Evaluating and Improving the MDL Process

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Since its creation in 1968, the U.S. Judicial Panel on Multidistrict Litigation (JPML) has played an increasingly important role in the administration of complex multidistrict federal cases. In early 2010, the panel embarked on a thorough self-evaluation to better understand the dynamics of multidistrict litigation, to help the panel make more informed decisions and to better prepare transferee judges to handle these complex cases.

In one of our projects, we sought to solicit comments from lawyers who practice before the panel and who litigate centralized cases. To accomplish such an unprecedented and daunting task, the panel enlisted the assistance of Francis McGovern. What follows are McGovern's primary summary comments and the chairman's observations on behalf of the panel.

Background

McGovern: By way of background, the panel comprises seven judges appointed by the Chief Justice of the United States Supreme Court. The panel decides whether similar cases in multiple federal district courts should be centralized in a single MDL docket. Currently, federal judges preside over 280 centralized MDL dockets comprising about 15 percent of the cases on the federal civil docket.

Obviously, the panel's activities are quite consequential for the administration of civil justice in this country. For that reason, I jumped at the opportunity to learn more about how the lawyers viewed the process. Over a six-month period, I conducted personal interviews with a cross-section of approximately 90 attorneys who practice before the panel and in MDL dockets. These interviews were extensive, and counsel's comments were quite thoughtful.

Overall, counsel believe that the panel is accomplishing its basic objective of easing the burdens of multiparty, multijurisdictional litigation on parties, counsel, and courts. Counsel made many worthwhile observations and raised a number of justifiable concerns. Naturally, some counsel were unhappy that their cases were centralized and with the procedures that led to it. Others were unhappy that the transferee judge did not take a more decisive role in managing difficult cases. Lawyers expressed little tolerance for the perceived outlier practices of some transferee judges. Most wanted the panel to do more to enforce the commonly accepted and proven practices.

Heyburn: Professor McGovern's initial report to us about a year ago reassured us that our inclination about the need to improve our processes is on target and encouraged us to continue

our efforts.

His final report and insightful observations have been an important catalyst to our efforts to improve our processes and decision making. Over the past few years, the panel significantly upgraded educational resources for transferee judges, published guides that encourage more consistent administration of MDL cases, reduced transaction costs by fully implementing our electronic filing system, and began research projects to help us understand some consequences of our own decisions.

McGovern: The panel adheres to a tight briefing schedule, which is completed within 30 days of the filing of a 1407 motion to centralize. It meets every two months to hear oral argument on these cases. The panel issues an order in each case within about two weeks of the argument. The first group of comments concerns the manner in which the panel receives argument by briefing and oral argument.

Most attorneys felt that briefing was an acceptable vehicle for virtually all their necessary arguments. Some even believed that the briefs could replace oral arguments altogether; others thought that the briefs should be expanded to contain an "agreed to" statement of facts. The bulk of the suggestions related to ensuring that the timing for filing briefs did not adversely delay the matter to a subsequent panel hearing.

Recent Record

Heyburn: The panel is very satisfied with the high standard of factual and legal advocacy in the briefs. Through active docket administration and the efficiencies derived from our electronic filing system, we have significantly advanced the argument dates for 1407 motions. The panel now issues a final decision no later than four months and often closer to two months after filing of a 1407 motion. Improving upon this is not possible without reducing response times or our preparation time, each of which would have some adverse consequences.

McGovern: The panel's unique oral argument procedures generated considerable comment, though no consensus emerged concerning changes to it. The panel hears oral argument on 15 to 20 cases at each session. Parties arguing for the same result are strongly encouraged to designate one spokesperson. Even so, on any docket, anywhere from two to eight lawyers might argue. Each counsel is limited to between two and five minutes of argument.

Most counsel felt that the panel hearings presented a worthwhile opportunity for the lawyers to meet and confer informally outside of the hearing session itself.

Most comments focused on the limited amount of time allocated to each counsel; others debated whether oral argument was necessary at all. A third group was satisfied with the

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Judge Heyburn and Professor McGovern's discussion of the Judicial Panel on Multidistrict Litigation in their article "Evaluating and Improving the MDL Process" provides an insightful analysis of how the process works, why it is needed, and what needs to be done to improve it. Through their alternating dialogue, the authors present a balanced approach. Professor McGovern's synopses of the surveyed lawyers' diverse opinions provide appropriate context for Judge Heyburn's explanations of the MDL Panel's procedures and approaches to the lawyers' concerns.

