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A PLEA FOR THE PRESERVATION OF THE PUBLIC'S INTEREST IN MULTIDISTRICT LITIGATION

JOHN T. McDERMOTT*

In the first issue of this volume Mr. John H. McElhaney attacked the use of the machinery of the Judicial Panel on Multidistrict Litigation for aviation tort cases. Mr. McElhaney maintained that preservation of the individual interests of the claimants in air disaster litigation is an essential prerequisite to any acceptable disposition of the claims, but that the operation of the Panel often compromises these interests by a rigid set of rules designed principally to solve a different set of problems. In reply, Professor McDermott rejects what he considers to be an invalid comparison of isolated cases. He argues that Mr. McElhaney's principal reason for denigrating the usefulness of the Panel is that it is not 100 percent effective in solving all of the problems. In support of his conclusion that the use of the Panel in aviation tort cases is both practical and desirable, Professor McDermott points to the growing docket congestion, insisting that the expeditious processing of cases is more important than preferential treatment for individual air disaster litigants. By analyzing all transferred cases and comparing them with other cases, he concludes that the present operation of the Panel under section 1407 promotes just, speedy and inexpensive determination of the litigation.

I. INTRODUCTION

DURING the first three years of its existence,¹ the Judicial Panel on Multidistrict Litigation has transferred more than 1,800 civil cases to a single district for "coordinated or consolidated pretrial proceedings."² Although this number represents less than one percent of the

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¹ For a general description of the history and development of the Panel, see Peterson & McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737 (1970).

² 28 U.S.C. § 1407 (Supp. V, 1968). Technically, only 1,713 of these cases were actually transferred under § 1407. The remainder were originally filed in the Panel-

civil suits filed in the federal courts during this same period, the Panel has touched, at least to some extent, more than 1,500 lawyers involved in cases considered for transfer under section 1407 of the United States Code.³ Since a large number of these attorneys specialize in the types of cases generally held appropriate for transfer,⁴ it is not surprising that several articles have recently appeared purporting to analyze the operation of the Panel. Although most of these, especially the more objective ones, have commented favorably,⁵ attorneys specializing in air disaster litigation have been quite critical and have blamed the Panel and section 1407 for grievances usually associated with multiparty, multidistrict litigation.⁶ For example, in a recent piece appearing in this *Journal* Mr. John H. McElhaney launched a frontal attack on existing multidistrict litigation procedures used for consolidating aircraft disaster cases.⁷ His article is based on "a comparison of the actual track record of a non-

designated "transferee court" and were included in "coordinated or consolidated pretrial proceedings" conducted by the "transferee judge."

³ At the joint request of the Panel and the board of editors of the *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION* (1970) [hereinafter cited as *MANUAL*], the author wrote to each of these lawyers soliciting their views, comments and suggestions with regard to the operation § 1407 and the use of the *MANUAL*. Responses were received from more than fifty attorneys who regularly appear before the Panel. The comments of several of these attorneys will be discussed *infra*.

⁴ The legislative history reveals that the following type of cases were considered appropriate for treatment under § 1407:

(a) antitrust cases; (b) cases involving a large number of parties or an unincorporated association of large membership; (c) cases involving requests for injunctive relief affecting the operations of a large business entity; (d) patent, copyright, and trademark cases; (e) common disaster cases; (f) individual stockholders', stockholders' derivative, and stockholders' representative actions; (g) products liability actions; (h) cases arising as a result of prior Government litigation; (i) multiple litigation; or (j) other cases involving unusual multiplicity or complexity of factual issues.

STAFF OF SENATE COMM. ON THE JUDICIARY, 89th Cong., 2d Sess., *REPORT ON MULTIDISTRICT LITIGATION* (Comm. Print 1967). Antitrust and common disaster (air crash) litigation has dominated the Panel's docket from the beginning, but there has been a recent upsurge in the filing of § 1407 motions in patent and securities litigation. Of the categories described above, only products liability litigation has failed to come under the auspices of the Panel.

⁵ See, e.g., Harris, *Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a)*, 22 *HASTINGS L.J.* 1289 (1971); Comment, *A Survey of Federal Multidistrict Litigation*, 15 *VILL. L. REV.* 916 (1970).

⁶ G. FARRELL, *MULTIDISTRICT LITIGATION AIRCRAFT LITIGATION* 51 (2d ed. 1971); Levy, *Complex Multi-District Litigation and the Federal Courts*, 38 *FORDHAM L. REV.* 786 (1970); McElhaney, *A Plea for the Preservation of the "Worm's Eye View" in Multidistrict Aviation Litigation*, 37 *J. AIR L. & COM.* 49 (1971) [hereinafter cited as McElhaney].

⁷ McElhaney, at 51-56. It is often suggested that § 1407 is a useful "tool" for the defendants. This contention finds some support in the fact that defendants in other types of multidistrict litigation often are the first to seek transfer under § 1407. It may therefore be somewhat surprising that the defendants in multidistrict air disaster cases do not generally seek transfer under § 1407 although they seldom oppose transfer which is considered on the initiative of the Panel.

Panel case and several Panel cases.”⁸ The comparison demonstrates to Mr. McElhaney’s apparent satisfaction that the “Panel” is responsible for positive harms interfering with the interests of the claimants. He lists eight: (1) delay; (2) additional expense; (3) added issues; (4) the creation of a record containing conflicting interests; (5) the loss of discovery opportunities; (6) the possibility the transferee court will also become the trial court; (7) inconvenience of selecting the place of the crash as the transferee district; and (8) the expense and inconvenience of settlements in the transferee forum. An analysis of all recent air disaster litigation demonstrates, however, that while Mr. McElhaney’s admonitions may be a useful reminder for future cases, the facts simply do not substantiate his charges. This article will focus on eight “disadvantages” advanced by Mr. McElhaney and will conclude with a look at specific examples of the operation of the Panel in air disaster cases.

II. THE “DISADVANTAGES” OF SECTION 1407

1. *Delay*

The most frequently heard complaint, and the one principally advanced by Mr. McElhaney, is that “transferred” cases take longer to process than do “non-transferred” cases.⁹ This delay supposedly originates from several sources, including the time the matter is before the Panel for decision on possible transfer, the time the transferee court waits for the filing and transfer of related cases (generally referred to as “tag-along” cases), and the unnecessarily-extended pretrial proceedings followed by transferee judges.

In attempting to determine if transfer under section 1407 actually causes any delay in the processing of multi-district air disaster litigation, the elapsed time from filing to termination of eleven groups of cases transferred under section 1407 has been compared with eight groups of “non-transferred” cases.¹⁰ These comparisons appear in table three to the Appendix to this article. This data demonstrates conclusively that cases transferred for “coordinated or consolidated pretrial proceedings” and

⁸ *Id.* at 54.

⁹ See, e.g., McElhaney at 51-56. Cf. Seeley, *Procedures for Coordinated Multidistrict Litigation: A Nineteenth Century Mind Views with Alarm*, 14 ANTITRUST BULL. 91 (1969).

¹⁰ For purposes of comparison, it would have been desirable to include only those groups of air disaster litigation in which all cases have been finally terminated with respect to both liability and damages. Unfortunately, few groups of “transferred” cases fall into this category since most are quite recent and no comparison could be made with the generally older, “non-transferred” cases, some of which have been completed. Neither would it have been fair to exclude from these calculations all pending cases since this would create a serious bias in favor of the more recent “transferred” cases. Therefore, all pending cases were treated for statistical purposes as terminated on June 30, 1972. Of course, not all of the pending cases will be terminated by then but some will undoubtedly be terminated much sooner. See APPENDIX, Table III *infra*.

assigned to a single judge simply do not, on the average, take longer than other groups of air disaster litigation.¹¹

The filing of a motion for transfer or an order to show cause undoubtedly causes some delay. The Panel has attempted to avoid this by insisting that the filing of a motion or the issuance of a show cause order "does not affect or suspend orders and discovery proceedings in the district courts in which the cases are pending."¹² Although the district courts are encouraged to proceed with pretrial proceedings pending decision by the Panel, most judges, as well as most parties, seem to prefer to stay proceedings until the Panel has decided whether there will be a transfer and, if so, to which district the cases will be transferred. Nevertheless, the delay occasioned by Panel "intervention" in the litigation usually is not great. The average time from filing of the initial motion or show cause order to the filing of the Panel decision in air disaster litigation is sixty-seven days; in only three instances has the time exceeded ninety days.¹³ Whether this sixty day hiatus is a real cause of delay is extremely doubtful; generally, little discovery takes place until after the report of the National Transportation Safety Board has been released. Moreover, this sixty day delay relates only to the initial decision on transfer. Nearly half of the air disaster cases transferred under section 1407 have been "tag-along" cases which are transferred almost immediately while preserving each party's right to oppose transfer and to have a separate hearing.¹⁴ For example, in the Fairland, Indiana Air Disaster Litigation the average time from the commencement of a "tag-along" case to its transfer was only thirty-two days.¹⁵

¹¹ An analysis and comparison of the groups of "transferred" cases with the groups of "non-transferred" cases shows that the average time from commencement to termination is substantially less for the "transferred" cases (27.0 months) than for the "non-transferred" cases (31.6 months). A comparison of the average time from the date of the accident to termination also reveals that "transferred" cases are terminated a little more quickly (42.8 months v. 44.0 months). See APPENDIX, Table I *infra*. It is especially important to note that in four groups of cases transfer was first considered more than two years, and in some cases almost three years, after the crash had occurred. This two- to three-year "delay" cannot, of course, be attributable to the Panel but rather is evidence that even prior to its establishment air disaster litigation did not proceed as rapidly as the critics would have us believe.

