

Louisiana Law Review

Volume 74 | Number 2

Eastern District of Louisiana: The Nation's MDL

Laboratory - A Symposium

Winter 2014

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Repository Citation

Stanwood R. Duval Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. (2014)

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Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases

*The Honorable Stanwood R. Duval, Jr.**

The Eastern District of Louisiana has been a magnet for significant multidistrict litigation (MDL) cases and mass tort cases, particularly in the past ten years.¹ For example, Judge Eldon Fallon has presided over the *Vioxx*, *Propulsid*, and *Chinese-Manufactured Drywall* MDL cases.² The *Deepwater Horizon* incident involving British Petroleum Company, Transocean, and others is currently lodged before Judge Carl Barbier.³ Judge Kurt Engelhardt has been handling the *FEMA Trailer Formaldehyde Products Liability Litigation*.⁴

Since 2005, I have presided over *In re Katrina Canal Breaches Consolidated Litigation*, or the so-called “Katrina Umbrella,” under which hundreds of cases were consolidated for pretrial litigation purposes, as well as for trial of certain exemplar cases.⁵ The Katrina Umbrella is unique in that a number of different categories of litigation were included therein.⁶ Any complaint filed that was in any way related to damages arising as a result of a levee or floodwall breach was consolidated into the Katrina Umbrella and then placed in a specific category.⁷

Though these are just a few examples, a multitude of MDL cases have occurred and continue to occur in the Eastern District.⁸ Therefore, as a result, this District has a great deal of experience in

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1. James C. Gulotta & Lauren E. Godshall, *Multidistrict Litigation in New Orleans: Why the Judicial Panel on Multidistrict Litigation Frequently Favors the City that Care Forgot*, U.S. LAW WEEK, Nov. 2, 2010, at 1.

2. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2005 WL 756742 (E.D. La. Feb. 18, 2005); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133 (E.D. La. 2002); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL 2047, 2012 WL 92498 (E.D. La. Jan. 10, 2012).

3. *In re Oil Spill by Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL 2179, 2013 WL 144042 (E.D. La. Jan. 11, 2013).

4. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 583 F. Supp. 2d 758 (E.D. La. 2008).

5. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644 (E.D. La. 2009).

6. *See 5th Circuit Upholds Government’s Liability for Katrina Levee Failures*, WESTLAW J. GOV’T CONT., Apr. 2, 2012, at 1, available at 2012 WL 1077662.

7. *Id.* “The U.S. District Court for the Eastern District of Louisiana consolidated many of the suits and organized the litigation into several categories of plaintiffs.” *Id.*

8. *See supra* notes 1–4.

handling these complex cases and has learned the critical importance of choosing the appropriate counsel to take the lead in such cases. This short Article is intended to give a brief synopsis of some of the factors that judges consider in choosing liaison counsel, steering committees, and any other necessary subcommittees, depending on the nature and complexity of this kind of litigation.

In MDL cases, there are generally hundreds of petitions or complaints filed, resulting in the involvement of hundreds of lawyers. In order to manage such hydra-headed litigation, a presiding judge must choose lead counsel for the purpose of efficiently coordinating discovery, motion practice, and ultimately any trial.⁹ After consulting with several of my colleagues, I have compiled the following list of factors that we often consider when undertaking the difficult task of choosing counsel.

- *Team Players*

The primary factor in choosing lead counsel, liaison counsel, or even membership on a steering committee is whether the attorney is a team player. There is a difference between class counsel and MDL counsel: Class counsel usually works alone, but MDL counsel must work with others. One judge with whom I spoke explained, "The attorney must have the personality and character to play well in the sandbox." The attorney must be able to work cooperatively with others for the greater good of the entire class or MDL. Often, there are excellent trial lawyers who, on paper, seem quite qualified, but their personalities and egos are such that they are unable or unwilling to act in a cooperative manner with other lawyers. A judge should not appoint a lawyer without this important characteristic as lead counsel or to a steering committee.

- *Expertise*

A judge must consider an attorney's expertise in the subject matter. In addition, previous experience in an MDL or other complex litigation is always considered, but it is not necessarily an overriding factor. My colleagues and I often see the same attorneys appointed to all such committees. This repetition is not necessarily a good thing.

9. "[T]he position of lead or liaison counsel in any multidistrict litigation . . . takes on crucial importance as being primarily responsible for leading the negotiations of deadlines and ground rules concerning discovery and other evidentiary issues, hearings and drafts of omnibus orders." FRANKLIN G. BURT, FARROKH JHABVALA & RAHUL RANADIVE, AM. LAW INST.-AM. BAR ASS'N., SELECTED TACTICAL PROBLEMS IN CLASS LITIGATION 148 (1998), available at SC72 ALI-ABA 95.