Over my more than a quarter of a century on the U.S. district court bench in Chicago, I have been both an MDL transferor and transferee judge. It is crystal clear to me that the need to centralize and thus economize the pretrial aspects of related civil cases filed across the country has never been greater. That need comes down to two words, "pretrial discovery." Because almost all discovery in today's litigation involves electronically stored information, the potential costs of discovery, unless monitored and controlled, are astronomical. E-discovery issues are not going away, so we judges and lawyers who participate in pretrial litigation need to rein in the burden and expense of e-discovery wherever possible.

Without the centralized control of an MDL transferee judge, the cost of duplicative discovery and e-discovery in each case consolidated as an MDL action for pretrial purposes would be a significant detriment to each case's litigants and justice in America as a whole. Considering the costs of such potential duplication absent MDL Panel consolidation through transfer allows one to assess the palpable benefit the MDL system provides.

Of course, as the article concedes, "centralization does not benefit all parties equally." One size rarely fits all, but when considering the chaos that would ensue without coordination by the MDL Panel, one size is fairly comfortable for most.

The breadth of MDL cases reflects a cross-section of litigation in our country. In the past year alone, I have handled MDL cases involving antitrust issues (*Antitrust Litigation*, MDL No. 1535), consumer fraud (*In re Kentucky Grilled Chicken Coupon Marketing and Sales Litigation*, MDL No. 2103), products liability (*In re Aqua Dots Products Liability Litigation*, MDL No. 1940), and patent infringement (*Innovatio IP Venture LLC Patent Litigation*, MDL No. 2302). In each MDL case, the pretrial dynamic among counsel and the need for tailored treatment of the

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existing procedures. Those advocating more time for argument made a variety of suggestions: limiting presenters to one argument per proposed MDL jurisdiction, selecting that presenter on a first-come-first-served basis, issuing questions from the panel prior to oral argument, giving each case a specific oral argument time, utilizing video conferencing or webcasting, and requiring an "agreed to" statement of facts.

Many lawyers were concerned about the expense of traveling to and from panel hearings. They found it difficult to justify attending panel hearings for so brief an argument. Some suggested that oral argument was superfluous because the panel had already made up its mind. Some proposed that the panel waive oral argument in many cases and convene in more centrally located venues.

Heyburn: The panel's collaborative decision-making process is an essential part of producing consistent and well-reasoned judgments. The insight of counsel during oral argument adds immeasurably to that process.

Panel members prepare extensively for each argument. We arrive at oral argument with some tentative views and some questions as well. The oral argument often helps us coalesce around the correct decision and sometimes reveals insights that change our view. For these reasons alone, the panel continues to believe that oral argument is essential to our work.

We see other advantages as well. In part due to our urging, oral arguments have improved over the past few years. Attorneys are addressing more relevant issues, even though an occasional diversion to humor is neither discouraged nor unwelcome. We agree with Professor McGovern's observation that oral argument sessions also provide a useful deadline for finalizing one's position and encourage cooperation and discussion among the parties.

We are sensitive to the expense of traveling for an oral argument of limited duration. However, the value of oral argument for us more than justifies any inconvenience. In the overall scheme of things, these costs pale in comparison with the gravity of a decision to centralize and huge transactional costs saved where centralization is appropriate.

The panel rules have always permitted parties to waive oral argument. In response to counsels' concerns, we have implemented a process for identifying cases in which oral argument is deemed unnecessary. At each session, though, only a few cases meet our criteria.

The Panel's Decisions

McGovern: The next group of comments broadly concerns the form, appropriateness, and underlying rationale of the panel's decisions. Many concerns arose from a belief that the panel exhibited an undue preference for centralization. All of these subjects generated extensive comment.

The panel's written orders invariably meet the following description: formalistic, concise, unanimous, and timely. No counsel was heard to rhapsodize about their literary merit.

