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Cover Page Footnote

The authors thank Kevin Clermont, Evan Davis, Sara Schotland and Linda Silberman for their comments on earlier drafts, and Jeff Saxon for his research assistance.

ARTICLES

MODERN MASS TORT LITIGATION, PRIOR-ACTION DEPOSITIONS AND PRACTICE-SENSITIVE PROCEDURE

MITCHELL A. LOWENTHAL AND HOWARD M. ERICHSON*

INTRODUCTION

PROCEDURAL rules are not created in a vacuum. They assume a particular tradition of litigation practice. The Federal Rules of Civil Procedure, notwithstanding their patchwork of amendments over the years, assume to a large, perhaps too large, extent the tradition of litigation practice as it existed in 1937, when a litigant was still a litigant and a lawsuit was still a lawsuit.¹ However great the tradition, rules may linger long after that tradition has been displaced. This is truest where rules affect such rapidly developing areas as complex litigation, in particular, mass tort litigation.

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1. See Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645 (1937); see also Charles E. Clark & James W. Moore, *A New Federal Civil Procedure*, 44 Yale L.J. 387, 392 (1935) ("It must be recognized that procedure is not an end in itself, but merely a means to an end, a tool rather than a product, and that procedural rules must be continually reexamined and reformed in order to be kept workable.").

As relates to mass tort litigation, perhaps it is more accurate to say that the rules assume the tradition of litigation practice as it existed in the early 1960s, when the Advisory Committee on Civil Rules and its Reporter, then-professor Benjamin Kaplan, carefully reassessed issues of aggregate litigation in preparation for the ambitious rule amendments of 1966. See Judith Resnik, *From "Cases" to "Litigation"*, 54 Law & Contemp. Probs. 5, 7-17 (1991). The Federal Rules of Evidence largely assume litigation practice as it existed in 1975, or, to the extent they follow the common law, a much earlier tradition.

To the extent the rules reflect an anachronistic conception of litigation practice, it is not the fault of the rulemakers alone. Professor George Priest and Judyth Pendell point out that most lawyers still perceive *Pennoyer v. Neff*, 95 U.S. 714 (1877), *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854), *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), and *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), as the foundations of our civil liability law, even though

[t]he caseload of the modern civil judge is less likely to be dominated by an action involving an attempt to collect on a note against land (*Pennoyer*), or damages for delay in delivery (*Hadley*), or for suffering a hit from a stick (*Brown*) or a scale (*Palsgraf*), than by an action involving the joinder of multiple parties with complex third-party liability claims asserting a causative link that requires complicated scientific understanding.

George L. Priest & Judyth W. Pendell, *Foreword* to 54 Law & Contemp. Probs. 1, 1 (1991).

Perhaps the most cherished assumption that must be reevaluated in light of the way mass tort litigation is now practiced is the assumption of independently controlled litigation. Modern mass tort litigation has witnessed a remarkable growth of interdependence among litigants who, although not parties to the same "lawsuit," find themselves on the same side of a "litigation."² Mass tort litigants with common interests tend to pursue those interests collectively.³ While the growth of mass tort litigation has been much discussed in the scholarly literature, as have various formal procedures for aggregating claims,⁴ insufficient attention has been given to the profound changes occurring informally, in particular, the trend toward aggregation through coordination by same-side counsel.⁵ In light of the growing interdependence among litigants to separate actions, the time has come to reassess rules that assume each litigant is, in terms of litigation control, independent. One procedural point ripe for such reassessment, and the point this Article will take as illustrative, is the use of prior-action depositions.

The story usually runs something like this. A disaster occurs—a crash, contamination, conflagration, collapse or other calamity—and dozens, hundreds, maybe thousands of victims seek recompense for their injuries from the perceived wrongdoer or wrongdoers. Lawsuits crop up in multiple jurisdictions. Suits are filed in state and federal

2. For an excellent discussion of the trend toward aggregate litigation and some of its implications, see generally Resnik, *supra* note 1.

3. For a useful analysis of the costs and benefits of "collective litigation" from the vantage point of political and economic thought about collective action, see generally Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. Ill. L. Rev. 43.

4. *E.g.*, Complex Litigation Project (ALI, Proposed Final Draft Apr. 5, 1993) [hereinafter Complex Litigation Project] (recommending a comprehensive set of procedures for aggregating multiparty, multiform litigation); Myron J. Bromberg & Anastasia P. Slowinski, *Pay or Play in Mass Torts: Alleviate Backlogs with an Expanded Court System or Joinder Methods for Mass Tort Cases*, 45 Rutgers L. Rev. 371 (1993) (advocating reform to address court calendar congestion caused by mass tort cases); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89 (discussing the ongoing debate over aggregation procedures); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429 (1986) (discussing the high costs that mass tort litigation places on consumers and the need for reform); Symposium, *American Law Institute Complex Litigation Project*, 54 La. L. Rev. 835 (1994) (discussing and critiquing the reforms proposed in the ALI's Complex Litigation Project); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779 (1985) [hereinafter Trangsrud, *Joinder Alternatives*] (urging that fairness concerns be balanced against efficiency of joinder in mass tort cases); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69 [hereinafter Trangsrud, *Mass Trials*] (arguing against use of mass trials to shorten court calendars); Comment, *Procedural Devices for Simplifying Litigation Stemming from a Mass Tort*, 63 Yale L.J. 493 (1954) (evaluating major devices for simplifying mass tort litigation while reconciling defendants' and claimants' conflicting interests).

5. See Resnik, *supra* note 1, at 39 (noting that informal aggregation mechanisms "are less visible to the academy" than are formal ones, and that "references to such activities are more often found in legal newspapers and conferences of lawyers and judges than in academic journals").

court in a number of states and perhaps around the globe. Despite the technical independence of each of the multitudinous lawsuits,⁶ the whole legal affair is perceived as a single complex litigation: the breast implant litigation; the L-tryptophan litigation; the MGM Grand Hotel fire litigation; even the asbestos litigation.⁷

Quickly, litigation control structures develop. The defendant retains a law firm to handle its defense as lead counsel. That lead counsel in turn hires local counsel in each of the various jurisdictions where suits are pending or anticipated, establishing what may become a vast, networked team of defense lawyers. If multiple defendants have been sued, they may enter into indemnification or other coordination arrangements, further extending the defense counsel network.

Each plaintiff, too, hires counsel. Eventually, dozens of plaintiffs' lawyers find themselves prosecuting very similar cases. Sensibly, they coordinate their efforts, establishing a networked team of lawyers on the plaintiffs' side, with a committee or other vehicle to coordinate strategy and the exchange of information.

Perhaps plaintiffs' counsel seek class certification to turn the litigation into a single class action. If so, they likely fail, as courts have proved reluctant to allow mass tort litigation, especially mass products liability claims, to proceed as class actions.⁸ Rather, the litigation likely proceeds as a number of formally independent cases, but with litigation control structures that render case management a highly coordinated, collective process. If federal cases are consolidated pursuant to the multidistrict litigation ("MDL") statute,⁹ any state court cases remain formally independent,¹⁰ but MDL court-sanctioned mechanisms render coordination among counsel even more highly structured than in non-MDL mass tort litigation.¹¹

6. The suits are independent only in the absence of a formal mechanism for aggregation, such as class action or consolidation. On the infrequency of mass tort class actions and the limitations of other joinder methods, see text *infra* at notes 108-17.

7. In addition, a sampling of mass tort litigation might include the Pan Am Lockerbie air crash litigation, the World Trade Center bombing litigation, the diethylstilbestrol (DES) litigation, the Union Carbide Bhopal gas disaster litigation, the San Juan Dupont Plaza Hotel fire litigation, the Bendectin (anti-nausea drug) litigation, the Agent Orange litigation, the repetitive stress injury litigation, the Bjork-Shiley heart valve litigation, the tobacco litigation, the dibromochloropropane (DBCP pesticide) litigation, the MER/29 (anti-cholesterol drug) litigation, the Sioux City air crash litigation, the Dalkon Shield (contraceptive) litigation, the formaldehyde litigation, the toxic shock syndrome litigation, the Three Mile Island nuclear accident litigation, and the Kansas City Hyatt Regency Hotel skywalk collapse litigation.

8. See *infra* notes 108-10 and accompanying text.

9. 28 U.S.C. § 1407 (Supp. V 1993).

10. See Transgrud, *Joinder Alternatives*, *supra* note 4, at 810. It is possible for a federal judge and a state judge handling pieces of the same mass tort litigation to coordinate with each other notwithstanding MDL's inability to reach state court cases. See *id.*; Manual for Complex Litigation (Second) §§ 31.31, 33.21 (1985) [hereinafter M.C.L.2d].

11. For example, MDL proceedings almost inevitably produce an organized infrastructure on each side of the caption, with the establishment of "steering committees"

Discovery proceeds in the various individual cases. In the case of one plaintiff, let's call her P₁, a witness is deposed concerning some general aspect of the defendant's (D's) liability. The testimony proves favorable to D. The issue: If that witness is unavailable to testify in the subsequent trial of a different plaintiff (P₂), may D introduce the deposition testimony?

The operative federal rules—Federal Rule of Civil Procedure 32(a)¹² and Federal Rule of Evidence 804(b)(1)¹³—appear to say that D may not use the testimony against P₂ unless P₂ or P₂'s predecessor in interest had an opportunity to examine the witness. The rules appear, at first glance, to make perfect sense. It seems unfair to allow D to use the testimony against P₂ if P₂ was not present at the deposition and had no opportunity to cross-examine. Allowing D to use the deposition against P₂ seems a very different matter from allowing P₂ to use it against D, because D was present at the deposition. Nevertheless, courts have struggled with this issue, and have divided on whether to prohibit D from using the deposition testimony against P₂ because P₂ was absent when the testimony was given.¹⁴ Most courts have given the rules a broad construction, allowing the use of a prior-action deposition of an unavailable witness if there was a party to the prior action with similar motive and opportunity to develop the testimony.¹⁵

and other formal and informal coordination devices. Plaintiffs' counsel may have divergent interests in the structured coordination MDL imposes. "Although some plaintiffs' attorneys will welcome coordinated efforts to press discovery, others would prefer to pursue their own strategy in their own forum without risk of loss of control to what is supposed to be a representative Steering Committee." Sara D. Schotland, *Multidistrict Litigation Presents Litigators with Range of Strategy Choices*, 6 *Inside Litig.*, Feb. 1992, at 22, 24.

12. Rule 32(a) allows deposition testimony to be used, in certain circumstances, "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." The rule further provides:

[W]hen an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

Fed. R. Civ. P. 32(a)(4).

13. For unavailable witnesses, Rule 804(b)(1) establishes a hearsay exception for:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed. R. Evid. 804(b)(1).

14. *Compare, e.g., Ikerd v. Lapworth*, 435 F.2d 197, 205 (7th Cir. 1970) (allowing use of prior-action deposition) *with Alamo v. Pueblo Int'l Inc.*, 58 F.R.D. 193, 194-95 (D.P.R. 1972) (prohibiting use of prior-action deposition).

15. See *infra* notes 124-27, 140-43 and accompanying text.

Whether or not they supported D's use of the testimony, however, courts and commentators considering the issue have uniformly assumed a fundamental difference between D's use of the testimony against P₂ and P₂'s use of the testimony against D.¹⁶ D was present at the deposition; P₂ was not. It is on this point that the realities of modern mass tort litigation make a difference, and a difference that critically undermines the central argument against allowing D to use the deposition testimony against P₂.

What the courts and commentators have failed to recognize is that in modern mass tort litigation, the plaintiffs' and defendants' lawyers often share a roughly equivalent counsel structure. The defendants' litigation control structure consists of primary defense counsel at the hub and various local counsel at the spokes. The plaintiffs' litigation control structure consists of individual plaintiffs' lawyers at the spokes and a coordinating committee or information exchange vehicle at the hub.

The nature of these litigation control structures in modern mass tort litigation undermines the cherished assumption of litigation control independence, the assumed separateness of individual lawsuits. Moreover, the rough equivalence of plaintiffs' and defendants' litigation control structures suggests the fallacy of clinging to litigation independence as a proper dichotomy between D's use against P₂ and P₂'s use against D. For both of these reasons, a realistic appraisal of modern mass tort litigation undermines the foremost criticism—what we shall call the fairness critique—of the broad interpretation many courts have given to Federal Rule of Civil Procedure 32(a) and Federal Rule of Evidence 804(b)(1).

This Article examines the litigation control structures commonly employed in modern mass tort litigation, and finds that developments in both the plaintiffs' bar and the defense bar have resulted in vastly increased interdependence and coordination among counsel. It then turns to the implications of this collectivist trend on procedural decision-making, using as an example the issue of whether deposition testimony may be used in subsequent actions involving different parties. In particular, it looks at the broad construction given by a number of courts to Federal Rule of Civil Procedure 32(a) and Federal Rule of Evidence 804(b)(1), allowing the use of deposition testimony against certain non-parties to the prior actions. This Article assesses the fair-

16. See J. Randall Coffey, Note, *Admissibility of Prior-Action Depositions and Former Testimony Under Fed. R. Civ. P. 32(a)(4) and Fed. R. Evid. 804(b)(1): Courts Differing Interpretations*, 41 Wash. & Lee L. Rev. 155, 178-79 (1984) (stating that courts nearly always allow P₂ to use deposition or other former testimony against D where the issues are substantially the same, but the issue is more difficult where the deposition or testimony is sought to be used against a non-party to the prior action). Likewise, courts easily allow a later defendant (D₂) to use a deposition or other former testimony against a plaintiff (P₁) who was a party to the prior action. *Id.* In mass tort litigation, the P₂ v. D₁ posture arises more often than the P₁ v. D₂ posture.

ness critique, the dominant criticism of the courts' broad formulation, in light of the realities of modern mass tort litigation. It concludes that the courts' broad formulation works well and proposes a clearer codification of that formulation. The issue of prior-action depositions in mass tort litigation illustrates the importance of paying attention to major shifts in the way law is practiced, in this case, a shift toward interdependence among counsel. The collectivism inherent in modern mass tort practice carries implications as well for non-party issue preclusion and for the utility of non-transsubstantive rules¹⁷ of civil procedure.

I. MODERN MASS TORT LITIGATION

A. *Nature of the Beast*

"Mass tort" refers to conduct of one or more tortfeasors that causes widespread injury, where the individual tort claims share some common factual basis.¹⁸ Most mass tort litigation can be classified either as mass disaster litigation, which involves injuries suffered by many at one time and place, or mass products liability litigation, which involves wide distribution of a defective product.¹⁹ The former includes plane, train and bus crashes, building collapses, hotel fires, explosions, chemical spills, gas leaks, and nuclear reactor accidents. The latter includes claims by consumers, workers and others for product-caused injuries.

It has been observed that the proliferation of mass tort litigation "reflects the increasingly collective nature of life in the second half of the twentieth century."²⁰ What is "mass" in mass tort litigation follows naturally, if not inevitably, from mass transportation in planes and trains that may crash, mass production and mass distribution of products that may injure, and mass media that alert would-be plaintiffs to their potential claims.²¹

Mass tort litigation is characterized by extraordinary commonality of evidence relating to the defendant's liability from one plaintiff's

17. "Transsubstantive" rules are rules that apply across all substantive areas of law, as opposed to "specialized" or "non-transsubstantive" rules, which apply only to specifically defined areas of law. The current Federal Rules of Civil Procedure are transsubstantive. See sources cited *infra* note 195.

