

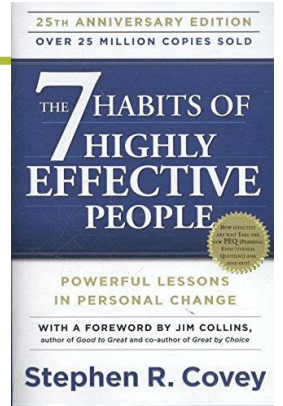


Mass Torts Made Perfect
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**7 Habits for Running the Plaintiffs' MDL or Mass
Tort Case Like a Business:**
A Special Master's Perspective
(2:05pm – Latour Ballroom)



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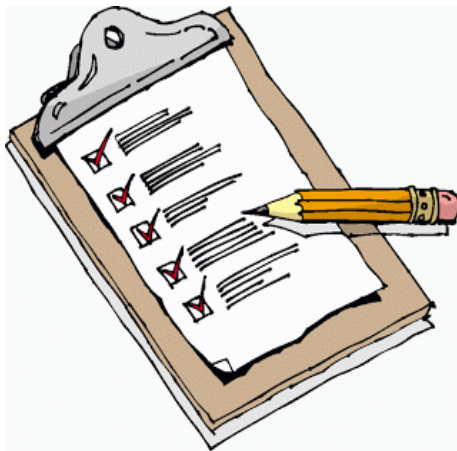


7 HABITS FOR RUNNING THE PLAINTIFFS' MDL OR MASS TORT CASE LIKE A BUSINESS

1. Have an Organization Business Plan from the Start: A Written Joint-Venture Agreement
2. Come with a Leadership Selection Plan and a Case Management Plan
3. Fight (Fund) the War of Attrition
4. Budget and Discipline Common Benefit Vendors (The Real MDL Winners?)
5. Get Help from a Neutral: Your Ambassador with the Bench, Facilitate Court Business Model Buy-In and a Plaintiff Voice
6. When the Case Resolves, Don't Believe Mass Tort Seminar Vendor Hype: Small is Beautiful in Settling and Administering Cases
7. Don't Abandon Ship at the End: Victims Need You After the Case Settles



1. HAVE AN ORGANIZATION BUSINESS PLAN: A WRITTEN JOINT-VENTURE AGREEMENT



A. Create the Written Case Management Agreement (Joint Venture Agreement) at the Beginning, Spelling Out How the Case is to be Funded by Common Benefit Counsel and How the Lodestar is to be Paid if (When) the Case Comes in (Subject To Court Approval).

- Set up a common benefit fund to which common benefit lawyers contribute capital in specified proportions and to make common benefit distributions.
- Issues raised related to time and capital contribution compensation of common benefit counsel:
 - Determine the amount/percentage of capital assessments among lawyers (should mirror anticipated shares of time)
 - Compensating Time and Capital. Ratner: a plaintiff lawyer making the case management decisions (for a class or an aggregate) is simultaneously both a financier and an advocate. Therefore, lodestar can be for time and capital. 28 Georgetown Journal of Legal Ethics at 294.
 - How to balance compensation for time with compensation for capital, 50/25/25, 50/50, 75/25?
 - Have a knockdown clause if formula doesn't work.
- The lesson of Chinese Drywall: make peace up front between common benefit lawyers and individual Plaintiffs' Counsel in lodestar allocation, with a Common Benefit assessment order or other written agreement.
 - The Drywall Chasm:
 - Common Benefit Lawyers: CB-65/IP-35 vs. Individual Plaintiffs' Counsel: CB-18/IP-82

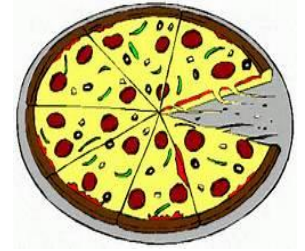




- Joint venture agreement case management rules of the road
 - Establish PSC rules for fair work assignments
 - Audit time and expenses as you go
 - Catch and correct attorney outlier (overbilling) activity early on
 - Manage fee expectations
- Define compensable functions of designated counsel
- Order (or joint venture agreement) defining the limitations of common benefit fees and expenses, detailing issues ranging from travel expenses to the types of work that will be compensable
- Specify what time records are to be filed/kept
- Is pre-MDL time compensable?
- Establish objective time, billing and expense oversight: Require common benefit attorneys to submit regular reports to plaintiffs' leadership (or a monitor) on work and held expenses incurred as a result of common benefit work
- Prepare quarterly financial reports and a budget.



