), and establish criteria for post-settlement review. Also as part of the settlement process, the judge should understand the ramifications of settlement offers with respect to insurance subrogation liens and collateral litigation (e.g., consumer enforcement or regulation by state attorney general) as the vested interest of these "non-parties" can affect the viability of settlement offers.

Much legitimate criticism has been leveled at mass tort settlements in which attorneys' fees appear to exceed any benefit gained by the litigants by a wide margin. To prevent those types of abuses, the trial judge should defer decisions on attorneys' fees until all of the claims are finalized, or at least until there is a reliable estimate of the number of claims or coupon redemptions that litigants are likely to file. This also provides an incentive for plaintiffs' counsel to encourage litigants to file claims. The judge should also consider the appropriateness of establishing a *cy pres* agreement for unclaimed vouchers or claims.

Expert Scientific Evidence

Standards for admissibility of expert testimony differ from jurisdiction to jurisdiction. The federal courts are governed by *Daubert v. Merrill Dow Pharmaceuticals, Inc.*⁸ and related cases.⁹ Some state have retained the *Frye*¹⁰ standard for evaluating the admissibility of expert testimony, some have adopted *Daubert*, while still others have adopted hybrid standards or other variations on *Frye* and *Daubert*. In making individual determinations, judges must be guided by the governing standards in their own jurisdictions. However, it is possible to coordinate some of these hearings with other jurisdictions through the use of joint hearings or video-conferencing. The MCL Fourth describes several instances in which this technique was used.

Conclusions

The techniques and ideas suggested here were proposed by the attendees at the Philadelphia Mass Tort Judges Forum based on their collective experience in managing mass litigation. In many respects, the primary recommendations for effective mass tort litigation management do not differ substantially between state and federal courts. The key factors are multi-jurisdiction coordination on pretrial management and discovery and adequate communication mechanisms among the relevant judges, counsel, and parties. The main drawback for state court judges continues to be the lack of formal mechanisms for state court judges to coordinate mass litigation with their peers in other state and federal courts. Most of the successful examples of doing so have been makeshift efforts led by creative and thoughtful jurists. These qualities will continue to be important to the future management of mass litigation.

There are some new efforts underway. Recently, the National Center for State Courts established the Mass Tort Judges Network, a secured-access, online database of state court judges who are presiding in mass tort cases.¹¹ The Judges' Network is maintained by the NCSC both as a vehicle to connect mass tort judges with one another and to provide access to news and educational resources about developments in mass tort management. In addition, judges participating in the Network will also have the opportunity to obtain free access to case documents (e.g., case management orders, orders, decisions, and memoranda) in other state and federal courts' mass tort cases through an online document clearinghouse at Westlaw and to contribute their own documents for access by other state and federal judges.¹²

⁸ *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

⁹ See, e.g., *Kuhmo Tire Company, Ltd. v. Carmichael*, 119 S.Ct. 1167 (1999).

¹⁰ *Frye v. United States*, 293 F. 1013 (App. D.C. 1923).

¹¹ Judges who wish to join the Mass Tort Judges Network can register at http://www.ncscsurveys.com/Mass_Tort/survey.php. For more information about the Network, contact Anne Skove at skove@ncsc.dni.us.

¹² West will provide the litigants and Westlaw subscribers paid access to these documents as well. West will bear the cost of copying the documents in accordance with each court's procedures.

The National Center for State Courts is also planning additional training opportunities for state and federal judges to learn about effective mass litigation management practices. It is hoped that these opportunities will provide some of the infrastructure needed to support multi-jurisdiction coordination in mass tort litigation. In the meantime, the CCJ Standing Committee on Civil Justice and the U.S. Judicial Council Committee on Federal-State Relations continue to discuss ways to facilitate interstate and state-federal coordination of mass litigation.

APPENDIX A:

HYPOTHETICAL LITIGATION USED IN THE PHILADELPHIA MASS TORT JUDGES FORUM

Consumer Fraud Litigation

The defendant is a financial services company with branches in 25 states, mostly concentrated on the East Coast and in the South. It is headquartered in your state. The plaintiffs allege that its Investment Services Division failed to disclose service fees charged to clients against investment income. The complaints identify two types of fees:

- (1) Inactive account fees for accounts with assets less than \$10,000; and
- (2) Premature withdrawal fees (again charged to accounts with assets less than \$10,000).

The inactive account fees are assessed quarterly at 0.5% APR with a minimum charge of \$10 per quarter for accounts that have had no activity in the most recent quarter. A premature withdrawal fee of 2% is charged when clients deposit funds and then attempt to withdraw funds exceeding the previous balance less than 10 days after the deposit date. For example, if Client has a balance of \$2,000 in an account, deposits \$4,000 on the first day of the month, and then attempts to withdraw \$5,000 from the account on day 6, a \$60 fee is assessed (2% of \$3,000).

The complaints allege that the defendant has been charging these fees without adequate disclosure since March 2002. Across the entire company, the estimated number of accounts affected by these fees is 300,000 and the average account balance is \$6,800. To date, 84 complaints have been filed in state courts across the country.

The plaintiffs seek reimbursement of the charges, plus reimbursement of profits not earned due to those charges, plus punitive damages. A motion for class certification has been filed in one of the complaints in your court, as well as in courts in two other states.

Personal Injury – Pharmaceutical Litigation

In this case, the defendant is a pharmaceutical company that manufactures a cholesterol drug that is alleged to cause liver and kidney damage after prolonged use. The drug was first approved by the FDA in 1998 and it is estimated that 80,000 people take the drug daily. The plaintiffs' allegations are supported by an epidemiological study published in JAMA and conducted by Johns Hopkins Medical Center on 300 adult males with pretreatment cholesterol levels in excess of 240 mg/dL and LDL levels in excess of 160 mg/dL over a three-year period (May 2001-April 2004). That study found that patients taking the drug were 38% more likely to develop liver damage and 22% more likely to develop kidney damage than a control group taking a different type of drug to lower cholesterol.

To date, 1,200 product liability complaints have been filed nationally against the pharmaceutical company alleging defective design and failure to warn of side effects. Approximately 200 of the complaints also allege medical malpractice against the prescribing physician for failure to adequately monitor patients' medical condition while on medication.

The injuries claimed by plaintiffs range from severe organ damage resulting in death or permanent disability (60 cases), to moderate but irreversible damage resulting in partial disability (80 cases), to slight damage requiring treatment and ongoing medical monitoring (400 cases), and to no immediate detectible physical damage but requesting ongoing medical monitoring (remaining 660 cases).

Plaintiffs are seeking compensatory damages for existing and future medical costs, lost income, pain and suffering, emotional distress, lost quality of life, and loss of consortium (spouses).

Mixed Warranty / Personal Injury

A manufacturer of consumer electronic devices is the defendant in approximately 130 product liability cases alleging defective design and defective manufacture of three different models of HDTV television sets produced by the company since 2003. The manufacturer is headquartered in Texas, but has manufacturing plants in Texas, Ohio, Georgia, and California; all but the California plant produced the three models. The suggested retail costs of the sets range from \$1,899 to \$2,699 depending on the model. Since 2003, manufacturer has produced and distributed to retailers approximately 2,500 of each model.

The complaints allege that the television sets are prone to electrical shorts that have completely destroyed the television sets and, in approximately 30 cases, caused house fires. For cases alleging property damage due to electrical fires, the average damage amount is \$140,000. Approximately half of the cases also involve retailers as co-defendants.

Plaintiffs are seeking damages for property damage (house fire cases) and reimbursement for retail cost of television set. A class action case has also been filed in your court against the manufacturer seeking reimbursement for all purchasers of the television sets.