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The Use of 'Science Days' and Other Expert Tutorials in Mass Tort Litigation

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To address specific scientific, technical and other complex issues in mass tort litigation, courts sometimes either seek or accept assistance from independent experts. Indeed, the "Manual for Complex Litigation" (Fourth) specifically notes that "[i]ncreasingly, judges are seeking additional pretrial briefing on relevant technological or scientific issues. Although experts will address those issues in their trial testimony, the court may find it more helpful to learn the fundamentals — the vocabulary and general intellectual framework of the subject matter — in a setting with less immediate time constraints in order to deal more intelligently with issues during the trial."

The rationale for judicial concern in this area can be seen in cases such as *Wells v. Ortho Pharmaceutical Corp.*, 615 F. Supp. 262 (N.D. Ga. 1985). In that case, based upon expert presentations, a

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determination was made that particular spermicides caused certain birth defects. That determination was later characterized as "a first-rate specimen of judicial craft," but it was also identified as being "absolutely wrong." Goss, "Expert Evidence", 1991 *Wis. L. Rev.* 1113, 1122. Clearly, a court's failure to fully comprehend the scientific issues involved in litigation, or to adequately control the admission of expert testimony on those subjects, can result in both inappropriate resolution of factual questions and embarrassment for the court itself.

Concerns in this area have led to a number of suggestions for addressing necessary judicial education. Many of these suggestions have involved expansion of judicial education programs run by the courts themselves or by third parties. See "Examples of Joint Education Programs," *Manual for Cooperation Between State and Federal Courts*, James G. Apple, Paula L. Hannaford, G. Thomas Munsterman (1997), p. 56, and *In re Aguida*, 241 F.3d 194 (2nd Cir. 2000).

In the context of a particular litigation, however, there is relatively little guidance as to the most appropriate and effective means for the courts to proceed. In particular cases, this goal of judicial education can be accomplished through many different procedures. The court can appoint its own experts pursuant to Rule 706 of the Federal Rules of Evidence. See Joe S. Cecil and Thomas E. Willging,

"The Use of Court-Appointed Experts in Federal Courts," *Judicature*, vol. 78, no. 1, July-August 1994; see also, *In re Joint E. & S. Dist. Asbestos Litig.*, 830 F. Supp. 686, 693 (E. & S.D.N.Y. 1993) (noting that "[t]he work of such [court-appointed] experts is especially critical in dealing with complex mass tort problems" because, among other reasons, "the number of persons affected runs into the hundreds of thousands"). In addition, the court can identify parties to occupy the role of special masters, pursuant to Rule 53 of the Federal Rules of Civil Procedure. Finally, it has been recognized that courts have the inherent authority to appoint technical advisors to assist them in the acquisition of information necessary for performing their functions in litigation. See generally, "Manual for Complex Litigation (Fourth)" section 11.5; *Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988) (the Court could exercise its inherent authority to appoint a technical advisor "to act as a sounding board for the judge — helping the jurist to educate himself in the jargon and theory disclosed by the testimony and to think through the critical technical problems").

Particularly since 1997, when Justice Breyer in *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997), endorsed the appointment of specialists to assist district courts in understanding scientific or technical evidence, courts have been relatively open to input from experts with respect to scientific and technical aspects of litigation.

Indeed, the significance of addressing scientific and technical issues in litigation has been recognized in the "Manual for Complex Litigation (Fourth)" in its

section dealing with “Expert Scientific Evidence.” Thus, in Section 23.32 of this “Manual,” it is noted that “[i]n many cases it may be helpful for the court to be educated at the outset about the science or technology involved, particularly where the expert evidence will involve science and technology that use language foreign to the uninitiated. Arrangements for initial education can be made pursuant to court order or by stipulation between the parties. In addition, the court should establish whether any tutorials should be videotaped or transcribed for review by the judge as the litigation proceeds.”

As is true of many aspects of mass tort litigation, however, developments in this area have largely been the product of the ingenuity and skill of the judges on the front lines of managing these cases. Just as federal and state mass tort judges have coordinated *Daubert* hearings on the admissibility of expert testimony, they have also conducted coordinated “science days” in which, as one mass tort practi-

tioner phrased it, “attorneys on both sides educate the court about specific technical issues relevant to the litigation.”

Such scientific presentations can take a number of different forms. They can be essentially lectures by experts selected by both sides; question and answer sessions with court participation — in which cross examination may or may not be permitted; or written presentations in which key background texts and analyses are summarized and made available to the court. Such sessions can involve coordinated proceedings involving both state and federal mass tort judges or much more informal, “off-the-record” conferences at which background information is made available to individual judges through counsel for the parties.

Some courts have transcribed or recorded such sessions in order to permit the court to go back at later stages of the case to re-educate itself as to the necessary background information. Other judges have prohibited the creation of such formal “records” in order to facilitate a more

candid and informal educational process.

Continued utilization of these judicial education efforts without a formalized protocol for how they are to be conducted (in open court or in chambers presentations), what sort of adversarial challenges are allowed (e.g., the use of discovery and/or cross examination) and the parties’ rights to advance notice of the particulars of the “educational materials” and testimony that will be presented, is quite dangerous.

The court’s comfort level with the basic science involved in mass tort litigation can be a crucial element in how disputed scientific and technical issues are ultimately resolved. As such, while the initiative and ingenuity of mass tort judges and practitioners should be encouraged, state and federal authorities responsible for enacting rules governing judicial oversight of mass tort litigation should examine these judicial initiatives and clear rules should be established to ensure the fairness and transparency of those innovative procedures. ■