18. See Trangsrud, *Joinder Alternatives*, *supra* note 4, at 780. The once-popular term "mass accident," used in Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966), works well for plane and train crashes, but inaptly describes most toxic torts and mass products liability litigations. See Resnik, *supra* note 1, at 9.

19. See Trangsrud, *Joinder Alternatives*, *supra* note 4, at 780-81 & nn. 2-6.

20. Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 *Law & Contemp. Probs.* 227, 227 (1991).

21. As to the mass media's impact, Peterson and Selvin observe that mass litigation involving Bendectin, an anti-nausea drug that allegedly caused birth defects, was precipitated by a 1979 *National Enquirer* article. *Id.* at 227 n.1 (citing *New Thalidomide-Type Scandal—Experts Reveal . . . Common Drug Causing Deformed Babies*, *Nat'l Enquirer*, Oct. 9, 1979, at 20).

case to the next. That, after all, is what makes it mass litigation rather than simply a bunch of cases. In the asbestos litigation, for example, evidence concerning the industry's scientific knowledge—and therefore its duty to warn of known hazards and its inability to rely on a state-of-the-art defense—figures prominently in essentially every case. The deposition of Dr. Kenneth Wallace Smith provides a prime example. Dr. Smith, the former medical director of Johns-Manville Corporation, was deposed January 18, 1976, in the Pennsylvania case of *DeRocco v. Forty-Eight Insulation, Inc.*²² For much of his twenty-four year career at the world's largest asbestos manufacturer, Dr. Smith was the organization's only full-time physician. His deposition, taken when Dr. Smith was sixty-three years old, thus provides the testimony of a witness uniquely able to discuss the extent of knowledge available to the asbestos industry in the 1940s and 1950s concerning the product's hazards.²³ After Dr. Smith's death, his testimony, which was favorable to plaintiffs, remained powerfully relevant. Plaintiffs frequently sought to use the deposition in later cases.²⁴

Even more than in toxic tort cases such as the asbestos litigation, mass disaster litigation involves heavily overlapping factual issues. Evidence concerning an airplane crash or building collapse varies little, at least as to liability, from one plaintiff's case to another's.²⁵

This commonality of evidence from case to case partly explains why courts, lawyers, litigants, and the public perceive a mass tort litigation as an interrelated whole. That perception may owe even more, however, to the commonality of interest among same-side litigants.²⁶ With commonality of interest as the carrot, and the sheer magnitude and

22. No. 7880 (Pa. Ct. C.P. 1974), cited in *Dykes v. Raymark Indus.*, 801 F.2d 810, 815 (6th Cir. 1986), cert. denied, 481 U.S. 1038 (1987); *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 343 (6th Cir. 1985); *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1294 (6th Cir. 1983), cert. denied, 467 U.S. 1253 (1984).

23. See *Dykes*, 801 F.2d at 815-16; *Murphy*, 779 F.2d at 343; *Clay*, 722 F.2d at 1294.

24. See *Dykes*, 801 F.2d at 815-16; *Murphy*, 779 F.2d at 343; *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985); *Clay*, 722 F.2d at 1294; *In re Johns-Manville Asbestosis Cases*, 93 F.R.D. 853, 854 (N.D. Ill. 1982).

For similar reasons, the 1975 deposition of Richard Gaze continues to excite asbestos litigants. Gaze was a scientist for Cape Industries, a South African company that mined raw asbestos. He had worked for Cape Industries since 1940, and testified at his deposition about the state of scientific knowledge in the asbestos industry. Like the Smith deposition, the Gaze deposition has continued to cause courts evidentiary headaches following Gaze's death, as plaintiffs seek to use the deposition to establish the industry's state of scientific knowledge. Compare *King v. Armstrong World Indus.*, 906 F.2d 1022, 1025-26 (5th Cir. 1990) (allowing use of Gaze deposition), cert. denied, 500 U.S. 942 (1991) with *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160-61 (4th Cir. 1986) (prohibiting use of Gaze deposition).

25. See Ralph K. Winter, *Comment: Aggregating Litigation*, 54 Law & Contemp. Probs. 69, 70-71 (1991).

26. Professor Judith Resnik has commented on the shift in focus from litigants' "rights" to "interests," and the concomitant movement "as cases themselves lose their boundaries and become part of a 'litigation.'" Resnik, *supra* note 1, at 50. As she noted:

dispersion of mass litigation as the stick, litigation control structures on each side of the modern mass tort litigation have evolved into complex coordinated networks of attorneys.

B. Litigation Control Structures

1. Defense Counsel

A defendant faced with the prospect of substantial mass tort liability or litigation invariably hires outside counsel to handle the defense.²⁷ In the increasingly common situation where such litigation is multi-jurisdictional, however, that outside counsel typically cannot handle the entire defense on its own.²⁸ Counsel defending against multi-jurisdictional mass tort litigation, therefore, generally hires local counsel in each jurisdiction where a complaint has been or is likely to be filed.²⁹

Hiring local counsel is one of lead counsel's first and most important tasks.³⁰ Local counsel are lead counsel's eyes and ears—and mouths—in every court where the lead counsel are not admitted to practice. For local counsel to discharge this function effectively, lead counsel must establish mechanisms to keep local counsel abreast of developments in the litigation and for local counsel to inform lead counsel of suit-specific happenings. Techniques employed include periodic seminars, regular mailings and, with increasing frequency, inter-firm electronic mail.

The complexity of the defense counsel network, not surprisingly, multiplies with multiple defendants. Multiple defendants retain multiple lawyers, and those lawyers may coordinate either informally or formally through indemnification and defense agreements.³¹ Rela-

By phrases such as the "asbestos litigation" and the "Savings and Loan litigation," we link individuals and their interests with the image that courts and lawyers could and should interact with such a "litigation" as an interrelated whole. The primacy of the individual in relation to her or his own case has declined.

Id. at 51-52.

27. See John Gerald Gleeson, *Planning the Defense of the Mass Toxic Tort Case*, For the Defense, June 1993, at 13, 15.

28. This inability is not generally a function of lead counsel's inadequate size. Indeed, lead defense counsel in mass tort litigation are frequently from among the country's largest firms. Rather, the need derives from local rules requiring local counsel's involvement, from local counsel's greater familiarity with practice and judges in dispersed fora, as well as from cost considerations.

29. See Patricia L. Glaser, *Case Management and Depositions in Complex Litigation*, in *Management of Complex Mass Tort Litigation: Preparing for Trial*, at 301, 305 (PLI Litig. & Admin. Practice Course Handbook Series No. 306, 1986).

30. *Id.*

31. See Edward Lowenberg, *Consolidated Defense Experience: Working with Co-Defendants to Really Minimize Costs*, in *Litigation Management Supercourse*, at 489, 491-94 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5184, 1993); Albert H. Parnell, *The Coordinated Group Defense*, For the Defense, Nov. 1980, at 16. The Defense Research Institute (DRI), a rough counterpart of the plaintiff-ori-

tionships within the defense network may become quite intricate. If a lead defendant offers to indemnify codefendants and undertake a common defense, some codefendants may decline the offer, creating a sharp division between aligned defendants and nonaligned defendants. Even where coordination is informal, alliances and divisions of interests and ideas form rapidly and shift often.

Group effort may be more difficult among defendants than among plaintiffs³² because defendants often seek to avoid or minimize liability by allotting blame to their codefendants.³³ In mass tort litigation where one party, such as the manufacturer of an allegedly defective product, appears to be the plaintiffs' primary target, an indemnity agreement may remove this conflict and enable the codefendants to present a united defense.

Even where defendants seek to minimize their exposure in the allocation of liability among joint tortfeasors, they normally can unite on certain issues. In particular, non-merit defenses such as the statute of limitations, and procedural options such as venue transfer, forum non conveniens and removal,³⁴ often find defendants of one mind.³⁵ In the mass tort litigation involving exposure to the agricultural chemical dibromochloropropane (DBCP), various defendant chemical manufacturers and fruit growers jointly sought removal from Florida state

ented Association of Trial Lawyers of America (ATLA), provides seminars and research for defense lawyers. David Ranii, *For the Other Side*, Nat'l L.J., Sept. 13, 1982, at 1, 10. Mr. Parnell wrote in 1980 that "[c]oordinated group defense is in its infancy." Parnell, *supra*, at 24. In 1982, a DRI leader described the Institute as being in "late adolescence." Ranii, *supra*, at 10. Whether or not defense lawyers will agree that coordination has reached adulthood, they can no longer view it as embryonic. The DRI has formed litigation groups for defense counsel involved in certain types of product liability litigation, and offers other services to the defense bar such as an expert witness index and a brief bank. See Kathryn Dix Sowle, *Toward a Synthesis of Product Liability Principles: Schwartz's Model and the Cost-Minimization Alternative*, 46 U. Miami L. Rev. 1, 38 n.174 (1991).

32. For a discussion of coordination among plaintiffs' counsel in mass tort cases, see *infra* part I.B.2.

33. A defendant whose individual interests diverge from those of the group as a whole may find itself bound or burdened by decisions of the group. This has been called the problem of the "kidnapped rider," and is in a way the flip side of the better known "free rider" problem. See Yeazell, *supra* note 3, at 44.

34. In the case of removal to federal court, coordination among defendants may not only be possible, but required. Courts have held the removal procedure statute, 28 U.S.C. § 1446, to require unanimity among defendants. That is, unless all served non-nominal defendants join in the petition for removal within 30 days after the first defendant is served, the removal is defective. See, e.g., *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990).

35. One defense lawyer has advocated the use of formal, written agreements among mass tort defendants to cooperate, and even to be represented by a single defense counsel. While defendants have a strong interest in presenting a unified front, informal "understandings" of cooperation can break down because of defendants' urge to point the finger at each other. Peter N. Sheridan, *Sharing Agreements: One Method of Managing Mass Tort Litigation*, in *Management of Mass Tort Litigation*, at 89, 91 (PLI Litig. & Admin. Practice Course Handbook Series No. 231, 1983).

court to federal court,³⁶ and asserted motions for dismissal under the doctrine of *forum non conveniens*.³⁷ Defense counsel in the asbestos litigation similarly have cooperated by coordinating discovery efforts³⁸ and by sharing information.³⁹ One mass tort defense lawyer has noted the development of “[m]ore effective and economical use of multi-defense counsel by organization within the group, by periodic meetings, delegation of particular tasks to specific attorneys, formation of deposition and trial teams, widespread and effective use of paralegals, and the use of one attorney or firm to represent, where appropriate, more than one defendant.”⁴⁰

2. Plaintiffs’ Counsel

In recent years, plaintiffs’ lawyers in mass tort litigation increasingly have availed themselves of the advantages of coordination.⁴¹ Popular mechanisms include newsletters, shared discovery, prepared trial packets, seminars on pending litigation, joint strategic planning, coordinated identification and preparation of expert witnesses, centrally handled scientific research and jury focus groups, and “schools” to ed-

36. See *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir. 1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1216 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); *Rojas v. DeMent*, 137 F.R.D. 30, 31 (S.D. Fla. 1991).

37. See *Cabalceta*, 883 F.2d at 1555-56; *Sibaja*, 757 F.2d at 1216; *Rojas*, 137 F.R.D. at 31-32. In a more recent round of DBCP litigation in Texas, a number of defendants likewise supported removal to federal court and moved for *forum non conveniens* dismissal. See Brief of Defendants in Opposition to Plaintiffs’ Motion to Remand at 1, *Delgado v. Shell Oil Co.*, No. H-94-1337 (S.D. Tex. 1994); Defendant’s Memorandum of Law in Support of Motion to Dismiss on Grounds of *Forum Non Conveniens* at 1-2, *Delgado v. Shell Oil Co.*, No. G-94-193 (S.D. Tex. 1994).

38. See *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1075 (3d Cir. 1983). This is an example of defense coordination gone awry. Defendant Johns-Manville Sales Corp., pursuant to the defendants’ informal arrangement, was to gather evidentiary material for use at trial by all of the defendants. When Johns-Manville filed a bankruptcy petition shortly before trial, the other defendants were left with inadequate discovery. *Id.* at 1075. The court refused to postpone the trial. *Id.* at 1075-76. See also Bromberg & Slowinski, *supra* note 4, at 386 (noting that the *Gold* case and similar instances may discourage coordination among defendants).

39. See Myra Alperson, *Asbestos Defendants Begin to Cooperate in Litigation*, *Legal Times*, Sept. 19, 1983, at 3.

Information sharing is made easier by the capabilities of modern litigation computer databases. Peterson & Co., a consultant to the Center for Claims Resolution, a group of 21 asbestos defendants, maintains a database tracking 100,000 claims and over one million documents. Jo McIntyre, *Handling the Monster Case*, *Law Office Computing*, June-July 1992, at 33, 34.

40. O.J. Weber, *Mass Tort Litigation: The Pot Boils Over*, 6 *J. Prod. Liab.* 273, 280 (1983).

41. More obvious but to similar effect, a single lawyer or firm may represent a number of plaintiff-clients. “While in theory and in form each case is separate, in practice lawyers on both sides deal with the cases as a group, sometimes making ‘block settlements’—in which defendants give a lawyer representing a group of plaintiffs money that is then allocated among a set of clients.” Resnik, *supra* note 1, at 38.

ucate individual lawyers about their tort and how to try the case.⁴² Multiple plaintiffs with separate counsel may be connected by an affiliate relationship with a single prominent plaintiffs' firm. For example, one South Carolina firm, which has represented more asbestos plaintiffs in the past twenty years than any other firm, shares responsibility and fees for thousands of cases brought by "affiliated counsel" around the country.⁴³

Coordination may arise from formal, external forces such as the judicial aggregation of cases by class action, multidistrict litigation or consolidation.⁴⁴ In such cases the court may (and usually does) impose a structure and set ground rules for a "steering committee," and decisions of the committee bind all of the aggregated claims.⁴⁵ In addition to a steering committee or lead counsel, the court may require the appointment of "liaison counsel" to serve as a link among the steering committee, the individual plaintiffs' lawyers, and the court.⁴⁶ Alternatively, coordination may and frequently does arise informally through voluntary cooperation among counsel.⁴⁷ The position of lead counsel or committee member is coveted both for the challenges and

42. See David Ranii, *How the Plaintiffs' Bar Shares Its Information*, Nat'l L.J., July 23, 1984, at 1, 9 [hereinafter Ranii, *Plaintiffs' Bar*]; Resnik, *supra* note 1, at 38-39; Paul D. Rheingold, *The Development of Litigation Groups*, 6 Am. J. Trial Advoc. 1, 5 (1982) [hereinafter Rheingold, *Litigation Groups*]. Professor Roger Trangsrud suggested in 1985 that at least as to discovery, it is rare for mass tort lawyers to coordinate informally. Trangsrud, *Joinder Alternatives*, *supra* note 4, at 811. Based upon the authors' experience, that view is, at best, outdated.

43. Roger Parloff, *The Tort that Ate the Constitution*, Am. Law., July-Aug. 1994, at 75, 77. Under its arrangement, the firm handles liability issues and national discovery, and the local firms handle issues of individual exposure and damages, as well as day-to-day case administration. See Sowle, *supra* note 30, at 39 n.175 (citing Karen Dillon, *Only \$1.5 Million a Year*, Am. Law., Oct. 1989, at 38, 38-40).

44. Rheingold, *Litigation Groups*, *supra* note 42, at 1-2.

45. *Id.* at 3-5; M.C.L.2d, *supra* note 10, § 20.22.

