NEW JERSEY
MULTICOUNTY LITIGATION
(Non-Asbestos)
RESOURCE BOOK

Fourth Edition
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N O T I C E

This Multicounty Litigant (Non-Asbestos) Resource Book is intended to provide procedural and operational guidance to New Jersey judges and Judiciary staff in the management of cases within their area of responsibility. The Resource Book was prepared by the designated MCL judges and the Civil Practice Division of the Administrative Office of the Courts and has been reviewed and endorsed by the Conference of Civil Presiding Judges. It is intended to embody Judiciary policies adopted by the New Jersey Supreme Court, the Judicial Council, and the Administrative Director of the Courts, but does not itself establish case management policy. It has been approved by the Judicial Council, on the recommendation of the Conference of Civil Presiding Judges.

While the Resource Book reflects Judiciary policies existing as of the date of its preparation, in the event there is a conflict between the Resource Book and any statement of policy issued by the Supreme Court, the Judicial Council, or the Administrative Director of the Courts, that statement of policy, rather than the provision in the Resource Book, will be controlling.

ACKNOWLEDGEMENT

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Introduction

This manual covers all litigation, other than that involving asbestos, that the New Jersey Supreme Court has designated as a multicounty litigation ("MCL").

Definition of a "Multicounty Litigation"

The definition of a MCL in New Jersey derives from an identification of certain common case characteristics. Each group of cases designated as a MCL do exhibit many, if not all, of these characteristics. Thus far, there have been three general classes of cases determined to be MCLs. These include:

- large numbers of claims associated with a single product - - for example, diet drugs or other large products liability cases such as tobacco, Norplant, breast implant, Propulsid, Rezulin, PPA and latex litigation.
- mass disasters: these cases are characterized by common technical and legal issues. The Durham Woods pipeline explosion litigation is a good example of this type of case.
- complex environmental cases and toxic torts: these cases are characterized by a large number of parties with claims arising from a common event. An example of this type of case is the Ciba-Geigy litigation, alleging air, water and soil pollution.

Some of the possible characteristics of a MCL include:

- sheer number of parties involved;
- many claims involving common, recurrent issues of law and fact that are associated with a single product, mass disaster, or very complex environmental or toxic tort;
- geographical dispersement of parties;
- common injuries or damages incurred;
- value interdependence between different claims where the perceived strength or weakness of the causation and liability aspects are often dependent upon the success or failure of similar lawsuits in other jurisdictions; and
- degree of remoteness between the court and actual decision-makers in the litigation - - *i.e.*, the fact that the simplest of decisions often must pass through layers of local, regional, national, general and house counsel.

MCLs and Class Actions

There is often great confusion regarding the term "MCL" on the one hand and "class action" on the other, to the extent that the terms are commonly misused interchangeably. MCLs are governed by R. 4:38A and are subject to a different procedure for their designation, as previously discussed. Class actions are governed by *R.* 4:32. In a typical *R.* 4:32 situation, a complaint may be filed on behalf of a small number of named parties alleging an injury and asserting a putative class action on behalf of themselves and similarly situated others whose identities are yet unknown. In a MCL scenario, by contrast, separate complaints are brought by separate, allegedly injured parties and those matters if designated as a MCL by the Supreme Court, will be coordinated and handled by a single judge, as also previously discussed. Although arguably containing many similar attributes, MCLs and class actions are different. This is not to say, however, that a portion of a large MCL may not present a class action. For example, in the initial diet drug MCL, the court certified a class action on behalf of asymptomatic users of diet drugs who required medical monitoring.

Procedure for Requesting Designation of a Case as a Multicounty Litigation for Centralized Management

The Supreme Court in 2003 adopted and promulgated MCL guidelines as provided for in Rule 4:38A. Those guidelines prescribe the procedures to be followed in seeking designation of a new MCL for centralized management. In October 2007 the Court promulgated revised guidelines in Administrative Directive #10-07, with the revisions establishing a parallel process for seeking the termination of a previous MCL designation.

The Assignment Judge of any vicinage or an attorney involved in a case or cases that may constitute a MCL may apply to the Supreme Court, through the Administrative Director of the Courts, to have the case(s) classified as a MCL, and assigned for centralized management in one county and by one judge as the court may designate. The Assignment Judge or attorney making such an application must give notice to all parties then involved in the case(s), advising that the application has been made and that a Notice to the Bar will appear in the legal newspapers and in the MCL Information Center on the Judiciary's Internet website providing information on where and within what time period comments on and objections to the application may be made.

The Administrative Director of the Courts will present the application, along with a compilation of any comments and objections received, to the Supreme Court for its review and determination.

If the Supreme Court determines that the case(s) should be classified as a MCL and assigned to a designated judge for centralized management and, in that judge's discretion, trial, the Court will enter an Order so providing. The Administrative Director (or designee) will send the order to all Assignment Judges and Civil Presiding Judges, will publish it in the legal newspapers, and will post it in the MCL Information Center on the Judiciary's Internet website. See *R.* 4:38 and Administrative Directive #10-07, a copy of which appears in the appendix.

Criteria to be Applied in Determining Whether Designation as a MCL is Warranted

In determining whether designation as a MCL is warranted, the following factors, among others, will be considered:

- whether the case(s) possess(es) the following characteristics;
  - it involves large numbers of parties;
  - it involves many claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environment or toxic tort;
  - there is geographical dispersement of parties;
  - there is a high degree of commonality of injury or damages among plaintiffs;
  - there is a value interdependence between different claims, that is, the perceived strength or weakness of the causation and liability aspects of the case(s) are often dependent upon the success or failure of similar lawsuits in other jurisdictions; and
  - there is a degree of remoteness between the court and actual decision-makers in the litigation, that is, even the simplest of decisions may be required to pass through layers of local, regional, national, general and house counsel;

- whether there is a risk that centralization may unreasonably delay the progress, increase the expense of complicate the processing of any action, or otherwise prejudice a party;

- whether centralized management is fair and convenient to the parties, witnesses and counsel;

- whether there is a risk of duplicative and inconsistent rulings, orders or judgments

if the cases are not managed in a coordinated fashion;

- whether coordinated discovery would be advantageous;

- whether the cases require specialized expertise and case processing as provided by the dedicated MCL judge and staff;

- whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court.

