

# Inside the JPML

BY KAREN K. CALDWELL



## How the Judicial Panel on Multidistrict Litigation keeps the federal courts' massive MDL docket on track

**T**he world knows multidistrict litigations (MDLs) by the names of the cases' defendants and the high-stakes, high-dollar claims at issue. In fact, these claims are often touchpoints for major moments in recent American history: Litigation stemming from asbestos exposure, the Volkswagen "clean diesel" cars, the opioid epidemic, the weed killer Roundup, and Google's advertising practices have all proceeded as MDLs.

In the last 50 years, MDLs have come to play an increasingly prominent and important role in our country's legal system. It all started in the 1960s, when the judiciary was forced to manage more than 1,800 related electrical equipment civil antitrust cases filed in multiple district courts across the country. An ad hoc coordinating committee was formed to manage that litigation, including coordinating discovery across all the cases. It was apparent that such complex litigation proceeding in multiple district courts would only become more common. Congress responded by passing the federal statute creating the MDL mechanism, 28 U.S.C. § 1407. Section 1407 gives courts a way to solve complex problems in cases filed in multiple courts, and it helps alleviate the problems of inefficiency, duplicative discovery, and inconsistent pretrial rulings posed by having related cases pending in multiple district courts.

According to the Administrative Office of the U.S. Courts and the U.S. Judicial Panel on Multidistrict Litigation, MDLs constituted 38 percent of the federal civil docket in 2019.

That figure has since grown to approximately 59 percent. MDLs dominate civil litigation, and they are here to stay.

Less talked about is the Judicial Panel on Multidistrict Litigation (JPML or the Panel), for which I serve as Chair. Section 1407 allows the JPML to transfer civil actions involving common factual questions pending in different districts to one court for pretrial proceedings. We call this process of bringing cases together "centralization." The goal is to create a federal legal process that enables the judiciary to administer and resolve factually related complex civil cases more efficiently. Here I offer some reflections on how the JPML works to bring that goal to life.

### What Does the JPML Do?

**Determines the appropriateness of centralization.** First, and perhaps most importantly, the JPML determines whether centralization of a particular group of cases for pretrial discovery and motions practice will further the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

The Panel must use three broad criteria in making its determination. First, civil actions must be pending in differ-

ent districts and must involve "one or more common questions of fact." Therefore, the litigation must have what we call "multidistrict character," and the cases must share factual issues. These common issues need not predominate over individual questions, as in the class-action context. The fewer common factual questions are found among a group of cases, though, the more complex those questions generally need to be to merit centralization. Common legal questions, standing alone, are not sufficient to merit centralization under Section 1407. Second, the Panel must determine "that transfers for such proceedings will be for the convenience of parties and witnesses," and, third, that they "will promote the just and efficient conduct of such actions." Whether centralization will promote convenience and efficiency is a very case-specific determination. The JPML weighs numerous factors, including the number of cases pending, the nature of the claims and defenses, and the number and complexity of the common issues. Any single factor can only be properly evaluated in the context of a particular docket, as every litigation is unique. And the Panel considers issues of convenience and efficiency from the perspective of the litigation as a whole, rather than any one party in isolation.

The JPML has said that centralization should be the "last solution after considered review of all other options." That is because actions centralized for pretrial proceedings ultimately must be remanded to their transferor court if they are not resolved during pre-

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trial proceedings. Alternatives such as informal coordination among the parties and involved courts, as well as transfer under Section 1404 for coordinated or consolidated pretrial proceedings, allow the actions to proceed through pretrial in the court that eventually will try the case. If such alternatives are practicable, they may be preferable to creating an MDL for a given litigation.

Since the JPML's inception, it has created more than 1,800 MDL litigation dockets and has denied more than 790 motions for centralization. Usually, a party makes the request, but sometimes the Panel will create an MDL on its own initiative, usually through a show-cause order. Either way, notice must be given to all parties of the JPML's hearing at which it will consider whether the actions should be centralized. Parties brief the issue, and may support or oppose centralization or suggest different transferee districts.

Every two months, the JPML holds a hearing at a different courthouse to consider these motions. Because we are a national court, we make an effort to hold hearings in all regions of the country each year. We usually hear oral argument only on motions to create new MDLs, and decide motions in existing matters on the basis of the briefing. If the Panel decides to create a new MDL, a Panel member will contact the proposed transferee judge to ascertain their willingness to be assigned the litigation, and the chief judge of the proposed transferee district to obtain their consent to assignment of the MDL to that district. The JPML strives to issue its orders within two weeks of the hearing session.

**Assigns a court.** Once the JPML decides that centralization is appropriate for a given litigation, we must select

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the court in which the MDL will proceed (the “transferee court”) and the judge who will preside over the MDL (the “transferee judge”). By statute, this selection must be made with the consent of the chief judge of the transferee district.

