

COMPLEX CASE MANAGEMENT

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In litigation there is an increasing frequency of cases which raise complicated legal, medical or scientific issues and which may involve multiple parties across the country. The growth of these complex cases has placed pressure on the judicial system. This paper will focus on some of the issues in so-called "complex" cases, such as mass torts.

What is "complex" litigation? There isn't an easy definition. Typically, such a case involves large numbers of potentially relevant documents, extensive discovery, and a relatively large number of lawyers. From the defense standpoint, such litigation can literally rise to the "bet the company" level, with intense client involvement. From the plaintiff standpoint, it can involve hundreds of potential clients, making case management paramount in importance. For most lawyers, the opportunity to participate in a complex case can be a "once in a career" experience, while for others it constitutes the entirety of the practice. Regardless, the lawyer in a complex case must be both advocate and manager.

For most lawyers, the mass tort case begins with a single client with a single problem. Often a decision must be made early in the process whether to escalate the case into complexity, or try to handle it the old fashioned way, "one at a time." The economics of the case will generally dictate the direction the case will go. The aggregation of numerous claims may provide the financial justification for taking a case. On the other hand, there must be a realistic assessment of whether the cost of pursuing particular litigation.

Mass tort claims may be handled in one of three ways. The traditional way to handle such cases involves representation of a single client against defendants in a single lawsuit. However, the particular client may be one of a large number of persons with the same legal claim against either a single potential defendant or perhaps a class of several similar defendants. In those cases, the litigation may wind up either as a class action or, alternatively, in Federal Court managed under the rules governing multi-district litigation.

In Multi-District Litigation, cases are consolidated in one court for proceedings common to all of the cases, including fact and liability discovery. It is not a class action. Although the claims of many litigants are combined, for awhile, for these common proceedings, once that is completed the cases are remanded to the local court for further case-specific discovery, if necessary, and ultimate resolution. In order for litigation to qualify for MDL status, it must be submitted to the Judicial Panel on Multi-District Litigation. Upon a finding that a transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions" the panel can transfer the cases (if filed in Federal Court) to any district for coordinated or consolidated pre-trial

proceedings.¹

Personal injury claims do not lend themselves to class actions. This is because of the individual nature of a particular claimant's injury or damage, which may make computation of compensation difficult. Often, however, where "global" settlements occur, the settlement may be administered as a class action, with some kind of formula for determining compensation to be awarded to individuals within the settlement class. Such a settlement usually involves a limited fund, in circumstances in which allowing individual cases to proceed could exhaust a defendant's resources. The early birds get the worm, latecomers go hungry, and there's no more worm.

This paper is not intended to be a legal brief on complex litigation. Rather, its purpose is to outline the management of complex cases. Three major areas will be addressed: 1) case selection, 2) case and office management, and 3) trial management.

I. Case Selection

We have already briefly addressed the question of a solid "cost-benefit" analysis in determining whether to accept a case which is likely to develop into complex litigation. The following factors are important:

A. The client. As mentioned above, for most lawyers the introduction to complex litigation, like every other kind of case, begins with a single client. It may be that this client's claim is relatively small, but that he or she has suffered a loss in circumstances where there may be others who satisfy the typicality requirements of class action or MDL litigation. Counsel must determine that liability

¹ While this paper primarily addresses MDL proceedings, MDL is not the only option available in mass tort litigation. Cases may be assigned to a single judge from within or outside the district, as designated under 28 U.S.C. §§292-293, 296. Also, counsel in the various cases may agree that one case will be designated the "lead case" with proceedings in other cases stayed pending resolution of the lead case. There may be joint hearings or conferences in which judges meet to discuss the particular docket and which may be attended by counsel in person or by telephone. The courts may coordinate the appointment of joint experts under Federal Rule of Evidence 706, or special masters under Federal Rule of Civil Procedure 53, to avoid unnecessary duplication and inconsistency of result.

issues are common for all claimants and must be aware that there are, in fact, others similarly situated.

The client may simply walk into the lawyer's office, or may already be a client, or may have been referred or have responded to advertising. No matter how he or she comes in to the office, the initial question to be answered is whether he or she has a case at all. Then, and only then, should counsel begin exploring whether the case has complex potential.

