

Micro Special Mastering Opportunities and Challenges

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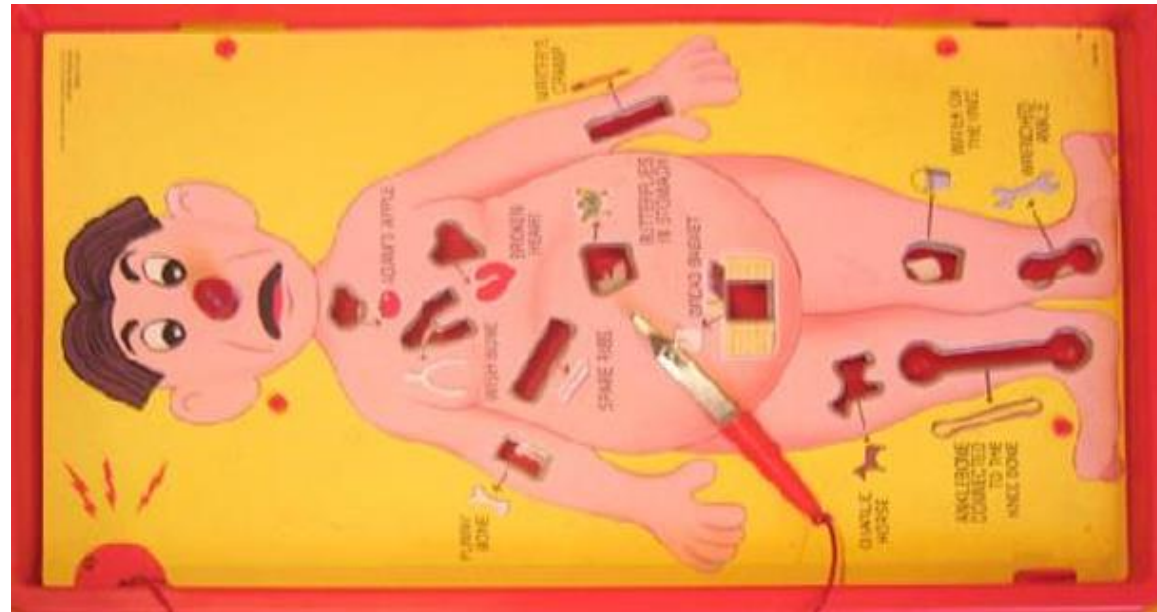
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Moderator: Edgar C. Gentle, III



A. AGGREGATE SETTLEMENTS – IS IT POSSIBLE TO BE HAPPY TOGETHER (“INFORMED CONSENT” ABA RULE 1.8(g))?



- What if the Plaintiffs’ Lawyers Don’t Want to Run the Traps? Could forfeit fees (Burrow v. Arce, 997 S.W. 2d 229 (TX 1999) or be sued by their clients (Tilzer v. Davis, (KS 1999)).
- Does informed consent need to occur before or after you allocate the hold-back?
- What is in-bounds and out-of-bounds to coax the dissident Plaintiff?
- What role should the Plaintiffs’ lawyers play in getting closure (conflict of interest)?
- How do you ethically parse aggregates of different Plaintiffs firms or groups that are separate in time but otherwise for the same type of injuries?
- Is the dynamic aggregate (Plaintiffs consenting to a grid up front before settlement or trial) workable?

B. DISCOVERY MASTER CHALLENGES

- Circumstances for appointing a Special Master
 - Special Master as Einstein
 - Overworked/overwhelmed Judge
 - Lawyers Behaving Badly
- If you want to be a discovery master...
 - You better like digging into the minutiae
 - You better be willing to spend a lot of time dealing with billing multiple parties
- Different approaches to discovery disputes – Trial Judge vs. Special Master
 - Client service approach
 - Depth of analysis
- The most important stage of the process – the initial meeting with counsel
 - Initial meeting checklist



C. SEAL AND PRIVILEGE MASTERING - HIDE AND SEEK



- 1. Documents Under Seal – When to Seal and Unseal
 - A Parties’ Seal Team?
 - First Amendment vs. Defendant Rights to Protect Trade Secrets vs. Due Process.
 - FRCP 26(c) “Good Cause” to Seal
 - Shane Group v. Michigan Blue Cross (E.D.Mich. 2015) – Impacts full disclosure to a putative settlement class and possible settlement approval.
 - Need to know disclosure to Plaintiffs’ counsel only?
- 2. Privilege Log Processes and Pitfalls
 - Privilege Master/Court – Define “Privilege” up front
 - A Defendant lawyer to certify under oath that the documents on the log are privileged
 - Large logs – Master to sample and provide results, with the results to be used as precedent to trim the log.
 - Loser pays?



D. A MAJOR COMMON BENEFIT MASTER PROBLEM: Budgeting and Disciplining Vendors

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



E. COMMON BENEFIT MASTER TASK: RESOLUTION OF FEE DISPUTES ON THE FRONT END: HAVE AN ORGANIZATION BUSINESS PLAN: A WRITTEN JOINT-VENTURE AGREEMENT

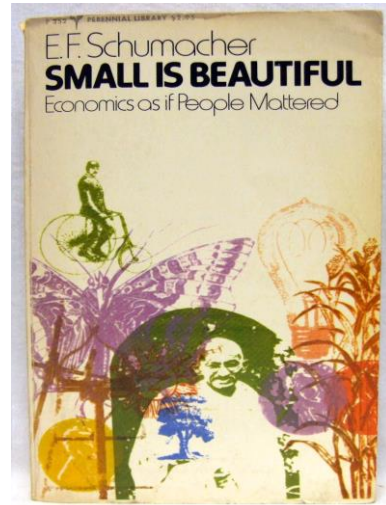


Create the Written Case Management Agreement (Joint Venture Agreement) at the Beginning, Spelling Out How the Case is to be Funded by Common Benefit Counsel and How the Lodestar is to be Paid if (When) the Case Comes in (Subject To Court Approval).

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



F. WHEN THE CASE RESOLVES, IS SMALL BEAUTIFUL IN SETTLING AND ADMINISTERING CASES?



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

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



G. TAMING THE SEA OF LIENS

- The Classics: Medicare, Medicaid and Private Liens
- ERISA – employment-based health coverage
 - Federal programs administered by private insurers
 - State and local government programs
- Medicare:
 - Verifying Eligibility
 - Defendant Reporting Requirements
 - Global Resolution or One at a Time
- Medicaid:
 - Global is the Usual Way to Go
- Private Liens:
- Other Governmental Liens
 - Tricare
 - VA
 - Indian Health Services
- Private Insurance Liens
- Preserving Government Needs-based Benefits
 - Surprisingly, claimants in Mass Tort Settlements had higher incidents of government needs-based benefits than United States citizens generally, by a factor of 2



H. COMMUNITY TORT SETTLEMENT ADMINISTRATION CHALLENGES



"THREE BIG CORKS? THAT'S IT?"

- Taking the Heat Out
- Engaging the Community
- Remedy/Grid Design by Consensus
 - Making Peace
- Building a Community Legacy