Choice of Site for Centralized Management

Issues of fairness, geographical location of parties and attorneys, and the existing civil and MCL caseload in the vicinage will be considered in determining to which vicinage a particular MCL will be assigned for centralized management. This decision will be made by the Supreme Court.

Pending and Subsequent Related Actions

The initial Order of the Supreme Court denominating a particular category of cases as a MCL and referring those cases to a particular county for centralized management may specify that all currently pending actions are to be transferred from the counties in which they are filed to the designated MCL county and judge without further application to the Supreme Court, and that all subsequent related actions are to be filed in the designated MCL county.

Issuance of Case Type Number

Upon designation of a case type as a MCL, the AOC will assign a unique case type code to the litigation. This code will subsequently be used on all pleadings and added to the codes appearing on the Civil Case Information Statement (CIS) when it is amended. The MCL judge's initial case management order will typically require pleadings in all future cases of this type to use the designated case type code.

Notice to the Bar and Initial Case Management Order

Immediately following the designation by the Supreme Court of a case as a MCL, a Notice to the Bar is distributed to the bench, bar and court staff and is published in *The New*

Jersey Lawyer and The *New Jersey Law Journal* for several weeks advising that the litigation has been designated as a MCL, has been transferred to a particular judge for centralized management and that all future new cases of this type should be filed in the county to which the matter was transferred. Samples of the Order and Notice to the Bar appear in the appendix. Accompanying the Notice is a copy of the Supreme Court Order (a sample is also attached) as well as the MCL judge's initial case management order. These items are also immediately posted on the Judiciary's Internet MCL Information Center located at www.judiciary.state.nj.us/masstort/index.htm.

A sample of the MCL judge's initial case management order also appears in the appendix. This order may contain the following provisions:

- requiring all future complaints to be limited to a single plaintiff or household (this provision is intended to ensure that the court can easily ascertain the true number of claims pending before it and provides for statistical accuracy);
- requiring all future complaints and accompanying CIS filings to use the designated case type code to allow ease in identification of such cases and automated tracking;
- requiring all papers filed with the court to include "MT" following the docket number;
- providing that all future complaints be filed and venued in the county handling the centralized management and directed to the MCL team in that county;
- providing that all previously pending cases be transferred from the original counties of venue and sent to the MCL team in that county;
- staying the filing of all responsive pleadings and motions until further order and requiring defense counsel in receipt of process or retained by any defendant to immediately notify the court and plaintiffs' counsel by letter as to the name of the party represented and the names of all cases involved in that representation;
- setting a date, time and place for the first case management conference;
- creating a master file for the litigation to eliminate multiple filings of similar documents;
- precluding or suspending discovery requests;
- ordering that files, records, and documents not be destroyed; and
- providing for counsel to confer.

Upon receipt of all of the necessary files and information, the court will review the materials and prepare a counsel list for all the cases comprising the MCL. Once the list is prepared the court will schedule the first case management conference in the litigation (if such conference has not already been scheduled). All known counsel in the pending cases will be noticed to attend. The judge may also want to consider including in the case

management order resulting from the conference, a provision directing all defense counsel to assemble lists of the similar cases involving their clients and pending in other jurisdictions, including the name, address and telephone number of the judges handling such cases and the status of each case. This can be helpful to the court in later coordinating with courts in other jurisdictions.

Severance of Issues

Upon review of the cases designated as a MCL and assigned for centralized management, the MCL judge may sever and return to the original county(ies) of venue any that do not appear to warrant centralization.

Meeting with Counsel

Some judges prefer to meet informally with counsel before scheduling the first case management conference, at which the terms of a case management order are determined. This initial conference is to orient the judge to the litigation and to discuss some preliminary matters that may later become part of the case management order. It is helpful to use this informal meeting to order counsel to confer before the meeting to prepare a joint proposed agenda and to designate the issues in the case to be covered by the formal order. Other judges simply prefer to issue an order scheduling the initial conference and include in the order some preliminary matters that need to be addressed. Alexander B. Aikman, *Managing Mass Tort Cases: A Resource Book For State Trial Court Judges* at 39 (1995).

Ongoing Case Management

Case management plans and orders must be promptly developed, updated, and modified as the litigation unfolds. Samples appear in the appendix. The initial case management order should, among other things, help organize the cases and counsel, preserve evidence, set priorities for pretrial pleadings and other activity, defer unnecessary pleadings, preliminarily identify legal and factual issues, outline preliminary discovery and motions, and direct counsel to coordinate the implementation of the order. The order should take into account the proposals of counsel and should encourage collaboration among counsel and the parties. See *The Manual for Complex Litigation, Fourth Edition* at 403.

With respect to the responsibilities of counsel, the following are examples of provisions contained in typical case management orders entered in various MCLs:

- directing all defense attorneys in receipt of process or retained by any

defendant to notify the court and plaintiffs immediately in writing as to the identity of the party represented and the name of every case involved in that representation;

