

And Now a Word from the Panel: ABCs of JPML Practice

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Welcome to the 11th installment of “And Now a Word from the Panel ..,” a bi-monthly column which “rides the circuit” with the Judicial Panel on Multidistrict Litigation as it meets on a bi-monthly basis at venues around the country.

This week, the panel embarks on a rare October hearing session (most likely due to the Rosh Hashanah/Jewish New Year falling on the last Thursday of September) in the JPML chairman’s “home court” of Louisville, Kentucky. In honor of that unusual occurrence, this column will take a step back and provide its readers with a review of some fundamental panel practice pointers, which, as detailed below, we’ll refer to as the “ABCs of JPML Practice.” But before providing further gloss on that acrostic, we cannot resist mentioning a somewhat intriguing MDL petition being heard at the October panel hearing. The petition involves local rules governing attorney admission and several lawsuits naming members of the federal judiciary—including a member of the panel (who is also a district court judge in DC)!

A Multidistrict Litigation About Multijurisdictional Practice?

Perhaps appropriately for a “multidistrict” panel, an MDL petition has made its way to the panel’s docket regarding the ability of attorneys in one jurisdiction to become admitted to practice in a federal district court within another jurisdiction, i.e., multijurisdictional practice (MJP). *In re National Association for the Advancement of Multijurisdiction Practice Litigation* (MDL No. 2568). The petition involves a total of three lawsuits filed in the District of Columbia, Maryland and New Jersey regarding those district courts’ local rules for the admission of attorneys. Although there are variations in the admission rules at issue, the crux of the lawsuits is the inability of lawyers admitted in certain states to automatically gain admission in federal courts in other states, or what the plaintiffs refer to as the “Local Rule Balkanization.”

This panel petition raises several issues of import to panel motion practice —putting aside these cases’ impact on practitioners’ ability to become admitted to practice in other districts.

Specifically:

- Is MDL centralization appropriate when relatively little factual discovery, if any, needs to be taken? These cases primarily address the local rules and potential constitutional arguments. If creation of an MDL necessitates the existence of “one or more common questions of fact” (28 U.S.C. § 1407 (a)), why are these cases ripe for centralization?
- Does the naming of all federal district judges in the districts in which the cases were filed preclude MDL centralization because judges in those districts would need to recuse themselves? As readers of this column are aware, there is no prerequisite that either the selected MDL judge or the selected MDL transferee district have one of the pending subject cases. Curiously, the petitioners’ opening brief did not even suggest a particular MDL transferee district court. But in reply, the petitioners suggest using a relatively obscure statutory provision of the MDL statute, authorizing the chief justice of the United States Supreme Court to select the MDL judge. 28 U.S.C. § 1407(b).¹
- In addition, the MDL petition raises the recurring panel question of whether there is a critical mass of cases needed to justify creation of an MDL proceeding. Although the MDL statute requires a minimum of two cases pending in different judicial districts, does the existence of three cases (all in districts along the Eastern Seaboard) warrant an MDL?

This petition again illustrates that although potential MDLs may cut across a variety of legal issues and subject areas, rules of general application for panel practice will often be gleaned from somewhat unusual petitions for creation of an MDL.

And Now a Word About the ABCs of JPML Practice!

Having discussed a bit of alphabet soup with the interplay between MDL and MJP, and with the new school year upon us, it seems ripe to go back to the basics of the “ABCs of JPML Practice.” To be more precise, this column will explore three key areas of panel motion practice. Those ABCs, in chronological order but in reverse alphabetical order, are:

- Calendar
- Briefing
- Argument

¹ “[U]pon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States.”

C is for Calendar

One of the most commonly asked questions regarding panel practice is: “When will the panel hear my motion?” The questioner is usually aware that the panel meets every other month. To confirm the precise date of the next hearing, your best bet (in the words of Yogi Berra) is “you could look it up.” The panel website provides a calendar of upcoming hearing dates and locations. If you are not near a computer, or would prefer not to “look it up,” the general rule is that the panel meets on the last Thursday of the “odd” months (January, March, May, July, September and November). As we have noted in the past, this rule has its exceptions for holidays, snowstorms and possibly even Pro Bowl games.

The next question that is often asked is: “By when do I need to file an MDL motion to be heard at the next panel hearing?” A failure to watch the calendar could result in a time lag of as long as four months from the time an MDL motion is filed until the motion is heard. With more careful planning, the time lag may be as little as two months. Generally, the panel sets its docket approximately six weeks (and perhaps as little as five weeks) prior to the next panel hearing. If history is a guide, an MDL motion will likely need to be filed at least eight weeks prior to the next panel hearing to be heard at that session. A chart reflecting the last several panel hearing dates, when the session’s docket was released and the filing date of the last MDL motion to be heard at that panel session, is set forth below:

Panel Hearing Date	Hearing Docket Release Date	Filing Date of Last MDL Motion on Docket
March 27, 2014	Feb. 21, 2014	Feb. 3, 2014
May 29, 2014	April 14, 2014	March 28, 2014
July 31, 2014	June 16, 2014	June 2, 2014
Oct. 2, 2014	Aug. 19, 2014	Aug. 7, 2014

As a cautionary word, these are merely signposts and dockets could vary. Nevertheless, this emphasizes the import of watching the calendar in planning your trip to a possible MDL proceeding.

