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The ALI's Complex Litigation Project: A State Judge's View

*Herbert P. Wilkins**

I set forth some observations on the American Law Institute's Complex Litigation Project from a state judge's perspective. I participated, in a peripheral way, as an adviser to the Project from the preliminary study through the final report. Professor Arthur R. Miller of Harvard Law School and Dean Mary Kay Kane of the Hastings College of Law, the reporter and associate reporter, worked diligently and thoughtfully to produce an admirable and sound proposal for the improved handling of one of the most difficult problems in the administration of justice in this country.

At the May 1987 annual meeting of the American Law Institute, Professor Miller presented a report representing a Preliminary Study of Complex Litigation. This formidable preliminary effort set forth Professor Miller's observations on the possible scope and likely complexity of the proposed subject. Looking back at the preliminary outline of the project, with the benefit of having the Proposed Final Draft (April 5, 1993) of the Complex Litigation Project in hand, one must be impressed with the clear road map that Professor Miller drew at the very beginning of the Complex Litigation Project.

That is not to say, however, that the route to be followed on that map was firmly established from the start. The possible scope of the effort was well-defined, but some courses ultimately to be traveled were not yet anticipated. It was not as clear at the inception as it became later, for example, that a draft federal act would be an indispensable component of the final report. It surely was not clear then that the difficulty of preparing a workable plan for consolidating state cases in one state court from other state courts would become so problematical (in the minds of most of the advisers) that the final draft of the report would back away from advancing a firm proposal for action in this area. The report would present the reporter's proposed model system for state-to-state transfer and consolidation only as a reporter's study.¹

Nor was it clear at the early stages of the Project, at least to me, how important and time-consuming the subject of choice of law would become in the development and approval of the final draft. Dean Mary Kay Kane, not then even an adviser, was to become an indispensable associate reporter and would carry the major burden on the important subject of choice of law. Perhaps the most interesting and important point of the conflict-of-laws aspect of the project was the nearly universal acceptance of the concept that any federal statute would have to prescribe fairly rigid choice-of-law rules. Among a group largely raised to reject the application of rigid conflicts rules and to admire case-by-case,

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1. American Law Institute, Complex Litigation Project, Proposed Final Draft [hereinafter Proposed Final Draft], Appendix B (April 5, 1993).

center-of-gravity applications, it is surprising that the need for fixed, but not wholly rigid, choice-of-law principles was so readily accepted. There were, of course, substantial battles over what those rules should be. For the objects of the project to be achieved, however, the substance of the rules falls second to the need for specific guiding conflicts rules. The uncertainty as to what state's law applies to a case or to an issue can make the settlement of a case greatly more difficult than where the choice of law is clear. The same is often true in the attempted settlement of cases where the existence and scope of insurance coverage is unclear.²

From the beginning it was established what complex litigation meant for the purposes of this endeavor. The complexity of a single case, however unmanageable, was not the area of concern. A particular case, of course, may present most difficult questions of procedural and substantive law, may involve many parties, and may concern a subject that is obscure even for experts in the relevant field (much less for juries and judges). The concern of the Project, however, was with litigation having a different quality of complexity, that is, litigation involving many parties and cases in more than one jurisdiction.³ The goal was to define when and how to consolidate cases in one court if they involved one or more common questions of fact.⁴ The transfer and consolidation of cases could be justified in general only if the process would tend to reduce or eliminate duplication of effort, reduce litigation costs, or tend to eliminate inconsistent adjudications and ease the burden on courts.⁵ Moreover, no decision to transfer and consolidate would be warranted without considering whether it would be fair to the parties to do so.⁶ A substantial portion of the project is devoted to the expression of the way by which these general principles should be implemented.

The project's final draft is not free from controversy, as other articles in this symposium issue demonstrate. Several of the areas of contention surfaced early among the advisers. The project calls for the removal of cases from the control of

2. The advisers were not selected with particular attention to their conflict-of-laws skills. They were, rather, people noted as proceduralists or as experts in multi-state, multi-party litigation (and a few generalists, such as this article's author).