¹² RULES OF PROC. OF THE J.P.M.L. 13(8), 53 F.R.D. 119 (1971) [hereinafter cited as RULES].

¹³ Substantial delay may occur, for example, when it is necessary for the Panel to find an out-of-district judge to handle the litigation. See, e.g., *In re San Juan*, P.R. Air Crash Disaster, 316 F. Supp. 981 (J.P.M.L. 1970).

¹⁴ Upon learning of the pendency of a "tag-along" case, the Clerk of the Panel enters a "conditional transfer order" which is automatically stayed fifteen days to afford all parties the opportunity to oppose transfer. If no opposition is noted within the fifteen-day period, the transfer becomes effective immediately. RULES 12.

¹⁵ The promptness by which "tag-along" cases are transferred has often created special problems. Cases may be in the midst of transfer when the time to answer arrives, and there is some confusion as to which court has jurisdiction to file the answer or grant an extension, if so requested. This problem is easily resolved, for § 1407 provides that

Mr. McElhaney refers to the six-month discovery program advocated by Mr. George Farrell in his seminars and writings on air disaster litigation.¹⁶ While no transferee judge has utilized Mr. Farrell's six-month discovery schedule,¹⁷ neither have very many other judges. Judge Pregerson and Judge Bownes initially set a trial date within a year of the date that the cases were assigned to them, but neither was able to adhere to the schedule due to pressure from attorneys on both sides, insisting that they could not adequately prepare for trial in such a short period of time. In the *Cincinnati Air Disaster Case*,¹⁸ Judge Swinford established a two-year discovery program and found that even this was too short for the attorneys involved. Although careful analysis of the discovery process relating to air disaster litigation is beyond the scope of this work, Mr. Farrell's allegation that the discovery program generally takes too long is supportable.¹⁹ However, discovery takes too long in non-transferred cases as well as in transferred cases. Unquestionably, the charge that coordinated discovery programs in transferred cases results in substantial delays in processing these cases is clearly refuted by the previously-discussed data. Transferred cases simply do not take longer.

2. Additional Expense

The second "disadvantage" allegedly stemming from a section 1407 transfer is said to be the additional expense occurring "unless the litigant

the Panel's transfer order is "effective" when filed in the office of the clerk of the transferee court. Since the present practice followed by most district court clerks is to "open" the case file when the transfer order is filed (rather than when the record is received from the transferor court, as is done in § 1404(a) transfers), there will be an active file in the transferee court even if the original file is still in the transferor court, and the answer, motion or other pleadings can be filed with the transferee court.

¹⁶ McElhaney at 54. Cf. *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621 (J.P.M.L. 1970).

¹⁷ Judge C. Clyde Atkins, the transferee judge in the Maracaibo, Venez. Air Disaster, Docket No. MDL-48 (J.P.M.L. filed, May 14, 1970), did set a six-month discovery schedule, but the cases were quickly settled and there is no way of knowing if discovery would have been completed during the six-month period.

¹⁸ See, e.g., *In re Air Crash Disaster at Greater Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968); *In re Air Crash Disaster at Greater Cincinnati Airport*, 298 F. Supp. 353, 355, 358 (J.P.M.L. 1968-69).

¹⁹ A plaintiff's attorney in the *In re San Juan Air Crash Disaster*, 316 F. Supp. 981 (J.P.M.L. 1970), objected to the breadth of the discovery program on the ground that he did not need to prove that the defendant was 300% negligent but only 100% negligent, and it was not going to take him two years of discovery to do that. It is the author's personal view that one of the major difficulties is the absolute refusal of the attorneys, primarily those representing the defendants, to stipulate to anything before discovery is complete. In the Hanover, N.H., cases, one of the defendants refused to stipulate to such things as the flight number of the ill-fated aircraft and the approximate time and location of the crash. In all other types of multidistrict litigation with which this author has been personally involved, the parties are willing to agree on or stipulate to certain basic, undisputable facts prior to their "discovery" by formal methods. This is certainly one factor which unnecessarily extends discovery in air disaster litigation.

is willing to be relegated to a passive role."²⁰ Certainly, transfer of cases to a single district makes it more likely that counsel from that area will assume a larger role in processing the litigation than will counsel from a more distant location;²¹ but an attorney is never *required* to take a passive role and is free to participate to any extent he wishes. But as is the case in most multiparty litigation, a few lawyers generally carry the burden for all.²² A reduction in the number of active counsel, however, will also reduce the time required to coordinate joint efforts and should therefore reduce the cases to be assessed to each of the parties. Recognition that many were benefiting from the work of a few prompted one court to insure that liaison counsel were fairly and adequately compensated for their services and out-of-pocket expenses before it would approve the dismissal of any settled cases.²³ Thus, consolidation under section 1407 gives claimant's attorneys an opportunity to share the work and expense and to reduce the time and effort involved in preparing the cases for trial on the issue of liability.²⁴

Finally, if the additional expense and inconvenience associated with coordinating efforts among many counsel across the country is considered, the plaintiffs in transferred cases should be able to prepare their suits for trial more quickly and less expensively through the use of committees and teams than they could individually. This potential for substantial savings is readily apparent in the area of depositions. It is not unusual in air disaster litigation for the parties to take twenty-five to fifty depositions. If these were to be taken by one counsel, at the rate

²⁰ McElhaney at 51, 57.

²¹ Some transferee judges make a point of insuring that some of the liaison counsel are from outside the district to avoid the appearance that the litigation is being dominated by local counsel. An equally acceptable alternative is to establish co-liaison counsel, one local and the other from outside the district.

²² For example, at a pretrial conference in Covington, Kentucky, counsel from a distant state indicated he had not been very active in pretrial proceedings and was satisfied to sit back and take advantage of the efforts of liaison counsel for the plaintiffs. One wonders if the fee charged his client reflected his limited participation in discovery and other pretrial proceedings.

²³ The court was frequently faced with the problem of transferred cases being dismissed by the transferor court. Judge Swinford made it clear that the dismissals of all cases had to be approved by liaison counsel for the plaintiffs and by the *transferee* court. The Panel has emphasized that from the time a case is transferred under § 1407 until it is remanded by the Panel, the transferee court has exclusive jurisdiction, and consequently, the transferor court has been completely, albeit temporarily, divested of jurisdiction. *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968).

The Panel's recently-revised rules further provide that unless an action transferred under § 1407 has been remanded to the court of origin (or transferred for all purposes to another district under § 1404(a) or § 1406(a), "all orders, including orders regarding settlement, must be filed in the transferee district." RULES 15(f).

²⁴ There would seem to be some question whether an attorney who has done little or no work on behalf of the plaintiff he represents and who, quite properly, uses the work product of counsel for other plaintiffs is entitled to receive the same fee, contingent or otherwise, that he would be entitled to if he personally prepared his case for trial.

of one deposition per week, more than a year would be required, while ten teams of deposition counsel could take the same depositions in a five or six-week period.²⁵ In spite of the vocal protestations to the contrary, multidistrict air disaster litigation is really not substantially different from other multidistrict litigation. Plaintiff's attorneys may have different theories or modes of preparation but their goal is the same—to establish the liability of one or more of the defendants. The opportunity to save time and money is greatest when the cases have been transferred under section 1407. Other plaintiff's attorneys have benefited. If specialized plaintiffs' counsel in air disaster litigation refuse to cooperate with each other and with local counsel in an attempt to conserve time and costs, they cause the delay and extra expense that they complain of so vocally.

3. *Added Issues*

Mr. McElhaney also suggests that coordinated or consolidated pretrial proceedings may become involved in issues that do not necessarily effect every litigant.²⁶ While this is possible, delay in pretrial proceedings on common issues need not and should not result. The solution is simple. The transferee judge has sufficient flexibility to either defer non-common proceedings or to schedule them in a manner that will avoid conflict and delay.

The major issue upon which all pretrial proceedings will naturally focus concerns which defendant, if any, was responsible for the accident. Mr. McElhaney stresses the difference between the "liability theories" of crew members and passengers suggesting that the Panel has overlooked these differences in making transfers under section 1407.²⁷ Nevertheless, the Panel has frequently pointed out that while legal theories may be different, the facts upon which these theories are based are identical. Even so, the plaintiff frequently complains that since his is a simple case against the carriers as the sole defendant, he may insist that little discovery is necessary to establish that the decedent bought a ticket and that the aircraft crashed causing the decedent's death. Be this as it may, the plaintiff does not have absolute control over the litigation; the carrier may, and normally will, implead other parties as third-party defendants. This destroys the simplicity of the case and makes it appropriate for coordinated or consolidated pretrial proceedings.²⁸ As a corollary, air

²⁵ For an easy and inexpensive method for insuring that the rights of absent parties will be protected, see MANUAL § 2.31.

²⁶ McElhaney at 57-58.

²⁷ *Id.* at 58-59.

²⁸ *But cf. In re Galveston, Texas Oil Well Platform Disaster*, 322 F. Supp. 1405 (J.P.M.L. 1971), a case in which the Panel declined to order the transfer of suits arising out of an offshore oil well explosion and fire. Since the plaintiffs in the Western District of Louisiana contended that their discovery was virtually complete and that they, there-

disaster litigation is not simple. In one year, for example, 34.1 percent of the air disaster cases actually tried took more than four days to try while trials in excess of three days occurred in only 13.2 percent of all civil cases tried in federal court in the same year. One air crash case necessitated thirty days.²⁹ Simple litigation? Hardly!