46. M.C.L.2d, *supra* note 10, § 20.221. The first tentative draft of the Manual for Complex Litigation (Third), like its predecessor, discusses coordination among counsel and defines useful roles for lead counsel, liaison counsel and counsel committees. Because the Manual is geared toward giving judges tools to manage complex litigation, it focuses almost entirely on coordination imposed by the court, urging judges to institute procedures for coordination and to designate lead counsel or committees by court order, and largely ignores the enormous amount of coordination that occurs voluntarily among counsel in the absence of any judicial intervention. See Manual for Complex Litigation (Third) § 20.22 (Tentative Draft No. 1, 1994) [hereinafter M.C.L.3d (Tentative Draft)]. In the specific context of mass tort litigation, however, the draft mentions that cooperative information-sharing among plaintiffs' counsel is increasingly common. *Id.* § 33.22 n.1346.

47. Rheingold, *Litigation Groups*, *supra* note 42, at 2. See Ranii, *Plaintiffs' Bar*, *supra* note 42, at 1. Ranii comments:

Although some "litigation groups" are formed at the behest of courts in multidistrict litigation or in class actions, personal-injury lawyers have found it mutually advantageous to join forces voluntarily in many other cases involving the same product and common foes, sometimes doing so with the aid of the Association of Trial Lawyers of America.

power it brings and, as in securities class actions,⁴⁸ for the additional fees it often generates.⁴⁹ After an initial power struggle,⁵⁰ control generally falls to a small cadre of lawyers.

At the center of the movement toward voluntary coordination is the Association of Trial Lawyers of America ("ATLA"), and the "litigation groups" it sponsors. According to ATLA, the purpose of a litigation group is to permit plaintiffs

to benefit from the collected experience, materials, and information in the possession of the plaintiffs' attorneys litigating similar cases, while reducing the high costs of litigation. The litigation group provides a collegial networking structure whereby members exchange information, share experiences, and develop discovery and litigation strategies in the spirit of professional cooperation toward mutually held goals.⁵¹

ATLA litigation groups exist for everything from Accutane to Yugos; among them are a Dalkon Shield Litigation Group, a Construction Site Accidents Litigation Group, and a Breast Implants Litigation Group.⁵² There is even a Delivery Service Negligence Group, de-

48. See Evan A. Davis & Mitchell A. Lowenthal, *Class Actions, in 4 Securities Law Techniques* § 92.10 (A.A. Sommer, Jr. ed., forthcoming 1995).

49. Evidencing the desirability of lead counsel positions, the draft Manual for Complex Litigation (Third) lists demotion or removal from lead counsel as a possible sanction for misconduct. M.C.L.3d (Tentative Draft), *supra* note 46, § 20.153.

50. See, e.g., Daniel Wise, *Lawyers Pack World Trade Center Hearing*, N.Y. L.J., May 9, 1994, at 1. One lawyer has described organizational meetings for plaintiffs' groups as "splendid displays of ego and peacock tail spreading." Rheingold, *Litigation Groups*, *supra* note 42, at 3.

51. *ATLA Guide to Litigation Groups*, Trial, July 1991, at S1, S2.

52. *Id.* at S3-S24. The Breast Implants Litigation Group, for example, strives "to permit each victim of breast implant injuries to benefit from the collected experience, discovery tactics, and litigation strategies of plaintiffs' attorneys who have handled or are handling similar cases." *Breast Implants Litigation Group*, in J. Douglas Peters & Margaret M. Aulino, *Breast Implants: Science & Litigation*, Trial, Nov. 1991, at 26, 31. Writing about the massive litigation arising out of the ingestion of the amino acid L-tryptophan, one plaintiffs' lawyer noted that in that litigation, "plaintiffs' lawyers are organized and well informed, which leads to another 21st century feature of the L-T mass disaster litigation: the ATLA L-T Litigation Group." Gayle L. Troutwine, *Genetic Engineering of L-tryptophan: Futuristic Disaster*, Trial, July 1991, at 20, 25.

The current list of ATLA litigation groups and subgroups includes, among others: Accutane, Airbags, All-Terrain Vehicles, Automatic Doors, Back-Up Alarms, Battery Explosions, BIC Lighters, Birth Defects, Teratogens and Bendectin, Brakes, Breast Implants, Child Restraints, Chymopapain, Construction Site Accidents, Crane Injury, Dalkon Shield, Defective Firearms, Defibrillators, Delivery Service Negligence, DES, Diet Products, Dioxin and PCP, Dry-Cleaning Fluid Exposure, Electromagnetic Radiation, Ethylene Oxide, Fire Loss, Formaldehyde, Fuel System Integrity, Halcion, Hard Metals Disease, Hazardous Materials, Heart Valves (Bjork-Shiley), Helmets, HMR 500, Industrial and Agricultural Products and Vehicles, Interstate Trucking, Isocyanates, Kerosene Heaters, Lead Paint, Legionnaires' Disease, L.P. Gas Explosions, L-Tryptophan, Mining and Oil Field Products and Accidents, Motorcycles, Multi-Piece Wheels/Rims, Non-Steroidal Anti-Inflammatory Drugs, Pesticides, Pleasure Boats/Personal Watercraft, Prozac, Roof Crush, School Buses, Seat Belts, Seat Design, Sudden Acceleration, Tardive Dyskinesia, Theophylline, Tire/Rim Mismatch,

voted primarily to suing Domino's Pizza for automobile accidents resulting from too-speedy pizza deliveries.⁵³ In addition to the litigation groups, ATLA provides the plaintiffs' bar access to an on-line database of thousands of current tort topics.⁵⁴

Within the plaintiffs' network, the attorneys claim a "common interest privilege" to protect confidential communications among the various plaintiffs' counsel in a mass tort litigation.⁵⁵ In order to speak freely about strategy and other confidential matters, organizers sometimes go to extraordinary lengths to protect their meetings from infiltration by defendants or other unwanted interlopers.⁵⁶

The first significant plaintiffs' group was formed in 1963 by a group of thirty-three lawyers pursuing claims in numerous state and federal courts against Richardson-Merrell, the manufacturer of MER/29, an anti-cholesterol drug linked to cataracts.⁵⁷ The group supplied its members with materials, including a newsletter, copies of documents from Richardson-Merrell's files for use in proving liability, a medical analysis of cataracts, and transcripts of previous trials.⁵⁸ It sponsored the "MER/29 School," which taught attorneys how to conduct trials against Richardson-Merrell.⁵⁹ Perhaps most importantly, the group

Toys and Recreational Equipment, Transmissions, Urocanic Acid, Vaccines, Vehicle Rollovers, Vehicle Underride, Vending Machine Tip-Overs, and Versed. *ATLA Guide to Litigation Groups 1* (1993).

53. *ATLA Guide to Litigation Groups*, *supra* note 51, at S10.

54. Kenneth R. Betzler, *Plaintiffs' Counsel*, in *Effective Coordination of Multiple Product Liability Litigation*, at 49, 51 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5040, 1988). ATLA also offers an expert witness database, a planned deposition bank, and a brief-writing service. Sowle, *supra* note 31, at 39-40. The ATLA Exchange, a repository of information on cases handled by members, includes data on, among other things, more than 4000 products. *Id.* at 39 & n.176.

55. The same is true of defense counsel. The MDL judge in the L-tryptophan litigation achieved this by order:

The Court recognizes that cooperation and coordination by and among plaintiffs' counsel and by and among defendants' counsel are essential for the orderly and expeditious resolution of this litigation. The communication of information among and between plaintiffs' counsel and among and between defendants' counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorneys' work product . . .

In re L-tryptophan Litigation, MDL No. 865, Order No. 1, at 9-10 (D.S.C. Feb. 25, 1991).

56. See Rheingold, *Litigation Groups*, *supra* note 42, at 4-5. For example, in the "school" sponsored to train swine flu vaccine plaintiffs' lawyers, forms on odd-colored paper were mailed to known members of the plaintiffs' litigation group. Tickets on a different odd-colored paper were sent to lawyers who registered by returning the form. A police officer controlled the ticket-only admission. *Id.* at 5. "In addition, the location of strategy meetings sometimes is kept 'so secretive that the people who are supposed to be there don't know where it is going to be' until the last minute." Ranii, *Plaintiffs' Bar*, *supra* note 42, at 11 (quoting plaintiffs' lawyer Jonathan T. Zackey).

57. Ranii, *Plaintiffs' Bar*, *supra* note 42, at 9; Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Cal. L. Rev. 116, 122 (1968) [hereinafter Rheingold, *The MER/29 Story*].

58. Rheingold, *The MER/29 Story*, *supra* note 57, at 122-24.

59. *Id.* at 131.

reached a voluntary agreement with the defendant that all discovery carried out by the group's representatives was applicable to all cases in the MER/29 group, including cases that joined the group after the completion of the discovery.⁶⁰ This arrangement lowered discovery costs to both the defendant and the plaintiffs. Over 100,000 documents were made available to the group's trustee, who copied pertinent documents.⁶¹ Additionally, the group submitted a standard set of interrogatories to which the defendant provided uniform answers.⁶² Ultimately, the MER/29 group members had greater success in obtaining settlements from the drug manufacturer than did those who declined to join the group.⁶³

The development of plaintiffs' groups continued in the 1970s with the Dalkon Shield group. Many of the Dalkon Shield group's members, all of whom represented plaintiffs claiming injury from the Dalkon Shield intrauterine contraceptive device, had been involved earlier with the MER/29 group.⁶⁴ One member of the Dalkon Shield group offered a succinct explanation of the value of coordination: "[E]arly on I got a box of what I call smoking-pistol papers that would have been very difficult, if not impossible, to get hold of on my own."⁶⁵ In the decades since, plaintiffs' groups and other forms of coordination in mass tort litigation have grown from the exception to the rule.

A measure of the power that well-organized plaintiffs' groups have attained is the response they engender in defendants. One mass tort defendant recently felt compelled to strike back at the organized plaintiffs' bar by filing a lawsuit against plaintiffs' counsel, alleging, among other things, RICO and antitrust violations.⁶⁶ The defendant, an asbestos manufacturer, alleged that ATLA's Asbestos Litigation Group "refers to itself as 'The Allied Forces,' and is united in its efforts to control access to the courts for asbestos claimants, monopolize the market for asbestos claimants, and monopolize the market for asbestos settlement and verdict dollars."⁶⁷

A primary activity of plaintiffs' groups is sharing information.⁶⁸ Information may be conveyed by word of mouth, newsletter or, usually

60. *Id.* at 127.

61. *Id.* at 129-30.

62. *Id.* at 130.

63. *Id.* at 138. MER/29 has been called "one of the great success stories of voluntary cooperation among litigants." Complex Litigation Project, *supra* note 4, at 12.

64. Paul D. Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, 3 Litig., Spring 1977, at 18, 18 [hereinafter Rheingold, *Mass Disaster Litigation*].

65. Ranii, *Plaintiffs' Bar*, *supra* note 42, at 9.

66. Keene Corp. v. Williams Bailey & Wesner, L.L.P., Asbestos Litig. Rep. (Andrews Pubs.) 30082, 30110, 30112 (Bankr. S.D.N.Y. June 3, 1994).

67. *Id.* at 30095.

68. One plaintiffs' lawyer involved in mass tort litigation extolled the benefits of information sharing: "Most important, we have not spent hours reinventing the wheel; instead, we have been able to rely on the shared research and discovery of

at a price, by a pre-packaged "trial packet" that provides an instruction manual to lawyers bringing a certain type of case, often with a collection of material documents (organized, sometimes, on trial-ready CD-ROM). The swine flu plaintiffs' steering committee created a five-volume trial handbook.⁶⁹ Steering committees may negotiate extensive protocols covering the documents' authenticity and admissibility,⁷⁰ making their packages even more user-friendly.

Defendants have vigorously fought information sharing, often arguing that privilege or trade secrets require that discovery remain confidential.⁷¹ Unless the plaintiff's attorney conducts discovery with the purpose of using the information in a later case,⁷² however, courts generally view evidence sharing as consistent with the efficient administration of justice.⁷³

In addition to sharing evidence, litigation groups support individual lawyers in several ways. Some, such as the MER/29 group, have held "schools" to educate individual plaintiffs' lawyers on how to try their cases.⁷⁴ Some litigation groups have appeared as amici curiae on legal issues common to their mass tort.⁷⁵ ATLA's L-tryptophan group researched jurisdictional issues, located a laboratory equipped to analyze L-tryptophan pills, retained a research organization to explore

fellow group members." Troutwine, *supra* note 52, at 25; see also Richard L. Marcus, *Apocalypse Now?*, 85 Mich. L. Rev. 1267, 1288 (1987) (stating that "[i]nformation sharing among plaintiffs' lawyers has become a widespread feature of the contemporary litigation landscape").

69. Rheingold, *Litigation Groups*, *supra* note 42, at 8.

70. See, e.g., *In re L-tryptophan Litigation*, MDL No. 865, Order No. 29 at 1 (D.S.C. Feb. 24, 1994) (approving stipulation as to foundation for certain documents, including authenticity and applicability of business records hearsay exception).

71. See Jonathan Kirsch, *Evidence-Sharing*, Cal. Law., June 1985, at 19, 22; Gary L. Wilson, Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 Wis. L. Rev. 1055, 1059; see also, Rich Arthurs, *Defendants Fight Back on Data-Sharing*, Legal Times, July 16, 1984, at 1 (describing Ford Motor Company's attempt to use trade secret protection to prevent plaintiffs' attorneys from sharing crash test data).

72. See *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973); see also Damon Darlin, *Lawyers Who Won Verdicts in Rely Trials Are Selling Their Evidence*, *Angering P&G*, Wall St. J., Dec. 20, 1982, at 19 (concerning sale of information for profit by plaintiffs' attorneys); David Ranii, *Lawyer Cited in Document Sale*, Nat'l L.J., July 18, 1983, at 10 (same).

73. See, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (noting with regard to an ATLA litigation group that "[e]fficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved"); see also Kirsch, *supra* note 71, at 22, 86 (commenting from plaintiffs' perspective on efficiency of evidence sharing and arguing that it violates no legal or ethical duties); Wilson, *supra* note 71, at 1060-64 (noting that courts generally approve discovery sharing).

74. Complex Litigation Project, *supra* note 4, at 12; Rheingold, *The MER/29 Story*, *supra* note 57, at 131. Similar schools have been held in the Dalkon Shield and swine flu litigations. Rheingold, *Litigation Groups*, *supra* note 42, at 8.

75. Rheingold, *Litigation Groups*, *supra* note 42, at 7.

medical and scientific aspects of the claims,⁷⁶ and conducted focus group jury studies.⁷⁷ In the breast implant litigation, plaintiffs' counsel devised a "Master Complaint," filed in the Multi-District Litigation, and a "Complaint and Adoption by Reference," to be filed by individual plaintiffs in whichever federal district court they chose.⁷⁸ The individual plaintiff's counsel fills in blanks with information such as the plaintiff's name and dates of implantation surgery, checks off entities from a list of thirty-five potential defendants, and "adopts by reference" claims from a list of twenty-eight potential causes of action asserted in the Master Complaint.⁷⁹

There is something inexorable about plaintiffs' coordination in mass tort litigation. It bubbles up from attorneys for the collective strength it brings. It filters down from judges for the coherence it imposes. And bench and bar alike are drawn to its efficiency.⁸⁰ Perhaps it is simply a manifestation of Americans' long-observed urge to associate.⁸¹

Perhaps, too, organization of plaintiffs' groups is driven by the same forces that drive the formation of large law firms, among them, specialization and economies of scale. Plaintiffs' personal injury lawyers

76. See ATLA's *L-tryptophan Group Provides Model for National Litigation Efforts*, ATLA Advoc., Mar. 1993, at 11.

77. Bill Trine, *Remarks From Your Chair*, Newsl. of the ATLA L-tryptophan Litig. Group, Oct. 1993, at 2 (on file with the authors).