In making that decision, a number of questions must be answered. Does the case have the potential to become a mass joinder or class action? Are the issues in the case appropriate for pursuit as a multi-plaintiff case? Will the case involve multiple defendants? Frequently, the answers to these questions are apparent at the onset of the case. For example, cases involving air crashes, hotel fires, chemical spills or the use of prescription medicine or medical devices are commonly handled in a multi-party context. Sometimes, the case does not at first present as one appropriate for multi-party litigation.

B. The case. We have already discussed the typicality requirements. In addition to that, there are other considerations which must be addressed before taking on a complex multi-party case.

First, regardless of whether the case is certified as a class action, or is managed under MDL rules, there must be a frank assessment of whether this is a case which the lawyer really wants to accept. There are numerous obstacles in the way of successful prosecution of a complex case. The obstacles are partly created by the nature of multi-party litigation itself, and others are raised by the facts or the law of the particular case.

In my own experience, two separate multi-district proceedings are illustrative.

Some years ago, a Japanese company manufactured a synthetic amino acid called L-tryptophan. In the United States, this product was sold as food supplement in order to avoid regulation by the Food and Drug Administration. Elsewhere in the world, it was sold as a prescription medication. At some point, problems with the product emerged and people who consumed it began to get very sick. The problem was traced to product manufactured by this company during a specific time period, during which the company had made drastic changes in the manner of production and in quality control. The specific cause of the problem was never identified.

Nevertheless, it was known that the health problems occurred only when the product manufactured by this particular company were used. While medical causation was not a "slam dunk," it was certainly reasonably apparent. For the most part, people were healthy before consuming L-tryptophan, and then they got sick. The L-T was the common denominator for all. This reasonable appearance of medical causation increased the attractiveness of the cases.

The other example is more problematic. In the 1980's a number of medical device

manufacturers began promoting a device to be used in spinal fusion surgery. The device fixed plates or rods along the spine by the use of screws inserted into and through the pedicles. Allegations were that the companies had marketed the devices in violation of the Food Drug and Cosmetic Act and that the widespread use of the devices was causing additional injury to patients whose fusion surgery involved their use.

Unfortunately, these were all people who suffered from very serious back conditions in the first place. Otherwise, they would not have had the surgery. While a case was made that the devices were improperly marketed, the fact was that, by the mid-1990's, whether by fraud, fad or medical usefulness, the devices had attained widespread acceptance by spinal surgeons who argued that the devices, at least in the context of certain kinds of back conditions, represented the "state of the art" medicine for fusion surgery.

Given that even in the best of circumstances spinal fusions don't always work and, even if they do, the patient doesn't always get well (and sometimes gets worse) following surgery, proof of medical causation became extraordinarily difficult, if not impossible.

Another obstacle is the expense involved. If you aspire to be class counsel, you may be required to "front" all or nearly all of the expense of the litigation. If you win, you may be able to recover this money, but your cash flow will be seriously interrupted in the meantime. Even if you are not class counsel, or are not part of the committee appointed by the MDL Court to manage the litigation, you face the prospect of funding the case-specific expenses for a large number of clients. This can involve the costs of obtaining documents (e.g., medical records, reports, etc.), hiring and paying expert witnesses (economists, case-specific liability experts, causation experts, engineers, etc.), and perhaps additional staff and equipment. There will be case-specific depositions and other discovery. If you are participating in a class action or an MDL proceeding, the Court may require each claimant to deposit money to defray the expenses of the national litigation (most, if not all, of my clients don't have any money).

An assessment must be made of the time which will be involved in your representation. You must face the prospect that this work will be so time-consuming that the remainder of your practice will suffer, or even disappear, because of your inability to attend to it.

Finally, you should make a frank and objective assessment of your management skills. Remember, these cases are as much about case management as they are about advocacy and frequently the most successful lawyers in complex litigation are not the best trial lawyers, but are the most effective managers.