Several strands of thought emerged regarding the panel's opinions. A substantial majority support the status quo: The opinions are just fine and a certain amount of opacity is acceptable. A related view was that the panel's opinions are inherently ambiguous because the nature of MDL decision making is simply not susceptible to the traditional judicial reasoning process. On the other hand, a forceful minority urged far more transparency. They thought the panel's opinions were too formulaic—lacking definable criteria, and mostly a "cut and paste" rendition of previous opinions.

Most counsel appreciated the law review symposia focusing on MDL criteria and practices, and the resulting publications. However, some wanted the panel to do more, such as preparing a variety of statistical analyses of its opinions to show more systematic patterns, transparency, and predictability not obvious from reading individual opinions.

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Heyburn: The panel's goal is to give thorough consideration to all 1407 motions, to reach a consensus, and then to communicate our decisions without undue delay. Recently, we made an effort to explain more clearly and more specifically our opinion rationales. Perhaps those efforts have gone unnoticed because our orders do follow a standard format and employ similar terms. The use of similar language, however, should not suggest a lack of thought or care with the decision. Nor should our unanimity in a case suggest the absence of robust debate concerning it. Our discussions are intense. Each motion receives full consideration by each panel member.

Most counsel are aware of the criteria that we consider. My June 2008 *Tulane Law Review* article referenced many of them. Notwithstanding the known list of potential factors, certain circumstances make for difficult decisions: small number of cases, disparity of filing dates, multiple statewide class actions, a relative lack of complexity, different and varying defendants,

and even the motivations of a movant. These circumstances and others create an inherent unpredictability. In close cases, our decision may evolve from a balancing of factors and from the judges' collective intuition and our ongoing assessment of our own past decisions. Thus, past panel decisions should be more properly viewed as predictive guides, rather than as binding precedent.

It bears mentioning that the panel's greatest asset is the experience of its membership. Most of us were practicing lawyers for a considerable time before assuming the bench. This fund of experience is vital to our work and contributes to the credibility of our efforts.

McGovern: Some attorneys expressed a philosophical disagreement that so many multiparty or complex cases seem to be automatically declared appropriate for MDL status.

From the perspective of some plaintiffs' counsel, the panel's

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discovery are different. For a federal district judge, however, that is one of the challenges and one of the rewards of being selected as a transferee judge by the panel. Working with highly competent counsel of record in MDL cases is one of the joys.

All institutional systems have room for improvement, but the Judicial Panel on Multidistrict Litigation provides justice admirably.

I thank and applaud Judge Heyburn, who currently chairs the panel, and all judges who serve and have served for taking on their responsibilities with open minds and critical self-analysis.

America is better for it. ■

Illustration by Artist

decisions can have significant financial consequences. A substantial group of local plaintiffs' counsel resent the panel's role in facilitating national plaintiffs' counsels' "takeover" of their cases. They criticize a repeat-player syndrome in the selection of plaintiffs' MDL counsel. They view their litigation skills as superior to the managerial skills of MDL counsel; many were apoplectic about having to pay a percentage of their fee into a common benefit fund to pay for expenses they deem unnecessary. They particularly bewailed the slow pace and cost of MDL compared with that of pursuing an individual claim.

Heyburn: The panel is aware that the competition among all groups of plaintiffs' counsel can be intense. We know that our orders can effectively disenfranchise some local plaintiffs' counsel. In every case, we ask ourselves whether centralization sufficiently promotes justice and efficiency, so much so that we should inconvenience some for the benefit of the whole.

We are acutely aware that not every group of complex multidistrict cases benefits from MDL treatment. Our recent decisions reflect this view. For many years, the panel regularly granted more than 75 percent of all 1407 motions. During the last two years, that percentage has dropped to about 55 percent. No case is considered automatic for centralization. In recent years, we have even denied centralization in cases where all parties supported it.

Transferee Judge Assignments

McGovern: For a long time, transferee judge assignments were mostly reserved for only the most senior federal judges. Over the decades, the vast increase in complex federal litigation has left the panel no choice but to cast a broader net for transferee judges.

Counsel expressed substantial interest in the panel's judge and location selection rationale. Most believed that the panel's selection rationale was often obscure. They want the panel to state more explicit rationale for choosing a particular location and judge, and to better identify the factors critical to the decision. However, most counsel seemed to understand the dilemma of providing sufficient transparency and predictability without violating internal judicial confidences. Indeed, counsels' own stated reasons for favoring a particular location were sometimes surrogates for their desire for a favored judge or circuit.