The committee should not be an “exclusive club.” The appointment of a different attorney can lead to new approaches and innovations, as well as achieve fundamental fairness. A judge should try to deal with this issue by strongly suggesting that the steering committee appoint subcommittees comprised of attorneys who are not on the steering committee. Also, when there is a regular meeting of all counsel, the judge should suggest that anyone who wishes to work on a subcommittee contact liaison counsel.

- *Reappointment*

Some judges appoint the steering committee for a set time with the understanding that counsel may apply for reappointment. In the application for reappointment, lawyers must list the hours that they have worked on the case within the past year and detail specifically the depositions, discovery, and motion practice that they have performed so that the judge can make an informed decision for reappointment. This process keeps lead counsel more engaged.

- *Diversity*

There should be diversity in gender, racial, and geographic terms. Judge Barbier noted that these considerations were particularly important to his appointment of the Plaintiff Steering Committee members in the *Deepwater Horizon* case.¹⁰

- *Financial Considerations*

Complex litigation is an extremely costly endeavor. Thus, the ability to provide financial and other resources that will be needed is a significant factor, but it is not decisive. Most judges include some counsel who are well qualified and capable but lack the financial wherewithal to be part of a larger group that is able to provide the necessary financial assistance.

- *Numerosity*

Some courts give consideration to the number of clients per case that a lawyer has in the litigation. Although this consideration is certainly relevant, there are occasions where lawyers overstate the number of clients they have in the litigation. They might be unable to identify and provide basic contact information for these alleged

10. See generally *In re Oil Spill by Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL 2179, 2013 WL 144042 (E.D. La. Jan. 11, 2013).

clients. This conundrum occurs in instances where there are literally hundreds of thousands or millions of claimants. Thus, this factor is not necessarily a decisive one.

- *Collegial Consultation*

When choosing counsel for these critical roles, a judge often contacts colleagues who have specific knowledge about the effectiveness of counsel applying for a lead role. By conducting this research, a judge benefits from the keen insights of colleagues who may have had more dealings with a particular attorney. A lawyer must remember that maintaining credibility, integrity, and a high level of professionalism in his or her dealings will always serve him or her well.

- *Regular Meetings*

It is my practice and the practice of many other federal district court judges to hold regular meetings with liaison counsel, keep minutes of those meetings, and report the results of those meetings in a minute entry. Moreover, there is a consensus that courts should schedule regular meetings with all of the attorneys, although this activity occurs less frequently because MDL cases often have hundreds of attorneys from all over the country. As such, these meetings should be scheduled well in advance.

- *Flow of Information*

All counsel, both for the plaintiff and the defendant, must keep all of the lawyers involved in the litigation informed of all developments as quickly as possible and must consult with them regularly. This critical task keeps everyone “in the loop” and minimizes dissatisfaction, which will always be present. Therefore, liaison counsel and lead counsel must have excellent communication skills and a very strong work ethic, as these difficult cases are quite demanding in terms of the correspondence required.

- *Reports to the Court*

The presiding judge generally requires reports from all of the committees and liaison counsel committees on a fairly regular basis. He or she keeps track of discovery, motion practice, and unexpected developments to ensure that the litigation proceeds along the timeline established and, if not, determines the reason for delay. The court must be actively involved in all aspects and must be proactive. Even

if a committee meeting is not scheduled, a judge should be prepared to call an impromptu meeting, either telephonically or in person, if the judge perceives that some issue needs to be addressed.

- *Role of the Magistrate Judge*

The magistrate judges assigned to the case will also have a substantial amount of responsibility. Magistrate Judge Joseph Wilkinson was the magistrate judge assigned to the Katrina Umbrella and has performed a remarkable job in assisting me in the multitude of matters we have had to address, many of which were unanticipated. Therefore, the presiding judge should consistently consult the assigned magistrate judge during the litigation and should consider the judge a partner in these rather daunting mega-cases.

Finally, there are additional resources that practitioners may find useful in navigating complex litigation. Case management orders relating to the appointment of counsel, for instance, may be helpful to practitioners. They are essential to the efficient administration of a complex lawsuit with thousands of claimants, hundreds of lawyers, and multiple issues. I also suggest that any attorney involved in an MDL, class action, or mass tort action read carefully *The Manual for Complex Litigation* published by the Federal Judicial Center.¹¹ It is an extremely excellent resource that gives many helpful suggestions to both judges and lawyers.

In conclusion, choosing counsel is probably one of the most critical decisions a judge makes in an MDL or mass tort case. By wisely choosing counsel, a judge ensures that the case, no matter how complicated, will proceed in an effective and efficient manner.

11. *MANUAL FOR COMPLEX LITIGATION* (4th ed. 2004).