C. The lawyer(s). If the determination is made that the case has multi-party potential, the lawyer then must decide if he or she has the requisite skill, knowledge and resources to handle it. It may well be that the litigation has already begun, and that the attendant publicity of the litigation has brought the client into the office in the first place. If that is the case, then the lawyer must decide

how his or her client(s) will best be represented, either through very active representation or through referral or association.

Few firms have the luxury of having all the resources needed to prosecute (or defend) large, multi-party, multi-state litigation in house. Therefore, it is mandatory that any participation in the case must begin with an honest, objective, assessment of you, your office, and the litigation team, with regard to managing a large amount of information and documents for a large number of claimants.

Later, we will examine the kind of technology needed to effectively manage complex litigation, but suffice it to say here that a lawyer who cannot deal with technology cannot deal with modern complex litigation.

Most of these cases involve more than one law firm. The client may have originated with one firm, which then associates with or refers to another firm. You will have to work with these referring lawyers. In doing that, clear lines of responsibility must be established.²

You will also need to be able to "manage" a large number of clients, each of whom sees his or her case as the only one going on, and each of whom will make demands on your time.

If you find that there is already ongoing litigation, either by class action or MDL proceeding, note carefully who is class counsel or makes up the plaintiff's steering committee. Although the court appoints these lawyers, because the same faces tend to show up time after time you can get some idea as to the overall merits by simply knowing the lawyers who are running the show. Frankly, some lawyers do not enjoy fabulous reputations and the danger of self-dealing, even with court oversight, is very real.³

II. Case and Office Management

In class action or multi-district litigation, there are essentially two levels of management. The first is management at the "local level," that is, at your office. The other is management at the "national" level at which the common liability issues are litigated. They will be addressed in that order.

² Keep in mind the rules of professional responsibility as they relate to such things as referral fees, which will be discussed later in this paper.

³ Be warned by the case of *Jarndyce v. Jarndyce* in Charles Dickens' Bleak House, in which a suit which had made the fortunes of several generations of lawyers "lapses and melts away" because "the whole estate is found to have been absorbed in costs." Dickens' description of the last lawyer to leave the court is damning: "[H]e gave one gasp as if he had swallowed the last morsel of his client, and his black buttoned-up unwholesome figure glided away to the low door at the end of the Hall."

A. Organize the team.

1. Staffing. There is a great temptation to overstaff a complex case. You should avoid trying to put a complete staff into place at the outset. However, you should have a plan for staffing as the case grows. Staffing needs will be dictated by the number of clients involved in the litigation and the type of claim being prosecuted. If you anticipate a very large number of clients, you should determine the maximum number of cases a single staff person can manage, using available technology, efficiently and economically. As the case load grows, the staff grows along with it.

You may be able to make use of temporary manpower during the course of the litigation.⁴ Using temporary staff provides a more economical way to handle the work load and, once the litigation is concluded, so is the need for the staff. Your paralegals will be the bridge between you and the clients. It is the paralegals who will have the most day-to-day contact with the clients and who will be primarily responsible for making sure all of the proper documentation is obtained.

Consideration must also be given to the possible need of specialty staffing. For example, not infrequently in this type of litigation some individual discovery is in the form of completing a questionnaire in lieu of interrogatories. Sometimes these questionnaires call for explicit medical information. Hiring a nurse to review medical records for these purposes might be a good idea.

The number of lawyers dedicated to the litigation may depend on the number of clients as well as the level of the litigation. Your arrangements with co-counsel or referring counsel may lessen the need for additional lawyers assigned to the cases.

If you choose to assign lawyers to a specific number of clients, it will be anticipated that these lawyers will have some degree of overall responsibility for everything with respect to his or her "clients." This means each lawyer would have responsibility for discovery, witnesses, pleadings, research and briefing, pre-trial procedures and administrative items.

You may also opt to assign lawyers, not to clients, but to specific tasks in the litigation. For example, one lawyer may oversee all discovery, while another is in charge of research and briefing and preparation of pleadings.

2. Training. Once your "team" is in place, you should plan regular meetings for the purposes of keeping all of the team educated about the issues involved in the litigation and for keeping them up to date on developments. Lawyers and lay staff will perform better if they understand the substantive issues in the litigation, the facts, and the governing law.