78. Aaron M. Levine, *Fundamental Issues in Litigating Breast Implant Cases*, in *Litigating Breast Implant Cases*, at 15, 53-86 (PLI Litig. & Admin. Practice Course Handbook Series No. H-451, 1992). Mr. Levine is a member of both the Plaintiffs' National Steering Committee and the Plaintiffs' Lead Counsel Committee in the breast implant litigation. *Id.* at 42-43.

79. *Id.* at 81-86.

80. While efficiency is part of coordination's allure to plaintiffs' attorneys, it matters little to plaintiffs themselves, most of whom pay counsel by contingent fee. It is the attorney who has the economic incentive to seek efficiency in group effort. In contrast, because defendants generally pay counsel hourly fees, it is the defendants themselves, rather than their lawyers, who have the economic incentive to favor efficiency.

On the interest of judges in aggregating mass litigation to minimize unnecessary drudgery, and on the possibility that litigants and lawyers may sometimes prefer delay and inefficiency, see Peterson & Selvin, *supra* note 19, at 230-33; see also Lea Brilmayer, *Comment on Peterson and Selvin*, 54 *Law & Contemp. Probs.* 249 *passim* (1991) (raising questions about judges' interests in whether cases are aggregated).

81. The observation belongs to de Tocqueville:

Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds Whenever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

2 Alexis de Tocqueville, *Democracy in America* 128-29 (Bowen ed. 1862). Indeed, as Professor Yeazell points out, one form of collective litigation in the United States is that pursued by voluntary organizations such as the National Association of Manufacturers, the National Council of Churches, the American Mining Congress and labor unions. Yeazell, *supra* note 3, at 62.

often feel quite comfortable handling the damages phase of a mass tort case—proving the extent of injury to their own clients. The liability phase, however, may involve complex science, language barriers, and hundreds of thousands of documents. An individual case may not warrant the time to develop a sophisticated position on complex liability issues. An individual lawyer may in any event lack the requisite expertise. Organization allows the pooling of resources and the assignment of responsibilities to those best equipped to handle them.⁸² One leading plaintiffs' lawyer commented over a decade ago on the gravitation toward coordination:

Whereas in the first two decades of groups there were perhaps only six that ran well and made achievements, it is easy to predict that there will be many more in the near future. The courts are consolidating litigation to diminish their own burdens and thereby bringing plaintiff's groups into existence, willingly or otherwise. Manufacturers are putting out more bad products that cause widespread injury; the high costs of handling a product case and the increased expertise needed to develop one properly drive plaintiff's lawyers together. No longer can each lawyer afford the time and money to become an expert in one case.⁸³

Recent developments have confirmed his prediction.

Consider, for example, the Twin Towers bombing litigation. The lawsuits began immediately after the 1993 terrorist bombing of the World Trade Center. Over the course of a year, 126 personal injury suits were filed, raising 294 claims; 17 property damage suits were filed, raising 159 claims, mostly for cars damaged in the bomb-collapsed garage; and 31 business interruption suits were filed, raising 194 claims by companies with offices in the World Trade Center.⁸⁴ One of the plaintiffs' attorneys contacted all of the others and convened an organizational meeting, which over fifty lawyers attended. By the time of the first court conference in the litigation, the group had tentatively formed a plaintiffs' steering committee and designated a liaison attorney.⁸⁵ At the hearing, the judge expressed a clear preference for coordination, telling the gathered throng of eighty lawyers, "We have to have coordination to avoid wasting your time and my time."⁸⁶ Among other things, the duplicative papers that would be generated in the absence of coordination "would be anti-ecological."⁸⁷

82. This theory is borne out by the arrangement of the South Carolina firm with its affiliated counsel in the asbestos litigation. See *supra* note 43 and accompanying text.

83. Rheingold, *Litigation Groups*, *supra* note 42, at 12-13. Mr. Rheingold has been among plaintiffs' lead counsel in, among others, the Dalkon Shield, MER/29, L-tryptophan and swine flu litigations.

84. Wise, *supra* note 50, at 5.

85. *Id.* at 1.

86. *Id.*

87. *Id.*

The lawyers thus set about finalizing their steering committee plan, circulating it to all plaintiffs' counsel and submitting it to the court for approval.⁸⁸

Notwithstanding the benefits of coordination, plaintiffs' lawyers usually insist on retaining ultimate control over their individual cases.⁸⁹ It is interesting to note that in the asbestos litigation, Plaintiffs' Liaison Counsel, which represented roughly 18,000 plaintiffs, supported multidistrict litigation consolidation of asbestos actions, but a number of individual plaintiffs' lawyers registered their opposition.⁹⁰ The tension between efficient coordination and individual case management results in a litigation control structure that neither forgoes centralized control nor deprives individual lawyers of the power to shepherd their own cases. At the hub of the plaintiffs' power structure, control is tightly held by a small group, in part because "to succeed, [plaintiffs'] groups need a lawyer or a very small group of

88. Any objector to the plan would be given an opportunity to be heard before the court approved it. *Id.* at 5.

The most impressive recent display of coordinated clout in mass tort litigation was targeted at the tobacco industry. Undeterred by previous setbacks for tobacco plaintiffs, a group of powerful plaintiffs' attorneys joined forces to file a products liability class action on behalf of smokers. Andrew Blum, *Tobacco Fight Grows Hotter: An Alliance of Plaintiffs' Firms Tries New Tactics To Battle Big Tobacco*, Nat'l L.J., April 18, 1994, at A6 [hereinafter Blum, *Tobacco Fight*]; Claudia MacLachlan, *Tobacco Foes Force Industry Showdown*, Nat'l L.J., May 2, 1994, at A1, A21; see also David Ranii, *New Group Takes Aim At the Tobacco Industry*, Nat'l L.J., Feb. 11, 1985, at 4 (describing formation of an earlier group of tobacco plaintiffs' lawyers). The team includes many of the nation's leading plaintiffs' lawyers—San Francisco's Melvin Belli, Louisiana's Wendell Gauthier and Russ Herman, Cincinnati's Stan Chesley, Albuquerque's Turner Branch, and Mississippi's Don Barrett. *Id.*; see also *The 1994 Power List*, Nat'l L.J., Apr. 4, 1994, at C6, C8 (including Gauthier and Chesley among the nation's hundred most powerful lawyers). Barrett commented on the significance of team effort: "The fact that so many of the important plaintiffs' firms nationally have now joined this fight in my opinion tips the scales in favor of the plaintiffs in cigarette litigation." Blum, *Tobacco Fight*, *supra*, at A7. Each of 40 firms agreed to contribute \$100,000 toward expenses, yielding a plaintiffs' war chest of \$4 million. Andrew Blum, *\$4M Pledged to Fight Nicotine*, Nat'l L.J., May 2, 1994, at A4. The group is headed by a 12 member Plaintiffs' Executive Committee, chaired by Mr. Gauthier. *Id.*

89. See Bromberg & Slowinski, *supra* note 4, at 385-86; Rheingold, *The MER/29 Story*, *supra* note 57, at 125; see also Transrud, *Joinder Alternatives*, *supra* note 4, at 811 ("One impediment to cooperation is the suspicion, many times held by the widely-dispersed lawyers involved in such cases, that coordination will cause them to lose control of their cases, lose fees, or suffer professionally."). Thus, plaintiffs' groups are typically less effective at controlling individual cases than they are at coordinating discovery and disseminating information. See Rheingold, *Litigation Groups*, *supra* note 42, at 3-9.

90. See *Case Management: Judicial Panel on Multidistrict Litigation*, Asbestos Litig. Rep. (Andrews Pubs.), at 22766 (Apr. 5, 1991); Bromberg & Slowinski, *supra* note 4, at 392. Subsequently, both the Plaintiffs' Steering Committee and the independent plaintiffs moved unsuccessfully for remand of all the MDL asbestos cases. Bromberg & Slowinski, *supra* note 4, at 393. The L-tryptophan litigation similarly saw some plaintiffs' lawyers oppose both class certification and MDL.

lawyers with enough driving force to keep the group operating."⁹¹ The tightness of the hub allows for coherent planning, but precludes detailed control of individual cases. Thus, modern mass tort litigation frequently sees individual plaintiffs' claims managed by individual lawyers in close consultation with and by direction from a central organ, such as an ATLA litigation group or a court-appointed steering committee or lead counsel.⁹² Coordination on these terms among the plaintiffs' bar in mass tort litigation will continue to grow. On this, both plaintiffs' lawyers⁹³ and defense lawyers⁹⁴ agree.

3. Equivalence of Litigation Control Structures

What is most interesting about the evolution of litigation control structures in modern mass tort cases is that plaintiffs' counsel and defense counsel—to the horror of each, perhaps—have come to resemble each other. What once may have been a monolithic defense firm able to manage every detail of a lawsuit from one location, due to the necessities of modern multijurisdictional mass tort litigation, has evolved into a lead counsel with oversight responsibilities for multiple local counsel. And what once may have been an individual plaintiff's lawyer with plenary control over an individual client's case, has evolved due to the very same necessities into one of multiple local plaintiffs' lawyers handling the details of case management but accepting information from and oversight by a central organ. In the typical mass tort litigation, both the plaintiffs and the defense thus organize themselves in a hub-and-spoke formation. With the involve-

91. Rheingold, *Litigation Groups*, *supra* note 42, at 2.

92. A newsletter of the ATLA L-tryptophan Litigation Group described the plaintiffs' coordination in that litigation as "the greatest example of information and work sharing in the history of the United States civil justice system." *Introductory Comments*, Newsl. of the ATLA L-tryptophan Litig. Group, *supra* note 77, at 1. While emphasizing the control and direction of that litigation by the plaintiffs' hub—both the ATLA litigation group and an MDL Plaintiffs' Steering Committee—the newsletter also makes it clear that each individual plaintiff's lawyer continues to manage each case. It offers, for example, this warning against relying too heavily on the steering committee: "Remember—it is the responsibility of individual plaintiff's counsel to contact and retain experts for all issues!" *Discovery*, Newsl. of the ATLA L-tryptophan Litig. Group, *supra* note 77, at 4.

93. See, e.g., *ATLA Guide to Litigation Groups*, Trial, July 1991, at S1, S2 ("Within the past three years, the number and variety of litigation groups has grown tremendously. New groups are doubtless being formed as you read this . . ."); Rheingold, *Litigation Groups*, *supra* note 42, at 12 ("[I]t is easy to predict that there will be many more [successful plaintiffs' groups] in the near future."); Troutwine, *supra* note 51, at 25 ("Working together and fully sharing research and discovery lend another futuristic element to this litigation. Indeed, cooperation must become more common as we enter the next century.").

94. One defense-oriented newsletter, for example, bewailed the fact that manufacturers are falling behind the coordinated plaintiffs' bar in product liability litigation, and that "[t]here can be no doubt that the plaintiffs' bar will continue to become even more well-coordinated." Malcolm E. Wheeler, *Defendants Confront Onerous Pretrial Tactics*, *Leader's Product Liab. L. & Strategy*, Jan. 1993, at 1, 4.

ment of a plaintiffs' litigation group, steering committee or other central authority, plaintiffs enjoy (or suffer) the same litigation control structure for centralized strategizing and information-gathering as that practiced by the defense. And with the involvement of local counsel in multiple jurisdictions, defendants enjoy (or suffer) the same litigation control structure for local case management as is practiced by plaintiffs. As one plaintiffs' lawyer commented, litigation groups create "an ad hoc plaintiffs' national law firm."⁹⁵

II. THE USE OF DEPOSITION TESTIMONY IN SUBSEQUENT ACTIONS INVOLVING DIFFERENT PARTIES

The problem with using former testimony, in general, is that it is hearsay.⁹⁶ This is not so, of course, where the former testimony is used for impeachment as a prior inconsistent statement,⁹⁷ or where the former testimony is offered not for its truth but simply to prove that it was said, as for example in a witness's subsequent perjury trial.⁹⁸ In this Article, however, we concern ourselves with the introduction of former testimony to prove the truth of the matter asserted. In this context, introduction of the testimony requires a hearsay exception. Courts, legislators and rulemakers, wary of allowing testimony to be used against a party who cannot cross-examine the witness, have restricted the use of former testimony to ensure accuracy and fairness.

At common law, testimony from a prior proceeding could not be used unless both the party offering the testimony and the party against whom the testimony was offered had been parties to—or in privity with parties to—the prior proceeding.⁹⁹ The rule thus encompassed

95. Ranii, *Plaintiffs' Bar*, *supra* note 42, at 9.

96. Most courts and commentators today classify former testimony as hearsay, and treat it within the rubric of exceptions to the rule against hearsay. *See, e.g.*, *Dykes v. Raymark Indus.*, 801 F.2d 810, 815 (6th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Lloyd v. American Export Lines*, 580 F.2d 1179, 1184-85 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978); *see also* 2 McCormick, *Evidence* § 301, at 305 (4th ed. 1992) (classifying former testimony as hearsay, but noting Wigmore's contrary view). Earlier, some had taken the view that former testimony was non-hearsay because it met the requirements of oath and cross-examination. *See, e.g.*, *Minneapolis Mill Co. v. Minneapolis & St. L. Ry.*, 53 N.W. 639, 642 (Minn. 1892); 5 Wigmore, *Evidence* § 1370 (Chadbourn rev. 1974).

97. *See* Fed. R. Evid. 613. Federal Rule of Evidence 801(d)(1)(A) goes further, defining as "not hearsay" a witness's prior inconsistent statement if given under oath at a proceeding. Thus, the federal rule allows such former testimony of a live witness to be used as substantive evidence, not merely for impeachment. *See* Fed. R. Evid. 801(d) advisory committee's note on 1972 Proposed Rules.

98. *See* *State v. Wykert*, 199 N.W. 331 (Iowa 1924).

99. *E.g.*, *Metropolitan St. Ry. v. Gumby*, 99 F. 192, 198 (2d Cir. 1900) (finding no privity between infant and mother with different causes of action); *Atlanta & West Point R.R. v. Venable*, 67 Ga. 697, 700 (1881) (finding privity between mother and child where both actions arose from common cause); *Morgan v. Nichol*, 15 L.T.R. 184 (C.P. 1866) (not admitting evidence because father held not to be in privity with son);

both an opportunity-to-examine component (testimony was usable only against one who was a party to the prior proceeding) and a mutuality component (testimony was usable only by one who was a party, and against whom the same testimony could therefore be used). In time, the mutuality aspect of the common law rule disappeared, but the rule concerning the party against whom the testimony was offered remained intact.¹⁰⁰ In other words, testimony could not be used against one who was neither a party nor a privy to the prior proceeding, but it did not matter whether the party offering the testimony had been present in the prior proceeding.¹⁰¹ Courts thereafter extended the rule to allow the use of prior-action testimony against representatives and successors in interest to a prior party.¹⁰²

In federal court, Federal Rule of Evidence 804(b)(1) and Federal Rule of Civil Procedure 32(a)(4) govern the use of prior-action testimony. The two rules overlap but offer independent bases for the admission of former testimony.¹⁰³ As discussed below, each of these rules appears to allow the use of prior-action testimony only against those who were present or in privity with those who were parties to the prior action. Courts, however, generally allow the use of prior-action testimony of an unavailable witness¹⁰⁴ as long as there was an adverse party who had an opportunity and similar motive to develop or challenge the prior testimony.¹⁰⁵

see Mark Lawrence, Note, *The Admissibility of Former Testimony Under Rule 804(b)(1): Defining a Predecessor in Interest*, 42 U. Miami L. Rev. 975, 978 & n.13 (1988).