- From the beginning, track and report to the Court monthly common benefit time and capital (helps the Court see the War of Attrition).
- In Vioxx, reports submitted to Court-appointed CPA. In MDL 2406 (Blue Cross), reports submitted to a Special Master



B. When the Case Comes in, How is Lodestar to be Paid Under the Joint Venture Agreement?

- There are always uncertainties despite a written agreement. E.g. Blue Cross, Breast Implant.
- Consider use of a Special Master or Allocation Committee (which is separate from the Steering Committee) to arrive at a suggested fee distribution which is subject to objections and reviewed by the Court (joint venture agreement).
- Avoid too much reliance on Committees in allocation of the Common Benefit Award, which raises the specter of favoritism and conflicts of interest, as Committee members often determine how to allocate fee awards among their own firms and others. Joint Venture Agreement is a good cure.
- Guard against overbilling of junior attorneys or those who support the leadership.



2. COME WITH A LEADERSHIP SELECTION PLAN AND A CASE MANAGEMENT PLAN



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A. Who's to be in Charge of Leadership Selection: Judicial Selection v. Counsel Consensus

- There are two basic models for the appointment of common benefit counsel – and a suggested hybrid of the two:
 - The Competition Model – The Court invites applications for leadership positions and the Court picks.
 - The Consensus Model – The Court directs the plaintiffs to file a proposed leadership slate, subject to Court approval and an opportunity for objections to be heard. Largest case inventory counsel often select lead counsel.
- Sometimes it is suitable to use a hybrid model:
 - Utilize competition for most positions (such as lead counsel and steering committee) and consensus for others (such as liaison counsel).
 - Repeat vs. New players? Knowledge based on experience versus stifling diversity and new ideas in leadership, and log rolling. Bankrolling the case may require veterans.
 - At least one court has noted that diverse representation in and of itself is an insufficient rationale justifying appointment of multiple lead plaintiffs in class action pursuant to Private Securities Litigation Reform Act (PSLRA), *In re Nice Systems Securities Litigation*, 188 F.R.D. 206 (D.N.J. 1999)(citing Manual 3rd ed., § 20.22)
- Regardless of the approach, there is no magic formula for selecting designated counsel, but have a specific plan for the Court.
- Procedural Tips:
 - Notice and opportunity to be heard through open Plaintiff leadership selection process.
 - Schedule evidentiary hearing if necessary.
 - Special Master/Monitor to ensure lawyer selection fairness. Special Master entré to ongoing communications with the Court.
 - Do Defendants have a role? No?





B. Balancing of Plaintiffs' and the Court's Interests in Organizing the Plaintiffs' MDL/Mass Tort Team:



- Plaintiffs' Counsel Perspective:
 - Plaintiffs' Counsel must acknowledge that the Court has a fundamental institutional obligation to ensure that proceedings before it are fair, regardless of what private leadership and business arrangements the parties have made, and that all Plaintiffs need to be represented.
 - The Court's naked deference to organizational proposals by Plaintiffs' Counsel without independent examination – even when they seem to have the concurrence of a majority of those affected – invites problems down the road, like inadequate Plaintiff representation and Settlement dissenters.
- Interests of the MDL/Mass Tort Court:
 - Must understand that case transparency and fairness are critical.
 - Must be careful to ensure that all interested and capable Plaintiffs' attorneys are given an opportunity to apply and be considered for common benefit positions.
 - Should consider diversity in leadership and new entrants.



