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Being a Litigator Versus Being a Litigation Manager

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No shortage of experienced litigators will say the practice of law—and, in particular, litigating cases in federal court—has changed in the last two decades. Changes in the law, advances in technology, and the increasing availability and acceptance of alternative dispute resolution has transformed how cases march through the system. Furthermore, when it comes to mass actions, the federal MDL statute (28 U.S.C. § 1407) has a distinct playbook.

The MDL statute allows a specially-created federal court (the Judicial Panel on Multidistrict Litigation) to consolidate actions from federal courts around the country and place them in front of a single judge for pretrial and discovery. That judge generally appoints a leadership team of ten to thirty attorneys to conduct document requests, document review, depositions, and nearly all other pretrial matters on behalf of all the consolidated cases. At the end of the discovery period, the court can return the consolidated cases to their various courts around the country with a complete set of discovery and nearly ready for trial.

Plaintiffs, defendants, and courts benefit from the MDL structure. At one time, courts found themselves swamped with commonly themed litigation that could not be consolidated into class actions. For instance, when hundreds of people are injured by a faulty pharmaceutical or medical device, the defendant's liability may be common (for example, designing a flawed product, not properly testing the product, ignoring signs of the product's dangers, or concealing the warnings that should accompany the product). But, the injuries from the same wrongdoing may run the gamut from short term discomfort to permanent disability and even death. Too much of is common to not consolidated the cases, but too little is common to call them a class action. Since the MDL statute was first passed nearly fifty years ago, more than 2500 consolidated actions have been created.

Unrelated to the MDL statute, something else has changed our business: cases rarely go to trial. This is no secret. Five years ago, the Wall Street Journal noted the percentage of cases going to trial dropped from 11% in 1962 to 1.2% in 2009 and posed the question "Why Have Federal Civil Jury Trials Basically Disappeared?"[1] The trend certainly has not reversed since then.

Of course, the lack of trials does not mean we do not litigate. It only moved the marker; where once litigation happened at trial, now it happens during discovery and motion practice. By the time plaintiffs have survived a Motion to Dismiss, fought with the defense over which documents will be produced, reviewed the documents they were able to get, hired experts, survived *Daubert* motions, and survived a summary judgment motion, the case has been well "litigated," even if it has not been tried.

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[1] Ashby Jones, *Why Have Federal Civil Jury Trials Basically Disappeared?*, THE WALL STREET JOURNAL LAW BLOG, September 21, 2010 (*available at* http://blogs.wsj.com/law/2010/09/21/why-have-federal-civil-jury-trials-basically-disappeared).

Even so, this change—from trying cases in a courtroom before a jury to trying cases during discovery to a judge or to each other—invites a new role: litigation manager. This is particularly so in MDL practice since the sheer volume of cases and issues necessitates a good deal of management. By their nature, MDL member cases are similar to each other, but not the same and this creates the need to coordinate different categories and individual cases. Furthermore, the sheer volume of discovery in many MDL actions combined with the fact that many federal MDLs have simultaneous state court actions (for instance, when sets of cases cannot be removed from the defendant's home state because plaintiffs in that state are not diverse to the defendant).

Within this, though, is the temptation to let the demand for litigation management turn us—plaintiffs' lawyers—into just litigation managers. This is a danger. A plaintiffs' lawyer who is just a litigation manager might not swing for the fences. That is, he or she may focus on preparing the case for mediation and settlement and not for trial before a jury and may end up building out the case with less force.

Even though all but a few cases are resolved prior to trial, when defendants resolve a case without trial, to them, it is usually about risk management. To a defendant, the value of paying on a trial-ready case is often much more than the value of paying a case that could be developed for trial. A less-than-fully-prepared case is a smaller risk and Defense counsel will undoubtedly take advantage of this approach; diligence must be committed to avoid the trap.

Of course, being a litigator and not a litigation manager does not mean fighting every possible fight. Discretion is the better part of valorous litigation. It means, however, seeing trial as the end goal of the case and conducting discovery, motion practice, and the entire case as if preparing to try it. It means that, during the inevitable settlement discussion or mediation, the litigator can point to a litigation packet and remind the defense how various documents and depositions would play in front of a jury.

As federal litigation—including federal MDL litigation—continues to follow the trend of resolution prior to trial, we must caution ourselves to manage the litigation without becoming litigation managers.