

Ten Steps to Better Case Management

A Guide for Multidistrict Litigation Transferee Judges

The Judicial Panel on Multidistrict Litigation
&
The Federal Judicial Center

2009

Contents

Preface, v

- I. Coordinate with Your Clerk's Office, 1
- II. Promptly Schedule a Conference with Counsel, 1
- III. Take Great Care in Appointing Counsel, 2
- IV. Enter a Case Management Order, 3
- V. Rule Promptly on Motions, 5
 - a. Rule on Remand Motions, 5
 - b. Resolve Discovery Disputes, 6
 - c. Avoid Delay from Interlocutory Appeals, 6
- VI. Hold Regular Telephone Conferences, 6
- VII. Coordinate with Parallel State Court Cases, 7
- VIII. Encourage an Early Mediation Process, 8
- IX. Anticipate *Lexecon* Issues, 8
- X. Exercise Your Primary Responsibilities, 9
 - a. Decide Pretrial Issues, 9
 - b. Settle or Try All Claims When Possible, 10
 - c. Remand Cases to the Transferor Courts, 10
 - d. Tell the Transferor Court What You Did, 11

Preface

This guide is intended to help judges to whom an MDL case has been transferred. You, as the judge, will be faced with the many challenges that exist in most MDLs. Congress created the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407 and gave it the responsibility to transfer “civil actions involving one or more common questions of fact” from multiple districts to any single district for coordinated or consolidated pretrial proceedings. The Panel centralizes cases in order to promote the convenient, just and efficient conduct of the actions. After the Panel transfers cases under § 1407, it exercises virtually no further control over them.

Section 1407 empowers a transferee judge to exercise all the powers of the transferor court, with the exception of actually conducting the trial of the case (except in special circumstances). The purpose of this Guide is to briefly introduce some of the “best practices” that transferee judges have developed over the years. Of course, these “ten steps” oversimplify your complex task. Some MDLs will require special arrangements and extraordinary treatment. In the main, however, there is some virtue in focusing upon core responsibilities. That is our purpose here.

Multidistrict litigation presents a federal judge with difficult management, intellectual, and personal challenges. It is these challenges, in fact, that attract so many of our best judges to serve as transferee judges. In the final analysis, intangible leadership qualities rather than mechanical rules define the best MDL judges.

A highly useful resource for every transferee judge is the *Manual for Complex Litigation, Fourth Edition*, which contains a wealth of detailed suggestions. You will find references to the Manual throughout this Guide. Other sources of helpful information can be found by clicking the *Judge Resources* button on the homepage of the Panel’s J-Net website. The site contains relevant articles and speeches.

The Panel and the Federal Judicial Center hope that this Guide helps you successfully manage your MDL. Our thanks particularly to Panel member Judge J. Frederick Motz (D. Md.) for the inspiration and recommendations necessary to complete this Guide.

John G. Heyburn II
*Chairman, Judicial Panel on
Multidistrict Litigation
U.S. District Court Judge
Western District of Kentucky*

Barbara Jacobs Rothstein
*Director, Federal Judicial Center
U.S. District Court Judge
Western District of Washington*

I. Coordinate with Your Clerk's Office

Upon receiving an MDL assignment, you, as the transferee judge, your courtroom deputy or the case administrator, and those in the clerk's office who will be responsible for handling the MDL should settle upon some practical administrative matters. The number of parties and the vast amount of filings will require special attention from your clerk's office. This will go far towards ensuring the smooth processing of this complex litigation.

You should consult *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks*. This publication, which is available on the Panel's J-Net website by clicking on the *Judge Resources* button¹ and on the Center's intranet website, called FJC Online, under *Class Action & Complex Litigation*,² sets forth the initial actions necessary to properly administer a multidistrict litigation case. If this is your district's first MDL, you should also encourage your clerk to contact the Panel's clerk's office and other district court clerks' offices that have handled MDL litigation in the past.

II. Promptly Schedule a Conference with Counsel

Remember, your new cases may already have experienced some delay while the Panel considered and resolved the issue of centralization under § 1407. It is important to get them moving again. Try to schedule a prompt organizational conference. See Manual § 11.2. To do so sends a message that you are serious about organizing and moving the MDL. This conference may occur either by telephone or in person, but most judges believe that an in-person meeting is best.

1. To access the website, go to the J-Net (<http://jnet.ao.dcn>) and click on *Judicial Panel (JPML)* on the lower right side of the page. The *Judge Resources* button is the eighth button down on the left.

2. To access FJC Online from the J-Net, click on *FJC Intranet (FJC Online)* on the lower right side of the page. To go directly to FJC Online within your browser, enter <http://cwn.fjc.dcn>.