The substantial absence of conflicts experts from the advisers may have helped in bringing about the proposed final draft, if one considers the diversity of opinion and the firmness of view that appears to be an indispensable generic aspect of professors of conflict of laws as a class. I do not mean to imply, however, that the proceduralists among the advisers were not assertive and articulate. My previous experience as an American Law Institute adviser has been with Restatement of Property (Third) projects. Property law professors are somewhat relaxed and reflective, not moved to engage in immediate aggressive assaults on legal problems. They know that the property will be there tomorrow, next week, and probably next year. Proceduralists, on the other hand, aware that an issue may be waived, lost because not raised, or made moot with the passage of time, are wont to launch immediate, forceful analysis of a problem lest it disappear.

3. See Proposed Final Draft, at 1-2.

4. *Id.* § 3:01(a).

5. *Id.* § 3:01(b)(1).

6. *Id.* § 3:01(b)(2).

plaintiffs' counsel. Thus, plaintiffs' causes of action would be subjected to collective treatment, often in a court not of the plaintiffs' choosing and under the influence of lead counsel also not of plaintiffs' choosing. One adviser persistently challenged the propriety of collectivizing claims without the approval of individual plaintiffs. This theme in several variations will be played repeatedly when and if federal legislation is sought to put the project's proposals into effect.

Fairness is an important factor in the consolidation decision, but plaintiffs' rights to self-rule (which often sounds as the rights of counsel) cannot become a dominant theme. Transfer and consolidation are indispensable elements of any worthwhile attempt to control and dispose of complex litigation. Plaintiffs' "inalienable" rights to control their own litigation will have to be sacrificed where the greater benefit to the courts and the litigation process warrants it. It should be noted that there are many advantages for a plaintiff whose case is consolidated for treatment with other similar cases.⁷

At an early point in the advisers' meetings, federal judges expressed concern that the proposed consolidation process seemed to be focused on putting more business into the federal judicial system, a system that they viewed as already seriously overburdened. Although the project recognizes that a state court may be the court to which all cases are transferred,⁸ it is probably true that the dominant intersystem flow of cases would be from state courts to federal courts. Even if this would be the case, there would be a likely net benefit from the efficient disposition of federal cases transferred to a single federal court (even if some state cases were consolidated there as well).

Federal judges' concern that no additional burden should be placed on the federal judicial system cannot be permitted to control the debate over the implementation of the complex litigation project. First, the federal judicial system has financial resources that exceed what state judiciaries have available to them. Second, because this project deals with litigation that by definition is not concentrated in one state, it touches national or at least regional concerns. It is hardly surprising that logic would point to the federal courts as the appropriate fora to deal with many such problems. One would suspect that the net burden, if any, on the federal judicial system (as opposed to the burden on a given federal judge who is assigned the consolidated cases) would not be great. One would be warranted in concluding that complex litigation cases would more justifiably be placed in the federal system than simple diversity cases. The problem is a national one for whose solution the involvement of federal courts will be needed in specific instances.

7. Fairness can be argued in a due process of law context. With the enactment of legislation clearly directed to solving a chronic, national litigation problem and with the public interest in the enacted solution fully documented by the final report and congressional hearings, one may hope that the Supreme Court of the United States (whose junior member was an adviser on the project) will put any individual's due process fairness argument in proper context.

8. See Proposed Final Draft, § 4:01.

As a state judge, I have no problem with the fact that the operation of the proposed system will result in cases being taken away from state court jurisdiction on a standard of freer mobility than that applied in traditional removal cases. That will be the inevitable and necessary consequence of the efficient transfer and consolidation of cases by the complex litigation panel. Similarly, I have no difficulty in accepting into the state judicial system those cases that meet the standard for the panel's transfer of federal and state cases to a state court. These cases in large measure are cases that could have been commenced in the courts of the transferee state, and the legal issues are ones to be decided under the law of the transferee state.

As I have said, the Project does not provide a mechanism for the transfer of cases from the courts of one or more states for consolidation with cases in another state. In this sense, the Project is incomplete.⁹ It is this aspect of the preliminary study that ultimately was diverted to Appendix B as a reporter's study, showing what a model of a compact or uniform act might look like. Professor Miller did not initiate such a change of plan with any enthusiasm, but he recognized that the substantial concern over state-to-state consolidation, which I shall discuss shortly, could threaten the implementation of the entire Project. A distinct majority of the advisers favored eliminating state-to-state transfer and consolidation from the initial proposals of the Project. It was suggested that the removal of such a proposal would make the Project more salable. One could argue that the American Law Institute should always take the intellectually proper position on a legal point without regard to the consequences. I acknowledge that I made no such argument. Professor Miller reluctantly decided to follow the advice of a majority of his advisers, although it would have been his right to press the point on the floor of the Institute's annual meeting.¹⁰

The opposition to the inclusion of a plan for state-to-state transfer and consolidation was based on several considerations, none of which challenged the soundness of such consolidations in theory and in particular instances. To many the process proposed for consolidation seemed unwieldy, unavoidably so to be sure,

9. See Proposed Final Draft, Appendix B, Introductory Note (a), at 559 ("no transfer and consolidation system would be complete or fully effective without a procedure for moving complex cases from one state court to another").