Importantly, the transferee court protects the interests of all parties, and toward this end it should appoint separate liaison or lead counsel for the "passenger plaintiffs" and for the "crew plaintiffs." Since potential conflicts are generally recognized by the courts,³⁰ crew member plaintiffs are given a full opportunity to present their position. An extreme example occurred in *In re Air Crash Disaster at Greater Cincinnati Airport*.³¹ The "passenger plaintiffs" successfully contended that the carrier was solely responsible for the crash, and therefore, motions for summary judgment filed by the other defendants were unopposed. Their position was completely contrary to that of the "crew plaintiffs" who, in order to recover, had to establish the negligence of one or more of the *other* defendants. Counsel for the "passenger plaintiffs" yielded to counsel for the "crew plaintiffs" who was given a full opportunity to present his position on the summary judgment motions.

4. *Creation of a Potentially Damaging Record*

Mr. McElhany is concerned that transfer might lead to the creation of a pretrial record, admissible at trial, which might contain evidence at variance with the litigant's theory of the cases; or, alternatively, that transfer of all cases to one court might result in more limited discovery than would have been the case in the court of origin.³² In this regard Mr. McElhany apparently presumes that the posture of the cases when they are remanded for trial will not enable the transferor court to expand discovery or inject, at the request of counsel, issues and legal contentions that were overlooked during pretrial proceedings. This argument is specious. In the first place, none of the potential evidence discovered during the pretrial proceedings will be used automatically in the trial of the case. All evidence must be offered by one or more of the parties who must, of course, lay a proper foundation for its admission. Much will be inadmissible or repetitious, while some will lead to stipulations of facts among the parties.³³ If admissible evidence at variance with the plaintiff's

fore, would not benefit from a transfer, the Panel noted that the cases to be transferred did not involve complicating third-party claims and denied the motion.

²⁹ REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1970).

³⁰ Cf. *Dupont v. Southern Pacific Co.*, 366 F.2d 193 (5th Cir. 1966).

³¹ 298 F. Supp. 353 (J.P.M.L. 1968).

³² McElhane at 59.

³³ Such stipulations will only bind those who sign them. Therefore, stipulations must

theory of liability is available, chances are that it will be offered by the defendant. The fallacy is the mistaken notion that the plaintiff, in the absence of transfer under section 1407, can limit the issues, the breadth of his case and its concomitant discovery. To avoid liability the defendant usually can and will bring in other parties and raise other issues. The plaintiff generally cannot avoid the enlargement of its action to include additional parties and issues.

The notion that the transferee judge will unduly limit the breadth of discovery since he will want to insure that all common discovery has been completed before the cases are tried is unlikely.³⁴ But if a party feels that the transferee judge has unduly limited the scope of discovery, the transferor court, after remand, may be requested to reopen discovery to the extent necessary. Of course, if the transferor court declines, the issue can be presented to the appropriate court.

What Mr. McElhaney really fears is that the transferee court may try one or more of the cases on the merits before the transferor courts can try the remanded cases.³⁵ The inference is that the trial of one or more of the cases by the transferee court will affect the rights of all other claimants. But this is generally true in all types of litigation³⁶ including air disaster litigation, and no case has been discovered where the issue of liability of a specific defendant was litigated a second time. The first case tried always has a profound effect on the remaining litigation, and it is unusual indeed if most of the remaining cases do not quickly settle. This was as true before the creation of the Judicial Panel on Multidistrict Litigation as it is today.³⁷

Another concern of specialist aviation counsel is the increasing trend among transferee judges to dispose of issues of liability prior to remand.³⁸ This can and has been accomplished in several ways. One is to dispose of issues of liability by partial summary judgment. For example, when extensive discovery has been permitted and a complete pretrial record has been prepared upon which all parties will necessarily rely at trial, the transferee court may be able to dispose of the issue of liability, of

be signed by counsel for each party and not only by liaison of lead counsel unless he has been authorized to enter into such stipulations on behalf of all parties he represents.

³⁴ Actually the more common criticism is that the transferee judge is too cautious in limiting discovery and that overly time-consuming and expensive discovery results.

³⁵ McElhaney at 60.

³⁶ Prior to the recent Supreme Court decision, *Blonder-Tongue Laboratories, Inc. v. Univ. Ill. Foundation*, 402 U.S. 313 (1971), it was not unusual for the validity of a particular patent to be relitigated in several circuits. It is unlikely that their practice will continue, especially where related cases have been transferred under § 1407.

³⁷ For example, the cases arising from the American Airlines crash at the Greater Cincinnati Airport were transferred under § 1407 after one of the cases had been tried. The decision in this case effectively disposed of the entire litigation.

³⁸ This may preclude counsel from "shopping" for the best forum to try the present case.

some defendants at least, by requiring the filing of motions for summary judgment prior to remand. This procedure is contemplated by the legislative history of section 1407 which provides that the transferee court has the power to rule on motions for summary judgment.³⁹ In addition, disposal of liability by means of partial summary judgment was utilized in the *Cincinnati (TWA) Air Disaster Cases*.⁴⁰ Following the completion of an extensive three year discovery program, the parties were asked to file motions for partial summary judgment on the issue of liability. Motions were filed by three of the four defendants and by the passenger plaintiffs. The court held that the defendants were absolved from liability for the accident and that the passenger plaintiffs were entitled to a judgment against the carrier on the question of liability.⁴¹ The court pointed out that direct evidence to support the carrier's contention that the crash was "proximately" caused by the instrument malfunction was lacking.⁴² Since there was no affirmative evidence presented to show that the instruments were either defective or that they had a history of malfunction,⁴³ the court reasoned that a presumption of instrument malfunction was not a result of mere occurrence of the accident.⁴⁴ After exonerating the other defendants, the court concluded that the undisputed facts established that the flight crew was negligent in the performance of their duties resulting in liability of the carrier.⁴⁵

³⁹ See, e.g., H.R. REP. NO. 1130, 91st Cong., 2d Sess. 3 (1968).

⁴⁰ *In re Air Crash Disaster at Greater Cincinnati Airport*, 295 F. Supp. 51, 298 F. Supp. 353, 355, 358 (J.P.M.L. 1968-69).

⁴¹ The court found that the undisputed facts were that the TWA Flight No. 128 was cleared to land at the Greater Cincinnati Airport and commenced its approach under weather conditions reporting light snow, visibility of a mile and a half, an indefinite ceiling at 1,000 feet and a seven-knot wind; that the crew attempted to make a visual approach; that although the required preliminary checklist call-off was made, the required "minimum level altitude" call-out was not made by the First Officer; and that Flight No. 128 descended below its minimum level altitude well in advance of a visual sighting of the runway and contacted small trees at an elevation of 875 feet mean sea level, almost two miles short of the runway. The court posed the "fundamental issue" as whether the crew knew or should have known their altitude, speed and rate of descent prior to the crash or whether the crew, because of instrument failure or dereliction of duty by tower controllers, had reason to believe that they were executing their landing from a safe approach altitude and at a safe speed.

⁴² TWA theorized that the amount of precipitation in the air at the time of the accident and the icing propensities of the precipitation at the aircraft's altitude prior to the accident might have resulted in the ingestion and freezing of moisture in the pilot and static pressure tubes on the aircraft which, in turn, might have caused the altimeters to malfunction. The court characterized this contention as "totally hypothetical" since it was based on double and triple inferences.

⁴³ It was uncontested that, at the time, the aircraft electrical power ceased (presumably at the time of the crash), the Captain's altimeter indicated an altitude of 856 feet mean sea level and the First Officer's altimeter indicated an altitude of 899 feet mean sea level, both altitudes very nearly corresponding to the 875 mean sea level altitude at which the aircraft first came in contact with the trees.

⁴⁴ *Reidinger v. Trans World Airlines* (E.D. Ky. June 18, 1971) (unpublished).

⁴⁵ The crew's negligence was traced to their failure to perform two fundamental and highly important functions: the First Officer's failure to make the necessary call-off in

A second method for resolving common issues prior to remand is a test case. The parties or the transferee judge selects one or more of the cases originally filed in his district (or transferred there for all purposes under section 1404(a) or section 1406(a)) and a trial is held on the single issue of liability. In addition, the transferee judge may, as was done in the *In re Butterfield Patent Infringement*,⁴⁶ invite the parties in cases transferred under section 1407 to stipulate to be bound by his decision and by the decision on appeal.⁴⁷ Even in the absence of agreement, a decision on the merits will likely have a profound influence on the remaining litigation resulting in quick settlement of the other cases once the question of liability has been decided. Additionally, except when "mutuality" is required between plaintiffs and defendants, a common party or parties may be bound by an unfavorable decision under the doctrines of res judicata or collateral estoppel.

