

The JPML Hearing: A Plaintiff's Perspective

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89 UMKC L. Rev. 827

UMKC Law Review

Summer, 2021

Multidistrict Litigation: Judicial and Practitioner Perspectives

Formation

Judicial Panel on Multidistrict Litigation

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THE JPML HEARING: A PLAINTIFF'S PERSPECTIVE**I. INTRODUCTION**

The public-facing work of the Judicial Panel on Multidistrict Litigation (“JPML” or “Panel”) is most evident in the Hearings it holds at least every other month, to decide whether, where, and to whom to transfer federal cases sharing common questions of fact.

Of this singular institution, the Panel Hearing, it can be said (with profuse apologies to Winston Churchill): “[N]ever in the field of human conflict have so many, come so far, to speak so briefly, on cases of such magnitude.” It is true that under contemporary Panel practice, the hearing has evolved into a uniquely efficient centralization mechanism, designed to afford logistical due process to the myriad participants in the dozen or more pieces of major litigation on each hearing's docket. This is done, in the course of one morning (and sometimes into an afternoon), with what may seem like mere snippets of argument on behalf of the parties, and searching interrogation by the Panel members, occasionally leavened by humorous repartee. The Panel ensures that the advocates for or against centralization focus on the statutory mandates of 28 U.S.C. § 1407(a): convenience for the parties and witnesses, and promotion of the just and efficient conduct of the litigation. The Panel relies on presenters to assist it in the search for transfer to an appropriate district and assignment to a judge who can (in what has become a Transfer Order mantra) “steer these cases on an efficient and prudent course.”¹ Above all, while promoting § 1407's objectives, arguments must avoid the topics most dear to a lawyer's heart: the merits.

A Panel argument is thus, at least on the surface, all logistics, and no law. To enhance this paradox, in the quest for the ideal transferee judge, the worthiness of any may not be impugned. While some districts may be overburdened in general, may host too many other multidistrict litigations (MDLs), or may be simply inconvenient (e.g., Alaska, which has never hosted an MDL), all districts, and all the federal judges who serve in them, are wonderful.

The fact that the Panel manages to skillfully decide the momentous questions of centralization and assignment, without the lengthier arguments on each case to which litigators are accustomed, puzzles and frustrates participants, who travel from afar to advocate for the destiny of their cases. To be, or not to be, “centralized”? And if “transferred,” where? And to whom? Can the fate of one's case, and hundreds or thousands of others, truly hinge on a two-minute (or, *828 for respondents, often a one-minute) argument?

Over the years, in the course of representing plaintiffs in a variety of federal statutory class actions, consumer litigation, and mass tort cases, I have made multiple pilgrimages to Panel hearings. I have come to appreciate them not only as a unique forum, but as a surprisingly functional mechanism that promotes early and active case management that catalyzes the development of

the relationships among counsel, which crucially achieves functional (rather than dysfunctional) coordination. If it is true that “80% of life is showing up,”² the genius of the Panel Hearing is existential.

The utility of the hearing to the participants transcends and justifies the inconveniences of travel by providing an invaluable opportunity for meetings among lawyers and jump-starting case management planning. The regular hearings of the Panel, in ten or so different locations each year, have created and nurtured a specific, durable, and living MDL culture that in turn has come to play an essential, albeit subjective and qualitative, role in the success of the MDL system in fulfilling § 1407's purpose.

II. WHAT THE PANEL HEARING MEANS TO THE PANEL

In 2008, an esteemed former Chair of the Panel, the late John G. Heyburn II, wrote a comprehensive article on the work of the Panel, *A View From the Panel: Part of the Solution*.³ Although twelve years have passed since Judge Heyburn wrote it, the article remains instructive as to the history, evolution, and contemporary practices of the Panel.⁴ Judge Heyburn summarized the Panel's procedures:

***829** The Panel's procedures, including rules setting forth relatively short deadlines for motion practice, are designed to promote fairness, efficiency, and an opportunity to be heard. The Panel keeps its written opinions brief and to the point. Each decision follows a similar format, succinctly addressing the relevant issues. And, over the past two decades, nearly every one of those decisions has been unanimous. The straightforwardness and unanimity of the Panel's decisions are not because every decision is easy, and this dynamic is not a result of the complete absence of differences among the Panel members. The Panel devotes considerable discussion to the more complex and difficult dockets. Those discussions invariably lead to a consensus about the best course of action.⁵

