

# State-Federal Conference

## Balboa Bay Club, Newport Beach, CA

### Roundtable Meeting Agenda

State-Federal Judicial Working Group Co-Chairs:  
Hon. William Highberger & Hon. Brian Martinotti  
Conference Co-Chairs: Mark Robinson (Robinson Calcagnie) &  
Alicia Donahue (Shook Hardy & Bacon)



EMORY  
LAW

Institute for Complex  
Litigation and Mass Claims

#### Wednesday, February 27 (Quarterdeck Room)

6:30 PM **Welcome reception**, sponsored by conference co-chair  
Mark P. Robinson, Jr. (Robinson Calcagnie)

#### Thursday, February 28 (Commodore Room)

- 8:00 AM **Judicial Breakfast (Judges Only)**
- 8:50 AM **Attorney Registration/ Sign In**
- 9:00 AM **Session One – Coordination Issues:  
Parallel State/Federal Proceedings**  
Cathy Yanni (JAMS) & Ed Bell (Ankura)
- 10:00 AM **Session Two – Discovery: Concerns from the Bar**  
Latest Discovery Technology & Techniques –  
Chris Seeger (Seeger Weiss)  
State Actors as Plaintiffs – Sheila Birnbaum &  
Hayden Coleman (Dechert)
- 12:15 PM **Lunch Break –**  
Sponsored by Ankura Consulting (Ed Bell & Jen Alpert)
- 1:00 PM **Session Three – Breadth of Consolidation**  
Judge Frank & Judge Highberger
- 2:00 PM **Session Four – State Court Insights: Appeals**  
Comparative Interlocutory Appellate Rights in State  
and Federal Court – Judge Dow & Judge Highberger
- 3:00 PM **Break – Sponsored by Milestone Consulting (John Bair)**  
(attorneys adjourn)
- 3:15 PM **Judges-Only Session**
- 4:15 PM **Judges-Only Happy Hour & Dinner**



# State-Federal Conference Roundtable Session Descriptions

## 9:00 AM - State/Federal Coordination – Challenges & Solutions

With the proliferation of parallel state and federal proceedings, the challenge of coordination not only by the courts but by counsel has grown exponentially. Even relatively simple matters like service of process and notice have become very complicated due to the sheer numbers of cases and forums. While we generally should not seek to create rules based on the complexities posed by so-called once-a-decade cases, they can be helpful in helping advance our thinking by testing the system in a unique way and often pushing counsel to find innovative new solutions that can then be beneficially applied in simpler cases. What lessons have already been learned that might be applied to more typical parallel proceedings? What challenges remain to be solved?

## 10:00 AM - Discovery: Concerns from the Bar

The most requested topic by counsel was discovery, and the day will conclude with a discussion of two issues – one selected by plaintiffs and one by defendants.

- The use of technology has dramatically shifted the nature of discovery from the days when we all began our practices. Technology promises amazing efficiencies not only for the lawyers and clients, but to even be able to improve the rulings of judges as judges (or magistrates). But with these advances have come second-generation problems—new battlefields for plaintiffs' and defense counsel. In this segment, Chris Seeger provides an introduction to the new technology being used in complex litigation cases, and then turns to a substantive discussion of the uses and abuses experienced by counsel.
- There have been increasing questions about the rise of state and local actions as part of complex litigation. In particular, the use of contingency attorneys to represent AGs, as well as the side-by-side litigation in these cases even where the AG's office does not retain outside counsel. Some of the concerns involve: (1) the state's ability to issue civil investigative subpoenas to obtain discovery from a potential defendant even before a lawsuit is filed, (2) the introduction of certain private financial incentives and litigation funding into what is supposed to be a purely governmental function; and (3) threatened or actual employment of the state's criminal processes.