Counsel made innumerable suggestions. Some urged that the mere willingness of a judge to serve should not be sufficient criteria for selection. Some said that the panel should discourage "campaigning" by district judges for MDL assignments. The views were often contradictory: Sending MDL cases to the same pool of judges is acceptable to some, not acceptable to others; to some, geographical diversity is good, while to others it is a negative.

Notwithstanding these diverse opinions, there is a strong consensus that the actual selections are generally superb.

Heyburn: As Professor McGovern correctly notes, the explosive growth of multidistrict litigation has required the panel to reach well beyond the original small circle of transferee judges. Currently, about 27 percent of all active judges and about 20 percent of senior judges have an MDL assignment. The federal judiciary contains a deep bench of amazing talent, and we are taking advantage of it. Overall, we view this as a positive development.

The choice of a transferee judge is subject to few criteria other than the relatedness of the location and our belief in the ability and experience of that judge. Typically, we have several well-qualified and acceptable candidates. We do not feel compelled to explain our reasons for choosing one over another. The difficulty with more express statements is that for every general truth, there can be an exception.

The panel never considers whether a judge might lean to one side or another and never considers how a particular circuit law may apply to a case. We try to avoid assignments that overtly favor one side based on the prior ruling of a judge in one of the pending cases. Our primary focus is to identify judges who are willing to bring energy, focus, and experience to the task of handling these complex cases. We assume that most judges will accept an MDL assignment. Prior to any final assignment, one of the panel members will discuss the case with the potential transferee judge to determine his or her availability and interest.

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McGovern: The panel's handling of tag-along cases generated many comments and suggestions. Each year, as a matter of course, the panel transfers thousands of tag-along cases to existing MDL dockets without objection from any party. A small number of the cases, however, produce quite vehement objections and, in truth, present real problems for the panel, lawyers, and transferee judges.

Most feel that tag-along cases are disadvantaged in the MDL context, particularly where a new defendant is added after completion of substantial discovery.

Some counsel complained that transferee judges do not pay sufficient attention to the particular problems of tag-alongs, particularly on the issue of remand to state court. Many disapprove of the panel's practice of transferring tag-along cases even though plaintiffs have motions pending for remand to state court.

Several mentioned that coordination among lawyers, courts, clerk offices, and judges could improve. Others noted that such problems are inherent in MDL and accept them or argue against MDL treatment in circumstances where the tag-along cases will generate severe problems.

Heyburn: Professor McGovern is correct that the handling of tag-along cases shows the panel at its most efficient operation and yet presents transferee judges with their most difficult problems.

Each year, the panel facilitates the transfer of about 5,000 tag-along cases. About 96 percent occur without objection. Thus, we must resolve only about 200 or so disputed tag-alongs annually. About a quarter of these disputes concern objections to the transferor court's exercise of federal jurisdiction. In these cases, we routinely transfer cases even though motions for remand to state court are pending. In doing so, we have emphasized that transferor judges retain jurisdiction to resolve these motions up to the time of transfer.

In response to counsel's concerns, we have emphasized to transferee judges their responsibility to resolve pending motions in a timely fashion. We are looking more carefully at whether transfer to the MDL is necessary and whether it is likely to create unfairness for one of the transferee parties. From a transferee judge's perspective, we are looking at the best practices for integrating tag-alongs with an existing MDL docket.

Another way that the panel seeks to avoid problems is to more clearly define the scope of each MDL and to avoid undue expansion of it. We do this, in part, by maintaining regular contact with transferee judges. In several recent cases, after consultation with the transferee judge, the panel has declined to transfer additional tag-alongs.

Complaints and Frustrations

McGovern: The single most prominent complaint about multidistrict litigation arises from counsel's negative experiences in so-called black hole cases—those that seems not to move at an acceptable pace.

The common theme is that some judges have simply failed to move the case with deliberate speed. The reasons varied: inexperience with complex litigation, inadequate subject matter knowledge, indecision, inattention, overriding search for settlement, and general inability to process the MDL. The palpable frustration of some counsel came through vividly in the interviews. The angst of the "black hole" case led some counsel to recommend severe solutions. Many of these counsel simply want out and want a way to express their frustration without alienating the judge.