Prior to the conference you should require counsel to meet and confer with one another and submit a proposed initial case management order. *See* Manual § 11.12. Counsel should be invited to submit proposed agenda items for discussion at the initial meeting. The important task of selecting lead/liaison counsel can occur at or immediately after this initial organizational conference.

At the conference, take charge and set the tone—consistent with your own style and personality. As with all other litigation, you must establish credibility with the lawyers.

Set a clear target date for the conclusion of your MDL, i.e., for all pretrial issues to be resolved and for the cases to be ready for trial. While making it clear that you expect the litigation to be conducted expeditiously, you should also respect the difficulties that counsel may confront in dealing with complex litigation involving numerous parties. You may also wish to use the organizational conference to solicit the parties' views as to whether there are key issues that you can decide early or on an expedited basis, thereby speeding settlement or other resolution of the litigation as a whole. *See* Manual § 11.33.

If counsel know that you are serious about maintaining the schedule you establish—and that you will demand at least as much of yourself as you demand of them—they will conform their own conduct to your wishes. Brisk progress in the litigation is likely to minimize or eliminate petty and time-consuming incidental disputes among counsel and help bring the MDL proceedings to a fair and prompt conclusion.

III. Take Great Care in Appointing Counsel

It is often necessary in complex MDLs to select lead, liaison, and/or administrative counsel. This is one of your first and most important decisions.

There is no magic formula for doing this. Consult the Manual for a listing of various selection criteria to consider. *See* Man-

ual §§ 10.224, 14.211, 22.62. Many judges request that lawyers submit their résumés, descriptions of their prior experience in other complex litigation, and their proposed fee arrangements. Judges often hold a hearing to observe and assess counsels' competence and professionalism. Your colleagues on the bench can be a valuable source of information. Feel free to contact other MDL judges for evaluations of particular lawyers who have served as lead, liaison, or administrative counsel in their cases.

Because you have a responsibility to members of any potential class, an important factor to consider—especially in cases that do not arise under fee-shifting statutes—is the method or amount of fees that a lawyer will charge. Establishing, explaining, and enforcing record-keeping requirements is also important. *See* Manual §§ 14.213, 40.23 (sample order). However, while a counsel's proposed fee arrangements are important, this factor should not be dispositive.

Identify and appoint counsel who are vigorous advocates, constructive problem-solvers, and also civil with their adversaries. Particularly in cases where there is related state court litigation, lead counsel must have the self-confidence to include other attorneys in the committee structure and delegate significant responsibilities to them. *See* Manual § 40.22 (sample order setting forth responsibilities of lead and liaison counsel). The political and economic dynamics among lawyers, unless monitored, can disrupt the MDL and related state court proceedings. You cannot manage an MDL entirely yourself. To a large extent, you must rely upon lead counsel to assist you.

IV. Enter a Case Management Order

Managing an MDL is fundamentally no different from managing any other case, except that an MDL usually has the added complexity of more moving parts—lawyers, parties, jurisdictions, choice-of-law issues, varieties of discovery and differentiated claims, just to mention a few. Any one of these factors can present you with serious challenges.

Your case management order should include the usual interim breakpoints, e.g., filing of a consolidated amended complaint (where appropriate), filing and briefing on motions to dismiss, a fact-discovery deadline, a deadline for resolution of any class certification motions, expert disclosures and discovery deadlines, and a summary judgment motions deadline. *See* Manual § 40.21 (sample order). Many MDLs involve overlapping state-wide and national class actions. Sequencing the discovery and briefing necessary to resolve class certification and summary judgment motions is one of your most vital initial tasks.

Try to avoid unnecessary sequencing with respect to the treatment of pending motions and other matters. For example, where a defendant moves to dismiss some but not all of the plaintiffs' claims, allow other discovery to proceed while you decide the motion. This technique may be particularly useful where the partial motion to dismiss raises difficult issues. On the other hand, limited discovery or "reverse sequencing" may be appropriate if settlement is likely. In such a situation, the parties can avoid unnecessary cost and delay by engaging in discovery and preparing expert reports on damages issues before addressing the merits of the underlying claims.

Your case management order should address the role of magistrate judges in the discovery process. *See* Manual § 10.14. Many judges have found magistrate judges to be indispensable for the efficient handling of discovery matters. You may also want to consider the potential roles for a special master or an expert advisor to the court. *See* Manual §§ 11.51, 11.52.

Another circumstance to bear in mind is the potential that new ("tag-along") cases could be added to your MDL docket, as such cases are filed in other jurisdictions and the Panel transfers them to you. Ask the parties whether additional actions are likely, and, if so, include appropriate provisions in the case management order for integrating such actions into the ongoing proceedings. *See* Manual §§ 20.132, 22.631.

