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Requests for reprints may be sent to:
Duke Law Center for Judicial Studies
210 Science Drive | Box 90362
Durham, NC 27708-0362
Phone: 919-613-7073 | Fax: 919-613-7158
Email: **judicature@law.duke.edu**
Online: **judicialstudies.duke.edu**

AS I SEE IT

THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE ABROGATED. I speak not of the criticisms of the rules as a failure to ensure the just, speedy, and inexpensive determination of litigation — though many distinguished lawyers and jurists have sadly moved in that direction. No, I direct my lament at those entrusted with the responsibility to ensure the vitality of the rules.

Providing uniform procedures that are consistently followed throughout the country is the raison d'être of the federal civil rules. An individual in Texas should not be treated procedurally differently than an individual in California with the same lawsuit. Over time, the rules have grudgingly accepted limited exceptions to address unique circumstances. But what was once a small pool of exceptions has now grown to a yawning chasm that is swallowing up the whole.

More than 110,000 cases are pending in 20 mass-tort MDLs. That number represents 33 percent of the entire pending federal civil caseload. These cases implicate enormous financial stakes that affect the U.S. economy. Yet no civil rule provides uniform procedures that can be applied consistently to MDL litigation throughout the country. Instead, MDL transferee judges wield virtually total discretion under the guise of pretrial management.

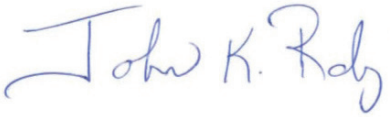
Left largely to their own devices, transferee judges have been compelled to develop procedures out of whole cloth to manage complex problems that regularly arise. A hodgepodge set of practices has evolved that may have worked for some judges in certain cases but now are indiscriminately adopted by newly designated transferee judges, who most often are handling their first MDL. Without rules or official guidance, these judges terminate nearly 90 percent of the centralized cases, all done under a statute that was intended to centralize cases for pretrial purposes only, primarily discovery. The legal authority for much of their actions is not self-evident.

Laissez-faire advocates dismiss any need for new rules, contending that Rule 16(c)(2)(L) is all that is needed to establish legitimacy. That rule authorizes a judge to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."

Based on this slender reed, they defend the status quo and MDL practices that: (1) establish multi-million-dollar common-benefit funds, assessing hundreds of unwilling parties proportionate costs, including parties in state-related litigation; (2) impose responsibilities on lead counsel that may conflict with fiduciary duties owed their clients; (3) recognize some judicial responsibility to review the fairness of global settlements albeit without explicit authority to do so, unlike Rule 23 class action settlements; (4) create and amply compensate steering committees consisting of 10-20 lawyers who peremptorily manage the litigation on behalf of hundreds of other lawyers; (5) develop screening methods that filter out meritless complaints filed as tag-alongs; and (6) hold bellwether trials whose rulings pressure parties to settle with little fear of appellate review. All under the Rule 16 rubric. By this argument, we might as well dispense with the body of rules and have only a single rule that authorizes a judge to develop procedures that are "just."

It is no surprise that experienced judges view the possibility of rules governing MDLs as obstacles, because they narrow that judge's discretionary authority. Plaintiff lawyers are equally satisfied with the existing MDL practices — though they, on occasion, are experiencing what defense lawyers have begun to experience, that is, a transferee judge bent on forcing an unwanted settlement. These judges and lawyers join institutional forces, including the opposition of JPML members, which pose a formidable defensive array.

Rather than cede the civil rules to certain irrelevance as the exceptions consume the whole, better to end the downward spiral and start afresh.



John K. Rabiej, Director, Duke Law Center for Judicial Studies