Wrangling the beast

CREATING NEW STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS

By Jaime L. Dodge

WITH MULTIDISTRICT LITIGATION CASES OCCUPYING A FULL THIRD OF THE FEDERAL DOCKET, WOULD YOU KNOW HOW TO LITIGATE OR ADJUDICATE ONE? If your answer is a bit timid, it may well be with good reason. Although these cases are ubiquitous, for many years, a handful of prominent judges drove the development of multidistrict litigation and the treatment of mass torts more generally. But, with the expanded use of MDL in recent years, virtually every federal judge now serves as a transferor judge during his or her career. Equally important, the Judicial Panel on Multidistrict Litigation (JPML) made the decision to attempt to spread the increasing number of MDL cases across more transferee judges — such that more judges are now engaged in the management of their first MDL matters.

With this diversification of the bench, the complexity and uniqueness of many MDL matters, and the relative lack of procedural rules governing the transferee judge's conduct of the MDL, the stage was set for innovation (whether by design or necessity). Because most leadership positions for both the plaintiffs and defendants were filled with experienced repeat-players, they were well positioned to informally share experiences about what worked and what did not. But, informal suggestions by counsel could go only so far: in the context of any given case, counsel's recommendations will often be tinged with a strategic overlay.

This article describes a unique effort by the bench and bar, with the guidance of the Duke Law School Center for Judicial Studies, to fill that gap by removing case-specific strategic maneuvering and allowing for a candid discussion. The result was the *MDL Standards and Best Practices for Large and Mass-Tort MDLs*[1] report. Understanding how the report evolved helps to shed light on why it is such a valuable contribution to the MDL bench and bar alike.

Until now, the "best" way to handle an MDL was often the result of each individual's limited experience with MDLs. Moreover, the strategic dynamics and understood norms of operation within the MDL process remained illusive to those outside leadership — even to attorneys with clients in the MDL and transferor judges whose cases were coordinated through the MDL process.

The Duke dialogue changed that. It brought together a wide array of experiences and perspectives, not only identifying which practices are typically helpful across a range of MDL situations but also analyzing the situations in which each practice is more or less likely to succeed. Indeed, it was only with this broad base of experiences and views that a large enough range of cases could be identified to make more nuanced recommendations to judges and practitioners.

As today's MDL judges and practitioners continue to innovate, they now have a foundation to draw upon, constructed with the collected wisdom of their peers as well as the strategic insights of leaders from both sides of the bar.

BACKGROUND

In the late 1960s, the courts and society struggled to create procedural mechanisms for addressing mass wrongs. The revision of Federal Rule of Civil Procedure 23 gave birth to the modern class action, which has in many ways dominated the landscape in the intervening decades. But it also saw the passage of 28 U.S.C. § 1407, which created multidistrict litigation.

Like the class action, MDL permitted the coordinated treatment of similar claims of wrongdoing brought by a large number of individual plaintiffs.[2] But, there were two important differences: First, a class action permitted a single plaintiff to reach final judgment on behalf of all of the other alleged victims, whereas MDL merely coordinated pretrial proceedings. Second, because the named plaintiff in a class action could legally bind the absent class members, a more rigorous set of requirements applied to the certification of the class action than were prescribed for the formation of an MDL.

In the shadow of these distinctions, class actions became the preferred mechanism for a wide array of mass wrongs. The class action allowed a single proceeding to dispose of essentially all claims, streamlining the litigation process for the courts, providing closure to defendants, and allowing plaintiffs' attorneys to negotiate damages based upon aggregate harm rather than just the harm to the handful of alleged victims who would likely file individual suits. MDL was in many ways reserved for the most complex and difficult cases in which individualized issues would likely prevent class certification. This stacked the deck against MDL; cases like Agent Orange and asbestos dominated the perception of MDL, giving rise to a sense that MDL was a lengthy process, with cases rarely remanded for trial, and changing the bargaining dynamic between the parties.

But, in recent years, parties and their counsel have taken a second look at MDL as the best way to resolve an ever-growing swath of mass-harm cases. Why has this happened? Two reasons come to mind: First, the Supreme Court has cabined the availability of class-action certification, while simultaneously sanctioning contracts that waive class-action procedures. Yet, in our standardized and interconnected society, the rate of mass claims remained high and the need for a viable procedure for handling those claims persisted.