100. See *Rumford Chem. Works v. Hygienic Chem. Co.*, 215 U.S. 156, 160 (1909).

101. See Lawrence, *supra* note 98, at 979-80.

102. See, e.g., *Virginia & W. Va. Coal Co. v. Charles*, 251 F. 83, 116-17 (W.D. Va. 1917) (admitting deposition of deceased deponent), *aff'd*, 254 F. 379 (4th Cir. 1918), *error dismissed*, 252 U.S. 569 (1920); see Lawrence, *supra* note 98, at 980-81.

103. See 4A James W. Moore et al., *Moore's Federal Practice* ¶ 32.02[1] (2d ed. 1994); Coffey, *supra* note 16, at 160.

104. Unavailability under Rule 804 includes, among other things, absence coupled with inability to compel attendance by process or other reasonable means. Fed. R. Evid. 804(a). Rule 32's notion of unavailability includes distance greater than 100 miles from the place of trial, and inability to procure attendance by subpoena. Fed. R. Civ. P. 32(a)(3). Because Rule 32 permits the use of an unavailable witness's deposition for any purpose but severely limits the use of an available witness's deposition, that rule functions to a large extent, like Rule 804(b)(1), as a hearsay exception for the testimony of an unavailable declarant. A deposition of an available witness generally is usable only for impeachment, Fed. R. Civ. P. 32(a)(1), or as an admission, Fed. R. Civ. P. 32(a)(2).

105. As Wright and Miller state:

[T]he courts have come increasingly to recognize that the real test is whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent now has. On this view a deposition may even be offered against one who was not a party to the earlier action if there were parties to it who had the same interest in cross-examination as the present party has.

The issue of prior-action depositions, by definition, arises only if there is a subsequent action separate from the prior one. Viewed another way, an attempt to use deposition testimony against one who was not a party to the action in which the deposition was taken necessarily presupposes the existence of a party to the present action who was not a party to the deposition action. Thus, the issue does not arise where the claims are part of a single class action.¹⁰⁶ Nor does it apply to claims aggregated through joinder under Federal Rules of Civil Procedure 19 and 20, through intervention under Rule 24 or through consolidation for all purposes under Rule 42. It does not arise where the prior and subsequent actions have been consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407, or where cross-noticing of the deposition has been accomplished to allow parties to related actions to participate in, object to and benefit from the discovery.¹⁰⁷ In each of these situations, claims are formally aggregated, at least for purposes of pretrial discovery. A party objecting to the use of a deposition taken within such a framework cannot properly consider himself a non-party to the action in which the deposition was taken.

Frequently, however, suits are filed in mass tort litigation that are not formally aggregated with others. Although a few mass tort litigations have been allowed to proceed as class actions,¹⁰⁸ and the trend appears to favor increasing use of the device,¹⁰⁹ courts overwhelmingly have rejected class certification of mass tort claims.¹¹⁰ Joinder of

8A Charles A. Wright et al., *Federal Practice and Procedure* § 2150 (2d ed. 1994) (footnotes omitted); see also Coffey, *supra* note 16, at 167 ("The predominant view among federal courts requires only a substantial identity of issues and the presence of an adversary with the same or a similar motive to cross-examine . . .").

106. See Fed. R. Civ. P. 23.

107. On cross-noticing, see *infra* text at notes 180-83.

108. *E.g.*, *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) (upholding class certification in oil refinery explosion litigation), *reh'g en banc granted*, 990 F.2d 805 (5th Cir. 1993); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (upholding class certification in Dalkon Shield litigation); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986) (affirming certification of an opt-out Rule 23(b)(3) class for injured asbestos workers); *In re Asbestos Sch. Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984) (establishing a Rule 23(b)(3) national class for school districts claiming asbestos property damage), *vacated in part, aff'd in part sub nom. In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying nationwide class of Vietnam veterans), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

109. See *A.H. Robins*, 880 F.2d at 729-38; M.C.L.3d (Tentative Draft), *supra* note 46, § 33.242.

110. *E.g.*, *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (reversing district court's certification of a Rule 23(b)(1)(B) mandatory national punitive damages class and statewide compensatory damages class), *cert. denied*, 459 U.S. 1171 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.) (reversing district court's certification of a Rule 23(b)(1)(B) no-opt-out class for everyone seeking damages for injuries from collapse of Kansas City Hyatt skywalk), *cert. denied*, 459 U.S. 988 (1982); *In re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985); see 7B Charles A. Wright et al., *Federal Practice and Procedure*

parties with mass tort claims under Rule 19 or 20 is easier to achieve than a class action, but accomplishes less because it rarely reaches all of the parties involved in a mass tort dispute.¹¹¹ The same is true of Rule 24 intervention.¹¹² Consolidation pursuant to Rule 42 involves only actions pending within a single jurisdiction,¹¹³ and therefore is unlikely to render a dispersed mass tort litigation immune from the issue of prior-action depositions.

The device most often and most successfully used to achieve formal aggregation of mass tort claims is multidistrict litigation ("MDL").¹¹⁴ Actions consolidated by the Judicial Panel on Multidistrict Litigation are treated as one for pretrial purposes, including discovery.¹¹⁵ Therefore, MDL consolidation reduces the occasions for the question of the admissibility of prior-action depositions to arise. Because MDL can-

§§ 1783, 1805 (2d ed. 1986); Complex Litigation Project, *supra* note 4, at 34-44. *But see* Paul D. Rheingold, *Tort Class Actions: What They Can and Cannot Achieve*, Trial, Feb. 1990, at 59, 63 (acknowledging setbacks for mass tort class actions, but concluding that "the trend in the courts seems toward the use of mandatory classes in tort actions as a means of disposing of mass litigation areas that threaten to clog the courts").

Much of the reluctance to certify class actions in mass tort cases can be traced to a comment by the Advisory Committee on Civil Rules in its note on the 1966 amendments to Rule 23:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966). For an account of the discussions leading to this position by the Advisory Committee, see Resnik, *supra* note 1, at 7-16.

Plaintiffs' lawyers themselves sometimes oppose class certification. A chairperson of the L-tryptophan plaintiffs' group, for example, filed an affidavit opposing Rule 23(b)(3) class certification: "The associated group of plaintiffs' counsel representing tryptophan victims have voted, without dissent, to favor voluntary organization of these suits and to eschew a class action as adding an unnecessary layer of organization." Affidavit of Paul D. Rheingold at 2, *Rapoport v. Showa Denko America, Inc.*, No. JH-90-518, (D. Md. Aug. 28, 1990).

111. *See* Complex Litigation Project, *supra* note 4, at 31-33. Given the dispersal of most mass tort claims, the requirement that joined parties satisfy jurisdiction and venue requirements dooms such joinder to incompleteness.

112. *See id.* at 33-35.

113. *See* Fed. R. Civ. P. 42(a). Interjurisdictional consolidation is possible by Rule 42(a) consolidation following venue transfer under 28 U.S.C. § 1404 or 28 U.S.C. § 1406. More likely and more appropriately, interjurisdictional consolidation is achieved by the MDL mechanism pursuant to 28 U.S.C. § 1407.

114. *See* 28 U.S.C. § 1407; Complex Litigation Project, *supra* note 4, at 28-31; Schotland, *supra* note 11, at 22; Trangsrud, *Joinder Alternatives*, *supra* note 4, at 803-09. Mass tort litigations consolidated for MDL handling include *In re Asbestos Prods. Liab. Litig.*, Nos. 875, C-92-3137-DLJ, C-92-2930-DLJ, C-92-2929-DLJ, 1993 WL 463301, at *1 (J.P.M.L., Nov. 2, 1993); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992); *In re A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F. Supp. 540 (J.P.M.L. 1975).

115. 28 U.S.C. § 1407.

not reach state court actions, however, and because MDL may include actions filed after an important deposition has been taken,¹¹⁶ the issue sometimes arises even in mass tort litigation consolidated under § 1407. In sum, the issue may come up with regard to mass tort litigation where there has been no formal aggregation, cases outside the jurisdiction where there has been intrajurisdictional consolidation, state cases where MDL consolidation of federal cases has been ordered, and cases filed after the relevant discovery has been taken.¹¹⁷

A. Federal Rule of Evidence 804(b)(1)

1. Statutory Language and Legislative History

In looking for a hearsay exception, we naturally turn first to the Federal Rules of Evidence. Rule 804(b)(1) excepts certain former testimony from the hearsay rule if the declarant is unavailable:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and simi-

116. On the other hand, a court may order that discovery already taken in the MDL shall be available and usable in "tag-along" cases, i.e., cases filed after the initial MDL consolidation and then transferred into the MDL. See M.C.L.3d (Tentative Draft), *supra* note 46, § 31.132.

117. The issue of prior-action depositions in mass tort cases will arise less often if the American Law Institute's recent complex litigation proposals become law. See Complex Litigation Project, *supra* note 4, at 340-44. The proposals won final approval at the American Law Institute's 1993 annual meeting. See *ALI Finishes Complex Litigation Project, Makes Progress on Various Restatements*, 61 U.S.L.W. 2709 (May 25, 1993).

The ALI's Complex Litigation Project suggests a comprehensive system, based largely on the existing MDL model, for aggregation of multiparty, multiforum actions. The proposals extend beyond current aggregation mechanisms in that, among other things, they would allow intersystem consolidation. Thus, they would allow in appropriate cases transfer from state court to federal court, from federal court to state court, or from one state to another. See Complex Litigation Project, *supra* note 4, at 539-674; Symposium, *American Law Institute Complex Litigation Project*, 54 La. L. Rev. 835 (1994) (discussing a number of the Complex Litigation Project's proposed reforms). Some have commented, however, that Congress "is not likely to enact [the ALI proposals] in the foreseeable future." William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689, 1699 (1992); see also Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 La. L. Rev. 977, 977 (1994) ("[T]he Complex Litigation Project seems destined to represent a massive, engaging intellectual exercise rather than a pragmatic blueprint that Congress will enact for the conduct of complex litigation.").

A more modest proposal, the Uniform Transfer of Litigation Act (UTLA), may enjoy a greater chance of passage than the ALI's rather revolutionary suggestions. See Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 La. L. Rev. 897, 898 (1994). The UTLA, by allowing greater consolidation of related cases, would likewise reduce the occasions for addressing the issue of prior-action depositions.

lar motive to develop the testimony by direct, cross, or redirect examination.¹¹⁸

The rule's language seems clear enough. It appears to say that the former testimony hearsay exception applies "if the party against whom the testimony is now offered, or . . . a predecessor in interest"¹¹⁹ had the chance to examine the witness. "Predecessor in interest," by usual definition, means one who precedes another in ownership or control of property.¹²⁰

The rule's legislative history does nothing to undercut the narrow, privity-focused construction suggested by the rule's "predecessor in interest" language.¹²¹ As originally promulgated by the Supreme Court, the rule required only that some litigant at a former proceeding had a similar motive, interest and opportunity to develop the testimony. It did not require that the party against whom the testimony is sought to be used, or a predecessor in interest, was present at the former proceeding. Any party with "motive and interest similar" sufficed. The House of Representatives amended the rule by adding the "predecessor in interest" requirement, explaining that it would be unfair to charge a subsequent party with the possibly inadequate cross-examination conducted by a prior party's lawyer.¹²² The Senate ac-

118. Fed. R. Evid. 804(b)(1). The former testimony exception was included in Rule 804, which requires unavailability, rather than in Rule 803, which does not require unavailability, because of the preference for live testimony to allow assessment of demeanor. See Fed. R. Evid. 804 advisory committee's note. On the preference for live testimony, the tentative draft Manual for Complex Litigation (Third) notes not only the inability of jurors to consider a deponent's demeanor, but also the "stultifying effect" that reading deposition testimony can have on jurors. M.C.L.3d (Tentative Draft), *supra* note 46, § 22.36.

119. Fed. R. Evid. 804(b)(1).

120. Black's Law Dictionary defines "predecessor" as the "correlative of successor." Black's Law Dictionary 1177 (6th ed. 1990). "Successor in interest," in turn, is defined as "[o]ne who follows another in ownership or control of property." *Id.* at 1431. See *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1523 (E.D. Wis. 1992); Lawrence, *supra* note 98, at 976 n.7.

121. For fuller discussion of Rule 804(b)(1)'s legislative history, see Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. Rev. 295, 298-99, 311-18 (1989); Coffey, *supra* note 16, at 162-64; Lawrence, *supra* note 99, at 981-85.

122. The House Committee added the language in italics and omitted the bracketed language:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of *the same or* another proceeding, [at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.] *if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

See 56 F.R.D. 183, 321 (1973), Pub. L. No. 93-595, 88 Stat. 1926, 1942 (1975), quoted in Weissenberger, *supra* note 121, at 313 n.96.

The House Committee's report explained the change:

cepted the House amendment but noted, to the dismay and confusion of future commentators and practitioners, that the Senate did not see much difference between the Supreme Court version and the House version.¹²³

2. Judicial Interpretation

The rule's language appears to exclude the use of prior testimony against one who was neither named nor noticed in the prior action, in that it requires that the party against whom the testimony is offered, or a "predecessor in interest," have had an opportunity to develop the testimony. The courts, however, have not read the rule so literally. Rather, most have interpreted "predecessor in interest" broadly to permit the use of former testimony provided the witness was examined by one whose motive in developing the testimony was similar to that of the person against whom the testimony is being offered.¹²⁴

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

H.R. Rep. No. 618, 93d Cong., 1st Sess. 15 (1975).

123. "Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment." S. Rep. No. 1277, 93d Cong., 2d Sess. 28 (1974). One commentator, emphasizing this legislative history, has decried the "extraordinary judicial manipulation" of Rule 804(b)(1)'s "predecessor in interest" language. Weissenberger, *supra* note 121, at 299.

124. *E.g.*, Dykes v. Raymark Indus., 801 F.2d 810, 816 (6th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); Hannah v. City of Overland, 795 F.2d 1385, 1390-91 (8th Cir. 1986); Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1160-61 (4th Cir. 1986); Murphy v. Owens-Illinois, Inc., 779 F.2d 340, 343-44 (6th Cir. 1985); Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1294-95 (6th Cir. 1983), *cert. denied*, 467 U.S. 1253 (1984); Lloyd v. American Export Lines, 580 F.2d 1179, 1184-87 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978); *see also* Lawrence, *supra* note 99, at 977 ("Despite the term 'predecessor in interest' in Rule 804(b)(1) and the Rule's legislative history, most federal courts employ analytical approaches that in effect ignore the predecessor-in-interest requirement.") (citation omitted).

The similar motive requirement is by no means an empty one. *See* United States v. Taplin, 954 F.2d 1256, 1258-59 (6th Cir. 1992) (rejecting government's use against defendant of co-defendant's testimony at evidentiary suppression hearing, because defendant lacked opportunity and motive to develop the co-defendant's testimony); *see also* United States v. Salerno, 112 S. Ct. 2503, 2507 (1992) (finding grand jury testimony inadmissible against government under Rule 804(b)(1) unless defendant shows government had "similar motive").