C. The Business Plan: Encouraging The MDL Transferee Court to Organize and Run the Case Like a Business

- Section 10.222 of the Manual on Complex Litigation suggests entering an Order specifically providing that communications between designated common benefit counsel and individual counsel do not waive the attorney-client or other applicable privileges.
- Written designation of responsibilities, to run the case smoothly.
- Role of the Court in running the Plaintiffs' Case (How active? How much oversight?).
- Up front communications between the Court and Plaintiffs' counsel, and among Plaintiffs' counsel.
- Communications between lead common benefit counsel and the individual case plaintiffs' attorneys is critical.
- Keep all counsel informed of leadership decisions.
- Court should encourage designated counsel to seek consensus when they make decisions.



D. Calming Outside the Tent Dissension

- Give an MMPI (Minnesota Multiphasic Personality Inventory) test to all Leadership Applicants? (LOL)
- How do you keep those not selected productive – or at least not destructive?
 - Do you want to keep everyone in the tent? Do you thereby protect the litigation from destructive lawyers?
 - There will always be lawyers partly excluded from the process.
 - Some lawyers may deserve to be excluded but almost all don't.
- Look at diversity of ideas in appointing a committee



3. FIGHT (FUND) THE WAR OF ATTRITION





A. The Defendants' Climate of Delay



- MDL (case interment) proceedings dominate the Federal civil docket, almost half (and growing) of the Federal civil case load is MDLs; MDL's are sometimes called black holes, the odds of remand are small, 5%.
- Due, in part, to the Supreme Court's hostility to class actions (Amchem).
- MDL's are now incited even more by Bristol v. Superior Court of California (2017) – State Court lacks personal jurisdiction over non-resident plaintiffs.
- “Junior MDL's” due to classing being difficult and Bristol: aggregate settlements are popular but difficult to settle due to ABA Rule 1.8(g).
- WAR OF ATTRITION defense strategy: Defense goal is to filibuster the case and bankrupt Plaintiffs' Counsel.





B. Ethically Funding Your Defense Against The Defendants' War of Attrition

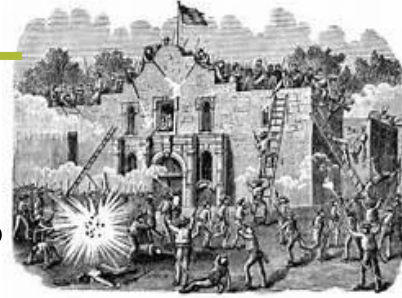
- Joint venture agreement among common benefit counsel (either in a MDL or in an aggregate case) that allocates the Lodestar between time AND CAPITAL.
- Plaintiff Leadership should include financial heavy hitters: this business strategy contradicts the repeat player discrimination rules.



- Is outside financing preferred to obtaining additional Plaintiff Lawyers to help bankroll the mass tort. Possibly, as you may otherwise have too many chefs in the kitchen?
- What do you do if Plaintiffs' Counsel is tapped out?:
 - Third Party Financing. NON-RECOURSE WITH LODESTAR SHARING can be obtained in good cases.
- The proposed arrangement should be reviewed beforehand with the Court in camera and approved in writing by an ethicist (and your State Bar), and should be considered protected work product, not discoverable by defendants. Weinstein, 88 NW U. L. Rev. at 22-24.
- Build an Ethical Fire Wall: In the agreement with the outside funder, prevent the economics of litigation or settlement strategy being affected by financing: funder has no decision-making role in the litigation.




C. Defending the Third Party Lending Joint Venture Against Defendant Attacks to Force Third Party Lending Discussions and Disclosure