Second, counsel who had participated in MDL reported positive experiences, making it a viable forum for not just those cases now excluded from the class-action system but even an array of cases that could not be certified. MDL also seemed to provide an effective forum for resolving potentially competing or overlapping class actions.

These forces combined to generate a substantial increase in MDL, discussed in the companion article by Prof. Thomas Metzloff (see page 36).[3]

But the flexibility of MDL's procedures also meant that both bench and bar had a far greater opportunity — and at times burden — to innovate. Although the MDL statute provided

MDL STANDARDS

1. The transferee court, in consultation with the parties, should articulate clear objectives for the MDL proceeding and a plan for pursuing them. The objectives of an MDL proceeding should usually include: (1) the elimination of duplicative discovery; (2) avoiding conflicting rulings and schedules among courts; (3) reducing litigation costs; (4) saving the time and effort of the parties, attorneys, witnesses, and courts; (5) streamlining key issues, and (6) moving cases toward resolution (by trial, motion practice, or settlement).

2. In an MDL action with many parties with separate counsel, the transferee judge should establish a leadership structure for the plaintiffs, and sometimes for the defendants, to promote the effective management of the litigation.

3. The transferee judge should select lead counsel, liaison counsel, and committee members as soon as practicable after the JPML transfers the litigation.

4. As a general rule, the transferee judge should ensure that the lawyers appointed to the leadership team are effective managers in addition to being conscientious advocates.

5. The transferee judge should consider setting aside a portion of the anticipated monetary proceeds from the settlement and establish a common benefit fund (CBF) for the purpose of paying reasonable attorney's fees, costs, and expenses from that fund.

6. Effective coordination between the federal and state courts in an MDL action promotes cooperation in scheduling hearings and conducting and completing discovery; facilitates efficient distribution of and access to discovery work product; avoids inconsistent federal and state rulings on discovery and privilege issues, if possible; and fosters communication and cooperation among litigants and courts that may facilitate just and inexpensive determination.

7. The transferee judge should endeavor to use the MDL forum to resolve or streamline the litigation before remand to the district courts.

*Excerpted from *Standards and Best Practices for Large and Mass-Tort MDLs,* Duke Law Center for Judicial Studies, December 2014. Download the full report at law.duke.edu/judicialstudies/research.

only for pretrial coordination, global settlements within the MDL became common — yet no safeguards existed. As the cases became larger and more complex, transferee judges found it prudent to select lead counsel and ultimately to provide for common benefit funds for their compensation. In time, leadership roles became more specialized but also more expansive, as evidenced most recently by the use of not just Plaintiffs' Steering Committees but also Plaintiffs' Executive Committees.[4]

Recognizing the innovation by bench and bar alike that was occurring to fill the sparse statutory framework, Duke Law School's Center for Judicial Studies — with the support of the JPML, Dean David F. Levi, and Prof. Francis McGovern — initiated what became a two-year process to synthesize and analyze the lessons learned.

DEVELOPMENT

The creation of the *Standards and Best Practices* report began with a two-day conference in Washington, D.C. in May 2013. The invitation-only attendee list drew together prominent defense and plaintiff-side practitioners within the MDL bar. Together, these lawyers had experiences spanning most of the mass MDLs filed in recent years, which could be brought to bear in a vigorous debate over both the primary value and secondary impacts of the variety of emerging practices.

Importantly, the center also invited the participation of not only the federal bar, but also state judges who had been tasked with presiding over parallel actions. Frequently, attorneys decide for either jurisdictional or strategic reasons to file matters in state court that would be incorporated in the MDL if they were filed in federal court. This can create more complex dynamics, necessitating a discussion of the appropriateness of federal-state court coordination. The participation of federal transferee judges, federal transferor judges, and state judges tasked with managing parallel litigation sets the stage for a robust discussion of the innovative practices of each of these judicial actors.

Arguably even more important, this discussion provided a forum for judges to speak with candor and transparency about the reasons for their actions — and the impact of other judges' actions on their proceedings. The conference also identified a number of consensus positions, despite the broad base of attendees — in many ways an unprecedented feat within MDL. While the JPML had solicited feedback from attorneys in the past, the conference allowed for an open conversation between bench and bar about the direction of MDL techniques and practices.

