Young Lawyer's Corner

Winning.

For most folks, it is something that does not need much explanation. Winning—and losing—is dependably black-and-white in a world with innumerable shades of gray.

Then, of course, you become a lawyer. And suddenly "winning" takes on a far more fuzzy hue.

For a young lawyer, nowhere does the concept of winning seem more murky than in the world of mass tort litigation—and, in particular, that behemoth known as federal multidistrict litigation. With thousands of cases in multiple jurisdictions all consolidated before one court, winning and losing is stripped of its old-fashioned notion of finality.

Part of the problem is inherent to the litigation. No matter how many individual cases you may win (or lose), there will always be more of the same looming on the horizon. It is like a prizefight, with each side heading to the corner, hands in the air, both claiming victory. But instead of going to the final scorecard, you just fight another round. Who wins becomes purely a matter of perspective.

Of course, that does not necessarily mean that the flipside to trying every case is any more conclusive—or less nuanced.

In many MDLs only a handful of cases are ever resolved by trial. You may go to law school with visions of Perry Mason moments, but as it turns out, once in practice, most litigants are not nearly as enthused to be in court as you are.

And let's be honest, in law school, you probably never thought you would be regaling the in-laws with war stories about claim matrices, down-stream opt-outs, and structured global resolutions—the latter of which never seem quite as "structured," or as "global," or even as much of a "resolution" as originally envisioned. It is hardly the kind of material that is going to keep everybody around the table for that extra glass of merlot or slice of pumpkin pie at Thanksgiving.
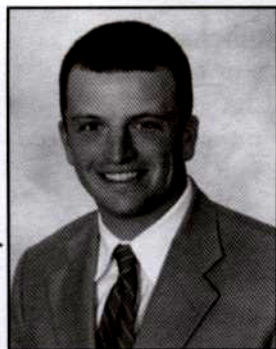
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Moreover, the law school experience does not really prepare young lawyers for the relativity of "winning" in a mass tort. Imagine, for a second, putting that law school moot court victory you recall so fondly into the framework of an MDL:

"Great job making it to the finals of moot court! You must be really excited!

"Oh, we cancelled the tournament."

"WHAT?"

"Well, we considered going the "bellwether" route, but in the end, we got together with Joe and Sally and created a moot court claim grid. Based on each team's collective G.P.A., their likelihood of future legal employment, and total student debt incurred at the time of the tournament, we were able to slot everyone into a final position. An appropriate portion of first prize will be distributed to each team. The plan is Dean-blessed, the Regents seem pleased, and long-term it will save the school from paying for judges and providing refreshments. Overall, we consider the arrangement quite workable. Hopefully we can get adequate buy-in from the 2Ls."

Yeah. Not quite how I remember it either.[1]

Of course, in the end "winning"—no matter how diffuse—is ultimately defined by the expectations and goals of your client. And therein lies the rub: because as a young lawyer, even when you may have something to shoot at, it does not mean it is any easier to keep your eyes on the target.

As you inevitably find out, federal multidistrict litigation involves more moving parts than a fancy car engine: you have hundreds of depositions taken, thousands of cases filed, and millions of pages reviewed and produced. And that does not even begin to take into account the endless stream of letters written, motions researched and filed, fact sheets completed, cases removed (or remanded—take your pick), jurisdictional issues argued . . . oh yeah, and somewhere down the line, actual trials. As a young lawyer, it is easy to get lost in all of the minutiae.

You can find yourself devoting so much energy to making sure one discrete part is actually working—or better yet, not breaking—that it is easy to lose focus on the much bigger picture. The goal, remember, is not to simply make sure each individual engine part is functioning appropriately—although that is undoubtedly important—but it is to make sure that the big fancy car actually arrives at the desired destination, and in good condition to boot.

After all, the objective in an MDL is really no different than in any other case: you are trying to *win*—even if winning isn't always as black-and-white as you remember it.

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1   This is, in part, because the author did not win Tulane Law School's moot court competition. He did, however, play a compelling—and difficult—witness for the losing team.