Perhaps the most innovative and controversial method of disposing of common issues prior to remand is by transfer under section 1404(a) and consolidation for trial, at least as to common issues, under the Federal Rules of Civil Procedure. Consolidation of all cases in one district for trial pursuant to section 1404(a) predates the passage of the Multidistrict Litigation Act; common air disaster litigation was often consolidated before a single court by the independent action of the various courts in which the actions were originally filed. The Panel has emphasized that sections 1407 and 1404(a) are not mutually exclusive and that the same group of cases might involve cases transferred by both means.⁴⁸ Transfer under section 1404(a) can either precede or follow consolidation under section 1407. Although it has been urged "that only the transferor court can rule on a section 1404(a) transfer mo-

reference to the aircraft's rate of descent, airspeed, and, most importantly, altitude and the crew's failure to execute a missed approach when they reached the minimum altitude without being able to see the runway. Thus, the court concluded that as a matter of law the negligence of the crew of TWA Flight No. 128 was the sole and proximate cause of the crash. It therefore directed that orders be entered granting summary judgment in favor of the other three defendants in favor of the passenger plaintiffs against the defendant Trans World Airlines.

At the request of Trans World Airlines, the court entered a certificate under 28 U.S.C. § 1292(b) (1970), permitting an interlocutory appeal and TWA's motion for such an appeal was granted by the Sixth Circuit.

⁴⁶ *Butterfield v. Oculus Contact Lens Co.*, 332 F. Supp. 750 (N.D. Ill. 1971).

⁴⁷ Ninety-eight patent infringement actions in forty-two different districts were transferred to the Northern District of Illinois under § 1407 and were assigned to Judge Hubert along with four related actions originally filed in that district. The common plaintiff and almost half of the "transferred defendants" entered into such a stipulation. 328 F. Supp. at 513.

⁴⁸ For example, in the *In re Air Crash Disaster at Ardmore, Okla.*, 295 F. Supp. 45 (J.P.M.L. 1968), seven cases were transferred to the Eastern District of Oklahoma by the Judicial Panel pursuant to 28 U.S.C. § 1407 (1970), while nine actions were transferred from four different districts pursuant to 28 U.S.C. § 1404(a) (1970).

tion,"⁴⁹ every court considering this question has held that the power to transfer resides with the transferee court. In some cases the parties did not challenge the authority of the transferee court; in others transfer was stipulated. However, in the *Antibiotic Drug Cases*,⁵⁰ the defendants challenged the authority of a section 1407 judge to make further transfers under section 1404(a). In this case the transferee judge sua sponte entered an order to show cause why all related cases should not be transferred for trial to the District of Minnesota under section 1404(a). After a full hearing the court concluded that it had the power to make the transfer and it ordered all related cases transferred to the District of Minnesota for trial. The defendants sought review by filing a petition for mandamus with the United States Court of Appeals for the Second Circuit, arguing that the transferee judge lacked the power to make transfer under section 1404(a). The Second Circuit denied the motion, upholding the power of the transferee court to make the order and finding no abuse of discretion. The court recognized that "while the Multidistrict Litigation Panel would have no power to transfer these cases for trial under section 1404(a), the judge to whom the cases have been assigned has such power here as he would in any other case."⁵¹

The first group of common disaster cases to be subject to a general transfer under section 1404(a) was the Hanover, New Hampshire Cases. These cases were transferred under section 1407 to the District of New Hampshire and assigned to Judge Hugh H. Bownes.⁵² The parties did not seriously question the authority of the 1407 court to make a further transfer under section 1404(a) but disagreed about the extent of the transfer, *i.e.*, whether it should be for trial limited to liability or should dispose of both liability and damages. The defendants objected to the transfer of all cases for trial on the issue of liability alone, but strongly supported transfer of all cases for trial on the issues of liability and damages. Most plaintiffs, on the other hand, did not object to a transfer for trial on the issue of liability, although some objected to a transfer for all purposes under section 1404(a). The court concluded that the best way to proceed was to determine the issue of liability first in a single trial and then to have separate trials on damages in each case. The court observed that since it was going to conduct a trial solely on the issue of liability in those cases which were its primary responsibility;⁵³ obviously, the convenience of parties and witnesses and the in-

⁴⁹ Levy, *Complex Multidistrict Litigation in the Federal Courts*, 38 *FORDHAM L. REV.* 786 (1970).

⁵⁰ *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299 (S.D.N.Y. 1971).

⁵¹ *Pfizer v. Lord*, 447 F.2d 122 (2d Cir. 1971).

⁵² *In re Air Crash Disaster Near Hanover, N.H.*, 314 F. Supp. 62 (J.P.M.L. 1970).

⁵³ Those cases originally filed in the District of New Hampshire, those transferred to

terest of justice would be best served by transferring the other cases to New Hampshire for a consolidated trial on the issue of liability. The court emphasized that the judge who supervised the pretrial discovery was better prepared to preside at the trial on the issue of liability than a transferor judge would be. In answering the "vital question" of whether transfer for trial on the issue of damages would serve the convenience of parties and witnesses and be in the interest of justice, the court concluded that the convenience of the plaintiffs would be best served by having the damage portion of the trial conducted where they brought suit, noting that the witnesses who could be expected to testify on the issue of damages were different from the witnesses who would testify on the issue of liability. While the court had "no doubt" that a New Hampshire jury would be quite competent to determine "liability," it expressed concern that the difference in the jury's background from that of jurors in New York City, Philadelphia or Ohio might effectively deprive the plaintiffs of their constitutionally-guaranteed right to a trial by jury of their peers. Thus, the court transferred all remaining cases to the District of New Hampshire for consolidated trial on the issue of liability.

These three transferee judges, when faced with the possibility of remanding large groups of cases to various districts for multiple determinations of common questions of law, each employed different techniques to insure that a single decision on the common issue would be made fairly and expeditiously. It can be expected that other transferee judges will be equally innovative in finding ways in which to process litigation of this type to completion with a minimum of delay and without the necessity of having similar issues presented to multiple courts for resolution.

Another "disadvantage" emphasized by Mr. McElhaney relates to the "rule of thumb" used by the Panel in selecting the transferee court in air disaster litigation, whereby cases are generally transferred to the district in which the crash occurred. Mr. McElhaney and others argue that the place of the crash is irrelevant and may bear no relationship to the residence of the majority of the claimants or to any significant operation of the defendants.⁵⁴ Conceivably, the district in which a crash occurs may not be particularly appropriate for discovery or other pre-trial proceedings,⁵⁵ but there is seldom any other district having a

New Hampshire under § 1404(a) prior to the Panel transfer, and those transferred under § 1406(a) after the Panel transfer.

⁵⁴ McElhaney at 61-62. *See also* Address by Mr. George Farrell, Practicing Law Institute, Jan. 15, 1971.

⁵⁵ The criteria applied by the Panel in selecting the transferee court is found in section 1407, convenience of the parties and the witnesses. However, the convenience of witnesses is a totally meaningless factor since witnesses will generally be deposed where

greater connection with the litigation than does the district in which the crash occurred. Since the defendants' records are almost always the target of pretrial discovery, possibly transfer should be to the district in which the major defendant's records may be found. While the defendant might not object to the transfer of all cases to its home district, the plaintiffs would unlikely find the choice satisfactory.⁵⁶ Although the plaintiffs might argue that it would be more desirable to transfer cases to the district where most of the plaintiffs resided, except in rare circumstances, the passengers come from diffuse parts of the country.⁵⁷ Finally the district in which the crash occurred is very often the plaintiff's choice of forum. Of the air crash cases which have been considered for transfer by the Panel, almost half were originally filed in the district in which the crash occurred.⁵⁸ Thus, the selection of the district in which the crash occurs minimizes the number of cases actually transferred to another district under section 1407.

The final disadvantage allegedly resulting from transfers under section 1407 is the additional expense and inconvenience which can result when the authority to approve settlements involving minors is vested in the transferee court or is controlled by the law of the transferee forum. Although settlements are generally understood to be a part of the "pre-trial proceedings" and thus within the jurisdiction of the transferee court,⁵⁹ the Panel, at the request of a party and with the concurrence of the transferee judge, could remand the actions before finalization of a settlement when special circumstances are present. This "straw man" argument is a good example of the type of misleading accusation commonly levelled at section 1407.

Mr. McElhaney notes that compliance with local settlement requirements of the transferee district has been described by those involved as

they reside not where the transferee court sits. Similarly, "parties" do not attend pretrial conferences and they cannot be personally inconvenienced (or inconvenienced) by the transferee district.

⁵⁶ For example, it might be hard to justify the transfer of the Cincinnati Air Disaster Cases to the Western District of Kansas on the grounds that the base of operation for the carrier, TWA, is in Kansas City, Missouri.

⁵⁷ It was argued in the Fairland, Indiana Air Disaster Litigation, 309 F. Supp. 621 (J.P.M.L. 1970), that the District of Ohio was the most appropriate district because more of the passengers resided there than in the Southern District of Indiana, the district in which the crash occurred. This argument loses its persuasiveness in view of the fact that an equal number of cases were commenced in the Southern District of Indiana as were commenced in the Southern District of Ohio and thirty other cases were originally filed in nine other districts. Thus, even considering the decedents' residence, there was no district which was any more appropriate than the Southern District of Indiana. Accordingly, the cases were transferred to the Southern District of Indiana under 28 U.S.C. § 1407 (1970).

⁵⁸ This comparison, of course, excludes those cases arising out of crashes occurring outside of the United States.