The Panel is a unique and paradoxical tribunal. It is a federal tribunal tasked with organizing, coordinating, and centralizing the nation's federal civil litigation; yet it operates independently of the Federal Rules of Civil Procedure. Instead, it has devised, and periodically revises, its own Panel Rules.⁶ It is not only a tribunal of first resort, but also last resort. There is no right of appeal from a Panel's order granting or denying transfer.⁷ Review is possible only by petition for writ of mandate,⁸ an avenue of recourse only rarely utilized. The Panel is just that: a seven-judge panel, comprised of district (and sometimes appellate) judges, each of whom must come from within a different circuit.⁹ The Panel holds a number of hearings each year, at a different location each time.¹⁰ The grant of MDL centralization is not a foregone conclusion. As an increasingly higher percentage of federal civil actions have found themselves components of multidistrict proceedings, observation of the Hearing Orders posted on the Panel's website reveals that the percentage of centralization petitions that the Panel grants has decreased, perhaps reflective of a Panel attempt to counterbalance concerns of multidistrict takeover.

The Panel considers the hearing itself a key factor in achieving its “consensus about the best course of action,” because it provides a unique opportunity to hear about the litigation with a high degree of candor from the lawyers who directly prosecute and defend it.¹¹ As Judge Heyburn notes:

***830** Perhaps the most remarked-upon aspect of these procedures concerns oral arguments on new § 1407 motions. These arguments are scheduled at different locations around the country every two months. During oral argument, each advocate is allowed between two and five minutes to present his or her party's position. The Panel's oral argument docket often contains fifteen to twenty § 1407 motions for creation of a new MDL, with between two and seven (or, on rare occasions, more) attorney appearances per motion. Once you do the math it becomes evident that the Panel generally must accommodate fifty to seventy lawyers during the normal two and one-half

hour sessions. The Panel staff attempts to try to divide the available time fairly among the new dockets and among those advocating or contesting centralization or advocating the selection of a particular transferee district.¹²

After describing the MDL Panel's hearing practice, Judge Heyburn states the obvious: “To the uninitiated, this may seem like an entirely unreasonable procedure.”¹³ How, and why, then, does it work, at least from the Panel's perspective? As Judge Heyburn continues:

In practice, it works quite well for a variety of reasons. The Panel is composed of seasoned and attentive judges who are well - versed in the details and implications involved in each docket. Oral arguments provide the unique opportunity for counsel to focus our attention on those issues that most affect the litigation and that really speak to the statutory criteria. Experienced counsel can distill the essential points of their argument within the few moments allowed. They emphasize their substantive concerns about why centralization under § 1407 will either promote or impede the just and efficient resolution of their case or the litigation as a whole. In a given docket, such arguments can be decisive.

Judge Heyburn's confidence in counsel is reassuring. But what do counsel--at least plaintiffs' counsel--think?

III. WHAT THE PANEL HEARING MEANS TO THE ADVOCATES

As practice before the Panel boils down, at least as this author perceives it, it is just this simple: in two minutes or less, make the case for centralization of the piece of necessarily complex litigation, emphasizing the § 1407 statutory factors, and avoiding all extraneous, irrelevant, or offensive matters.¹⁴ Do plaintiffs' counsel practice our two minutes (or more frequently, our one minute) of oral arguments before presentation? You bet we do. Do we remember to be responsive to the Panel's inevitable questions that break into our carefully rehearsed, not-one-word-wasted presentations? Of course, we try. Do we often leave our carefully written and rehearsed presentations aside, preferring to live in the moment and respond, directly and candidly, to the Panel's questions about *831 our case (which we both hope for and dread)? Absolutely.

A Panel argument is unique (and uniquely stressful) because the destiny of a piece of litigation is at stake. It is not the where, so much: geography is not always destiny. It is, of course, the who: the identity of the transferee judge to whom the management of the litigation is to be entrusted is, as in the nature of all complex litigation, decisive. It may not be decisive as to outcome, and of course advocates studiously avoid making “merits” arguments to the Panel. The role of the Panel is not to decide who will, or should, win or lose the motions in, or who should prevail in the outcome of a particular piece of litigation. Instead, the Panel's job is judicial air traffic control.