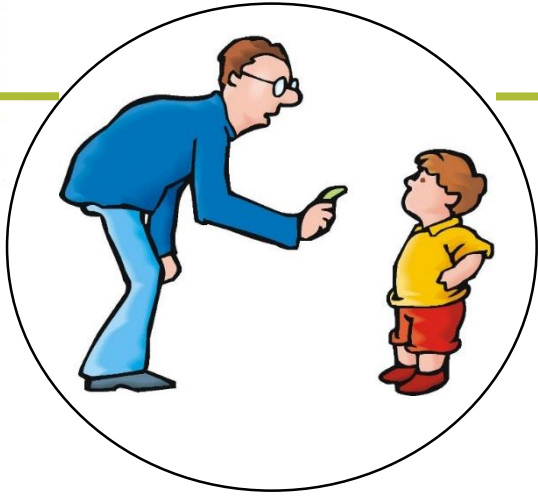


- Avoid the pitfalls of Garabe v. Chevron (N.D. Cal. 2016):
 - The lender controlled the case with a “Project Plan”, i.e. no firewall.
 - Lender was to be paid not just from lodestar lodestar but from the class recovery. Violates ABA Rule 1.9 conflict.
- Protect the Third Party Lender documents, but assume they will be discovered. California Federal Courts now require it: The Recorder, January 23, 2017
- Case law finding it is protected Work Product: Doe v. Sacred Heart (N.D. ILL. E. D. 2014).
- Disclosure violates public policy: “Plaintiffs often face wealthy Defendants who can afford to out-wait and out-spend their smaller adversaries, when a small adversary faces a multi-billion dollar corporation. Large companies can ignore, intimidate and disregard small plaintiffs. (Third party lending) Increases the likelihood that cases will be decided on the merits, rather than resources.” Odyssey Wireless v. L.G. Electronics (S. D. Cal. 2016).



- Label all Documents as Protected Work Product.
- Disclosure to the Lender of details respecting the litigation may eliminate the attorney-client privilege but arguably preserves the work product defense as being prepared in anticipation of litigation. Appleton Papers v. EPA, 702 F.3d. 1018 at 1022 (7th Cir. 2012).
- Desired third party lending structure may be for an additional common benefit attorney to appear in the case who is accountable to the Court and who provides the additional capital contributions to the Plaintiffs' case and has a lending relationship with the lender, with the contract between this attorney and funder clarifying the firewall.
- How to strike a balance between the third party lender and the remaining common benefit lawyers who still wish to participate in litigation funding: pass the hat with the lawyers for each capital call and only then does the third party lender make up the shortfall.
- Venue for dispute resolution between the financing company and Plaintiff's counsel?: The MDL or Mass Tort Court.

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- Champerty and Maintenance, attacks on third party lending assume that the third party lender meddles in the litigation. Firewalling the lender should moot these attacks.
 - ABA Commission on Ethics February 2012 White Paper: Society's embracing of credit as a financial tool has paved the way for a litigation funding industry that continues to grow.
 - Oppenheimer Fund 437 U.S. at 352: It is proper to deny discovery regarding a matter that is not and cannot be a defense in the case. E.g., outside funding source.
 - Defendant theory that funder is real party in interest under Rule 17: Unlike an insurer, the funder has not paid and will never pay the Plaintiff for his losses.

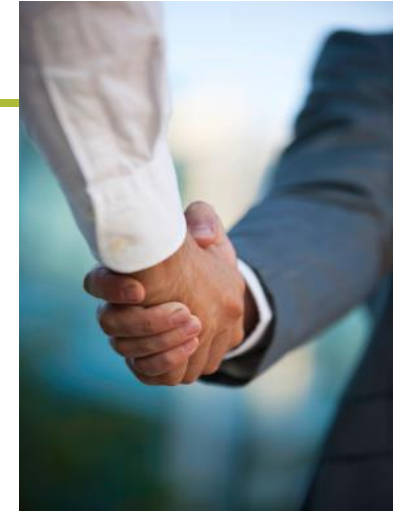


4. BUDGET AND DISCIPLINE COMMON BENEFIT VENDORS (THE REAL MDL WINNERS?)





- The first question in deciding whether to hire a vendor: Can a member of the Plaintiffs' Common Benefit Team do the work instead? If so, then do it in-house and save a bundle.
- Next step: Always have a written contract with the vendor.
- The winners of mass tort cases are experts. But, experts, like everyone else in that case, are amendable to budgets, if you just ask.
- Many large data and expert support providers in mass cases have billing problems and discrepancies. Large vendors should be audited. Put in the contract the right to audit and that the vendor pays for audit costs if substantial discrepancies are found.
- To avoid vendor disputes that you cannot manage, vendor contracts should have a mediation clause and a forum selection clause placing disputes before the MDL Judge. The lesson of Drywall.
- Expert witness vendors like to put Plaintiffs' Counsel over a barrel before the expert is deposed, by arguing that a large vendor receivable makes the case contingent for the expert witness. Moot this point with a specific contract provision and by having a heavy hitter plaintiff leader sign a payment guarantee.