⁵⁹ *In re Plumbing Fixture Antitrust Litigation*, 298 F. Supp. 484 (J.P.M.L. 1968). Cf. RULES 15(f).

a "nightmare."⁶⁰ This comment undoubtedly refers to the Hendersonville, North Carolina Air Disaster Litigation⁶¹ which, many have charged, involved a cumbersome and time-consuming settlement process. This accusation contains a double fallacy which should be obvious to anyone who knows anything about this litigation. First, the overwhelming number of cases involved in this litigation were originally filed in the Western District of North Carolina and thus would have been subject to North Carolina probate law. To suggest that cumbersome settlement, overly extensive discovery or inordinate delays in this litigation resulted from the two cases (of the more than one hundred cases involved in this litigation) that were transferred under section 1407 is almost ludicrous! These cases are being processed in the district in which the vast majority of them were filed and in the only district in which all defendants could be sued. The second fallacy is even more fundamental. Since the law of the transferor forum must be applied,⁶² transfer cannot result in the application of different substantive law.

III. SUMMARY OF AIR DISASTER LITIGATION

During its first three years the Panel considered cases arising from sixteen major air disasters.⁶³ Of these, thirteen were transferred under section 1407. Transfer of three was denied.⁶⁴ Many of these cases have been settled and dismissed; others have been tried and still others are nearing trial. The remainder of this article is devoted to a brief discussion of these cases, including their present status and an analysis of some of the problems encountered. Finally, the cases are compared with those air disaster cases which were found inappropriate for transfer under section 1407.

The first group of air disaster litigation transferred arose from the American Flyers airline crash at Ardmore, Oklahoma, on April 22, 1966. Although the crash occurred nearly two and one half years prior to Panel involvement in this litigation, most of the cases were recent,

⁶⁰ McElhaney at 62, quoting address of Mr. George E. Farrell before the Practising Law Institute, Jan. 15, 1971.

⁶¹ 297 F. Supp. 1039 (J.P.M.L. 1969).

⁶² Van Dusen v. Barrack, 376 U.S. 612 (1964).

⁶³ This article does not treat those cases transferred after August 1, 1971, including the New Orleans Air Disaster Litigation which was transferred to the Western District of Tennessee on August 25, 1971; San Antonio Venezuela Air Disaster Cases, 331 F. Supp. 547 (1971); Las Vegas, Nevada Air Disaster Cases, — F. Supp. — (1972) (transferred to the Northern District of Texas on January 6th) and the Mandeville, Louisiana Air Disaster Cases which were transferred to the Northern District of Texas on November 16, 1971.

⁶⁴ Nine of the sixteen groups of cases were considered for transfer on the initiative of the Panel, thus reflecting the lack of enthusiasm among the parties for transfer. Transfer was suggested by the defendants in six of the groups and by the plaintiffs in one group.

nearly half of them having been filed in 1968. The cases were transferred to the Eastern District of Oklahoma and assigned to Chief Judge Edwin A. Langley on October 17, 1968.⁶⁵ At that time the litigation included fourteen cases originally filed in the Eastern District of Oklahoma, nine cases previously transferred there under section 1404, and seven cases transferred under section 1407. Eighteen of these thirty cases were terminated by settlement within six months of transfer and eleven of the remaining twelve were terminated by settlement within ninety days thereafter. Only one case remained on the docket for any appreciable length of time, notwithstanding the continued efforts of the transferee judge and of the Panel to require the parties to either settle their dispute or to prepare the case for trial. However, the attorneys took no action whatever to prepare the case for trial and reported that the case had been informally settled subject to the resolution of certain ancillary matters before the Surrogate's Court in New York. Two years passed without action and the transferee court finally advised the parties that the case was in danger of being dismissed for want of prosecution. Only then were the problems resolved and the case settled and dismissed.⁶⁶ Although the average time from crash to termination of all cases involved in this litigation was only slightly below the "national average," the average time from transfer to termination (9.7 months) was the second lowest of all "transferred litigation." More than half the cases were terminated within three years of the crash and only one remained on the docket five years after the crash and it had been remanded to the Southern District of New York in 1969.

Two potentially related⁶⁷ groups of air disaster cases were transferred to the Eastern District of Kentucky on October 21, 1968, and assigned to Chief Judge Mac Swinford. Both resulted from crashes at the Greater Cincinnati Airport which is located across the river in Covington, Kentucky.⁶⁸ The first resulted from the American Airlines crash in

⁶⁵ See *In re Air Disaster at Ardmore, Oklahoma*, 295 F. Supp. 45 (J.P.M.L. 1968).

⁶⁶ It might be pointed out that the completion of this data and its analysis has been hampered by the fact that "settled cases" are often permitted to remain open on the docket for months or years after the controversy has been closed. This situation would be eliminated if more courts would adopt a local rule which would require the clerk to review the docket periodically and to enter an order to show cause why each case in which no docket entry had been made for six months or more should not be dismissed for lack of prosecution. The parties would then have the opportunity to explain their inaction, but those cases which had actually been settled could be dismissed.

⁶⁷ There was a strong suggestion in some of the pleadings that *both* crashes might have been caused by inherent defaults in the design, construction, or operation of the airport. For this reason, it was thought desirable to assign both groups to the same judge in case there was to be discovery common to both groups. The first few pretrial conferences were held together, but when it appeared that there were no *real* common questions between the two groups, each proceeded independently of the other.

⁶⁸ These two groups of cases may be exceptions to the general rule that air disaster cases should be transferred to the district in which the crash occurred. Judge Swinford

November 1965. At the time of transfer, the litigation involved thirteen cases filed in five different districts, the majority of which were in the Eastern District of Kentucky. Thus only six cases were actually transferred under section 1407.⁶⁹ The initial pretrial conference was held in Covington on January 15, 1969, less than ninety days after the order of transfer. At that time, the court suggested establishment of a discovery schedule but the parties disagreed. Instead they requested that all proceedings be stayed until a decision on the appeal of a related case⁷⁰ was announced by the Fifth Circuit, contending that a decision for the plaintiff in that case might resolve the question of liability in the remaining cases.⁷¹

After the Fifth Circuit filed its decision, *American Airlines v. Creasy*,⁷² the United States and one passenger plaintiff filed motions for summary judgment. After concluding from the legislative history of section 1407 and the decisions of the Judicial Panel that a transferree court has the authority to grant summary judgment, the court found that all criteria governing the application of res judicata were met, and it granted summary judgment in favor of the United States against American Airlines in all actions involving claims between them. However, the court denied the government's motion for summary judgment regarding the claims of individual plaintiffs since, unlike American Airlines, none of the plaintiffs were parties, or were in privity to the parties in the earlier case.

Before deciding the passenger plaintiffs' motion, the court was faced with a unique choice of law question since the case had been transferred from the Southern District of Ohio under section 1407. The court concluded that an Ohio court would look to the state in which the crash occurred to determine the law to be applied. Thus the central question

felt obliged to hold pretrial conferences in Covington, Kentucky, the "seat" of the Eastern District of Kentucky. This presented certain administrative problems for the courts, especially for its clerk. For example, the files and records were kept in Lexington and had to be transported to Covington, along with their custodian, for every pretrial conference. Hindsight convinces this author that the convenience of all concerned would have been better served by transferring these cases to the Southern District of Ohio.

⁶⁹ *In re Air Disaster Litigation at Constance, Kentucky (Amn. Airlines)*, 295 F. Supp. 511 (J.P.M.L. 1968).

⁷⁰ *Creasy v. United States*, Civil No. 3-1680 (N.D. Tex., filed Sept., 1966).

⁷¹ The parties even rejected the court's suggestion that the res judicata issue could be briefed, argued and resolved in the interim, and for that reason no discovery program was established except that the court required the plaintiffs to answer "damage interrogatories" so that the parties or the court would be in a better position to assess damages should the liability question be disposed of by the *Creasy* appeal. On September 25, 1969, the Fifth Circuit affirmed the judgment of the court in *Creasy* and soon thereafter Judge Swinford entered an order scheduling a pretrial conference for November 19, 1969, and requesting counsel in the remaining actions to specify any further discovery which would be required to supplement that had in the Northern District of Texas in *Creasy*.

⁷² 418 F.2d 180 (5th Cir. 1969).

became whether Kentucky courts would require mutuality of parties or would follow the Bernhard Doctrine and apply collateral estoppel to establish the liability of American Airlines.⁷³ Judge Swinford was unable to find inclination that Kentucky courts would abandon the mutuality requirement and the passenger plaintiffs' motion for summary judgment was denied.⁷⁴

The decision on the summary judgment motions was announced at pretrial conference held on March 12, 1970, and the court indicated that pretrial proceedings should be concluded as quickly as possible. Counsel for all parties were directed to review the complete appendix from the earlier appeal as soon as possible and all supplementary discovery was to be completed by May 1, 1970. A final pretrial conference was held on July 20, 1970. At that time, the court was informed that all transferred cases had been settled; the only cases remaining on the docket were those originally filed in the Eastern District of Kentucky. The plaintiffs in the pending cases were given until November 12, 1970, to designate the portion of the record in the earlier case that was to be used in the trial of their case, but nothing further was done by any of the parties and on December 14, 1970, the court dismissed all pending cases. At the request of counsel for certain plaintiffs, the court vacated its dismissal order and granted the plaintiffs' motion to dismiss their actions.

Since the court eventually ruled that the passenger plaintiffs could not avail themselves of the *Creasy* decision by way of collateral estoppel or res judicata, a probable approach was the resolution of the question pending appeal in *Creasy* so that when the decision was announced, the court could have promptly ruled on the summary judgment motions and set a discovery schedule for the remaining actions. The court proposed this procedure at the initial conference, but none of the parties had any real desire to proceed with the discovery or any other pretrial proceedings before or even after the *Creasy* decision was announced. Even though one of the cases arising from this crash was quite promptly tried, the litigation as a whole has a very poor "track record." Nevertheless, the delay in the conclusion of this litigation cannot be attributed to the Panel or to the transferee court; rather it stemmed from the refusal of counsel, particularly plaintiffs' counsel, to prepare these cases for trial.