The clients also require "training." Each is entitled to be kept informed on the progress of the case, the issues involved, and his or her particular role in the entire affair.

⁴ Beware! If the litigation promises to be very lengthy, these "temporary" contract workers may be viewed by government agencies as, in reality, "full time" employees, requiring the same pay and benefits enjoyed by your regular, full-time, staff.

Client newsletters are an invaluable means of keeping a large number of clients informed about the progress of the case in general, as well as alerting them to issues which affect them all.

Periodic client meetings to explain things and answer questions are also very helpful. Because complex litigation may involve representation of clients over a large geographical area, regional client meetings provide an excellent means of interacting with the clients and letting them see the lawyer who is representing them. A note of caution must be sounded about this, however. Questions particular to one client should be addressed in private, as discussing a particular client's case in the presence of other clients may not only be a breach of the duty of confidentiality, it may also waive the privilege and allow the other side to inquire about communications between counsel and client.

Video tapes also can assist in training not only staff, but also the clients. You may face the prospect of defending hundreds of client depositions during the course of the litigation. If your clients are spread across the state, or are even in several states, individual in-person meetings for the purpose of preparing the client for deposition may be impractical, if not impossible. Instructional video tapes, followed up by brief telephone or even in-person meetings to resolve any last-minute problems, can be very helpful.

3. Client preparation. Before filing a mass tort or complex commercial case, plaintiff's lawyer should compile a comprehensive client questionnaire. This should include not only biographical information, but also detailed health history, employment history, description of injuries and other relevant information.

II. Financing the Case.

Complex cases, whether mass tort or commercial in nature, are expensive for all parties. In fact, for plaintiff's counsel, the biggest single bar to participation is the prohibitive cost factor. Plaintiff counsel has the added pressure of representing people who, for the most part, do not have the financial resources to finance their claims. Finding the funding for the cases, as well as managing costs, is imperative.

You should begin by formulating a proposed budget of expected costs. The budget should include anticipated staffing needs, anticipated court costs, anticipated costs of document and record retrieval and storage, and anticipation of any equipment needs which cannot be adequately met by what you have on hand. Prospective discovery can also be expensive, and should be anticipated. Do you want to order transcripts of all depositions? Do you want to travel to all of your clients' depositions, or must you retain local counsel for that purpose, or even have the depositions taken by telephone? How will this litigation affect your ongoing costs of operating your office? Is your copier sufficient for the volume it will be required to handle? Does your computer system have enough storage? Will you need to purchase new software for document management?

You should also make a decision about whether to require financial "participation" by the clients or associate counsel. These decisions are often dictated by the client's ability (or lack thereof) to pay and your relationship with referring or co-counsel.

This budget should be constantly reviewed and updated to make sure that your expenses remain within your capabilities to meet them.

Under no circumstances should any law firm over extend itself in financing litigation. It is sometimes necessary to arrange a line of credit, just in case, but there is real danger in taking on more than you can afford.

If you are class counsel, or are on or helping the steering committee in an MDL proceeding, you may have extraordinary travel and other expenses, as well. In multi-district litigation, the plaintiffs' steering committee may also adopt a budget and the court may require financial contributions toward defraying the cost of the national litigation. This can vary, in my experience, from \$350 per claimant to \$1,500 per claimant.

In the L-tryptophan litigation, the plaintiffs' steering committee adopted a proposed budget and then met with other participating counsel to discuss the budget. The meeting resulted in some changes to the budget, but the involvement of all the lawyers made it much more palatable. The committee members also agreed that they would not charge any fee for their work on the committee, limiting their fee income to that derived from their own cases. After this, everyone was more than happy to pay an assessment of \$1,000 per claimant.

In the pedicle screw litigation, after about two years of existence, the plaintiffs' legal committee decided that it needed some help with expenses. They totalled up what had been spent, divided that by the number of litigants, and applied to the court for an assessment of \$350 per litigant, and were confronted with an unexpected howl of protest from lawyers handling the cases.