In *Dykes v. Raymark Industries*,¹²⁵ for example, an asbestos plaintiff sought to use the prior-action deposition of Johns-Manville's former medical director, Kenneth Smith.¹²⁶ The plaintiff sought to use the deposition against defendant National Gypsum on the issue of the asbestos industry's medical knowledge, even though neither the plaintiff nor National Gypsum had been party to the prior action. The Sixth Circuit, finding that Johns-Manville was a "predecessor in interest" of National Gypsum for purposes of Rule 804(b)(1), upheld the deposition's admissibility. "[P]redecessor in interest is not limited to a legal relationship, but is also to be determined by . . . whether the defendant had an opportunity and similar motive to develop the testimony by cross-examination."¹²⁷

Another court, however, felt constrained by the rule's legislative history to follow the narrower construction of "predecessor in interest."¹²⁸ That court therefore held a prior-action deposition inadmissible under Rule 804(b)(1), even though a party to the prior action had a similar motive to examine the witness.¹²⁹

B. Federal Rule of Civil Procedure 32(a)

1. Statutory Language

Federal Rule of Civil Procedure 32(a) governs the use of depositions. That rule allows the in-court use of a deposition under certain circumstances "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof."¹³⁰ A deposition may be used for any purpose if the witness is more than 100 miles from the place of trial or otherwise unavailable.¹³¹ The last paragraph of Rule 32(a) specifically addresses the use of prior-action depositions:

125. 801 F.2d 810 (6th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

126. For a discussion of Dr. Smith's deposition and its significance in asbestos litigation, see *supra* text at notes 22-24.

127. *Dykes*, 801 F.2d at 816. Other cases allowing under Rule 804(b)(1) the use of testimony against one who was not a party to the prior action include *Clay*, 722 F.2d at 1294-95, and *Lloyd*, 580 F.2d at 1184-87; see also *King v. Armstrong World Indus.*, 906 F.2d 1022, 1025-26 (5th Cir. 1990) (admitting prior-action deposition against different party under residual hearsay exception, Fed. R. Evid. 804(b)(5)), *cert. denied*, 500 U.S. 942 (1991); *Hannah*, 795 F.2d at 1390-91 (interpreting Rule 804(b)(1) to allow prior testimony against different parties, but denying such use because of dissimilarity of issues); *Lohrmann*, 782 F.2d at 1160-61 (same); *Murphy*, 779 F.2d at 343-44 (same).

128. *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1525-26 (E.D. Wis. 1992).

129. *Id.* at 1526. The court's consideration of Rule 804(b)(1) was superfluous, because the court admitted the deposition testimony under a broad reading of Federal Rule of Civil Procedure 32(a). See *id.* at 1522-24; see also *infra* text at notes 130-34.

130. Fed. R. Civ. P. 32(a).

131. Fed. R. Civ. P. 32(a)(3).

[W]hen an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.¹³²

Thus, the rule allows a prior-action deposition to be used under the same conditions as a present-action deposition,¹³³ as long as the later action involves the same subject matter and "the same parties or their representatives or successors in interest."¹³⁴

Rule 32 functions as an independent hearsay exception. "Representative" is generally defined as interchangeable with "agent," which in turn means a person authorized by another to act for that person.¹³⁵ "Successor in interest" is generally defined as one who follows another in ownership or control of property.¹³⁶

Although Rule 32 purports only to address the use of depositions, courts have interpreted the rule as covering trial testimony as well.¹³⁷ Thus, like Federal Rule of Evidence 804, Rule 32 and its interpretive case law provide a general framework for introducing former testimony.

2. Judicial Interpretation

Like Rule 804, the language of Rule 32 suggests a narrow view of the use of prior-action depositions by limiting such use to subsequent actions that involve "the same parties or their representatives or successors in interest"¹³⁸ and by allowing such use only against one who was "present or represented at the taking of the deposition or who had reasonable notice thereof."¹³⁹ Most courts, however, have read this language broadly to allow the use of depositions where a prior party had a similar motive to develop or challenge the testimony.¹⁴⁰ The Southern District of New York, for example, has held:

132. Fed. R. Civ. P. 32(a)(4).

133. A present-action deposition is usable for any purpose if the witness is unavailable. Fed. R. Civ. P. 32(a)(3). If the witness is available, a deposition generally may be used only for impeachment or as an admission. Fed. R. Civ. P. 32(a)(1)-(2).

134. Fed. R. Civ. P. 32(a)(4).

135. *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1523 (E.D. Wis. 1992) (quoting *Black's Law Dictionary* 676, 32 (5th abr. ed. 1979)).

136. *Id.* (quoting *Black's Law Dictionary* 746 (5th abr. ed. 1979)).

137. *See, e.g., Castilleja v. Southern Pacific Co.*, 445 F.2d 183, 186 (5th Cir. 1971) (comparing depositions and former testimony and finding no distinction under deposition rule).

138. Fed. R. Civ. P. 32.

139. *Id.*

140. *See* 4A James W. Moore et al., *Moore's Federal Practice* ¶ 32.08 (2d ed. 1994); Coffey, *supra* note 16, at 167 ("The predominant view among federal courts requires only a substantial identity of issues and the presence of an adversary with the same or

Where depositions and testimony from a prior trial are sought to be used at a subsequent trial and the issues are substantially the same, and the interest of the objecting party in the prior action was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end.¹⁴¹

Thus, in *Ikerd v. Lapworth*,¹⁴² an automobile accident defendant was allowed to use against the plaintiff (P₂) two depositions from an action earlier brought against the same defendant by P₁, a passenger in P₂'s car. P₂ objected on the ground that the depositions were taken before his case was filed, and therefore he had no opportunity to have his counsel present at the depositions. The court held that "the presence of an adversary with the same motive to cross-examine the deponent and identity of issues in the case in which the deposition was taken with the one in which it is sought to be used" satisfied the rule.¹⁴³

C. State Analogues

A number of states have enacted rules or statutes governing the admissibility of former testimony.¹⁴⁴ In California, for example, the

a similar motive to cross-examine the witness in order to admit prior action depositions in a subsequent action.") (footnote omitted).

141. *Hertz v. Graham*, 23 F.R.D. 17, 22 (S.D.N.Y. 1958).

142. 435 F.2d 197 (7th Cir. 1970).

143. *Id.* at 205. Other cases have similarly allowed deposition use under Rule 32(a) (or under its predecessor, Federal Rule of Civil Procedure 26(d)) notwithstanding the absence of the party from the prior action. *See, e.g.*, *Rule v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 396*, 568 F.2d 558, 568-69 (8th Cir. 1977), *modified on other grounds*, 17 Empl. Prac. Dec. (CCH) § 8409 (8th Cir. 1978); *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1522-24 (E.D. Wis. 1992); *Fullerform Continuous Pipe Corp. v. American Pipe & Constr. Co.*, 44 F.R.D. 453, 455-56 (D. Ariz. 1968); *see also Bankers Trust Co. v. Rhoades*, 108 B.R. 423, 430 (S.D.N.Y. 1989) (granting motion to treat prior-action depositions as if taken in present action, where non-movants included individual shareholders of corporate party to prior action), *adhered to on reh'g*, 111 B.R. 54 (S.D.N.Y. 1990); *Miwon, U.S.A., Inc. v. Crawford*, 629 F. Supp. 153, 154 n.3 (S.D.N.Y. 1985) (allowing use of prior-action deposition where there was substantial overlap of parties to prior and present actions); *George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund*, 359 F. Supp. 1037, 1039 (D. Mass. 1973) (denying use of prior-action deposition in absence of showing of adversary in prior action with like motive to cross-examine), *aff'd*, 493 F.2d 177 (1st Cir. 1974). *But see Alamo v. Pueblo Int'l Inc.*, 58 F.R.D. 193, 194-95 (D.P.R. 1972) (requiring same parties and substantially identical issues).

144. *See* Alaska R. Evid. 804(b)(1) (1979); 17 Ariz. Rev. Stat. R. Evid., 804(b)(1) (1977); Ark. Code Ann. Court Rules, Unif. R. Evid. 804(b)(1) (Michie 1976); Cal. Evid. Code § 1292(3) (West Supp. 1993); Colo. R. Evid. 804(b)(1) (1979); Del. Unif. R. Evid. 804(b)(1) (1980); Fla. Stat. Ann. § 90.804(2)(a) (Harrison 1979); Haw. R. Evid. 804(b)(1) (1980); Iowa R. Evid. 804(b)(1) (1983); Me. R. Evid. 804(b)(1) (1975); Mich. R. Evid. 804(b)(1) (1978); Minn. R. Evid. 804(b)(1) (1977); Neb. Rev. Stat. § 27-804(2)(a) (1979); Nev. Rev. Stat. § 51.325 (1971); N.M. R. Evid. 804(b)(1) (1973); N.C. R. Evid. 804(b)(1) (1983); N.D. R. Evid. 804(b)(1) (1977); Ohio Evid. R. 804(B)(1) (1980); Okla. Stat. Ann. tit. 12, § 2804(B)(1) (1980); 42 Pa. Cons. Stat. Ann. §§ 5917, 5934 (Purdon 1982); S.D. Codified Laws § 19-16-30 (1979); Tex. R. Civ. Evid.

broad interpretation given by federal courts to Rule 804(b)(1) has been explicitly embraced and codified. Section 1292 of the California Code of Evidence governs the admissibility of former testimony offered against one who was not a party to the former proceeding.¹⁴⁵ Under section 1292, former testimony may be admissible in a subsequent civil action where the declarant is unavailable as a witness and the issue is such that the party to the action or proceeding in which the former testimony was given had "the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing."¹⁴⁶ The California Assembly's commentary on section 1292 explains that "if one occurrence gives rise to a series of cases involving one defendant and several plaintiffs, section 1292 permits testimony given against the plaintiff in the first action to be used against a different plaintiff in a subsequent action."¹⁴⁷ The Assembly commentary justifies the hearsay exception on the ground that "[t]he trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine the declarant with an interest and motive similar to that of the present adverse party."¹⁴⁸

Elsewhere, however, proponents of prior-action testimony face a tougher battle. In New York, depositions taken in prior proceedings may not be admissible in a subsequent proceeding against a party who was not represented at or given notice of the prior deposition. The New York rule requires identity of parties.¹⁴⁹ The New York rule has

804(b)(1) (1991); Vt. R. Evid. 804(b)(1) (1983); Wash. R. Evid. 804(b)(1) (1978); Wis. R. Evid. 908.045 (1974); Wyo. R. Evid. 804(b)(1) (1977); *see generally* 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1387 (Supp. 1994) (citing state rules, statutes, and cases governing admissibility of former testimony).

145. "Former testimony" includes "testimony given under oath [in a] deposition taken in compliance with law in another action." Cal. Evid. Code § 1290(d) (West Supp. 1993).

146. Cal. Evid. Code § 1292(a)(3) (West Supp. 1993); *see* *Wahlgren v. Coleco Indus.*, 198 Cal. Rptr. 715, 717 (Ct. App. 1984) (holding that depositions of swimming pool manufacturer's officers, taken in prior unrelated action, were properly excluded from personal injury action against manufacturer of pool slide, as pool manufacturer and slide manufacturer did not have similar interests and motives in cross-examining deponent).

While testimony that meets the requirements of California's section 1292 is not inadmissible as hearsay simply because it was uttered in a prior action, it may of course be excluded on other grounds. Generally, "[t]he admissibility of former testimony . . . is subject to the same limitations and objections as though the declarant were testifying at the hearing." Cal. Evid. Code § 1292(b) (West Supp. 1993).

147. Cal. Evid. Code § 1292 (West 1966) cmt.

148. *Id.*; *see also* *Moore v. American United Life Ins. Co.*, 197 Cal. Rptr. 878, 889-90 (Ct. App. 1984) (noting that where party to prior proceeding had significant motive to cross-examine witness on issues relevant to subsequent action, testimony was more reliable than most evidence admitted under hearsay rule).

149. *See* N.Y. Civ. Prac. L. & R. § 3117(c) (McKinney 1991); N.Y. Civ. Prac. L. & R. § 4517 (McKinney 1992).

not yet been interpreted to allow the use of a prior deposition when a party with the same motive and opportunity to cross-examine was present, although New York case law does not foreclose such an argument.¹⁵⁰

D. *The Fairness Critique and Its Limits*

Not everyone agrees with the dominant rule that deposition testimony of an unavailable witness may be used in a subsequent action against a different party if there was an adversary with opportunity and the same motive to develop the deponent's testimony in the prior case.¹⁵¹ The Ninth Circuit has questioned the fairness of admitting a deposition against a party that did not participate in the cross-examination, given "the possibility that the prior opponent mishandled the cross-examination."¹⁵² Another court has similarly bemoaned the unfairness of allowing deposition testimony from a prior action to be used against a party that was absent from the prior action and therefore lacked opportunity to cross-examine the deponent.¹⁵³

The most thorough and powerful articulation of this critique was offered by Professor Glen Weissenberger.¹⁵⁴ Focusing on Rule 804(b)(1), with particular attention to its legislative history, Professor Weissenberger posits that the "expansive" approach to the admission of prior testimony elevates accuracy over fairness and the "restrictive" approach elevates fairness over accuracy.¹⁵⁵ He traces the former testimony exception to its earliest historical origins, and finds fairness rather than accuracy at the core: "The common-law adversarial system championed the axiom that a fair trial required each litigant to be responsible for the development of his own evidence, and consequently fairness principles of estoppel, rather than accuracy, justified the earliest receipt of evidence."¹⁵⁶ Professor Weissenberger concludes that in enacting Rule 804(b)(1), Congress "elevated policies of fairness over a prevailing trend toward accuracy," and courts, there-

150. See *Healy v. Rennert*, 173 N.E.2d 777, 779-80 (N.Y. 1961); *Overseas Nat'l Airways, Inc. v. General Elec. Co.*, 462 N.Y.S.2d 984, 988 (Sup. Ct. 1983); *In re Will of Goldberg*, 582 N.Y.S.2d 617, 619 (Sur. Ct. 1992).

151. On the majority rule, see *supra* text at notes 124-29, 138-41. This is the test propounded by and often identified with Dean Wigmore. See 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1388, at 111 (Chadbourn ed. 1974); see also Weissenberger, *supra* note 121, at 309-11 (discussing Wigmore's central role in liberalizing the use of prior-action testimony).

152. *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 n.* (9th Cir. 1982).

153. *Alamo v. Pueblo Int'l Inc.*, 58 F.R.D. 193, 194-95 (D.P.R. 1972).

154. Weissenberger, *supra* note 121.

155. *Id.* at 297-98.

156. *Id.* at 303. "The underlying fairness policy for admitting prior testimony was expressed in an early common-law rule which required absolute identity of the parties and issues in the former and the instant litigation." *Id.* at 306. Although the common law rule required identity of both parties and therefore encompassed both an opportunity-to-examine aspect and a mutuality aspect, Professor Weissenberger's fairness argument is geared primarily to the latter.

fore, should read the rule narrowly to advance adversarial fairness and to respect the legislature's wishes.¹⁵⁷

This fairness concern sometimes leads a court to deny the use of a prior-action deposition against one who was not a party to the prior action.¹⁵⁸ The fairness critique is implicit in courts' greater readiness to allow former testimony into evidence against a party that was also party to the prior proceeding.¹⁵⁹

Embedded in the fairness critique is a powerful assumption worth revisiting in light of developments in the practice of mass tort litigation. It is the assumption of litigation control independence. Proponents assume that an individual litigant and his counsel can and should maintain control over the prosecution or defense of their lawsuit. In holding that a prior-action deposition was admissible only if the parties were identical, one court declared: "The rule is based on an elementary principle of justice towards the party against whom the former deposition is tried to be used."¹⁶⁰ That "elementary principle of justice," unstated by the court, is the principle that each litigant is entitled to control his or her own case. If that principle is given primacy, then the possibility that a different party would conduct an examination differently is dispositive.¹⁶¹ The Ninth Circuit explained the concern well:

157. *Id.* at 335. Professor Weissenberger does not necessarily reject the possibility of improving the rule through amendment. Whether amendment would be beneficial or not, however, he views amendment in the direction of a more expansive approach as compromising or deemphasizing fairness. *Id.* at 335-36.