10. State-to-state transfer makes as much sense as state-to-federal and federal-to-federal transfers. Claims arising from the collapse of a bridge or other structure, for example, would involve questions of law of the state where the structure existed, and the issues of fact would generally involve local events and evidence available in the locality. The various claims should be tried as to liability, at least, in one consolidated case in one court. That court probably should be a local state court. However, if one or more actions are brought in the courts of another state, that consolidation will not happen under the proposed complex litigation project, unless there is also an action in a Federal District Court and the complex litigation panel decides to designate the state court pursuant to the terms of § 4.01 of the Report. It is this kind of relatively straightforward, consolidated complex litigation action from which initial experiences in transfer and consolidation might best be derived, rather than from a mass tort case (e.g., asbestos, DES) where all the plaintiffs are not immediately ascertainable, the applicable law is in doubt, and all the defendants are not clearly identifiable.

but nevertheless unwieldy. A judge would have to be appointed from each participating state to an interstate complex litigation panel.¹¹ Differences in procedural rules among states (such as the scope of discovery and the availability of jury trials) presented a partial obstacle.

Moreover, there was a sense that states were not yet ready for this kind of process, and that it would be better to see how the federal-federal and state-federal proposals worked before devoting scarce state judicial and financial resources to the project. The lack of enthusiasm for state-to-state transfer of cases may be exemplified by the relatively few states that have rules or statutes authorizing the certification of questions of state law to that state's highest state court from another state court (and vice versa).¹² Indeed, some states do not have effective devices for consolidating multiple litigation in different counties within the jurisdiction.

There was a further, somewhat practical consideration that influenced some advisers not to favor setting up a state-to-state procedure at this time. In most, perhaps nearly all, instances of complex litigation as defined by the project, there would be at least one case entered in a federal district court. If there were such a federal case, the transfer and consolidation provisions set forth elsewhere in the proposed project could be used to achieve desirable consolidations, even in a state court.¹³ It is true, however, that the standard that would warrant the complex litigation panel's designation of a state court as a transferee court¹⁴ is harder to meet than the standard for consolidating federal¹⁵ or state¹⁶ cases in a federal court.

Thus, it was that the state-to-state transfer and consolidation provision of the Complex Litigation Project was reduced to a single tentative section urging consideration of "the formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act."¹⁷ There is a Uniform Transfer of Litigation Act that the commissioners on uniform state laws approved in 1991.¹⁸ One problem with the uniform act is that it requires the consent of the transferring and receiving courts on a case-by-case basis.¹⁹ It is better than nothing, and unless

11. Proposed Final Draft, Appendix B, § 2 (b).

12. Since 1971, my court has had a rule allowing the highest court of another state to certify a question of Massachusetts law to it. Mass. Supreme Judicial Court Rule 1:03. We have never received such a certification from another state, although federal judges have often used the portion of the rule granting them the right to seek answers to questions that they certify to us. In turn, we have never certified a question out to another state court. That could be explained by the absence of any rule or statute in any of the other northeastern states expressing a willingness to receive such a certification. See John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 431 n.95 (1988).

13. See Proposed Final Draft, § 4.01(b).

14. *Id.*

15. *Id.* § 3.01.

16. *Id.* § 5.01.

17. *Id.* § 4:02, at 248.

18. See *id.*, Appendix C.

19. *Id.*, Appendix B, at 562.

some states adopt at least this modest step toward state-to-state transfer and consolidation, it is questionable whether there will be any near-term support for the preparation of either an interstate complex litigation compact or a uniform complex litigation act.

All this having been said, the soundness of the project and its potential benefits remain clear. State-to-state transfer of cases is not indispensable or even important at this time. The remaining question is whether effective support for congressional action will be forthcoming.