B is for Briefing

Once you have checked the calendar, your next step is to brief your MDL motion. You may be briefing your initial application to create an MDL, your motion to vacate a conditional transfer order (CTO), which identifies additional “tag along” cases for transfer to an existing MDL proceeding, or your motion to vacate a conditional remand order (CRO), which identifies cases for remand out of the MDL proceeding back to a transferor court.

Practitioners should remember that in briefing an initial motion to create an MDL or in opposing such a motion, you can brief not only the substantive arguments regarding transfer but also the choice of the MDL court and/or judge.

Once a motion is filed, parties generally have 21 days to file an opposition and replies are due seven days after the opposition. Mindful of the panel's hearing calendar, the panel may limit the length of time for an extension of these deadlines and might even expedite the briefing schedule on a motion to vacate a CTO or CRO to ensure that the motion can be heard at the next immediate panel hearing.

A is for Argument

As you prepare for the panel hearing, don't forget to file your "Notice of Presentation or Waiver of Oral Argument" form by the deadline, usually a few weeks before the panel hearing and which you can find on the panel docket for your case. The form informs the panel who will be arguing for a particular party, or whether the party wishes to waive oral argument. When you complete the form, you will also need to indicate whether your client supports or opposes creation of an MDL and your proposed MDL transferee court.

Finally, the big day arrives for your panel argument. The panel rules encourage parties with similar positions to confer in advance of a panel hearing and consider whether to appoint a single spokesperson for a particular position.² Also, expect to check in early that day in the courthouse. For example, at the July panel hearing, counsel were advised to arrive at 7:45 am (local time) to note their appearance and be assigned their allotted oral argument time.³ But don't expect much time for your argument. The allotted time may often be only several minutes, with a maximum of 20 minutes for the matter, "[b]arring exceptional circumstances."⁴ Be efficient in your presentation, without simply rehashing your briefs, and update the panel on any developments in the cases subsequent to the completion of briefing.⁵ You can expect panel members to quickly focus on the key issues in their questioning, which may relate to why an MDL should be created or to the choice of venue. Although the panel generally hears argument by panel docket number (the lower the number, the earlier you will be heard), arguments may be called out of order.⁶ Arguments are usually limited to motions to create an MDL proceeding; the panel now rarely hears oral argument on motions to vacate a CTO or CRO.

Once you complete your argument, the waiting begins for the "D," the panel's decision. Fortunately, you will not need to wait long, as the panel generally issues its decisions within one to three weeks after the hearing. The decision will be available via the panel's ECF system and on the panel's website, which completes our "ABCs" (and "D") of panel practice.

² JPML Rule 11.1(e).

³ http://www.jpml.uscourts.gov/sites/jpml/files/JPML-Oral_Argument_Guidelines_July_2014_Hearing_Session.pdf

⁴ JPML Rule 11.1(f).

⁵ JPML Rule 11.1(e).

⁶ http://www.jpml.uscourts.gov/sites/jpml/files/JPML-Oral_Argument_Guidelines-July_2014_Hearing_Session.pdf

Will the panel create an MDL about MJP? Does it matter that district court judges, including a member of the panel, are defendants in the subject actions? What creative arguments will the panel face next? Stay tuned for our next edition of “And Now a Word from the Panel ...,” as the panel will “Do the Charleston”—Charleston, South Carolina, that is (and hopefully in mild weather)—at its post-Thanksgiving Dec. 4 session.

PANEL TRIVIA CORNER

July Trivia Question:

Of the 297 current MDL proceedings, which are located in states without nonstop flights from the New York City area (and not otherwise served by Amtrak’s Northeast Corridor Acela)?

Answer to July Trivia Question:

Fresh and Process Potatoes Antitrust Litigation (Idaho); and the eight MDLs in the federal district courts in West Virginia: seven Pelvic Mesh MDLs plus Monitronics International Inc. Telephone Consumer Protection Act Litigation. In addition, the four MDLs pending in Kansas are technically in a state not served by direct flights from the New York City area, but fortunately, Kansas City, Missouri, is a short drive to the District of Kansas courthouse in Kansas City, Kansas (the situs of the July panel session).

October Trivia Question:

The Third Circuit Court of Appeals is the only Circuit Court to have had two of its sitting judges serve as members of the panel. But which is the only district within that circuit to have had sitting judges serve on the panel?

Like to venture a guess as to this month’s trivia question? Have tidbits of panel trivia that you would like to be featured in an upcoming column? Please do not hesitate to drop me a note at alan.rothman@kayescholer.com.

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