## 1:00 PM - Timing & Breadth of Consolidation

While we do not want to be driven by outlier cases, they can at times be helpful in shedding new light on trends that had been emerging in other cases but had not been so clear. This year, counsel from both sides of the aisle have been increasingly asking when the time is right for coordinated proceedings to be created, and whether they have been formed too early in some cases—causing problems in both the federal and state courts. And, there have been related questions about the scope of MDLs and JCCPs as they are being defined—how broad is too broad, and to what extent should courts be deferring to the judgment of counsel about the appropriate breadth of a coordinated proceeding. In addition, with mass-MDLs there has been a notation of the unique challenges created in simply administering litigation with massive numbers of parallel state and federal cases – from how parties can effectively notice each other, to confusion between the courts about authority to make decisions on certain matters – before one even reaches issues like what happens where some courts bifurcate and others do not. One of our state court judges also raised the interesting question of what mechanisms exist or could be created to allow a revisitation of the scope defined at the outset, where it becomes apparent that the scope is not functioning as envisioned but instead has become problematic for any of a number of reasons.

## 2:00 PM - State Court Insights: Appeals

The Federal Rules Committee has received a number of submissions on the topic of MDL appeals. At our conference with the Rules committee, the federal judges raised a number of concerns with a mandatory rule, while some in-house attorneys took the view that a permissive rule would not solve the problems faced. In response, the Rules subcommittee asked for more information on the types of problems defendants were seeking to solve as a way to target any potential solution to the real problems experienced. This mini-session revisits the topic, reflecting an interest in hearing about the experiences of the state courts – the laboratories of innovation – and how different appeals regimes have impacted the complex litigation process.

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### Participating Judges/ Neutrals:

**JCCP Judges:** Hon. William F. Highberger; Hon. David Cunningham; Hon. Ken Freeman; Hon. Amy Hogue; Hon. Ann Jones; Hon. Curtis Karnow; Hon. Carolyn Kuhl; Hon. Yvette Palazuelos; Hon. Brad Seligman; Hon. Peter Wilson

**Non-California Judges:** Hon. Rex M. Burlison (MO); Hon. Rachelle Lea Harz (NJ); Hon. Arnold New (PA)

**Federal Judges:** Hon. Eldon E. Fallon; Hon. Carl J. Barbier; Hon. Robert M. Dow Jr.; Hon. Joan N. Ericksen; Hon. Donovan W. Frank; Hon. Brian R. Martinotti; Hon. Casey Rodgers; Hon. James V. Selna; Hon. Dave Proctor - *via Skype*

**Special Masters:** Ed Gentle, Gentle Turner Sexton & Harbison; Cathy Yanni, JAMS

### Participating Attorneys:

**Defense:** Bill Beausoleil (Hughes Hubbard), Mollie Benedict (Tucker Ellis), Sheila Birnbaum (Dechert), Kelly Crawford (Riker Danzig), Alex Dahl (Lawyers for Civil Justice), Alycia Degan (Sidley Austin), Alicia Donahue (Shook Hardy), Blaine Evanson (Gibson Dunn), Sean Fahey (Pepper Hamilton), Mike Healy (Shook Hardy), Amy Laurendeau (O'Melveny), Joe Petrosinelli (Williams & Connolly), Susan Sharko (Drinker Biddle), Dan Smulian (Greenberg Traurig)

**In-House:** Tom Szivos (Bayer), Connie Matteo - *via Skype* (Pfizer)

**Plaintiffs:** Kim Adams (Levin Papantonio), Andy Birchfield (Beasley Allen), Rachel Jensen (Robbins Geller), Troy Rafferty (Levin Papantonio), Mark Robinson (Robinson Calcagnie), Ken Seeger (Seeger Salvas), Steve Skikos (Skikos Crawford), Adam Slater (Mazie Slater), Chris Seeger - *via Skype* (Seeger Weiss)

**Other:** Jen Alpert & Ed Bell (Ankura), Orran Brown Sr. & Phil Strunk (Brown Greer), Sonya Virant (LMI), John Bair (Milestone Consulting)