Following the conference, the identified best practices were put into written form by an editorial board composed of six of the most prominent mass-MDL lawyers in the nation, working with teams of equal numbers of plaintiffs' and defense-side counsel to continue the nonpartisan spirit of the project. Throughout 2014, we worked to develop consensus among the leadership team about which standards and best practices should be identified, and also the extent to which any particular factors should be identified as influencing whether or not a particular practice would be likely to work in a particular case.

The proposed language was then circulated to nearly a hundred members of the bar and nearly three dozen state and federal court judges with MDL expertise for comment in advance of the September 2014 Duke Law Distinguished Lawyers MDL Conference. At the September conference, each chapter was presented for comment by a panel consisting typically of a member of the bench, a plaintiff's attorney, and a defense attorney. Each panel sought to facilitate discussion about key contested points, often resulting in the addition of further nuance to the recommendations contained in the *Standards and Best Practices* report.

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filings? Why are rulings that are designed to create efficiency in this area so often opposed by counsel on both sides? Attorneys likewise took the opportunity to ask judges why certain practices were favored or disfavored and to weigh in on matters that they felt were too sensitive to raise when talking about a particular MDL. In this way, the conference succeeded not only in opening a dialogue about the recommended standards and best practices themselves, but also in beginning a broader discussion about the "whys" of MDL that were then used to inform the recommendations contained in the report.

One of the most interesting developments was the observation of the perception of MDL cases. Transferee judges initially focused upon the smaller MDLs, which have only a small number of actions coordinated before the court and are typically handled very smoothly, with many of the same principles of other familiar litigation. Indeed, most of the 297 then-pending MDLs were of this type — and were thus what most transferee judges experience.

But, for the bar, the focus was upon the 18 large MDLs that represent the vast majority of cases within the MDL process and the largest number of alleged victims. For the average citizen or attorney, it is most likely that their experience will be formed in the handful of mass-tort MDLs now proceeding. These cases required a different and unique skillset for both counsel and judge. Because of this disconnect between the bench and the bar, and because this second category of cases has triggered much of the innovation around MDL procedures, conference attendees agreed to focus the *Standards and Best Practices* on these large, mass-tort MDL cases.

While the expectation remains that the practices developed in this context may expand into the "smaller" MDLs and even nonaggregate litigation, the focus of the *Standards and Best Practices* is on the consensus and innovation in handling the large and mass-tort MDLs.

THE BEST PRACTICES

The *Standards and Best Practices for Large and Mass-Tort MDLs* was released on Dec. 19, 2014.[5] The final recommendations were a product of compromise, but also consensus. The issues and challenges targeted were those identified by the MDL bar. The recommendations for solving those issues were wide-ranging. Some of the recommendations focus on educating new entrants to MDL about practices that, while not codified, have become commonplace or even presumptively expected. Other recommendations focused on innovative new approaches, experimental solutions created by the attorneys or judges in a particular case dealing with a unique problem that might serve as a template for solving related issues in similar cases. The report thus served as a compendium of ideas, both new and well established, that could serve as a foundation for future MDL practice.

One resonating theme within the conference and the best practices themselves is that there is no one-size-fits-all solution that works across all MDLs. While the flexibility of MDL as a procedural device is one of its greatest virtues, it inevitably demands customized solutions that fit the needs of each individual case. The work of the drafters and commenters was not to create a firm set of practices that should be employed by rote in each MDL. Rather, it was to collect the best ideas and options, to help guide the expectations of bench and bar about what is typical in an MDL, to serve as a foundation for the promulgation of new ideas, and to inspire new innovations in future cases, built upon the ideas captured within the report's pages.

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[1] Standards and Best Practices for Large and Mass-Tort MDLs (2014), *available at* http://law.duke.edu/judicialstudies/research/.

[2] In a class action, the district court judge assigned to the case decides a motion for class certification. But, in the MDL context the cases may be individually filed in a number of jurisdictions around the country, before numerous judges. As such, the JPML decides whether the cases should be coordinated for pretrial proceedings. The JPML may do this on the request of the parties, judges, or sua sponte. If the JPML decides to coordinate the cases, it will determine which judge will serve as the transferee court, as well as determining the scope of matters that will be consolidated in the proceeding.

[3] Thomas Metzloff, *The MDL Vortex Revisited*, 99 Judicature 36 (Autumn 2015).

[4] For a fuller discussion of these trends and the impact on the judiciary, see Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329 (2014).

[5] Standards and Best Practices for Large and Mass-Tort MDLs (2014), *available at* http://law.duke.edu/judicialstudies/research/.