- advising all counsel to notify the court in writing as to the particulars of all past and pending motions filed in any of the cases;
- appointing liaison and lead counsel or scheduling conference and directing parties with similar interests to agree on a single attorney to act on their joint behalf and inviting other interested persons not named as parties in the litigation who may later be joined in the litigation or in related litigation in other jurisdictions to attend;
- directing counsel to familiarize themselves with *The Manual for Complex Litigation, Fourth Edition* and be prepared to suggest procedures that will "facilitate the just, speedy and inexpensive resolution" of the litigation;
- directing counsel to confer and seek consensus with respect to items on the agenda, including a proposed discovery plan and a suggested schedule for the joinder of parties, amendment of pleadings, consideration of any class action allegations, motions and trial;
- requiring counsel to submit statements of facts and legal issues or completed Excel or Access spreadsheets, or patient profile sheets, a list of affiliated companies and counsel to assist the court in identifying any conflict, recusal or disqualification issues, and a list of all related cases pending in any other court, including the status of each case;
- directing all attorneys to monitor all notices on the Judiciary's MCL website;
- requiring counsel for the plaintiffs to provide the court with an official service list including among other things fax numbers and e-mail addresses and include the dates of admission of all counsel admitted *pro hac vice*, and to update the list monthly;
- including provisions respecting *pro hac vice* admissions, including but not limited to, restricting such admission to no more than four counsel per party, requiring compliance with *R.* 1:21-2, allowing *pro hac vice* counsel to try the case but not be listed as designated trial counsel, providing for no adjournments due to the unavailability of *pro hac vice* counsel and requiring all papers submitted to the court to be provided to New Jersey counsel unless waived, to foster settlements; and
- appointing liaison counsel for those parties with similar interests to coordinate all pretrial activities of each such group, including determining, after consultation with other counsel, each group's position and preparing joint interrogatories and requests for depositions and for the production of documents.

Typical provisions in case management orders regarding pleadings may include:

- advising that all future complaints shall be filed with the CIS identifying the case type with the number assigned by the AOC;
- advising that all future complaints are limited to a single plaintiff or a related household of plaintiffs (as noted earlier, this is intended to allow the court to track the actual umber of aggrieved parties);
- requiring all future complaints to carry the designation of "MT" to assist in the identification of these cases;
- requiring parties filing amended and subsequent pleadings with the court to simply send a cover letter to existing parties copying the court and identifying all new claims and newly added parties;
- providing that a party's last filed answer is deemed an answer to all future amended pleadings unless a new claim is asserted against the particular party;
- providing that all cross-claims for contribution and indemnification are deemed filed without the necessity for any pleadings to be filed;
- providing that counsel lists shall be incorporated by reference on all papers filed with the court rather than having to be physically appended to the papers; and
- setting deadlines for the addition of new parties.

The following are examples of provisions in typical case management orders addressing responsibilities of the parties:

- requiring each party to preserve all documents and other records containing information that is potentially relevant to the litigation and all physical evidence or potential evidence;
- providing that upon receipt of a copy of a petition in bankruptcy or Order of a U.S. Bankruptcy judge implicating a new defendant, the defendant is automatically severed from all cases until further ordered from the U.S. Bankruptcy judge to reinstate; and
- providing that parties represented by more than one attorney of record must designate a single lead counsel who shall be the sole recipient of all notices and who shall be responsible for notifying all other co-counsel;

Typical provisions in case management orders relating to motion practice may include the following:

- prescribing procedures for motion practice;

- scheduling return dates for pending dismissal motions;
- noting that all deadlines previously set by the original counties of venue are superseded, that all pending motions are stayed and the filing of new motions is stayed; and
- prohibiting the filing of motions without leave of court unless such motions include a certification that counsel conferred and made a good faith attempt to resolve the matter.

The following are some miscellaneous provisions regarding discovery and case management that may be included in a typical case management order:

- staying all outstanding discovery but not precluding consensual discovery or prohibiting a party from gathering information in anticipation of responding to a discovery request; requiring advance notice to opposing counsel and their consent or the court's permission before any tests may be conducted on physical evidence;
- prohibiting destruction of automated data of the parties;
- establishing a master docket and a case file caption to organize the voluminous filings for the entire litigation;
- establishing a master docket and a case file caption to organize the voluminous filings for the entire litigation;
- advising that all orders, notices and other documents filed with the court and common to the entire litigation will be posted on the Judiciary's Internet website and providing the website address, to allow for electronic notice of such papers on all interested parties;
- setting up procedures that apply if a special master is appointed; and
- providing for the scheduling of periodic scheduling and status conferences and prescribing procedures for transcription of the conferences.

Pro Hac Vice Motions

Pro hac vice appearances are governed by *R.* 1:21-2. Once a Notice to the Bar is published indicating that litigation has been designated as a MCL, the court will begin to receive a number of motions from out-of-state attorneys seeking *pro hac vice* admission. Sample forms appear in the appendix. Accordingly, it is recommended that the following provisions be included in one of the early case management orders:

- requiring counsel to abide by the New Jersey Court Rules, including all disciplinary rules, *R.* 1:20-1 and *R.* 1:28-2;
- providing that counsel consent to the appointment of the Clerk of the Supreme

Court as an agent upon whom service of process may be made for all actions against his/her firm that may arise out of participation in the matter;

- requiring counsel to notify the court immediately of any matter affecting his/her standing at the bar of any other court;
- prohibiting the *pro hac vice* attorney from being designated as trial counsel;
- providing that no delay in discovery, motions, trial, or any other proceeding shall occur or be requested by reason of the inability of the attorney to be in attendance;
- requiring the attorney, within 10 days, to pay the fees required by *R.* 1:20-1(b) and *R.* 1:28-2 and to submit affidavits of compliance; providing that automatic termination of *pro hac vice* admission will occur for failure to make the required annual payment to the Ethics Financial Committee and the New Jersey Lawyer's Fund for Client Protection. After filing proof of the initial payment, continuing proof of payment shall be made no later than February of each year;
- providing that noncompliance with any of these requirements shall constitute grounds for removal; and
- requiring service of copy of the Order on all parties.

Appearance by New Jersey Licensed Counsel with Out-of-State *Bona Fide* Offices

Attached is a notice and certification form for use by New Jersey counsel having out of state *bona fide* offices to ensure that they have fulfilled the applicable rule requirements. In accordance with *Rules* 1:20-1(b), 1:28-2 and 1:28B-1(e), all counsel practicing in New Jersey are required to pay an annual fee to the New Jersey Lawyer's Fund for Client Protection and file annual registration statements. Moreover, pursuant to *R.* 1:21-1 (a), a power of attorney must be filed designating the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions. See *Rules* 1:20-1(b), 1:28-2, 1:28B-1(e) and 1:21-1(a).