In point of fact, the \$350 assessment was quite reasonable and the work of the committee was quite beneficial. I believe people were more willing to pay the \$1,000 in the L-T litigation because of their initial involvement.

III. Technology

A. Case management programs. The assumption here is that your office is equipped with computers, and fully networked. What you now need is a "case management" system. By this I mean a program that will allow the storage of numerous categories of data about each client in a fashion that will allow the data to be transported into documents, will maintain a calendar system for appointments, reminders, etc., and will track activity on each file so that the attorney will have some idea as to the current status of each case by checking the computer.

There are a number of good, and not so good, "off the rack" case management programs and it is not the purpose of this paper to review them.

B. Document storage and retrieval. Mass tort litigation, or complex litigation of any kind,

generates huge amounts of paper. One of the biggest problems facing anyone involved in this kind of litigation is that of sorting through warehouses full of documents in search of anything relevant, much less anything amounting to a "smoking gun." Even when all of the relevant documents are located and copied, two problems immediately arise: the documents must be organized and stored and the documents must be easily accessible.

1. CD ROM technology. CD-ROM (Compact Disk-Read Only Memory) and WORM (Write Once, Read Many times) drives are available for PCs. These disks store information measured in gigabytes and are now quite affordable. Indeed, most software programs now come in this form.

The primary advantage of CD-ROM for law firms is the huge increase in the amount of data one drive can access. Large capacity drives are a necessity for data intensive applications such as litigation support or legal research.

CDs can be accessed either through a "tower" as part of a network, or at individual workstations equipped with a CD drive. In the former instance, any workstation can access the information contained on the CD, while in the latter access is only at the workstation in which the drive is operating. You can, of course, have both.

CD-ROM relies on imaging technology, in which actual pictures of documents are stored rather than just textual representations of those documents. Imaging is quite important in litigation in which documents containing, in addition to text, such things as margin notes, diagrams, photographs, maps or other graphics which cannot be stored in textual format. CD technology makes possible the truly "paperless" office, in which images of documents are stored and the original documents filed away in deep storage or destroyed.

Large storage capacity is needed because an image is defined by the computer as a grid of tiny dots. The dots, when viewed in the aggregate, produce an image in the same way a newspaper is printed using tiny dots of various hues and densities. The higher the resolution desired, the greater the number of dots necessary. A one-page image of moderate resolution (300 dots per inch) will consist of about 1 million bytes of information - 1 MB. A 40 MB hard drive completely empty of software and other data can hold only 40 images of modest resolution.

Optical technology such as CD-ROM is much more stable than magnetic media, which tends to degrade over time. Magnetic media is sensitive to light, heat, humidity, and especially to magnetic fields. CD-ROM diskettes are impervious to these elements.

CD-ROM publishing is now "desk top." Sony, Phillips, JVC and others now offer affordable CD-R (CD Recordable) drives ideal for law firms that need the storage capacity of optical drives. Now, using this technology, a law firm can produce a CD-ROM containing all the research required for a specific practice area. An updated CD-ROM can be periodically produced to supersede the prior one. This technology is an excellent alternative for archiving or storing large

numbers of documents.

2. Scanners. Scanners are much like copiers, only they make electronic, rather than paper, copies. These electronic copies are then stored as computer images or can be turned over to optical character recognition (OCR) systems designed to create text files from the letters, numbers, and punctuation marks they identify from the scanned image.

Five years ago, scanners had a limited effectiveness for most law offices. Except for the very expensive, top of the line machines, copy quality was "hit or miss" and it could be time consuming to review the scanned image for corrections (e.g., "8" rather than "B"). However, the technology has continued to improve and today scanners are very effective tools for inputting data. Used properly, they save considerable time. If a document is received in other than electronic format (computer disk or CD-ROM diskette) and must be entered into the computer database, that entry must be manual, unless scanning technology is used.

For example, interrogatory answers must be on the same page as the questions. Rules require the sender to leave room on the page for answering the question, but the space available is often inadequate. The "old timey," time consuming and expensive way to handle preparing interrogatory responses is to manually type the answers onto the provided pages, or, if a professional appearance is desirable, have the entire document re-typed. If the information needs to be stored in the computer, however, this stone-age procedure won't work (unless the entire document is re-typed). With a scanner, the interrogatories are copied into the computer. The answers must still be typed, but the necessity for re-typing the questions is removed.