V. Rule Promptly on Motions

As you receive the new MDL cases, you may find many pending motions. Some of these motions may require more attention than others. Rulings should be prompt and disciplined; scholarly perfection is not required on all issues. We all remember from our days practicing law that a judge's decision in our favor was delightful and that one against us, while unwanted, enabled us to advise our client about his risks and expectations. The only decision which we could not live with was the one that was never made. Consider issuing short rulings, which assume that the reader has knowledge of the underlying facts and legal issues and which merely state your holdings and the reasons for them.

a. Rule on Remand Motions

The Panel routinely centralizes cases recently removed to federal court. In some of these cases, plaintiffs may have already filed motions for remand to a state court under 28 U.S.C. § 1447. The Panel's decision to transfer a case in no way suggests an opinion about any such motion. The Panel's belief is that the transferee judge is in the best position to determine jurisdictional issues. The Panel does not review your decisions on these or any other motions.

Take these motions seriously and rule upon them as soon as reasonably possible. Where several motions appear to present an identical or substantially similar issue (for example, the alleged fraudulent joinder of the same defendant), many judges will decide one of them, and then order the remaining movants and/or respondents to show cause why that ruling should not be made applicable to the motions pending in their actions. This is an easy way of testing any pertinent differences in state or circuit law.

b. Resolve Discovery Disputes

Resolving discovery disputes expeditiously is important to avoid undue delay in any case, but particularly in an MDL. Different judges have different practices in handling discovery matters. Some judges assign a magistrate judge to closely monitor all discovery issues. Others have found it beneficial to handle discovery disputes themselves. These judges have found that the more contact they can have with the lawyers, the more they can control the pace of the litigation and influence its progress. Some judges use telephonic conference calls to resolve discovery disputes, dispensing with briefing when unnecessary. Regardless, the mere fact that a judge or magistrate judge is immediately available to handle a discovery dispute itself may enable counsel to resolve the dispute among themselves.

c. Avoid Delay from Interlocutory Appeals

Many judges use the interlocutory appeal procedure afforded by 28 U.S.C. § 1292(b) to provide an opportunity for appellate review of critical rulings, while other aspects of the case move forward. Some circuits are more amenable to permitting such appeals than others. Whatever the case, the pendency of an interlocutory appeal should generally not be allowed to delay or halt other aspects of the MDL. Such delay is usually counterproductive.

VI. Hold Regular Telephone Conferences

Many transferee judges schedule regular (often monthly) telephone conference calls with counsel. *See* Manual § 11.22. When no pressing matters exist during a particular month, the conference can be canceled. However, unless the conference is regularly scheduled, issues that might seem minor but whose resolution is necessary may go unaddressed. Frequent contact allows you to take the pulse of the litigation, to fine-tune scheduling adjustments, to set briefing and hearing dates for any anti-

pated motions, and to rule upon discovery and small scheduling disputes.

Most judges have a court reporter present during the telephone conference, at least to make a record of any scheduling changes or substantive matters discussed and ruled upon. *See* Manual § 11.22. As to other administrative issues, you may confer with counsel to determine whether transcription is necessary.

VII. Coordinate with Parallel State Court Cases

Sometimes there are pending state court cases related to your MDL. Take it upon yourself to reach out to your state court colleagues from the outset. *See* Manual § 20.31. Try to forge constructive working relationships with them. One way of doing this is to establish an MDL-specific website so that your orders and rulings are readily available. *See* Manual § 40.3 (sample order directing creation of a website). You can also begin by assessing what issues presented in the related state and federal court cases might be suited for coordinated efforts.

Discovery is one area that is quite amenable to effective coordination. The use of common experts, along with consolidated expert disclosures and expert discovery, is also sometimes worthwhile. *See* Manual § 22.4. In sophisticated litigation, only a limited number of persons may be available to provide certain kinds of opinions. Moreover, high expert fees can provide an incentive for parties to join together in selecting their experts on common issues and to establish reasonable parameters on expert discovery.

Coordination of mediation or settlement efforts is particularly important when an MDL includes federal and state court cases. *See* Manual § 20.313.

VIII. Encourage an Early Mediation Process

As soon as you are satisfied that plaintiffs' claims have at least some arguable merit, suggest to counsel that they establish a mediation structure, select a mediator, and begin a process of settlement negotiations to occur simultaneously with the conduct of preliminary motions practice and the taking of discovery. *See* Manual § 13.1. Although such early negotiations may not bear immediate fruit, they do require all parties to keep the endgame in mind even in the initial phases of the litigation.

Sometimes the accumulation of costs and fees can be an obstacle to settlement. It is important at the outset to advise all parties about the importance of controlling costs. Particularly in cases arising under fee-shifting statutes, it may be helpful to set some ground rules, such as no first-class travel and a limitation on the number of lawyers at depositions. *See* Manual § 14.21.