Of course, "fairness" concerns can tip the other way as well. By jeopardizing the availability of testimony, a narrow reading may deprive a plaintiff or defendant of a key witness who was available to an earlier plaintiff or defendant, resulting in an underinformed second verdict and unfairly inconsistent outcomes. Moreover, multiple examinations and cross-examinations inevitably produce misstatements. If a court allows the use of prior-action testimony against the party that was present in the prior action but not against the party that was absent, the absent party can avail itself of a chance favorable misstatement even though the present party would not be allowed to use favorable testimony from the prior action. In this regard, the fairness issue is reminiscent of the inconsistent verdict problem in offensive nonmutual issue preclusion. See text *infra* at note 191.

158. See *Alamo v. Pueblo Int'l Inc.*, 58 F.R.D. 193, 194-95 (D.P.R. 1972); see also *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 n.* (9th Cir. 1982) (denying use of prior-action deposition because of dissimilarity of issues, and criticizing cases that allow introduction of prior-action testimony based on presence of party with similar motive to cross-examine).

159. See 8A Charles A. Wright et al., *Federal Practice and Procedure* § 2150 (2d ed. 1994) ("Thus, many cases have held that a deposition can be offered against one who was a party to the former suit even though the party now using the deposition was not."); Coffey, *supra* note 16, at 179 ("Courts have admitted almost uniformly depositions or other former testimony into evidence under rule 32(a)(4) and rule 804(b)(1) when the parties are situated in either a P₂ against D₁ or D₂ against P₁ posture, and the issues between the former and subsequent actions are substantially the same.").

160. *Alamo*, 58 F.R.D. at 194-95.

161. *Id.* at 195 ("Different parties and different issues are crucial circumstances that inevitably must alter the substance of the deposition taken.").

Wigmore defends the adequacy of an adversary with the same motive to cross-examine on the ground that "where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end." 5 Wigmore on Evidence § 1388 (4th ed. 1940). A number of the cases cited in the prior paragraph above adopt Wigmore's test. We, however, find it troubling. Not only does the test disregard the "same parties" requirement in Rule 32(a), but it also fails to take into account the possibility that the prior opponent mishandled the cross-examination. When that has happened, we question whether the deposition should be admitted against a party who did not participate in the cross-examination.¹⁶²

In other words, P_2 may have handled the cross-examination more skillfully, more thoroughly, or just plain differently from P_1 , and it is P_2 's prerogative to do so. To deny P_2 the opportunity to conduct her own examination of the deponent, by this view, is to deny P_2 a right that is hers by the very nature of individualistic litigation.¹⁶³

It is interesting to trace historically the individualistic system of litigation that is taken for granted by proponents of the fairness critique. Some trace it to a reaction against the Star Chamber, a powerful English court established in the early sixteenth century.¹⁶⁴ Complainants before the Star Chamber struggled to win the court's attention. Frequently, they did this by asserting widespread, rather than individual, harm. In time, the Star Chamber came to be perceived as tyrannical and abusive. Aiming its substantial power at widespread harm and disorder, the Chamber functioned as an instrument of sometimes hasty and unpopular government action, in marked contrast to the slow, individualized processes of the common law. The Star Chamber's consequent abolition thus coincided with a preference for individualized consideration of claims and guarantees of due process.¹⁶⁵

162. *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 n.* (9th Cir. 1982).

163. This notion of entitlement to individual control over litigation also forms a basis for the denial of class certification in mass tort cases. See *In re L-tryptophan Prods. Liab. Litig.*, MDL No. 805, Order No. (D.S.C. Jan. 3, 1992) (denying class certification because of "the extensive precedent disfavoring use of nationwide class action device in product liability litigation due to the particularized nature of each plaintiff's injury, as well as the advanced status of the L-tryptophan cases, and the evident interest of most litigants in controlling their own lawsuits"); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); Bromberg & Slowinski, *supra* note 4, at 410 ("Class certification has also been denied frequently on the ground that since plaintiffs have a strong interest in controlling their own litigation, other methods of adjudication, such as individual actions, would be superior."); see generally *Trangsrud, Mass Trials*, *supra* note 4 (arguing, based on the traditional preference for "individual claim autonomy," that mass trials are unwarranted in mass tort cases).

164. See Bromberg & Slowinski, *supra* note 4, at 374 n.14; Yeazell, *supra* note 3, at 49-50.

165. See Yeazell, *supra* note 3, at 49-50. For an interesting account of the development of adversary procedure in the eighteenth century and the rising view of litigants and counsel as controllers of the adjudicatory process, see Stephan Landsman, *The*

The process that is due, or that is assumed to be due by proponents of the fairness critique, is the process of an individual litigant forging ahead in an individual lawsuit. As two mass tort litigators have put it, "The American civil justice system is designed for individual litigation, and it has traditionally guaranteed each party individually-tailored due process of law."¹⁶⁶ Times have changed, however. Although the Star Chamber has disappeared and plaintiffs need not assert widespread harm, increasingly plaintiffs *do* assert widespread harm, as mass tort litigation has taken its place as a significant component of modern litigation practice. It is a change that necessitates a reassessment of the fairness critique and of the assumption of litigation control independence embedded therein.

The assumption of litigation control independence is powerful, but increasingly misguided. In mass tort litigation, at least, communication and interdependence among same-side litigants have become the norm. To assume that each party and counsel can and should control independently every aspect of their case is to ignore the realities of mass tort practice.¹⁶⁷

Where a litigant in one action is unified with a like-interested litigant in a subsequent action via cooperation and litigation control structures, the fairness critique against allowing a deposition to be used against the latter litigant fails except at the highest level of abstraction. As described earlier,¹⁶⁸ the hub-and-spoke litigation control structures in mass tort litigation have come to look remarkably similar for a single defendant and for multiple plaintiffs. Plaintiffs or defendants on the same side of a litigation often work closely together, making it reasonable to view the same-side litigants as a unified whole for purposes of many aspects of adversary fairness.

Mass tort litigation practice thus negates the concern that the expansive approach to prior-action depositions is anti-adversarial or un-

Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L. Rev. 497 (1990).

166. Bromberg & Slowinski, *supra* note 4, at 374; see also Trangsrud, *Joinder Alternatives*, *supra* note 4, at 781 (arguing that "uncompromised due process" should preclude joint trials of common issues).

167. The RAND Corporation's Institute for Civil Justice has conducted some fascinating empirical research into perceptions of tort plaintiffs. The findings tend to disprove the myth, implicit in traditional tort approaches, that individual litigants exercise control over their own cases and that intimate contact and consultation between lawyers and clients forces lawyers to respond faithfully to their clients' wishes. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 91-97. The studies show that it is more often the lawyer than the litigant who chooses to file suit rather than settle without filing—52% of litigants reported that it was solely or mainly the lawyer's decision, compared with 38% who reported that it was solely or mainly the litigant's decision. *Id.* at 94. Fifty-six percent of litigants felt that they had little or no control over how their cases were handled. *Id.* at 95. While these studies involved non-mass tort cases, plaintiffs in mass tort cases almost certainly have even less control and less lawyer contact. *Id.* at 95-97.

168. See text *supra* at note 95.

fair. As a practical matter, holding P_2 to a prior-action cross-examination by a like-motivated attorney for P_1 , another plaintiff within the same network, differs little from holding a single defendant to a prior-action cross-examination by another attorney within the defense network. The link created by a hub-and-spoke litigation control structure makes it likely that P_2 's cross-examination would have resembled P_1 's, because P_2 and P_1 are working from the same information base and are guided by the same general strategy.¹⁶⁹ The "accuracy-fairness polarity,"¹⁷⁰ in sum, is no polarity at all in the context of a coordinated mass tort litigation.¹⁷¹

All of this assumes substantial similarity of issues. If the issues in the subsequent action diverge from those in the prior action, it would be unfair to use the prior testimony in the subsequent action—whether or not the parties are the same. Because many issues of causation and liability are identical among plaintiffs in the same mass tort litigation, the parties' motives and interests in cross-examining adverse deponents will generally be similar. Where there is a significant difference in the plaintiffs' cases or in the amount of damages sought, courts appropriately may find that the plaintiffs' motives and interests in cross-examining deponents are not sufficiently similar to warrant allowing the use of prior-action testimony.¹⁷² Expert witnesses present another circumstance where courts should be reluctant to allow the use of prior-action testimony.¹⁷³

169. Although courts have not appreciated the significant link created by litigation control structures in modern mass tort cases, in the few non-mass cases where courts have noted a link between counsel, they have determined that P_2 's cross-examination would not have differed materially from P_1 's. See *Rule v. International Ass'n*, 568 F.2d 558, 569 (8th Cir. 1977) (involving parties represented by same counsel, with close interrelationship between parties); *Ikerd v. Lapworth*, 435 F.2d 197, 206 (7th Cir. 1970) (noting that because counsel for P_1 largely controlled P_2 's trial, court perceived "no basis upon which it can be assumed that the cross-examination of the deponents would have been any different had [P_2 's] counsel had the opportunity to participate therein").

170. Weissenberger, *supra* note 121, at 299.

171. In the context of aggregation of claims, some have suggested a fairness-efficiency polarity and argued that the efficiency of consolidating claims should not trump the fairness imperative of individual control over litigation. See, e.g., *Trangsrud, Joinder Alternatives*, *supra* note 4, at 782-83. Others have responded that "[t]he procedural fairness achieved by processing claims individually may sacrifice the fairness of reaching a just result in a timely fashion." Complex Litigation Project, *supra* note 4, at 24. Because efficient joinder can promote consistency of result and fair division of limited funds, "[f]airness and efficiency therefore are not antithetical, but in many ways are complementary." *Id.* at 25.

172. See, e.g., Cal. Evid. Code Ann. § 1292 comment of Assembly Committee on Judiciary (West 1966) ("[I]t can generally be assumed that most prior cross-examination is adequate if the same stakes are involved . . . [If not,] the difference in interest or motivation would justify exclusion.").

173. In *Dykes v. Raymark Indus.*, 801 F.2d 810, 816 (6th Cir. 1986), discussed in text *supra* at notes 125-27, the Sixth Circuit made it clear that it upheld the admissibility of Dr. Smith's deposition testimony because the testimony related primarily to historical facts rather than Dr. Smith's expert opinions. "Here, the testimony of Dr.

E. *The Use of Prior-Action Depositions in Modern Mass Tort Litigation, and Other Implications*

Given the weakness of the fairness critique in light of the realities of modern mass tort practice, it makes particularly good sense in modern mass tort litigation to follow the rule laid out by the Third Circuit in a non-mass tort case:

"[I]f it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.¹⁷⁴

In applying this rule in mass tort litigation, and especially in determining whether the previous party had a "like motive" to develop the testimony, courts should not ignore the litigation control structure employed by same-side litigants. Parties to different actions, if unified by the hub-and-spoke structure that is becoming common among plaintiffs in mass tort cases, are likely to share a common point of view regarding a witness's testimony because they share a common strategy and information base.

This broad approach to admissibility should inform judicial decision-making at two stages of litigation. Of course, the rule should govern the admissibility of prior-action deposition testimony when that testimony is sought to be used and the opposing party objects on the grounds that the testimony is hearsay or otherwise inadmissible.

Smith is not so much the testimony of any expert who is giving opinions, as it is the testimony of a very knowledgeable person who was aware of the historical development of the specialized subject matter under examination." *Id.* at 817. The court explained its reluctance to allow the use of ordinary expert testimony from a prior action:

[W]e are aware of the great risk which might normally attend the use of a deposition of an expert who is no longer available for cross-examination. Expert witnesses all too often may be obtained on any subject and may speak with great authority and express opinions very wide in scope. When they are not adequately cross-examined, even though an opportunity is present, experts are often prone to create too heavy an aura of authoritativeness. Further, it should rarely be necessary to use the purely opinion testimony of an expert who testified in an entirely different case; and the dangers are correspondingly great that, where there exists a wide variety of opinion, an alert attorney may simply search out expert testimony which he conceives to be favorable to his cause and which he knows to have been made by a witness who is no longer, through death or otherwise, available to testify.

Id. But see Timothy Wilton & Richard P. Campbell, *The Admissibility of Prior Testimony of Out-of-Court Experts*, 39 Rutgers L. Rev. 111, 115-29 (1986) (arguing that under certain circumstances, prior-action testimony of unavailable expert witnesses may be admissible under Fed. R. Civ. P. 32 or Fed. R. Evid. 804(b)(1)).

174. *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1187 (3d Cir.) (quoting McCormick, *Handbook of the Law of Evidence* § 256, at 619-20 (2d ed. 1972)), *cert. denied*, 439 U.S. 969 (1978).

But the rule also should inform the court's decision at an earlier stage. When a party seeks to depose a witness who has been deposed previously in a related case, the opposing party may move to quash the deposition notice or for a protective order.¹⁷⁵ If, under the broad formulation of Rule 32(a) or Rule 804(b)(1), the prior deposition would be usable in the subsequent action, the court in the subsequent action should entertain seriously a motion to avoid a repeat deposition of the same deponent. The test for admissibility—whether there was a like-interested party at the deposition with similar motive to develop the testimony—should function well as a test for whether a repeat deposition is warranted or whether the prior-action deposition suffices.¹⁷⁶ If a subsequent action features factual or legal issues that were absent from the prior action, or if a party to the subsequent action has interests that were unrepresented in the prior action, then a repeat deposition may be required. In such a case, the deposition should be limited to the necessary supplementation.¹⁷⁷ Limiting repeat depositions not only enhances efficiency, but also enhances fairness by removing a potent harassment tool.¹⁷⁸ This Article has argued that based on modern litigation control structures and the resulting practical oneness of a mass tort litigation, a deposition taken in P₁'s case often can be used in P₂'s case as though taken therein.¹⁷⁹ By the same reasoning, repeat depositions sought in a mass tort litigation often can be treated like duplicative discovery sought within an individual lawsuit.

It might be argued that a rule broadly allowing the use of prior-action depositions against parties that received no notice of those depositions would remove incentives to notify related non-parties of depositions. The rule is unlikely, however, to have that effect. "Cross-noticing" a deposition in a related case gives parties to that related case the opportunity to participate in the deposition and therefore

175. See Fed. R. Civ. P. 26(c).

176. This approach is consistent with the recommendation in the first tentative draft of the new Manual for Complex Litigation, which suggests that counsel and the court avoid unnecessary depositions by discussing the need for each deposition and by seeking more economical alternatives. M.C.L.3d (Tentative Draft), *supra* note 46, § 21.45.

177. The draft Manual for Complex litigation (Third) suggests this possibility. Although it does not mention the broad admissibility of prior-action depositions under Rule 32(a) or Rule 804(b)(1), the draft suggests that if materials from other litigation will be usable as evidence in the present litigation, the court may limit parties to supplemental discovery. *Id.* § 21.425.