The other group of air crash cases transferred to the Eastern District of Kentucky resulted from a Trans World Airlines crash which occurred under similar conditions slightly more than two years after the

⁷³ See *Bernhard v. Bank of America Nat'l Sav. & Tr. Ass'n*, 19 Colo. 2d 807, 122 P.2d 892 (1942). See generally Currie, *Mutuality of Collateral Estoppel*, 9 STAN. L. REV. 281 (1957).

⁷⁴ This decision was certified for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970), but no such appeal was apparently taken.

American crash. This litigation followed a completely different course and might be characterized as involving too much rather than too little action. Like the American Airlines cases, this litigation was considered for transfer under section 1407 on the initiative of the Panel pursuant to a show cause order entered on July 17, 1968—only a short time after the Panel was established. The initial transfer order, covering ten cases, was entered on October 21, 1968, only eleven months after the crash had occurred.⁷⁵ Actually, this transfer order represented only the tip of the iceberg since thirty-seven more “tag-along” cases were transferred during the next six months.⁷⁶ Since the new cases were being constantly filed and transferred to the Eastern District of Kentucky, quick movement by the court became difficult, if not impossible during the initial stages of this litigation. Thus, speed was impossible and some discovery matters were disposed of during the hiatus.

All “tag-along” cases had been transferred by the end of April, and the first phase of discovery was begun on July 16, 1969. The second major pretrial conference was held on November 19, 1969, and a comprehensive schedule for discovery was established providing that all discovery would be completed by the end of 1970 and that the parties would file their final pretrial brief, written offers or proof, written narrative statements or expert testimony and statements of uncontroverted fact early in 1971.⁷⁷ However, during the spring of 1970, apparently the United States had failed to timely respond to interrogatories and motions to produce, and after several conferences and much unnecessary delay, the court was forced to impose sanctions under rule 34.

Discovery proceeded and in the fall of 1970 counsel advised the court that they would be unable to complete all depositions in the time allotted. The court reluctantly continued the taking of depositions until January 20, 1971, with the condition that all discovery had to be completed by the end of that month. Once again counsel were unable to meet the schedule, due in part to illness of liaison counsel for the plaintiffs. Therefore, an additional thirty-day extension was granted by the court at the request of all parties. Counsel still were unable to complete their discovery, and again at the request of all parties, the court permitted an extension and modification of the discovery schedule. Discovery was finally completed in March 1971 and narrative statements of facts and stipulations of uncontested facts were filed shortly thereafter. The filing of motions for summary judgment was permitted and

⁷⁵ *In re Air Disaster at Constance, Kentucky (TWA)*, 298 F. Supp. 353 (J.P.M.L. 1968).

⁷⁶ See, e.g., *In re Air Disaster at Constance, Kentucky (TWA)*, 298 F. Supp. 385 (J.P.M.L. 1969).

⁷⁷ The order attempted to follow as closely as possible the sample pretrial order (No. 5) provided in the MANUAL § 3.3. (Part II).

resolution of these motions, as described previously, resulted in the conclusion of the liability phase of this litigation.

These cases also do not have a particularly impressive "track record," notwithstanding the lack of delay in their transfer. The average time from crash to termination is one of the highest for all transferred cases. These cases have been in the "judicial limbo" for almost nine months due to the pendency of the appeal from the summary judgments. Other delays have occurred, some unavoidable. For example, when the initial transfer was ordered many claims were unfiled and the court was required to await the filing of these "tag-along" cases before it could proceed with a comprehensive discovery schedule.⁷⁸ This took about six months. A second delay resulted from the refusal or inability of the Government to comply with the discovery orders of the court. This matter required two separate hearings before this issue could be resolved, and as a result, all discovery was delayed several months. The final delay resulted from the unfortunate incapacitation of liaison counsel for the plaintiff. However, this delay was less than sixty days and was obviously unavoidable.

The principal reason for the increased time in the pretrial proceedings stems from the extensive discovery program. The initial schedule provided more than ample time to complete discovery, but the parties were not even able to meet the deadlines they had set. Although the court thought that discovery could be completed in less time, it gave counsel all the time requested, even though the court warned that further delays would not be readily granted. In spite of the court's persistent attempt to process these cases, the parties were unable to comply with this schedule, resulting in a significant delay of the final pretrial conference. Notwithstanding these delays, arguably the Covington litigation was not unduly prolonged, especially if, as the district court found, the extensive discovery program provided a sufficient factual basis for determining the question of liability as a matter of law.

The Hendersonville, North Carolina, cases have probably spawned more criticism of the Panel than any other group of air disaster cases. This is surprising for at least two reasons. First, only two of the one hundred cases involved in this litigation were transferred under section 1407, and second, these cases have proceeded fairly expeditiously.

The cases arose from the July 19, 1967, collision between a Piedmont Boeing 707 and a private aircraft, resulting in the death of eighty-two persons. A motion was filed on November 18, 1968, by one of the defendants requesting the transfer of all pending federal cases to the dis-

⁷⁸ It is relevant that none of the parties involved in the Covington litigation pressed the court to establish a discovery schedule; indeed, several counsel indicated that the court was moving too fast.

trict court for the Western District of North Carolina. In addition to thirty-five related cases pending in state courts in North Carolina and Illinois at that time, there were sixty-one cases pending in the district, two in the Western District of Missouri, and one (involving claims by the estates of thirteen defendants) in the Southern District of New York. Prior to the Panel hearing, the New York suit was transferred to the Western District of North Carolina under section 1404(a). Similar motions were filed in the two Missouri cases, but disposition was deferred pending decision on transfer under section 1407.

On January 14, 1969, the Panel transferred the two Missouri cases to the Western District of North Carolina for pretrial proceedings under section 1407.⁷⁹ The litigation continued to expand until eventually it included one hundred separate actions, ninety-three of which were originally filed in the Western District of North Carolina, five which were transferred under section 1404(a) and two which were transferred under section 1407. Had the Panel declined to transfer the cases, the two Missouri cases probably would have been transferred under section 1404(a) and the entire litigation would have been centered in the Western District of North Carolina.⁸⁰ Discovery in these cases began in 1968, long before the transfer of the two Missouri cases, and continued until April 1970 when the attorneys for both sides requested that further discovery be suspended pending settlement negotiations. By November 1971 all cases growing out of the collision had been settled and final judgments entered terminating them. Thus, virtually all cases were finally terminated within five years of the crash—a record surpassed by very few groups of air disaster cases.

Perhaps the most often-heard complaint in this litigation concerned the admittedly cumbersome procedure required to complete a settlement involving minors under North Carolina law. Nevertheless, to attribute this problem to Panel intervention is incredible. More than ninety percent of these cases were originally filed in North Carolina and would, of course, be governed by North Carolina law. Apparently the law of the transferor forum would apply to the few cases transferred under section 1404(a) or section 1407, thereby avoiding the necessity of following North Carolina's law with regard to settlements involving claims of a minor. Any delays in executing settlements and securing court approval resulting from the application of North Carolina law are because the collision occurred in North Carolina and the law suits had to be filed in the state's federal or state courts to obtain personal jurisdiction

⁷⁹ See *In re Mid Air Collision Near Hendersonville, North Carolina*, 297 F. Supp. 1039 (J.P.M.L. 1969).

⁸⁰ As is frequently the case in air collision litigation, one of the defendants—the owner or operator of the private aircraft—is amenable to suit in only one district and the litigation naturally becomes concentrated in that district.

over all defendants. The problem obviously did not result from transfers under either section 1404(a) or 1407 as charged by Mr. McElhaney.

The largest group of air disaster cases transferred under section 1407 are the result of the September 1969 collision of an Allegheny Airlines DC-9 and a Piper Cherokee near Indianapolis, Indiana. Although the initial motion was filed by Allegheny Airlines, all parties supported transfer under section 1407. The only disagreement was whether the Southern District of Indiana or the Southern District of Ohio would be the most appropriate transferee forum. The only factor favoring the Southern District of Ohio was that a greater number of actions had been filed in that district (fifteen) than were filed in the Southern District of Indiana (twelve). However, the litigation has grown to include 131 federal actions, sixty-seven of which were originally filed in the Southern District of Indiana, the eventual transferee court.⁸¹

Within thirty days of the transfer of these cases to the Southern District of Indiana, the transferee judge required Allegheny Airlines to furnish the names and addresses of all prospective claimants and their attorneys, if known, who had not commenced actions so that the order scheduling the initial pretrial conference could be directed not only to the attorneys in the then-pending cases but to all known prospective litigants and their lawyers. The filing of some "tag-along" cases was delayed due to the failure of the Federal Aviation Agency to promptly deny administrative claims arising out of this accident.⁸² The Government's delay in rejecting claims in these and other cases has materially delayed the initiation of discovery and other pretrial proceedings. The parties cannot be expected to fully participate in or to agree to be bound by the proceedings being conducted by the transferee court until their actions have been filed and transferred. Judge Holder found it necessary to require the United States to file a monthly report of all administrative claims pending before the Federal Aviation Agency arising from this crash, including the reason for delay if the claim had not been denied within two weeks of filing. This procedure might be helpful in all air disaster litigation involving the United States as a major defendant.