Maintenance of Counsel and Case Lists

The MCL team is responsible for keeping the judge informed as to the number of suits pending, the number settled or resolved, the issues common to all or some, and the names of counsel representing the various parties. Counsel lists are posted on the automated MCL Info Center. Staff have developed databases to assist in this effort. In an effort to avoid staff having to reenter data provided by counsel relating to case characteristics, Atlantic county requires counsel to submit completed spread sheets to the court. A sample appears in the

appendix. The use of such a database assists the court in culling similarities or differences and ultimately in identifying bellwether cases for trial. One device that is useful for assisting the court in discerning similarities in issues is the use of short form pleadings as will be discussed. Furthermore, the MCL team leader is the contact person for new filers, alerting them to the procedures and to the names of liaison counsel from whom they may obtain counsel lists, case management orders and other documents.

Litigation Plan

Early in the litigation, the MCL judge will usually prepare a plan for the handling of the litigation. The plan must take into consideration the nature of the litigation, the legal issues involved, the number of parties, the number of counsel, the designation of parties by type of industry (*e.g.*, manufacturer, distributor/supplier, trade association), the existence of threshold matters (*e.g.*, class certification, product identification), the number of similar cases outside the jurisdiction, whether a multi-district case is proceeding in the federal courts and whether counsel have organized a steering committee to pursue the matter. To enable the court to gather the necessary information, the court should consider requiring counsel to file concise statements of facts and issues, short form pleadings and/or patient profile sheets. Samples appear in the appendix.

Appointment of Counsel

MCLs often involve numerous parties with common or similar interests but separate counsel. Traditional procedures in which all papers and documents are served on all attorneys and each attorney files motions, presents arguments, and conducts witness examinations, may result in a waste of time and money, in confusion and in unnecessary burden on the court. Special procedures for coordination of counsel are therefore needed and should be instituted early in the litigation to avoid unnecessary costs and duplicative activity. In some cases, the attorneys coordinate their activities without the court's assistance to eliminate duplication of effort and they should be encouraged to do so. More often, however, the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation. To do so, the court may invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their fees for doing so will be reasonable. Counsel designated by the court should be reminded of their responsibility to the court and their obligation to act fairly, efficiently, and economically in the interests of all parties and their counsel. See *The Manual for Complex Litigation, Fourth Edition* at 26.

After approval and/or modification of a litigation plan, the court implements the plan by organizing counsel into groups, setting forth simplified procedures for filing and for service on existing parties, for the drafting of abbreviated pleadings, for generic discovery and for the submission of motions. The court will designate liaison counsel and appoint various committees of attorneys, such as a discovery steering committee or a technology committee. Sometimes liaison and lead counsel will be designated earlier by the court and memorialized in the initial case management order.

Role of Counsel

The Manual for Complex Litigation, Fourth Edition, speaks in terms of liaison, lead and trial counsel. For reference:

- "liaison" counsel primarily are administrative managers for each side, charged with sharing documents, orders and other information and with maintaining close communication with the court;
- "lead" counsel are the primary spokespeople for their side in formulating and presenting arguments and positions; and
- "trial" counsel, as the name implies, serve as the principal attorneys at trial. *Id. at 24-25.*

Coordination of Counsel in Related Litigation

If related litigation is pending in federal or other state courts, the judge should consider the feasibility of coordination among counsel in the various cases. It may be possible through consultation with other judges to bring about the designation of common committees or of counsel and to enter joint or parallel orders governing their function and compensation. Where this is not feasible, the judge may direct counsel to coordinate with the attorneys involved in the other cases to reduce duplication and potential conflicts and to further efficiency and economy through coordination and sharing of resources. In any event, it is desirable for the judges involved to exchange information and copies of orders that might affect proceedings in their courts. In approaching these matters, the court will want to consider the status of the respective actions (some may be close to trial while others are in their early stages), as well as the possibility that some later filed actions may have been filed in other courts by counsel seeking to gain a more prominent and lucrative role. See *The Manual for Complex Litigation, Fourth Edition* at 229-241.

Appointment of Special Masters or Referral to Mediators

MCLs often require complex fact finding during pretrial, in preparation for trial, or in aid of settlement. Referrals to a neutral may at times be helpful, either by relieving the judge of time-consuming proceedings or by bringing special expertise to bear on specific issues in dispute. In addition to or in the absence of the full-time court employed masters, the MCL judge has discretion, with the approval of the Chief Justice, to appoint special masters in accordance with *R.* 4:41 *et seq*. The judge may also decide to refer all or portions of the litigation to a mediator. Referral of the litigation to mediators is governed by *R.* 1:40 *et seq*.

It is worth noting that the MCL judge is prohibited from appointing retired judges as either special masters or mediators. The only exception to this proscription is when the decision to select the retired judge originates with the attorneys rather than the judge. In such cases, after obtaining the approval of the Assignment Judge, the MCL judge may sign an order memorializing the attorneys' choice. See Administrative Directive # 7-04, a copy of which appears in the appendix.

Settlement

Settlement activity in MCL litigation tends to parallel pretrial and trial organization. Consolidated cases tend to generate settlement-related information at the same time and follow a settlement timetable driven by pretrial and trial deadlines. In general, organization of cases along individual plaintiff lines can be expected to lead to individual settlements, and organization along aggregated lines can be expected to produce aggregated settlements. See *The Manual for Complex Litigation, Fourth Edition* at 167-182.

Coordination with Other Courts

Because many cases involving the same MCL may be filed in several state and federal jurisdictions, it is vital that the judges handling these matters coordinate their efforts in order to maximize efficiency and economy.

Initial contact between judges is usually to discuss the litigation and is generally informal. This initial communication does not commit judges to extensive coordination. However, in some situations the exchange of ideas may lead to further coordination/cooperation as the cases mature and benefits of coordination become clear. See generally Federal Judicial Center, *Judicial Federalism In Action: Coordination of Litigation in State and Federal Courts, reprinted in* 78 Virginia Law Review 1689, 1733-1736 (1992).