The paradox of Panel arguments, to those who must make them, is that advocates may not speak on the matters most germane to the merits, at least on the surface. We are arguing the where and (delicately) the who of our cases, not the why. We are arguing the what of our cases to demonstrate common factual questions that will benefit from centralized pre-trial treatment. Among the “don'ts” novice advocates learn are: no judge can be disparaged; no judge may be favorably compared to another; the Panel is not interested in which judge will, or has, ruled favorably on the case from our perspective; and (at least in my observation of the Panel's reaction when such norms are violated) complaints about the misbehavior of one's adversary (or one's co-plaintiffs) must be factually addressed, if at all.

Panel arguments, within the time limits allowed, can become quite lively, if not contentious, given the stakes involved. This can be exhilarating despite, or perhaps because of, the time constraints involved. What will strike the outside observer (or, in

these COVID days, the passive telephone listener) are the generally high quality of the arguments made, the Panel's familiarity with the docket, and the sophistication of the questions posed by Panel members.

Advocates appearing for oral argument before the Panel typically converge in a large ceremonial courtroom to accommodate potentially hundreds of lawyers present for oral argument, either as presenters or interested observers. The sheer number of presenters who must be accommodated has led to the typically short allowance of oral argument time. One-minute arguments are typical for presenters who do not oppose transfer but simply wish to weigh in on the identity of the transferee court. A time clock is kept, the Panel is almost invariably a "hot" bench, and questions from Panel Judges fly fast and furious. Sometimes, a presenter may be permitted extra time if the Panel has many questions or is interested in questioning the presenter regarding the status, progress, and nature of the litigation. The Panel Judges come well prepared, having actually read the briefs and submissions, and, as Judge Heyburn's article emphasizes, are intent on reaching an informed consensus as to transfer, or denial of transfer, and/or the district court--and transferee judge--to whom an MDL docket will be assigned.¹⁵

***832 IV. WHAT THE PANEL HEARING MEANS TO MDL CULTURE**

Meanwhile, out in the hall, those whose dockets have yet to be called, or who have finished their arguments, congregate to greet familiar colleagues, meet and confer on case management or organization issues, and exchange endless predictions about the fate and destination of the matters argued that day. It is a "gathering of the tribes" of complex litigators from around the country: an unsurpassed opportunity to see and be seen, to meet, to discuss, and sometimes to bargain. Everyone wants to be "in the room where it happens."¹⁶

The day preceding the hearing, as the attorneys converge, is used to advantage as well: CLEs are provided by HarrisMartin, American Association for Justice, and settlement claims administration vendors; often, the class action notice and settlement administration firms sponsor their own receptions and gatherings. The day before the Panel Hearing has become a major educational and social event.

The Panel is well aware of this collateral activity. Since the Panel Judges themselves often serve as transferee judges, they know that the lawyers who have attended Panel sessions come to the initial status conferences in the resulting MDLs well-prepared to discuss discovery and case management. This preparation is every bit as valuable to the orderly and efficient conduct of multidistrict litigation as the minutes spent by each presenter on oral argument itself. Without the ability to convene and converge at the site of an MDL Panel Hearing both the day before and the day of the Hearing itself, the inestimable value of this convergence would be lost.

The Panel Hearings held in May and July 2020, during the early months of COVID-19, were markedly different. They emphasized both the commitment of the Panel to continue its essential work and the value lost when advocates cannot convene in person. For example, the July 30, 2020 hearing of the JPML was conducted via Zoom teleconference for the Judges and the arguers only. Those not presenting during a particular docket, and those accustomed to attending in person to observe were confined to telephonic listen-only mode. This second-best means of participation did not deter counsel from showing an interest in the proceedings. There is always one matter that seems to draw the lion's share of interest among attendees to a JPML Hearing. Unsurprisingly, in the time of COVID-19, at the July 30, 2020 Hearing Session, that case was MDL Docket No. 2942, *In re* COVID-19 Business Interruption Protection Insurance Litigation.¹⁷ At one point during the COVID-19 litigation arguments, there were 478 telephonic participants on the conference line.

The Panel members were, as always, quite well-prepared. In a concession to the somewhat static and linear nature of a Zoom conference (a phenomenon with which all courts and litigators are now depressingly familiar), the Panel did not interrupt presenters by peppering them with questions, and the presenters were allowed to make their two- or three-minute presentations uninterrupted.