To combat this problem, many counsel want the panel to more closely monitor and even manage individual MDL cases. They feel that the panel has abdicated its proper role by providing no recourse to remedy or to exit an MDL black hole.

Counsel suggested a variety of mechanisms for notifying the panel that an MDL docket needs additional attention: setting a completion date for each MDL, after which the panel would remand the case to the transferor court; setting mandatory panel reporting requirements for all noteworthy litigation benchmarks, which would trigger automatic reminders; or direct panel intervention or even reassignment of the MDL to another judge. Many counsel felt that the very existence of such procedures would motivate transferee judges to move MDLs more expeditiously. Others disagreed, believing that the panel had no micromanaging or second-guessing role and that it would be counterproductive.

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Heyburn: The panel is certainly aware of these complaints and the frustrations underlying them. The panel's statutory authority, however, does not specifically include the direct supervision of transferee judges. Moreover, even under ideal circumstances, we cannot understand a case as well as a transferee judge and substitute our judgment for that judge's. Finally, were the panel to excessively look over the shoulders of our transferee judges, we would likely severely compromise our ability to attract transferee judges.

Last year, the panel did undertake a study of approximately 40 of our oldest dockets to look for any common problems.

From this study, we have identified certain areas of concern and communicated these to our transferee judges as a group. For the most part, however, our study revealed that cases last many years for reasons beyond anyone's control—complicated and contentious issues that take time to resolve, frequent appeals, tag-alongs that extend the life of cases, and legal strategies of both sides that cause delay.

A relatively small number of lawyers mentioned case-specific problems, as opposed to systematic concerns. We are aware that centralization does not benefit all parties equally and that, for some parties, it can be actually less efficient. The panel is making a greater effort to advise transferee judges how to deal with special circumstances.

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We are well aware that, in certain MDL dockets, the parties have vigorously disputed whether cases should be remanded to the transferor courts. We have adopted a more proactive approach to these concerns. We have emphasized to transferee judges that, unlike their judicial appointment, an MDL assignment need not extend for a lifetime. We are encouraging judges to consider remand where their basic work is completed.

The panel remains convinced that the firm hand of an experienced transferee judge offers the best opportunity for a well-run MDL. We try to provide our judges with the best advice to do this. Handing more power to lawyers by the mechanisms suggested would, in our opinion, be counterproductive in many respects.

McGovern: The lawyers would like more predictability and consistency in the way MDL judges handle these cases. Many opined that transferee judges need more guidance and education to meet the numerous unique challenges that MDL cases present. Though most counsel considered the *Manual for Complex Litigation* to be an invaluable tool for judges and lawyers alike, they favored more formal mentoring or education programs for new transferee judges. The emerging view among lawyers seems to be that MDL litigation procedures should become more standardized.

Heyburn: These lawyers make some valid points, which the panel is attempting to address. In recent years, the panel has enhanced our annual conference for transferee judges to put greater emphasis on case-specific best practices.

We have also produced education materials such as our ten-step guides for judges and for clerks of court and a new products liability case guide, all to encourage more consistent case management practices. We have initiated a mentor program for MDL judges, and we have improved our form file of standard MDL orders.

If the judges had been queried, no doubt they would hope for more consistent tactics and behavior by attorneys. Inherently, these cases are difficult because they are large and complicated. Moreover, they tend to throw together lawyers and judges who have no experience working with one another. This makes for some difficulties for everyone.

The panel invests an enormous amount of discretion and trust in its transferee judges. We witness and, quite frankly, admire on a regular basis the tremendous experience, ability, ingenuity, and enthusiasm that transferee judges bring to their task. They make an amazing contribution to the fair administration of justice in this country. We provide as much guidance and practical assistance as is feasible, while being mindful of the limits of the panel's governing statute.

In sum, the panel's desire to improve the MDL process and Professor McGovern's insightful, wholehearted involvement in this project have created a remarkable synergy. The knowledge and understanding that each of us has gained extends far beyond knowledge of the details recounted in this paper. In every respect, we see benefits flowing to the panel, the practicing bar, and the administration of justice. ■