Frequently, New Jersey designated MCLs are also the subject of parallel litigation pending in the federal courts. This litigation is frequently coordinated nationally and assigned to a single Federal District Court judge via the Judicial Panel on Multidistrict Litigation, known informally as the "MDL" panel. See 28 *U.S.C. §* 1407. New Jersey MCL judges have found coordination with the designated MDL judge to be an effective means of avoiding duplication of efforts, coordinating discovery, conserving resources and facilitating global settlements.

The judges' initial conversations tend to focus on general perspectives of the litigation, case management strategies, and areas appropriate for state–federal cooperation. As the cases progress, the judges need to maintain contact on a range of matters including scheduling, simply keeping abreast of cases in the other system(s), preparing for joint hearings, making joint rulings, or consulting on matters of procedure or substantive law. *Id.*

To a certain extent, the amount and frequency of contact is a matter of individual preference, although much of it is tied to the stage the litigation is in, the extent of state – federal coordination, and other particulars of the case. For the majority of judges, monthly or bi-monthly contact will suffice; constant communication is far less necessary than might be thought. *Id.*

Maintaining ongoing contact and sharing information yields other benefits as well. Action taken in one court — such as settlement or dismissal — can directly affect the tactics of litigants in the other courts' cases. Remaining aware of the court's action in related cases helps avoid surprises. A situation where a judge is unaware of the action taken in another court is something to be avoided under any circumstances. *Id.*

Coordination can achieve major gains in efficiency and economy. Significant sharing of human and material resources was demonstrated in eleven (11) MCLs cases studied and reviewed in the aforementioned article. *Id*. at 1700-1706. Reduction in litigation costs, delay, and judicial time and effort were also demonstrated. *Id*. at 1732. Judges also benefited from each other's expertise, ideas, information and techniques *Id.*

Addition of New Parties

Management of MCL cases may be complicated by the addition of new parties. New actions may be commenced throughout the course of the litigation, particularly in cases involving latent toxic torts. Moreover, as discovery progresses additional defendants may be joined by amendments to plaintiffs' complaints or by a succession of third-party complaints. See *The Manual for Complex Litigation, Fourth Edition* at 408-409.

The court may establish at the initial management conference a schedule for joinder of

additional parties and amendment of pleadings. The parties should be afforded a reasonable opportunity for discovery before the deadline for adding parties or amending pleadings, but the schedule should not be modified without a showing of good cause. The court may establish a presumptive period for later-added parties to join other parties, *e.g.*, sixty days from service, subject to their right to seek additional time. *Id.*

The court may also develop a system for incorporating new plaintiffs into the structure of the litigation. For example, if prior cases are consolidated into clusters by worksite, disease, or some other feature, a system needs to be devised for assigning new cases to appropriate groups or for creating new groups. Such a system may entail the collection of information about the characteristics of each new case. Necessary data could be collected at filing and could be used to create a database that would provide a continuous flow of the type of information needed to manage the litigation. *Id.*

The court may also wish to consider directing the defendants to compile information, such as the dates on which, and areas in which, each defendant marketed a particular product, so that plaintiffs can determine the appropriate defendants to sue. Such records might forestall claims against the entire universe of possible defendants. *Id.*

Discovery should not ordinarily be postponed until all parties have been joined; indeed, some discovery often will be needed before all potential parties can be identified. Interrogatories may be served on the existing parties; their answers will be available to, and usable by, any parties later added to the litigation. Similarly, new parties may use documents produced in response to requests by others and should ordinarily be given access to document depositories. *Id.*

Pleadings, Master Files and the Master Docket

The court should consider establishing a master docket number and a master file which should contain standard pleadings, motions, and orders. The master docket number will not represent an actual case, but rather serves as an administrative index of all cases within a particular MCL. To conserve space and resources, counsel with duplicate pleadings could be permitted, for instance, to file one complete copy of a lengthy pleading, with separate caption and signature pages, fees and Civil Case Information Statement (CIS) forms submitted for each separate case. In such situations, the complete complaint can be maintained in the master file with the caption and signature pages and CIS forms placed in the separate file maintained for each docket number. Answers, third-party complaints, and motions contained in the master file may be deemed automatically filed in each new case to the extent applicable. Similarly, rulings on motions may be deemed to apply in the new cases, as may a pretrial order establishing a standard plan and schedule for discovery. These procedures will expedite proceedings in the later-filed cases, while preserving the parties'

rights to claim error from adverse rulings. The parties should not, however, be precluded from presenting special issues or requests in individual cases by supplemental pleadings, motions, and arguments. See *The Manual for Complex Litigation, Fourth Edition* at 409.

Factual and Legal Issues

Factual and legal issues should be identified as early as possible, starting in most cases at the initial pretrial conference. Legal issues should be resolved as soon as feasible and matters not in factual dispute should be identified and put aside. Examples of candidates for early resolution include jurisdictional issues and assuring proper parties are before the court (often related to product identification issues). Alexander B. Aikman, *Managing Mass Tort Cases: A Resource Book For State Trial Court Judges* 53 (1995). A sample statement of facts form appears in the appendix.

Motion Practice

Some judges have attempted to streamline motion practice by using several techniques: deemed filings, telephone conference call arguments, rulings banks for prior decisions and abbreviated briefing. Furthermore, timely rulings and immediate access to a judicial decision-maker can greatly reduce discovery disputes and practice.

Motion Filing Fees

The fee for motions is $30 per docket number unless a motion is filed and granted permitting counsel to file an *omnibus* motion. If such a motion is granted, a single $30 fee will be charged and counsel must attach a list of affected cases, including docket numbers, to the motion papers. Staff encountering objections to payment of the $30 docket number should advise counsel to file a motion seeking leave to file an *omnibus* motion. Finally, in appropriate cases, the judge has discretion to interpret the application of this policy.

Deeming Motions

Motions should be decided once. Parties should not be allowed to file the same motions repeatedly. The easiest way to assure this seems to be "deeming." As part of the case management order or otherwise, the judge can order that already-filed motions are deemed to have been filed by subsequent parties and the judge's rulings already made are deemed to

have been made for subsequent parties. There is limited support among judges for parties being able to opt-out of these deeming orders, but most judges seem to favor them and to make them binding. Associated with this idea of "deeming" would be the idea of a "rulings bank" for subsequent parties so they can learn how the court has previously ruled. See *The Manual for Complex Litigation, Fourth Edition* at 409.