Another source of delay resulted from the concentration of air disaster litigation among specialized law firms. Judge Holder found it necessary to warn counsel that if their firms had so much business that they could not keep up with the court's orders, they should either add personnel or restrict the number of cases being handled at one time.

Nevertheless, despite these delays as well as the magnitude of the

⁸¹ *In re Mid-Air Collision Near Fairland, Indiana* 309 F. Supp. 621 (J.P.M.L. 1970).

⁸² Where administrative claims arising from a crash are presented to and denied by the Federal Aviation Agency, there seems to be no justifiable reason why immediate disposition of subsequent claims by other victims should not be made.

litigation, the cases have proceeded expeditiously, and selected cases have been transferred under section 1404(a) and consolidated before the third anniversary of the tragedy.⁸³

On the other hand, more than five years have passed since the 1967 TWA mid-air collision near Dayton, Ohio, and the litigation has not been finally concluded although one trial has been completed. These cases, considered for transfer on the initiative of the Panel, were already three years old when they reached the Panel and were not even ready for trial. The parties opposed the transfer on the grounds that the litigation was proceeding adequately, albeit slowly, through voluntary informal cooperation among counsel. But since the cases had been pending for so long and so little discovery had been completed, the Panel concluded that informal procedures were not as successful as some of the parties claimed. As a result, the cases were transferred to the Southern District of Ohio.⁸⁴ In March 1971, a three-week jury trial was held in a case involving both Trans World Airlines and the owner of the small plane involved in the collision. The jury returned a verdict in favor of the plaintiff against Trans World Airlines but exonerated the owner from any liability. The court is still wrestling with the problem of applying *res judicata* or collateral estoppel to the other claims. Although the time from crash to termination of all cases will exceed five years, not a very impressive record, the time from transfer to termination of all cases may be substantially less than two years. Undoubtedly, transfer of these cases under section 1407 and their subsequent assignment to a single judge resulted in a prompt disposition of cases which had, up to that time, been progressing quite slowly.

⁸³ The successful transfer of cases arising out of the Thai Airways Crash in Hong Kong in 1967 are illustrative. This group of cases resulted from the crash of Thai Airways Flight PG601 as it approached the Hong Kong International Airport. Twenty-four passengers died as a result and three passengers and two crew members were seriously injured. Twenty-four actions were pending in three different district courts when counsel for plaintiffs in certain California cases filed a motion to transfer all other cases to the Northern District of California under § 1407. (The Panel later held that a party does not have standing to move for transfer of cases in which it is not itself a party.) *In re Western Liquid Asphalt Antitrust Litigation*, 303 F. Supp. 1053 (J.P.M.L. 1969). On March 12, 1969, seven cases from two districts were transferred to the Northern District of California and assigned to Senior Judge Peirson M. Hall of the Central District of California who had been assigned to the Northern District of California by Chief Judge Richard H. Chambers of the Ninth Circuit. *In re Air Disaster at Hong Kong*, 298 F. Supp. 390 (J.P.M.L. 1969). Later that year, Judge Hall granted partial summary judgment holding that Thai Airways was liable on the basis of presumptive liability created by article 17 of the Warsaw Convention Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1934, 49 Stat. 3000 (1934), E.T.S. No. 876. He then advised the Panel (*see* RULES 15(a)(ii)) that the cases were appropriate for remand for further proceedings. On February 11, 1970, an order was entered remanding all actions which had been transferred under § 1407. The liability phase of this litigation was concluded in less than twelve months from the date of transfer under § 1407, quite an enviable record! It is expected that the litigation from the 1969 United crash in Santa Monica Bay will be terminated by trial within three years of the crash.

⁸⁴ *In re Air Crash Disaster Near Dayton, Ohio*, 310 F. Supp. 798 (J.P.M.L. 1970).

Another group of transferred cases which will soon be tried stem from the Northeast Airlines crash near Hanover, New Hampshire, on October 25, 1968. When the Panel considered the transfer of this litigation on its own initiative, seventeen separate actions were pending in five different district courts, the majority of which were in the District of Vermont. The parties conceded that there were substantial common questions of fact relating to liability and, once again, the only dispute concerned the selection of the transferee forum. The only factor supporting the District of Vermont was that many more cases had been filed there than in any other district, including the District of New Hampshire. Nevertheless, the Panel found more persuasive reasons for transferring these cases to New Hampshire.⁸⁵

Prior to the transfer of these cases, the plaintiff in an action filed in the Eastern District of Pennsylvania sought a class action on behalf of all passengers or their legal representatives.⁸⁶ However, Judge Fullam concluded that rule 23 was not suitable, primarily due to the small number of potential class members who each had a substantial interest in maintaining his own suit.⁸⁷

The first pretrial conference was held in Concord, New Hampshire, on September 9, 1970, and Judge Bownes informed counsel that he expected all cases to be ready for trial by September 1, 1971. Initially, the attorneys were allowed to establish the order of discovery with a view towards meeting the September trial date, but the court found that counsel could not work out such a schedule among themselves and had to establish a definite schedule for the times and places for taking depositions. As described previously, Judge Bownes recently transferred all cases filed in other districts to the District of New Hampshire for trial on the issue of liability with the idea that they will be returned to the courts of origin for further proceedings regarding the issue of damages.⁸⁸

⁸⁵ The crash occurred in New Hampshire and the majority of the witnesses were located there, the ground navigational instrumentation, which was alleged to be a cause of the crash, was located in New Hampshire. New Hampshire was said to be the only district in which all defendants could be sued, and the District of New Hampshire had already been chosen by one court as the appropriate transferee district under § 1404(a).

⁸⁶ See FED. R. CIV. PROC. 23. This case is believed to be the first attempt to bring a class action in air disaster litigation.

⁸⁷ *Hobbs v. Northeast Airlines*, 50 F.R.D. 74 (E.D. Pa. 1970).

⁸⁸ It has been suggested that once a court determines that an action should be transferred to another district under § 1404(a), the decision becomes the "law of the case" and a further transfer or retransfer cannot be made under § 1407. However, where circumstances have changed or other factors become important, the convenience of the parties and the witnesses and the interests of justice might be better served by a second transfer. This would seem to be the situation here. Before liability is established, the convenience of the parties and witnesses and the interest of justice might compel transfer to a single district, but after liability has been determined by settlement, summary judgment or trial, the convenience of the parties and witnesses and the interest of justice might well be served by transfer to another district or retransfer to the court of origin.

Since the court intends to give counsel for all parties an opportunity to present or defend their case in any manner they wish, it is hard to envision how this procedure can do anything but promote the just and efficient conduct of this entire litigation without sacrificing the rights of any party. The defendants are saved the expense of having to try several cases in different forums on the issue of liability. Judicial time is conserved as is the time of experts and other witnesses. Moreover, each plaintiff's right to have a jury determine the amount of damages under the standards prevailing in his community is maintained. Despite a lack of precedential basis, this procedure, eminently fair and just, and will most certainly help dispose of the litigation expeditiously, efficiently, and economically.

Another group of cases, those arising from the 1969 Puerto Rican International Airlines crash, are also rapidly coming to a close. On April 30, 1970, the United States, the principal defendant, filed a motion to transfer all actions in which it was a party to the District of Puerto Rico for consolidated pretrial proceedings under section 1407. Puerto Rican International Airlines (Prinair) then moved to transfer the remaining cases to Puerto Rico. All parties agreed that the transfer of these actions to the District of Puerto Rico not only promoted the just and efficient conduct of the litigation but also served the convenience of the parties and their witnesses. The cases were transferred to the District of Puerto Rico and assigned to Judge Edward Weinfeld⁸⁹ of the Southern District of New York who had been temporarily designated by the Chief Justice to serve in Puerto Rico for the purpose of conducting coordinated or consolidated pretrial proceedings in this litigation.⁹⁰ The litigation has since grown to forty-two separate actions, twenty-three of which were filed in the District of Puerto Rico. Although pretrial proceedings are technically being conducted in the District of Puerto Rico, all attorneys (including those from Puerto Rico) agreed that certain preliminary matters could be best disposed of in hearings before Judge Weinfeld in New York City. Travel to Puerto Rico for pretrial hearings on motions or other matters was therefore unnecessary for either the Judge or large numbers of counsel. Discovery is proceeding satisfactorily and should be completed in the not too distant future unless the litigation is terminated by settlement. The short interval between the crash and the assignment of all litigation to a single judge under section 1407 has virtually guaranteed that this litigation will be expeditiously processed.

The best "track record" of any group of air disaster cases for which

⁸⁹ Judge Weinfeld has been a member of the Judicial Panel on Multidistrict Litigation since it was established in June 1968.

⁹⁰ *In re San Juan, Puerto Rico Air Crash Disaster Litigation*, 316 F. Supp. 981 (J.P.M.L. 1970).

data is available belongs to those resulting from the 1969 crash at Maracaibo, Venezuela. The entire litigation was terminated in slightly more than two years.

At the time the Panel considered this matter, nine cases were pending in federal district courts. Seven were in the Southern District of Florida and the other two were in the Southern District of Texas. The two Texas cases were transferred to the Middle District of Florida without opposition and assigned to Judge C. Clyde Atkins for coordinated or consolidated pretrial proceedings under section 1407. Subsequently, both of the transferred cases were settled and dismissed; the litigation regained its multidistrict status, however, when a new action was filed in the District of New Jersey in March 1971 and transferred to the Middle District of Florida the following month. It was settled and dismissed in August 1971. No further actions have been filed. Thus, the entire litigation was terminated within thirty months of the crash—a credit to the transferee judge and to the attorneys involved! The average time from filing of each case to its termination was a mere 435 days—only a little more than a year. This “track record” will be hard to dispute with or without transfer. Although this litigation may have been easier to settle than those arising from domestic crashes, an allegation that this litigation was delayed or made more expensive by transfer under section 1407 is wholly without merit.