Other document drafts, such as releases, contracts, leases, etc. can be scanned into the computer for modification as negotiations proceed, enabling the user to produce almost instant copies of drafts, and, depending on the software or document management programs used, often showing both the original version and any proposed changes.

As with other equipment, the quality of the product of these machines has greatly improved over the last few years and the cost has become more affordable.

Now, there are small, single page, scanners which can be kept right at the computer workstation, which allow the user to scan correspondence and other documents without leaving the workstation. While not as accurate as the more "heavy duty" multi-page scanners, they are quite adequate for most jobs and the cost is only around \$200, plus software.

Using this technology, the documents are scanned into the database for electronic storage and retrieval.

3. Litigation support and retrieval systems. Complex cases are complex in large part because they involve enormous quantities of paper, with countless hours spent identifying the existence of the paper, fighting over its production, and trying to interpret it. In order to do this

effectively, automated litigation support systems are imperative.

Automated litigation support is a phrase which refers to the application of technology to the management of evidentiary materials used during case preparation. This includes documents produced during discovery, deposition and other transcripts, and a variety of other materials. Computers are good at managing data, but not so good at evaluating it. Automated litigation support systems allow quick access to important data, but the lawyer still must decide what is, or is not, important.

A good litigation support database is one in which all of the important data is organized, indexed, and easily accessible. A "full text" database is one in which the user can search every piece of text in the document. It is very useful for managing long or complex documents. A "relational" database is one in which specific categories of information (names, dates, etc.) are stored. An "imaged" database uses graphic technologies.

There are so many litigation support systems on the market that it is impossible to evaluate them all. There are three manuals which are helpful in selecting appropriate systems and in designing your own database. Wilmer Cutler & Pickering Manual on Litigation Support, John Wiley & Sons, reviews many litigation document support systems and gives examples of design techniques for both full text and document control (field-oriented) databases. Using Litigation Databases, by Terence Kiely, John Wiley & Sons, also lists available online databases for legal research. Litigation Support Systems: An Attorney Guide, by Hugh E. Kinney, Callaghan & Company, provides a generalized approach to implementing automated litigation support systems.

When purchasing one of these systems (ALS), look first for products which run on standard hardware operating systems. Look for expendability. If your practice grows, the application must grow, too. Look for an easy to use structured database, first. The software should employ ASCII (American Standard Code for Information Interchange) since it is the most widely used format. Make sure the system is fully functional with a good set of versatile search tools. Look for speed.

Litigation support software should include the following components:

- **Imaging software:** Along with a scanner, imaging software lets you convert stacks of paper into electronic images. This makes the transport, indexing and retrieval of documents easier.
- **Database capabilities:** Any ALS program should allow you to track, sort and analyze all of the information related to the case. The database feature of most ALS programs lets you do this.
- **Full text searching:** This lets you find the proverbial needle in the haystack. Reducing the amount of paper in the office is only effective if you can find and retrieve documents quickly and easily.

Once you are organized and equipped for complex litigation, it is time to litigate.

IV. Litigation Management

A. Early court involvement. A complex case should be prosecuted only if it promises a large recovery if successful. As a result, the lawyers who get involved in these cases tend to be very good at what they do. However, the combination of zealous advocacy and a well-heeled defendant can present problems. Many defendants employ "scorched earth" tactics designed to exhaust and bankrupt plaintiffs and their attorneys.⁵ Some plaintiffs' lawyers use discovery for fishing expeditions which may be so exhaustive that corporate defendants must virtually cease functioning in order to comply with document requests. Nearly every case involves the sudden appearance (usually quite by accident) of highly relevant documents that were never produced in response to discovery requests. This list can go on and on.

To prevent these problems, the court should be involved early and often. This involvement may consist of periodic pretrial conferences, use of special masters and telephone conferences. If it is contemplated that many depositions will be taken, preliminary ground rules, if not worked out among counsel, should be established by the court.