Use of Telephone Conferencing

Telephone conference call arguments are favored to alleviate the burden on geographically dispersed counsel having to travel to the MCL judge's chambers, thus saving costs.

Privilege Claims and Protective Orders

Attention should be given at an early conference, preferably before discovery begins, to the possible need for procedures to accommodate claims of privilege or for protection of materials from discovery as trial preparation materials, as trade secrets, or on privacy grounds. If not addressed early, these matters may later disrupt the discovery schedule. Consideration will need to be given not only to the rights and needs of the parties but also to the existing or potential interests of those not involved in the litigation. See *The Manual for Complex Litigation, Fourth Edition* at 62.

Discovery

A discovery plan can facilitate the orderly and cost-effective exchange of discovery and expeditious resolution of discovery disputes. The plan should reflect the nature of the litigation and should be developed in collaboration with counsel. As the *Manual for Complex Litigation, Fourth Edition*, points out, although the judge should initially solicit counsel's proposal for a plan, the court should scrutinize the plan as limits may be appropriate on even the tentative discovery plan agreed to by counsel. Regular contact with counsel through periodic conferences will help monitor and ensure the progress of discovery and enable the court to adjust the plan, if necessary. *Id*. at 51.

According to *The Manual for Complex Litigation, Fourth Edition*, the following are examples of discovery limits that a judge might consider:

- *Time limits and schedules.* The discovery plan should include a schedule for the completion of specified discovery, affording a basis for judicial monitoring of progress.

To prevent time limits from being frustrated, the judge should rule promptly on disputes so that further discovery is not delayed or hampered while a ruling is pending.

- *Limits on quantity.* Time limits may be complemented by limits on the number and length of depositions, on the number of interrogatories, and on the volume of requests for production. Imposing such limitations only after hearing from the attorneys makes possible a reasonably informed judgment about the needs of the case.
- *Phased, sequenced, or targeted discovery.* Counsel and the judge will rarely be able to determine conclusively early in the litigation what discovery will be necessary; some discovery of potential relevance at the outset may be rendered irrelevant as the litigation proceeds, and the need for other discovery may become known only through later developments. For effective discovery control, initial discovery should focus on matters – witnesses, documents, information – that appear pivotal. As the litigation process, this initial discovery may render other discovery unnecessary or provide leads for further necessary discovery. Initial discovery may also be targeted at information that might facilitate settlement negotiations or provide the foundation for a dispositive motion; a discovery plan may call for limited discovery to lay the foundation for early settlement discussions. Targeted discovery may be nonexhaustive, conducted to produce critical information rapidly on one or more specific issues. In permitting this kind of discovery, it is important to balance the potential savings against the risk of later duplicative discovery should it be necessary to resume the deposition of a witness or the production of documents. Targeted discovery may, in some cases, be appropriate in connection with a motion for class certification; however, matters relevant to such a motion may be so intertwined with the merits that targeting discovery would be inefficient.
- *Subject-matter priorities.* Where the scope of the litigation is in doubt at the outset, the court may consider limiting discovery to particular time periods or geographical areas, until the relevance of expanded discovery has been established.
- *Sequencing by parties.* Although discovery by all parties ordinarily proceeds concurrently, sometimes one or more parties should be allowed to proceed first. For example, if a party needs discovery to respond to an early summary judgment motion, that party may be given priority. Sometimes judges order "common" discovery to proceed in a specified sequence, without similarly limiting "individual" discovery in the various cases.
- *Forms of discovery.* Some judges prescribe a sequence for particular types of discovery – for example, interrogatories may be used to identify needed discovery and documents, followed by requests for production of documents, depositions, and finally requests for admission.

If the court directs that discovery be conducted in a specified sequence, it may nonetheless grant leave to vary the order for good cause, as when emergency depositions are needed for witnesses in ill health or about to leave the country.

Various other practices can help minimize the cost, delay and burden associated with

discovery. The judge may consider reminding counsel of the following:

- *Stipulations.* The parties can facilitate discovery by stipulating with respect to notice and manner of taking depositions and adopting various informal procedures. The court may, however, require that it be kept advised of such agreements to ensure compliance with the discovery plan.
- *Informal discovery.* The court may encourage counsel to exchange information, particularly relevant documents, without resort to formal discovery.
- *Automatic disclosure.* Many orders require the parties to identify relevant witnesses and categories of documents early in the litigation, without waiting for discovery requests. By stipulation or court order, the timing and content of this disclosure may be tailored to the needs of the particular case.
- *Reduction of deposition costs.* Depositions taken by telephone, videoconference, electronic recording devices, or having deponents come to central locations sometimes save money. Likewise, parties may forgo attending a deposition in which they have only a minor interest if a procedure is established for supplemental questions – by telephone, videoconference, written questions, or resumption of examination in person – in the event that, after a review of the transcript, they find further inquiry necessary.
- *Information from other litigation and sources.* When information is available from public records (such as government studies or reports), from other litigation, or from discovery conducted by others in the same litigation, the courts may consider requiring the parties to review those materials before undertaking additional discovery. The court may limit the parties to supplemental discovery if those materials will be usable as evidence in the present litigation. Interrogatory answers, depositions, and testimony given in another action ordinarily are admissible if made by and offered against a party in the current action. Coordination of "common" discovery in related litigation may also save costs, even if the litigation is pending in other courts. If related cases are pending in more than one court, coordinated common discovery can prevent duplication and conflicts.
- *Modified discovery responses.* When a response to a discovery request can be provided in a form somewhat different from that requested, but with substantially the same information and with less time and expense, the responding party should make that fact known and seek agreement from the requesting party.
- *Phased or sequenced discovery of computerized data.* Computerized data are often not accessible by date, author, addressee, or subject matter without costly review and indexing. Therefore, it may be appropriate for the court to phase or sequence discovery of computerized data by accessibility. At the outset, allowing discovery of relevant, nonprivileged data available to the respondent in the routine course of business is appropriate and should be treated as a conventional document request. If the requesting party requests more computerized data, the court may consider additional sources in ascending order of cost and burden to the responding party. The judge may encourage the parties to agree to phased discovery of computerized data as part or the discovery plan.