Not all air disaster litigation considered under section 1407 has in fact been transferred, and it is revealing to look at the status of those few groups of cases in which transfer was deemed inappropriate. The cases arising from the 1966 Braniff crash at Falls City, Nebraska, are an example. Like the Dayton, Ohio, cases, they were first considered for transfer more than two years after the crash. At that time there were twenty-one actions pending in five different districts. One of these, the case pending in the Northern District of Illinois, was actually a consolidated action involving the claims of seventeen plaintiffs. Judge William J. Campbell, to whom those cases had been assigned under the local rule, separated the issue of liability from the issue of damages and, with consent of all parties, settled the claims of the plaintiffs against the two major defendants. The defendants’ counsel agreed that the amount of the settlements (which aggregated \$2,535,000) was fair and just but were unable to agree regarding the share each should pay. The court solved the problem by ordering each defendant to deposit one half of the total amount of the settlement into the registry of the court.⁹¹ The clerk was directed to pay to each plaintiff the sum found by the court to be the fair settlement of their individual claims upon presentation of

⁹¹ See F. R. Civ. P. 16.

proper acquittances and releases. The cases then proceeded to trial on the issue of liability between the two defendants. The court also provided that if one of the defendants was found to be entitled to the return of some or all of its money, it would also receive interest at the legal rate. By use of this unique procedure, the claims of the plaintiffs were quickly settled while the issue of liability, vis-à-vis the defendants, was preserved for trial.⁹²

In considering the transfer of these cases under section 1407, the Panel noted that the cases were in substantially different postures. The majority of the cases in the Northern District of Illinois and the Southern District of New York had proceeded with "great expedition" while pre-trial proceedings in the Nebraska and Texas cases were not so advanced. In both districts questions of venue and personal jurisdiction had been raised and the Panel opined that transfer under section 1406 or 1404(a) might have been preferable to transfer under section 1407; consequently, transfer was denied.⁹³ Two of the Nebraska cases and the consolidated Illinois cases were subsequently transferred to the Southern District of New York under section 1404(a) and are still pending along with the other three actions originally filed in the Southern District of New York.⁹⁴ All other cases have been terminated.

The cases not treated under section 1407 have not, with the exception of the plaintiffs' claims in the Illinois cases, been resolved with any great degree of rapidity. The average elapsed time from filing to termination exceeds both the average time for "transferred" and "non-transferred" cases.⁹⁵ More than five years has elapsed since the crash and a substantial number of cases are still pending. Of course, all "non-transferred" cases do not progress so slowly. As the Panel anticipated,

⁹² Although several other judges have expressed an interest in following the procedure used by Judge Campbell, they have not been able to secure the agreement of all defendants. This procedure is generally not feasible when the United States is a major defendant.

⁹³ *In re Air Crash Disaster at Falls City, Nebraska*, 298 F. Supp. 1323 (J.P.M.L. 1969).

⁹⁴ The docket sheets for several of these cases reveal that no docket entries have been made in several years. It is doubtful that these cases are still active although the author received an inquiry from a Nebraska lawyer last year concerning the status of his case.

⁹⁵ This comparison is not meant to be critical of the judges to whom these cases are presently assigned or of the attorneys involved, especially since the author is unfamiliar with the cause of the delays or with other problems arising from the litigation, but rather to point out that multidistrict air disaster litigation does not always progress rapidly when the cases are not transferred under § 1407.

Other examples of protracted air disaster litigation not transferred under § 1407 include the Las Vegas, Nevada, crash in 1964, the New Orleans crash also in 1964 and the TWA crash in Rome in 1964. The liability phase of the Rome litigation has only recently been concluded in the Northern District of Illinois, almost seven years after the crash.

the cases arising from the two Bradford crashes did not require transfer and most have been terminated by settlement.⁹⁶

CONCLUSION

Analysis of the cases demonstrates that while avoidable delays sometimes occur in air disaster litigation, they are not the direct result of the transfer under section 1407. Small delays result from the Panel's consideration of transfer, but they generally occur at a time when discovery efforts are at best superficial.⁹⁷ Also delays of up to three months occur between the transfer and the first pretrial conference. Finally, there may be a period of several months, as there was in the Cincinnati (TWA) Air Crash Cases,⁹⁸ while the transferee court awaits the filing and transfer of the "tag-along" cases before establishing a discovery program and schedule.⁹⁹ The important conclusion which can be drawn from the statistics presented in this article and appendix is that in spite of these delays, air disaster litigation being processed under section 1407 progressed as rapidly or more rapidly than similar litigation processed without transfers. Since there may be a delay of up to six months between the filing of the motion for transfer (or the Panel's show cause order) and the transferee court's initial pretrial conference, "transferred" cases should lag "non-transferred" cases by at least six months. Since no such lag is evident, the only conclusion to be drawn is that once the transferee judge has assumed control of the cases under section 1407, discovery proceeds at a faster pace than it would if no transfer had occurred.

Although this article does not identify all delays which can occur in major air disaster litigation nor does it assess blame for these delays or determine whether they were excusable or inordinate, several causes can be identified. One is the refusal of the Federal Aviation Agency to immediately reject administrative claims arising out of a crash in which prior identical claims were rejected. Delay may also result from concentration of much of the air disaster litigation in a small number of specialized law firms which apparently do not have the resources to

⁹⁶ These two groups of cases were considered together although they arose from two separate crashes under somewhat similar conditions occurring less than two weeks apart. On April 20, 1970, the Panel entered an order to show cause why each group of cases should not be transferred to a single district under § 1407. The parties advised the Panel that several of the cases had been settled and settlement was extremely probable in the remaining cases.

⁹⁷ Delays may become somewhat greater when it is necessary for the Panel to find an out-of-district judge to handle the litigation.

⁹⁸ 295 F. Supp. 51 (J.P.M.L. 1968).

⁹⁹ The technique employed by Judge Holder for bringing in potential claimants who are not yet parties in any pending law suit might eliminate or reduce the magnitude of this type of delay. This technique was apparently first used by Judge Pierson M. Hall of the Central District of California, and he has found it very useful.

adequately prepare cases in several different courts at the same time. Perhaps the worst offender, certainly through no fault of the individual attorneys involved, is the United States Government—a party to almost all major air crash litigation. A possible solution is to delegate the United States Attorney for the transferee district the responsibility for cases in which the possibility of liability of the United States appears remote.

The major source of delay in air disaster litigation is the dogged determination of counsel for all parties to insist on formal discovery of all facts, usually by way of depositions upon oral examination, however relevant and important, concerning the crash.¹⁰⁰ In all other types of multidistrict litigation being processed under section 1407, the attorneys for the contesting parties attempt, whenever possible, to reach stipulations of facts which are either minimal or are clearly known, thus making formal discovery unnecessary. In air disaster litigation, on the other hand, the parties generally refuse to stipulate as to even the most minor detail concerning the crash. With this attitude, reasons for increasing the length of time in air disaster litigation is apparent. What is hard to comprehend is how the attorneys can then blame the courts or the Panel for the delays.

Some critics argue that in the absence of section 1407, certain selected cases (their cases) might be disposed of more quickly and more profitably. They may be correct, but is it not the responsibility of this country to dispense justice equally and fairly to all and not to give preferred treatment to those litigants who are represented by specialist counsel who, because of their experience, prestige, power, or other factors, can obtain a larger or quicker recovery for their clients. In this age of growing docket congestion and delays, all cases must be processed as expeditiously as possible so that other law suits are not unnecessarily delayed.

The Judicial Panel on Multidistrict Litigation was created to help alleviate the problems created by multidistrict, multiparty litigation. The transfer of related cases and their assignment to a single judge has generally resulted in the expeditious conclusion of the litigation. The Panel and the transferee judges have worked together¹⁰¹ in an effort to develop new solutions to these old problems. The goal is simple—"to

¹⁰⁰ This attitude has prompted one transferee judge to remark that the attorneys in his case would have undoubtedly taken the depositions of Wilbur and Orville Wright if they were still alive.

¹⁰¹ All transferee judges are invited to semi-annual meetings to discuss common problems and possible solutions. However, anyone who thinks that the Panel, through these transferee judge meetings or any other way, effectively controls the course of the transferred litigation seriously misconceives the role of the Panel and its staff and undermines the significance of an independent judiciary and the federal judge's sense of duty.

serve the just, speedy, and inexpensive determination of every action."¹⁰² Fundamental to the achievement of this goal is that advocates, especially those involved in air disaster litigation, must "become part of the solution and not part of the problem."¹⁰³ At a minimum:

The lawyer who throws obstacles in the path of orderly and expeditious court progress, may in some instances be serving a narrow financial or personal interest of a single client, but he is necessarily prejudicing the interests of his other clients who desire and are entitled to speedy determinations. To choose to serve the interests of one client at the expense of others can find no defense in the tradition of the lawyer's duty to his client.¹⁰⁴

¹⁰² FED. R. CIV. P. 1.

¹⁰³ Murrah, *Recognizing Responsibility*, Trial, November/December 1971, at 21.

¹⁰⁴ *Id.*