**5. GET HELP FROM A NEUTRAL: YOUR
AMBASSADOR WITH THE BENCH,
FACILITATE COURT BUSINESS MODEL BUY-IN
AND A PLAINTIFF VOICE**




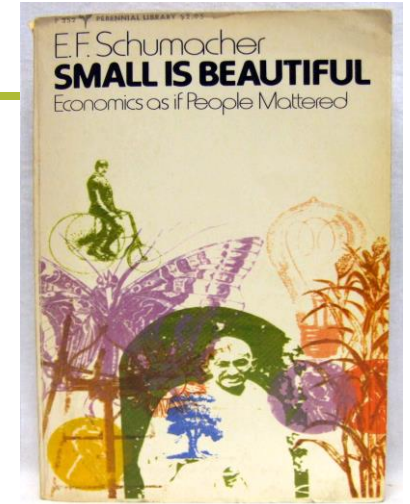


A. Having a Neutral Facilitator: Using Special Masters Effectively

- FRCP 53 and all states but Illinois have a mechanism for appointment of a Special Master. William Mitchell Law Review Volume 31:3 at 1300.
- Consent of the parties in selecting a Special Master is usually required and is recommended Perez-Vasquez (Fla. Dist. Ct. App. 2003).
- Selection considerations and how to get the most out of your Special Master
 - vetting Court/Defendant recommendations
 - bargain for a fair price
 - work collaboratively
 - have regularly scheduled meetings/calls
 - focus on solving problems
 - be willing to proceed informally
 - consult Special Master as soon as a dispute arises



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- Trade off between cost and case effectiveness.***
 - Promotes case management such as appointing Special Master to coordinate parallel state and federal proceedings.
 - Appointment examples: help the Court select MDL or Mass Tort common benefit lawyers, audit and compile common benefit time and expenses, serve as CFO for the Plaintiffs in Mass Tort litigation, facilitate discovery and resolve discovery disputes, hearing motions and draft recommended orders for the Court's review, administer settlements, carry out and monitor injunctive relief, make factual findings.
 - Divide up an Aggregate Settlement pie to comply with Rule 1.8(g).
 - The advantage of Special Master case multitasking: your Ambassador with the Court.***



6. WHEN THE CASE RESOLVES, DON'T BELIEVE MASS/TORT SEMINAR VENDOR HYPE: SMALL IS BEAUTIFUL IN SETTLING AND ADMINISTERING CASES

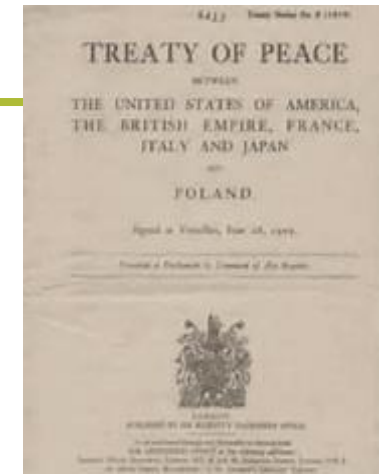




The Synergy of Combining Settlement Administration, Lien Resolution and Claimant Benefits Protection

- Combining claimant data compilation and review, Settlement Administration and lien resolution. It is cheaper and improves accuracy and efficiency by eliminating communications among vendors and work redundancy, and by ensuring that claimant information is correctly reported and utilized.
- Having a one source back office for a mass case settlement facilitates effective communications for Plaintiffs' Counsel and claimants.
- Better able to bargain with your vendor.





7. DON'T ABANDON SHIP: VICTIMS NEED YOU AFTER THE CASE SETTLES





- Craft a settlement remedy that is sensitive to post-settlement disputes. Examples: Stryker, Perrine W.V.
- Designate Settlement Implementation Counsel and compensate them: Usual Scenario is the Defendants continue to pay their lawyer, who still advocates, but Plaintiffs' Counsel have backed up to the pay window and moved on to the next case.