- *Computerized data produced in agreed on formats.* Information subject to discovery increasingly exists in digital or computer-readable form. The judge may encourage counsel to produce requested data in formats and on media that reduce transport and conversion costs and maximize the ability of all parties to organize and analyze the data during pretrial preparation.
- *Sampling of computer data.* Parties may have vast collections of computerized data, such as stored e-mail messages or backup files containing routine business information kept for disaster recovery purposes. Unlike collections of paper documents, these data are not normally organized for retrieval by date, author, addressee, or subject matter and may be very costly and time-consuming to investigate thoroughly. Under such circumstances, judges have ordered that random samples of data storage media can be restored and analyzed to determine if further discovery is warranted under benefit versus burden considerations.
- *Combined discovery requests.* Several forms of discovery can be combined into a single request. Ordinarily, more time should be allowed for parties responding to a combined discovery request, even though such responses sometimes consume less overall time than do responses to traditional separate discovery requests.
- *Conference depositions.* If knowledge of a subject is divided among several people and credibility is not an issue, a "conference deposition" may be feasible. Each witness is sworn, and the questions are then directed to the group or those having the information sought. Persons in other locations who may also be needed to provide information may be scheduled to be "on call" during the conference deposition. This procedure may be useful in obtaining background information, identifying and explaining documents, and examining reports compiled by several persons. *Id*. at 54-59.

The circumstance of each case will control decisions relating to the timing of discovery. As previously discussed, therefore, the court may consider:

- starting with discovery minimally necessary to allow evaluation of claims and a possible early settlement effort or diversion into CDR/ADR;
- focusing discovery on specific causation and damages for mature torts, since much of the early, largely voluntary discovery in a particular case and discovery in earlier cases is directed to liability;
- directing discovery on legal or factual issues that may be dispositive before other discovery is started;
- focusing discovery on certain issues for a defined number of weeks or months, with possibly overlapping time frames for different issues (*e.g.*, discovery on issue X from months 3-6 and discovery on issue Y from months 5-9); and
- limiting discovery to a few "bellwether" cases while staying discovery in other cases (a problem in some states because of prejudgment interest if plaintiffs prevail in a later trial). *Id.* at 435-436.

Discovery in MCL cases frequently has two distinct dimensions: that involving the conduct of the defendants, and that relating to the individual plaintiffs' activities and injuries. Sometimes the court directs that discovery first be conducted regarding those matters that bear on the defendants' liability to all plaintiffs, deferring discovery into the details of each plaintiff's unique claims. In other cases, however, recognizing the need to obtain plaintiff-specific information for settlement purposes, the court may order that such discovery be conducted concurrently with, or even preceding, discovery from the defendants. *Id*.

HIPAA - Compliant Authorization for Release of Medical Records

A form that complies with the provisions of 45 *C.F.R.* 164.508, the federal Health Insurance Portability and Accountability Act ("HIPAA") has been developed by the MCL judges to enable counsel to secure needed medical records. A sample appears in the appendix.

Depositions

Several courts have attempted to reduce the number of depositions taken. Some courts allow use of depositions from prior cases in the same or other jurisdictions. Others have authorized state, regional, or national depositions that can then preempt further discovery. There has also been an increasing use of video, telephone, and abbreviated depositions. One video deposition, for example, can be used in repeated standardized trials.

Updates can be conducted by telephone, if necessary. Courts are also limiting the duration of depositions and the number of questions permitted. See *id.* at 83-89, 438-439.

Commissions to Take Out-of-State Depositions

Sometimes, plaintiffs involved in New Jersey MCL litigation reside in other states. Because of this, treating doctors and other witnesses are often physically located outside New Jersey. To enable counsel to secure the depositions or the production of documents from out-of-state witnesses, counsel must bring motions seeking orders issuing commissions to compel discovery in the other states.

Interrogatories and Document Production Requests

To avoid multiple requests for the same information, the court may encourage or require parties with similar interests to meet and fashion joint standard interrogatories and document requests. Answers to interrogatories should generally be made available to other litigants, who in turn should generally be permitted to ask only supplemental questions. In

lieu of interrogatories, questionnaires directed to individual plaintiffs in standard, agreed-upon forms have been used successfully. *Id.*at 438.

Use of Sampling Techniques

In cases that involve a massive number of claims for damages for similar injuries, sampling techniques can streamline discovery relating to individual plaintiffs' activities and injuries. Sampling and surveying can be used to obtain information useful both for settlement and for bellwether trials of the sample cases or for a class trial. Whether the aim is settlement or trial, the court should ensure that the sample is representative of all claims encompassed in the particular proceeding with respect to relevant factors, such as the severity of the injuries, the circumstances of exposure to the product or accident, applicable state law, and the products and defendants alleged to be responsible. *Id.* at 436-437.

Expert Reports

Expert opinions play a vital role in many MCL cases, both during the discovery process and at trial. The court will ordinarily establish early in the litigation a schedule for disclosing expert opinions in the form of a written report and for deposing the experts. An early deadline for the experts' "final" opinions may be needed to avoid the confusion that often results if opinions are altered as trial approaches. An early deadline also permits the court to rule timely on admissibility and decide whether an independent expert should be appointed. *Id.* at 440-445.

Trial

According to *The Manual for Complex Litigation, Fourth Edition*, firm trial settings are as critical for disposing of MCL cases as they are for other types of civil cases. See *The Manual for Complex Litigation, Fourth Edition* at 169. In deciding which cases to set for trial, the filing-date order is as reasonable and fair a basis as any, since normal filing patterns will produce cases with a mix of claimed damages on a roughly random basis. A mix of claimed damages being set for trial contemporaneously is important because experience indicates that all parties' interests are well served by having a mix of serious and not-so-serious damage claims being set for trial at the same time. Most of the cases set for trial will settle rather than be tried, just as with the general civil trial calendar; settlement prospects are enhanced if the parties are able to settle a mix of cases. See State Justice Institute (SJI), *Megatorts, The Lessons of Asbestos Litigation* 11 (1992).