Selection of the transferee district often is a very case-specific decision. This can be a difficult question, sometimes more so than the question of whether to grant centralization. We may have many possibilities from which to choose the transferee district, or perhaps only a few good options. Sometimes, the court's location is important due to the nature of the discovery and the concentration of witnesses. Other factors include the location of the most procedurally advanced cases, the parties, a significant common event (such as a plane crash), and related proceedings. Again, the relative importance of any one factor will be litigation-specific, depending on what will most benefit the litigants and the judiciary. Ultimately, our goal is to place the MDL with a capable transferee judge in a convenient location.

**Assigns a judge.** Selecting a judge who is an active case manager often is key for a successful MDL. These are complex cases that can become bogged down if the transferee judge is not attentive and does not efficiently move the cases forward. The ideal transferee judge is one with some existing knowledge of one or more of the cases to be centralized and who may already have some experience with complex cases, on the bench or in practice. Accordingly, the JPML often transfers an MDL to a judge already assigned one or more of the cases on the motion. Sometimes this is not possible, however, as there may be no suitable judge in the districts in which the constituent actions are pending, or the judges may be too inexperienced for what portends to be a particularly complex docket. In such instances, we might select a transferee judge with prior MDL experience, even if they are not assigned one of the constituent actions.

The Panel also seeks to “broaden” our bench of transferee judges. We do not merely assign MDLs to a small group of judges who already have had MDL experience. Instead, we look at the experience of the judges we are considering, their willingness to take on additional work, and their workload as well as the workload of their district. We regularly survey district judges to ascertain their interest in and capacity to handle an MDL.

The JPML is not authorized to make any decisions on the merits or jurisdiction of a given case — all substantive decisions are made by the transferee judge. The Panel also does not consider how a particular circuit's law may apply or the legal or factual strength of a given case. Rather, Section 1407 focuses the JPML on the factors of justice, convenience, and efficiency.

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**Handles tag-along and direct-filed actions.** We also decide whether later-filed actions involving the same or similar factual issues — so-called “tag-along” actions — should be transferred to the MDL. Under Panel Rule 7.1, parties and counsel involved in an MDL are obligated to inform the Panel of any potentially related actions in which they are involved. If the JPML staff preliminarily determines the action is related to the MDL, they will place it on a conditional transfer order (CTO) and, barring objection, the case will be transferred. Any objecting parties may move to vacate the CTO, which will stay the transfer until the JPML can consider the motion to vacate. If the Panel determines the action is not related to the MDL and declines to place the action on a CTO, an involved party may move to transfer the action to the MDL. In addition to these tagalong cases filed in other courts, which are transferred by the Panel, additional plaintiffs often file new actions directly in the transferee court. We call these “direct-filed actions,” and sometimes they comprise many, or even most, of the cases in an MDL proceeding.

**Remands when necessary.** Section 1407 limits centralized proceedings to pretrial management. This strikes a balance of preserving plaintiff’s choice of venue for trial, yet includes proceedings — discovery and dispositive motion practice — that are most likely to be duplicative among the cases. The JPML therefore has the responsibility, once common pretrial proceedings are completed or the actions are ready for trial, to remand any unresolved cases back to the courts in which they were originally filed (the “transferor courts”), though of course — per a 1998 Supreme Court case — a transferee judge cannot transfer the case to

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himself. Most cases centralized by the Panel are resolved before they reach the point of necessary remand.

One exception to the general rule that remand should occur at the conclusion of pretrial proceedings is that it is not unusual for the parties in an MDL, particularly in larger products liability or mass tort MDLs, to consent to the transferee court trying what are called “bellwether cases.” These are essentially test cases that enable the parties and the court to, among other things, determine the nature and strength of the claims and get a sense of the range of values the cases may have for settlement purposes.

### Who Is on the Panel?

Section 1407(d) provides that the JPML consists of seven federal judges appointed by the Chief Justice of the United States, with no two judges being from the same circuit. This ensures a geographically mixed group of judges, which is critical for a panel that deals with cases that often span the nation. I have had the privilege of serving on the Panel since 2018 and as Chair since 2019. The current Panel consists of seven district court judges, but it can include, and has included in the recent past, judges from the courts of appeals. Judges appointed to the JPML, whether from the district court or the circuit court, typically are seasoned jurists

with substantial experience in overseeing complex litigation. The statute does not specify a term on the Panel, but the Chief Justice’s appointments usually are for a term of seven years.

My colleagues are skilled and collegial judges who are well-versed in the nuances of managing complicated dockets. All have presided or currently preside over at least one MDL, ranging from antitrust to data breach to sales practices to mass tort products liability. Their diversity of experience and backgrounds informs our decisions, their collective wisdom with respect to MDLs and complex litigation is immense, and our collaborative decision-making process produces consistent and well-reasoned judgments.

Given the large number of cases in MDLs, the JPML’s role in streamlining these civil actions is vital in unburdening our overloaded federal courts. My colleagues and I do this work gladly, even though we do not receive reduced caseloads in exchange for Panel service, which entails preparing for and attending hearing sessions every other month and addressing the occasional motion that requires a ruling in between hearing sessions. We also plan the JPML’s annual conference to provide MDL-specific learning opportunities for transferee judges. So, the Panel’s work never stops, and we wouldn’t have it any other way.



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