178. For example, in a mass tort litigation involving hundreds of independent actions against one or a few defendants, a defendant's chief executive officer makes an attractive deponent. Although the CEO's testimony will be usable in each subsequent case—even without a broad formulation of Rule 32(a) or Rule 804(b)(1), the CEO's testimony is admissible against that defendant as a party-opponent's admission under Federal Rule of Evidence 801(d)(2) or comparable state rules—each plaintiff may seek to depose the CEO in the hope that the defendant will pay more in settlement to avoid the repeated inconvenience of depositions.

179. See text *supra* at notes 168-74.

renders the deposition usable in the related case.¹⁸⁰ Cross-noticing forecloses an adversary's argument that it lacked the opportunity to examine the deponent and that therefore the deposition should not be usable against it. The rule supported by this Article, in contrast, depends upon a case-by-case determination of whether the issues and motives are similar enough for admissibility.¹⁸¹ While it may well be just "belt and suspenders," good practice will probably continue to include cross-noticing to the extent practicable whenever a party wants to insure that a deposition taken in one case will be usable in related cases or wants to fortify its defense against repeated depositions.¹⁸²

Frequently, however, cross-noticing is impossible or impracticable. This happens, of course, whenever a related action is filed subsequent to the deposition.¹⁸³ It also may occur when the actions share no overlapping parties. The parties to P_2 v. D_2 do not necessarily know in advance about a particular deposition occurring in P_1 v. D_1 , even if they are part of the same mass tort litigation and the same plaintiffs' and defendants' litigation control structures. Moreover, P_1 and D_1 may have no reason to give notice of the deposition to P_2 and D_2 . Nevertheless, P_2 and D_2 should be allowed to use the deposition at trial if the deponent is unavailable, as long as the issues are substantially the same and the adverse party at the deposition had a like motive to develop the deponent's testimony. It is not that modern mass tort practice makes each party aware of every deposition taken in every other case within the litigation. It is rather that modern mass tort practice gives each party a reasonably representative voice at those depositions.

The dominant, liberal rule for admissibility of prior-action depositions has anticipated, in effect, the litigation control structures of modern mass tort practice. It encourages efficiency and facilitates the search for truth. Judicial willingness to read expansively the language

180. See Fed. R. Civ. P. 32(a); M.C.L.3d (Tentative Draft), *supra* note 46, §§ 21.425, 31.14, 31.31.

181. See text *supra* at note 174.

182. In the L-tryptophan litigation, defense counsel sought to persuade the Food and Drug Administration ("FDA") to permit depositions of FDA employees, stating that counsel "will take all steps possible to assure that these witnesses are not subjected to repetitive discovery by cross noticing the depositions . . . in all cases that are not part of the MDL proceeding." Cleary, Gottlieb, Steen & Hamilton v. Department of Health & Human Servs., 844 F. Supp. 770, 786 (D.D.C. 1993). Proving that cross-noticing is no cure-all, however, the FDA denied the request and the court upheld that denial, in part because it was not clear "how to handle the cross-examination of 700 plaintiffs in the MDL proceedings, as well as the effect of the proposed deposition on the 300 state court cases." *Id.* at 787.

183. The draft Manual for Complex Litigation (Third) raises the question of the use of depositions against those who become parties to the action after the depositions have taken place, and suggests that a court may order that the depositions are usable unless the new parties show cause to the contrary. M.C.L.3d (Tentative Draft), *supra* note 46, § 21.453.

of Rule 32 and Rule 804(b)(1) demonstrates a pragmatic procedural flexibility that should be encouraged. It is the kind of flexibility urged by Rule 1 of the Federal Rules of Civil Procedure¹⁸⁴ and by the Manual for Complex Litigation.¹⁸⁵ And it is the kind of flexibility that courts must exercise to bridge the gap between fast-developing changes in law practice and the laborious process of rulemaking.

This is not to say that the rules need no amending. Even if a rule as written can and should be stretched to accommodate a sensible, practice-sensitive interpretation, the rule should be reworked if possible to clarify or ratify the sensible interpretation.¹⁸⁶ Simply put, the rules should be amended to correspond with an already sound judicial interpretation. Thus, the courts have first responsibility for ensuring practice-sensitive procedure when major trends in law practice render earlier interpretations anachronistic, but the rulemakers are not thereby relieved of their own responsibility for practice-sensitive procedure.

In meeting that responsibility as to former testimony, the drafters of an amended Rule 804 would do well to follow the language used in Texas:

Hearsay Exceptions. The following are not excluded if the declarant is unavailable as a witness—

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition

184. "[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. *Cf. United States v. High Country Broadcasting Co.*, 3 F.3d 1244 (9th Cir. 1993) (taking Rule 1 seriously), *cert. denied*, 115 S. Ct. 93 (1994).

185. See M.C.L.2d, *supra* note 10, §§ 20.1, 20.13; M.C.L.3d (Tentative Draft), *supra* note 46, §§ 20.1, 20.13, 31.31. The new draft Manual for Complex Litigation recognizes the economies that can be achieved when parties have access to prior-action depositions, but it mentions only depositions admissible as party-opponent admissions under Fed. R. Evid. 801(d)(2) or for impeachment under Fed. R. Evid. 801(d)(1)(A), and not the broader scope of depositions usable pursuant to Fed. R. Evid. 804(b)(1) and Fed. R. Civ. P. 32(a). M.C.L.3d (Tentative Draft), *supra* note 46, § 21.455. See generally Schwarzer et al., *supra* note 117, at 1749-51 (discussing and commending cooperation of federal and state courts to create efficiency in mass tort cases, even in the absence of formal rules for doing so).

186. See Complex Litigation Project, *supra* note 4, at 9, stating:

Creative lawyers and judges have shown that both justice and efficiency can be achieved by those willing to stretch the bounds of the existing procedural scheme to expedite the handling of these [complex litigation] cases. Nonetheless, as Congress, the profession, and newspaper journalists have noted, we are in urgent need of procedural reform to meet the exigencies of the complex litigation problem.

Without amendment, practitioners unaware of the broad formulation espoused by most courts may be misled by the current language into thinking that a prior-action deposition may never be used in the absence of exact identity or formal privity between prior and present parties. See, e.g., Paul M. Lisnek & Michael J. Kaufman, *Depositions: Procedure, Strategy and Technique* § 14.7 (1990) (including successor/predecessor requirement in discussion of requirements of Fed. R. Civ. P. 32(a)(4) and Fed. R. Evid. 804(b)(1), with no indication of broad formulation reached by courts).

taken in the course of another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.¹⁸⁷

While there is a strong preference in the law for live testimony, there is at least an equal preference towards rendering informed decisions based upon all relevant evidence. Where a witness is unavailable to tell a story directly to the fact-finder, the Texas rule allows the story to be told in its prior-action form through deposition transcript (or, as is increasingly the case, videotape). Because the story must have been given under oath and subject to similarly motivated cross-examination, any perceived unfairness is more formal than real.

The implications of the developments in mass tort litigation discussed in this Article transcend Federal Rule of Evidence 804(b)(1) and Federal Rule of Civil Procedure 32(a). They extend, for example, to issues of virtual representation and non-party preclusion.¹⁸⁸ The propriety and constitutionality of non-party preclusion and the scope of offensive nonmutual issue preclusion are beyond the reach of this Article. Nevertheless, the analysis herein may diminish the argument against non-party preclusion, given the calls for greater use of offensive nonmutual issue preclusion in mass tort litigation.¹⁸⁹ One plaintiffs' lawyer who touted the usefulness of offensive nonmutual issue preclusion in mass tort litigation, suggesting that "the results of the first tried case might be allowed in some fashion to become binding precedent for all later cases arising out of the same disaster,"¹⁹⁰ went on to note that only plaintiffs should be allowed to avail themselves of the collateral estoppel effect. "To protect the due process right of litigants to a fair opportunity to present their cases, the doctrine at most

187. Tex. R. Civ. Evid. 804(b)(1) (West 1994). Equally apt language is used by California, Cal. Evid. Code § 1292(3) (West Supp. 1993); Hawaii, Haw. R. Evid. 804(b)(1) (1985); Nebraska, Neb. Rev. Stat. § 27-804(2)(a) (1989); New Mexico, N.M. Stat. Ann. § 804(B)(1) (Michie 1978); and Wisconsin, Wis. Stat. Ann. § 908.045(1) (West 1974).

Texas maintains separate evidentiary rules for criminal cases and for civil cases. Former testimony is admissible in Texas criminal cases only "if the party against whom the testimony is now offered, had an opportunity and similar motive to develop the testimony." Tex. R. Crim. Evid. 804(b)(1) (West 1994). The current federal rule similarly distinguishes criminal cases from civil by allowing the use of former testimony "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony." Fed. R. Evid. 804(b)(1).

188. See generally Robert G. Bone, *Rethinking the "Day in Court" Ideal and Non-party Preclusion*, 67 N.Y.U. L. Rev. 193 (1992) (arguing for a broader set of nonparty preclusion rules); Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 Stan. L. Rev. 655 (1980) (discussing erosion of the mutuality doctrine, and logical extension to non-party preclusion).

189. See, e.g., *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1981) (declining to allow offensive nonmutual issue preclusion in asbestos litigation); see Weber, *supra* note 40, at 279.

190. Rheingold, *Mass Disaster Litigation*, *supra* note 64, at 21.

would be a one-way street whereby the results would bind only the common defendant who lost the previous case, after having had his fair opportunity to be heard."¹⁹¹

Like the fairness critique against using a prior-action deposition against a non-party, the due process notion that a judgment does not bind a non-party is grounded in the assumption of litigation control independence. As mass tort coordination continues to develop, formally independent litigants come to litigate increasingly as though they were a single party. It may become necessary to reevaluate whether due process warrants treating a single mass tort defendant with a hub-and-spoke litigation structure differently from a group of coordinated mass tort plaintiffs with a similar hub-and-spoke litigation structure¹⁹² for purposes of issue preclusion.¹⁹³

The trend toward coordination in mass tort litigation also carries implications for how rules of civil procedure ought to be structured. The view expressed in this Article, that the way mass tort litigation is practiced should inform the construction of Rule 32(a), meshes with the criticisms lodged against transsubstantive rules¹⁹⁴ by a number of proceduralists.¹⁹⁵ If mass tort litigation is practiced differently from

191. *Id.*

192. On the resemblance of plaintiffs' and defendants' litigation control structures, see *supra* part I.B.3.

193. The question of whether it is fair to bind a mass tort defendant with an unfavorable judgment, where the defendant would not be able to bind the mass tort plaintiffs were the judgment favorable to the defendant, calls to mind Professor Currie's famous hypothetical mass tort litigation. See Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 285-89 (1957). A railroad wins the first 25 lawsuits brought by passenger-plaintiffs injured in a train crash, based on a finding in each case that the defendant railroad was not negligent. Jury number 26, however, finds the defendant negligent. See *id.* at 285-86. To allow every plaintiff thereafter to establish negligence through collateral estoppel would be not only unfair but ridiculous. To some extent, Currie's concern has been addressed through the presumption against offensive nonmutual issue preclusion where there are inconsistent judgments. See Restatement (Second) of Judgments § 29(4) (1980) (listing inconsistent determinations as a circumstance that may justify allowing relitigation of an issue).

194. See *supra* note 17.

195. See, e.g., Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 Notre Dame L. Rev. 693, 716-17 (1988) (advocating view that does not equate uniformity with transsubstantivity); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 526-27 (1986) (commenting that transsubstantive rules have been undermined); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. Pa. L. Rev. 2131, 2175-78 (1989) (discussing the erosion of the transsubstantive nature of the Federal Rules of Civil Procedure); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2042-43, 2048-51 (1989) (advocating tailoring of procedural rules); Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. Rev. 1117, 1158-59 (1989) (arguing that nationwide personal jurisdiction proposal reflects a shift toward more rational transsubstantiveness). But see Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of*

other types of cases—and especially if the assumption of litigation control independence holds truer in other areas than in mass tort litigation—then perhaps procedural and evidentiary rules should be different in, say, a landlord-tenant case or automobile accident case than in an asbestosis case. On the particular issue of prior-action depositions, this need may be met by a single carefully drafted rule¹⁹⁶ or by appropriately crafted judicial language¹⁹⁷ that can mandate case-by-case analysis of whether the prior and subsequent parties' interests and motives were sufficiently similar. Nevertheless, the peculiarities of modern mass tort litigation practice and their procedural implications suggest the potential usefulness of non-transsubstantive rules of procedure.

CONCLUSION

Practitioners of modern mass tort litigation—on either side of the caption—do not view each plaintiff's action in isolation. Even in the absence of any formal judicial aggregation, each plaintiff's case is, by the nature of mass tort litigation, intertwined with others. Counsel have adapted to the collective nature of such litigation by coordinating their efforts. Over the last several decades, same-side counsel in mass tort litigation have become increasingly interdependent, and their joint efforts have become increasingly structured. Plaintiffs' counsel, in particular, have developed mechanisms for rapid collection and dissemination of information, joint strategic planning, centralized legal and factual research, master pleadings, trial-ready packets of documents, schools for training individual lawyers how to try the cases, and other pieces of a coordinated tort prosecution. In some cases, the hub-and-spoke litigation control structure of a large number of formally independent plaintiffs, each with separate counsel but with central planning and information sharing by a litigation group or steering committee, has come to bear a remarkable resemblance to the hub-and-spoke structure established by a single major defendant, with lead counsel at the hub but with much day-to-day case management handled by dispersed local counsel.

This Article has examined the possibility of taking into account the practical interdependence that occurs among formally independent litigants. Consideration of the admissibility of prior-action depositions demonstrates the fruitfulness of allowing the realities of counsel coordination to inform procedural decision-making. Some courts and commentators favor a narrow reading of Federal Rule of Civil Proce-

Civil Procedure, 137 U. Pa. L. Rev. 2067, 2068-69 (1989) (arguing that critique on transsubstantive rules is misguided); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2244-47 (1989) (same).

196. See text *supra* at note 184.

197. See text *supra* at note 174.

dure 32(a) and Federal Rule of Evidence 804(b)(1). They suggest that a prior-action deposition should not be admitted against one who was not formally a party or privy to the prior action, because it is unfair to bind a non-party with testimony he did not have the opportunity to cross-examine. This view, however, assumes an independence of litigation control that is belied—at least in the area of mass tort litigation, where the issue of prior-action depositions often arises—by the trend toward structured coordination by same-side counsel. Thus, the broader view, which allows the use of prior-action depositions as long as there was a like-interested party to the prior action with an opportunity and similar motive to develop the testimony, better comports with the way mass tort litigation is practiced.

One risk of practice-sensitive procedure is that it may become self-fulfilling. If procedural decision-making assumes coordinated practice, then practitioners may find themselves forced to coordinate—compulsory joinder of counsel, if you will—even where their clients' interests otherwise would suggest going it alone. Procedural rules, after all, are both descriptive and prescriptive, both reactive and proactive. This Article has focused on the descriptive, reactive aspect in urging that rules take into account the realities of law practice. But the prescriptive aspect of rules makes us wary. While coordination among same-side counsel has much to commend it, we do not necessarily suggest in this Article that rules be designed specifically to foster such interdependence. Rather, we observe interdependence of same-side counsel as an established fact in the world of modern mass tort litigation. Because it is already here, we suggest that it not be ignored.