In MCL cases involving large numbers of plaintiffs, a single trial of all issues before a single jury may be impractical, at least in the absence of special procedures. See *id.* Courts have, however, experimented with various approaches to structuring trials to achieve greater efficiency and expedition in the resolution of MCL cases. The approaches include: (1) a series

of traditional trials, each with an individual plaintiff against an individual defendant on all issues, tried with the expectation that a few verdicts will establish parameters for the settlement or trial of all remaining cases; (2) a series of consolidated trials on all issues, each with groups of plaintiffs against an individual defendant or multiple defendants; (3) a consolidated trial with all or most plaintiffs against all or most defendants on common issues only, reserving the individual issues for individual or smaller consolidated trials; (4) a consolidated trial on common issues followed by a stipulated binding procedure (*e.g.*, arbitration) to resolve individual issues or by some other approach to the individual issues (*e.g.*, bellwether trials, extrapolation, special master); (5) a consolidated trial of all issues of a representative sample of cases in which the trier of fact establishes a lump sum damage award for all plaintiffs; and (6) bellwether trials on all issues of a limited number of selected cases representative of the total mix, to establish a foundation for resolving the balance. See *The Manual for Complex Litigation, Fourth Edition* at 466-468.

Bellwether trials can be combined with one of the following procedures to resolve the remaining claims: (1) extrapolation of the average of the verdicts to all similar cases; (2) referral to a special master for application of the liability and damages verdicts; (3) consolidated follow-up trial or trials; or (4) a stipulated procedure to resolve individual claims according to a formula or by a hearing before an arbitrator, special master, or magistrate judge. See *The Manual for Complex Litigation, Fourth Edition* at 330.

In pursuing traditional or bellwether trials, the court will need to decide whether to have a unitary trial, or to bifurcate liability and damages, or to trifurcate liability, general causation, and individual causation. Reverse bifurcation or trifurcation, starting with damages, has been used when the court determines that degree of injury and the amount of damages are the primary issues in dispute. Traditional or bellwether trials of MCLs can benefit from many of the standard practices for managing trials of complex litigation. Similarities among the cases tried and cases awaiting trial may make feasible the development and use of a standard pretrial order, including generally applicable rulings on evidentiary and trial issues. The repetitive presentation of the same evidence may be streamlined by the use, for example, of videotaped expert testimony and standard exhibits. *Id.*

Bifurcating Trials

A common technique used in MCL has been bifurcating liability from damages. For the mature MCLs, Judges may “reverse bifurcate,” trying damages first which involves a shorter trial and defines defendants' exposure. It often will resolve the entire case. That, of course, is the goal when cases are divided: to divide the trial in such a way that the issue(s) or matter(s) tried first will produce a result that will enable the parties to settle the remaining issues without additional trial time. But this will work against settlement if the dollar award is very high or very low. Reverse bifurcation probably is more effective for mature MCLs than for emerging ones. When liability is hotly contested, especially for emerging MCLs, trying the liability issues separate from damages in some early benchmark cases may not be effective. *Id.*

Trifurcating or Further Dividing Trials

The principle in dividing a case into three or even more pieces is the same as dividing it in two: trying to find a way to resolve critical, possibly dispositive issues without trying all issues, and thus shorten the time required in trial. The circumstance in which subdividing a trial into three or more stages might be appropriate, for example, is two hotly disputed issues or sets of facts, either one or both of which could result in disposing of the entire case without trying all the remaining issues. The issues separated out must be discrete and reasonably independent of the others. If there is too much intertwining of facts, time might be saved in the first trial, but the time spent in the second and third trials retrying the original, intertwined facts may result in more total trial time--and hence delay--than if the case had just been tried in its entirety from start to finish. *Id.* at 109.

Use of Special Verdicts and Interrogatories

Special verdicts can be very helpful in MCL cases. In consolidated trials, in particular, special verdicts and interrogatories may be helpful to both the parties and the jurors to isolate key questions and issues. *Id.* at 110.

Subsequent Related Actions

The initial order of the Supreme Court denominating a particular category of cases as a MCL and referring those cases to a particular county for centralized management may specify that subsequent related actions are to be transferred from the counties in which they are filed to the designated MCL county and judge without further application to the Supreme Court.

Severance

The MCL judge may thereafter review the cases designated as a MCL and assigned for centralized management, and may sever and return to the original county(ies) of venue any that no longer warrant centralization.

Termination of Centralized Management

When the MCL judge determines that centralized management is no longer necessary or appropriate under the circumstances, he or she will send a written report to the Administrative Director, with copies to the Assignment Judge, Civil Presiding Judge, Trial Court Administrator, Civil Division Manager of his or her vicinage and all counsel of record in any pending cases. The report shall provide details of matters resolved as well

as the particulars concerning any unresolved matters including whether the latter will be returned to their original county(ies) of venue or will continue to be handled until resolution by the MCL judge. This report will be presented to the Supreme Court for review. Thereafter, a Notice to the Bar advising of the request and requesting comments or objections will be sent to all Assignment Judges and Civil Presiding Judges, will be published by the Administrative Director in the legal newspapers and will be posted on the Judiciary's Internet website both in the Notices section and in the MCL Information Center.

Once the comment period has closed, the Administrative Director of the Courts will present the termination request, along with a compilation of any comments and objections received, to the Supreme Court for its review and determination.

If the Supreme Court determines that the MCL designation should be terminated, it may terminate the centralized management or determine that continuing the centralized management of any pending and future such cases by the designated MCL judge is warranted. Following the Supreme Court's determination, an appropriate order will be entered. The order will be sent to all Assignment Judges and Civil Presiding Judges, will be published in the legal newspapers and will be posted on the Judiciary's Internet website both in the Notices section and in the MCL Information Center.

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