Usually, the first issue to be addressed by the court is the question of class action certification. Because "class counsel" stands to reap the highest reward (fee) in the event of success, there can often be jockeying among various plaintiff counsel, each seeking to have his or her case certified as "the" class action. As stated above, tort claims do not generally lend themselves to class action certification.

B. Discovery issues. Generally, the court will approve a master set of interrogatories and requests for production to be submitted to individual plaintiffs. If there are multiple defendants, the court will likewise approve master discovery requests for submission to each defendant. Sometimes, either in addition to or in lieu of interrogatories, the court will approve an extensive questionnaire to be completed by plaintiffs.

Some judges presiding over MDL proceedings will limit the number and scope of depositions to be taken. Others will not interfere unless a dispute arises in connection with a deposition. My observation is that the courts generally allow the litigants a free hand in taking depositions.

In the L-T litigation, Judge Perry resolved the discovery disputes himself. In the pedicle screw litigation (still ongoing), Judge Bechtel appointed a special master to handle discovery disputes.

⁵ It is "alleged" that this practice is common in the tobacco litigation. In order to meet this challenge, the consortium of plaintiffs' attorneys currently involved in this litigation on behalf of various states Attorneys General compiled a pre-litigation war chest of \$50 million.

C. Shared information. The function of the plaintiffs steering committee is to generate the discovery on liability issues common to all cases. This involves document production, depositions, and often retaining "generic" experts. In the MDL context, once this task is complete, cases are remanded, hopefully "trial ready" to local courts. In the meantime, case specific discovery has been conducted at the local level by local counsel. Since the steering committee is charged with developing the liability case, discovery at the local level tends to be one way: defendants depose the plaintiff and his or her witnesses as well as any case specific experts.

Usually, the steering committee works out an arrangement with the generic experts to make them available to the plaintiffs for their specific cases. Financial and other arrangements are between local counsel and the expert, however. Problems arise when the experts realize that two or three lifetimes can be used doing nothing but giving depositions and courtroom testimony, and they become unavailable.

The steering committee will also maintain a repository for documents produced during discovery, deposition transcripts and other relevant materials. The better committees will even provide notebooks on each defendant, with an index to the relevant documents. The documents themselves are available at cost.

Most steering committees will also host seminars for lawyers involved in the litigation in which there are discussions of the status of the litigation, results of depositions or other discovery, presentations by experts, etc.

D. Trial. Once a case is remanded to the local District Court, it will be calendared for trial. The MDL rules anticipate that cases will be remanded "trial ready" and that no further discovery should be necessary.

V. Some Ethical Concerns

Although there is a separate section in this seminar on ethics, some concerns are unique to complex litigation and should be addressed here.

Referral fees have always been a concern in any litigation. However, lawyers handling complex cases depend heavily on referrals from other attorneys who may expect some kind of remuneration in return. Referral fees may be legitimately paid when the referring attorney agrees to remain ultimately responsible for the handling of the case and when the client is advised that the referring attorney will receive part of any fee and consents to it. It is a good idea to have a written referral or association agreement outlining the rights and responsibilities of each of the lawyers involved.

The other concern has to do with the so-called global or aggregate settlements frequently seen in this type of litigation. Federal Rule 23 will allow class action certification for the purpose of

administering a global settlement in certain cases, especially where there are limited assets or funds out of which a settlement may be paid and where the defendant will go bankrupt if required to defend hundreds of lawsuits around the country. These are referred to as "limited fund class action settlements." These settlements do not usually present ethical concerns since they are court approved and are administered under court auspices. Generally, they provide that individual claimants will share in the settlement based on a settlement grid or scoring systems so that what an individual recovers has some relationship to the extent of his or her injury and damages.

However, there is a certain charm for all sides in settling cases as a group. Having multiple clients can give a plaintiff's lawyer some leverage, giving clients with weaker cases a bigger share than they would otherwise hope to obtain. Defendants are attracted to group settlements because they can save defense costs and eliminate outstanding liabilities faster than with a case-by-case approach. Judges like the prospect of clearing dockets when a group of plaintiffs settles.