IX. Anticipate *Lexecon* Issues

In *Lexecon Inc. v. Milberg Weiss*, 523 U.S. 26 (1998), the Supreme Court ruled that a transferee judge cannot “self-transfer” an MDL action to his or her district under 28 U.S.C. § 1404 for the purpose of conducting a trial after pretrial matters have been resolved. You should anticipate *Lexecon* issues and resolve them, if you can, on the front end. Often, as a transferee judge gains a thorough knowledge of the issues, the parties also develop a trust in the fairness of that judge. At this point, the parties may find a mutual interest in having the transferee judge conduct the trial of some cases.

Over the years, transferee judges have devised many methods of working within the confines of *Lexecon*. *See* Manual § 20.132. Where MDL proceedings involve competing national class actions, plaintiffs may file a consolidated amended complaint making the class allegations in an action originally filed in your district. Where no such action has been filed, plaintiffs may file a new consolidated class action in your district. *See* Manual § 22.36.

Other MDLs may involve a large number of individual actions rather than class actions. Some of these cases may have been properly filed in the first instance in the transferee district (that is, your district). Conducting one or more bellwether trials in those cases can help promote a global settlement or at least expedite settlement of other individual cases. *See* Manual §§ 20.132, 22.315, 22.93. Yet another way to resolve *Lexecon* issues is to obtain an intra- or intercircuit assignment to preside over one or more trials after pretrial matters have been resolved and the actions remanded to their transferor districts. *See* Manual § 20.132.

X. Exercise Your Primary Responsibilities

Good management techniques are a means, not an end. Never lose sight of your statutory responsibility, which is to efficiently and fairly manage pretrial proceedings.

a. Decide Pretrial Issues

Your ultimate responsibility is to resolve pretrial issues in a timely and expeditious manner. In addition to the previously discussed motions to remand under 28 U.S.C. §1447, your responsibility certainly includes resolving important evidentiary disputes, class certification issues and, perhaps most important, motions to dismiss and for summary judgment. The Panel exercises no review over any procedural or substantive ruling of a transferee judge.

While the powers of the transferee judge are extremely broad, they are not without limitation. The transferee judge generally must apply the substantive law of the transferor forum, including the appropriate state law and that forum's choice-of-law rules.

b. Settle or Try All Claims When Possible

Experience shows that MDL proceedings usually do settle. Indeed, an MDL provides an extremely favorable structure for reaching settlements. Where settlements are reasonable and just, they stand as a testament to the effectiveness of the MDL process. As you resolve pretrial issues and explore settlement options, the opportunity may arise to schedule a trial in one or more of the transferred cases. Such an opportunity is important to pursue creatively, as suggested in Section IX above.

c. Remand Cases to the Transferor Courts

At any time during centralized proceedings, the transferee judge has authority to recommend that the Panel remand a particular case—or even individual claims within a case—to the transferor court. *See* Manual § 20.133. Remand is thus an option even where centralized proceedings have not been completed. In certain circumstances, a transferee judge, after careful consideration, may conclude that he or she cannot effectively or efficiently coordinate a particular case or group of cases within the MDL (for example, where a tag-along action involves overwhelmingly individualized issues, or where a late-filed tag-along's inclusion in the MDL presents insurmountable logistical hurdles given the advanced stage of centralized proceedings). In those instances, the transferee judge should recommend that the Panel remand the case (or claim) to the transferor court. *See* Manual § 20.133.

Remand is required where centralized proceedings have concluded, but one or more transferred cases remain unresolved. When discovery has been completed, pretrial motions have been ruled upon, and reasonable attempts to try or settle the actions have not borne fruit, your final responsibility is to recommend that the Panel remand those unresolved cases to their transferor districts. *See* Manual § 20.133. When coordinated or consolidated pretrial proceedings no longer serve a valid purpose, do not hesitate in making this recommendation.

As a technical matter, the transferee judge issues a suggestion of remand to the Panel. *See* Manual § 20.133. Upon receipt of that suggestion, the Panel issues a conditional order of remand and also a stay of that order for fifteen days. *See* Rule 7.6(f) (i), R.P.J.P.M.L., 199 F.R.D. 425, 438 (2001). Usually, no party will object, the order becomes final, and the case or cases are remanded to the transferor court. Occasionally, where a party does object, the Panel schedules a briefing and then renders a decision. However, as a practical matter, the Panel gives great deference to the view of the transferee judge with respect to remand. *See* Manual § 20.133.

d. Tell the Transferor Court What You Did

A final recommendation: When suggesting the Panel remand to the transferor court, it can be of great benefit to the transferor court to include in the record a brief description of pertinent events that have taken place in the litigation, including key evidentiary and legal rulings, as well as a recommendation regarding any additional proceedings that you believe are necessary to make the case ready for trial. *See* Manual § 20.133.



Again, thank you for undertaking the challenge and public service of handling your MDL assignment.