*833 Although the Panelists made up for the lack of interruptions with pointed and incentive questions at the conclusion of each presentation, the excitement of real-time conversation among the panelists and lively interchange between panelists and presenters was appreciably diminished. Will that affect the quality of the outcome? Mostly likely not. The Panel members convene both before and after the oral argument sessions to discuss and reach consensus on their transfer decisions. Remote communications will not diminish their effectiveness.

But the most singular quality of a Panel Hearing from the practitioner's standpoint is missing: the profound value of being there. Complex litigation is all too often practiced remotely, via conference call and video conference--a common situation even before COVID. The in-person JPML hearing has been a gathering place, a magnet drawing practitioners from across the country to a momentous event of great interest to all, with just enough drama--and none of the trauma--of determinations on the merits that produce winners or losers. It was, and hopefully will be yet again, a uniquely valued opportunity for complex litigation practitioners of all stripes, and on both sides of "the v." to be, if only for a day or two, true colleagues. The tone and civility of complex litigation, particularly those cases of high stakes and high profile in which the Panel often deals, has been established and maintained, for the better, through the personal and human dimension of the Panel hearing as a convening mechanism.

An evolutionary note: a mass photo of those present at a Panel Hearing is a literal snapshot of the multidistrict bar. For many years, it would have looked like a group shot of an older, mostly white, mostly male club. This has begun to change, reflecting a long overdue increase in participation--including in arguments--by younger lawyers, women, and attorneys of color. Attendance at a Panel hearing and the accompanying events is a crash course in multidistrict litigation, and therefore a must for those lawyers looking to develop their litigation careers through visibility and engagement. Greater inclusion and diversity in the Panel hearing participants is both a cause and effect of the initiative by transferee judges to encourage--and appoint--more diverse plaintiffs' leadership structures. The MDL process is much the better for it.

V. CONCLUSION

This article celebrates the value of decades of recurring convergences of scores or hundreds of lawyers before a seven-judge Panel, live and in person, in real time in one real place. The live Panel hearing, like other court proceedings, fell victim to COVID-19. Pandemic-era Panel hearings have continued by necessity through Zoom. While the Panel's continuity and adaptiveness are impressive, and the Panel system certainly has not crashed, the hearings are not the same. The Panel hearing, more than most, depends for much of its vitality and utility, on "liveness." We are told that, even after the pandemic ends, many court hearings will remain remote. Convening telephonically or by video conferences is undoubtedly less expensive and more convenient than live hearings. Courts, practitioners, and their clients, will appreciate the real savings of time and money. Whenever the "new normal" arrives, many judges and *834 lawyers have expressed the hope and expectation that it will embrace more efficiency and less time lost, a goal that remote hearings of routine matters will foster. But it is also my hope, that when possible, the tradition of live JPML hearings will resume. If so, the long-term prospect of effective and efficient case management of complex MDLs will improve. Though the FDA has not approved this statement, live Panel hearings help support a healthy MDL system.

Footnotes

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¹ *In re Evenflo Co. Mktg., Sales Pracs., and Prods. Liab. Litig.*, MDL No. 2938, at 2 (J.P.M.L. June 2, 2020) (assigning the matter to Hon. Denise J. Casper, "an experienced transferee judge. We are confident that she will steer these cases on an efficient and prudent course."); *accord In re: Nine West LBO Sec. Litig.*, MDL No. 294, at 2 (J.P.M.L. June 2, 2020) ("Judge Jed S. Rakoff is an experienced transferee judge, and we are confident he will steer this litigation on a prudent and expeditious course to resolution.").

² This aphorism is most frequently tied to Woody Allen's quip that "80 percent of success is just showing up." Either way, it has become a given that success in multidistrict litigation is best enhanced by "showing up"--and being involved-- in the Panel process.

3 John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225 (2008).

4 *See id.*

5 *Id.* at 2235.

6 The Panel posts its Hearing and Panel Rules, and information on pending MDLs on its website, jpml.uscourts.gov.

7 28 U.S.C. § 1407(e).

8 *Id.*

9 28 U.S.C. § 1407(d).

10 *See* Heyburn, *supra* note 3, at 2235.

11 *See id.*

12 *Id.* at 2235-36.

13 *Id.* at 2236.

14 *Id.*

15 *See id.* at 2235.

16 Apologies to Lin-Manuel Miranda's Broadway hit, *Hamilton: An American Musical*.

17 *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942 (J.P.M.L. Aug. 12, 2020).

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