Rule 1.8(g) of the Rules of Professional Conduct states:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and or the participation of each person in the settlement.

Although in the mass tort context, some commentators argue that the rule should be reexamined,⁶ it remains as a serious settlement obstacle absent complete (and documented) client counseling and consent. I believe the disclosure requirements of this rule also places counsel at risk of violating the rule against disclosure of client confidences, because it requires disclosure to each of the clients what other clients are to receive. The affected clients must unanimously consent to the settlement. *Hayes v. Eagle-Picher Industries*, 513 F.2d 892 (10th Cir. 1975) (where a pre-trial agreement by plaintiffs in an asbestos trial provided that a group settlement could be accepted if a majority of plaintiffs agreed.)

VI. Conclusion

Class actions and multi-district litigation remain efficient and effective ways of resolving complex matters, although they are not without drawbacks. Only a few law firms can afford significant involvement in these matters. Those who do will have the opportunity to see the best and the worst in our profession.

⁶ See, Silver & Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733 (1997).

OUTLINE - COMPLEX LITIGATION

12/04/98

I. Introduction

A. What is "complex litigation"

1. May involve difficult issues (patent, antitrust, products liability)
2. May involve large no. of parties (class actions, mass tort, MDL)
 - a. issues of joinder
 - b. third part practice
 - c. aggregation (MDL)
3. Usually involves a lot of money at stake

B. Even "simple" cases can have complex aspects (most of the issues of "complex" litigation are probably more accurately described as problems of modern litigation)

II. Problems of complex litigation

A. Case selection

1. The client
 - a. is client "fairly" typical of a large number of potential claimants?
 - b. would the client make a good "class representative"?
2. The case
 - a. what is the stage of development of the facts?
 - i. other suits pending
 - ii. notoriety (20/20, 60 Minutes, etc.)
 - iii. how much discovery will be needed, and what kind (eg, depositions vs. interrogatories)
 - b. are damages sufficient
 - c. likely expenses
 - i. litigation expenses

- ii. increased overhead (technology, staff, etc.)
 - d. time requirements (how much other work can be done while this is in progress?)
 - e. management requirements (case is as much about management as about advocacy)
 - 3. Self assessment
 - a. management skills
 - b. financial condition
 - c. other resources
 - 4. Other lawyers/firms involved
 - 5. Who are the defendants?
- B. Case management
- 1. Professional and para-professional staffing needs
 - a. training
 - b. division of work/responsibilities
 - i. assignment by "category of work" (eg, legal research, specific issues, specific defendants, deposition team, etc.)
 - ii. assignment by client (so many clients per lawyer/paralegal)
 - iii. combination
 - 2. Document management
 - a. storage and retrieval
 - i. CD ROM
 - ii. scanners
 - iii. copying
 - iv. warehousing paper/organization
 - b. document sharing
 - c. document indexing

III. Litigation

A. Importance of budgeting at all levels

1. Need for PLC to be adequately funded
 - a. client/lawyer assessments
 - b. court-ordered assessments
2. Need for each atty to be adequately funded

B. Court involvement

1. Naming "plaintiffs' team" (PLC, PSC, etc. in class action or MDL)
 - a. Court involvement in organization
 - b. Court involvement in procedures (must approve most of them)
 - c. Court involvement in compensation
2. Discovery scheduling, guidelines
 - a. Special Master
 - b. Direct court involvement

C. Care and feeding of experts

IV. Settlement

A. "Global" settlement

1. who gets the money?
 - a. resolving problems (SoL, causation, etc.)
 - b. will some plaintiffs be paid a premium? (ie, those who filed suit before settlement get more than those who didn't)
 - c. attorney fees (no contingent fees after settlement announced)

2. distribution scheme
 - a. Breast Implant Lit. problem (fixing numbers in grid)
 - b. Trailways bankruptcy method (negotiation)
 - c. L-T litigation method (mediation)
 - d. Pedicle screw - AcroMed method (point system)

V. Ethical concerns

- A. problems w/aggregate settlements
- B. legal fees
 1. contingent or otherwise
 2. fee sharing (referrals)

