A Conversation with Hon. Karen Caldwell, Chair of the Judicial Panel on Multidistrict Litigation (JPML)

Interviewed by Hon. Rodolfo A. Ruiz II

Hon. Rodolfo A. Ruiz II is a U.S. district judge in the Southern District of Florida.

Judge Karen Caldwell has served as the chief of the Judicial Panel on Multidistrict Litigation (JPML) since 2019. The panel was created by Congress in 1968 to determine whether civil actions pending in different federal districts involve common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings and to select the judge or judges and court assigned to conduct such proceedings.

Ruiz: You're the chair of the JPML, a very prestigious position. What was your path to this position? For other federal judges who may be interested in serving on the panel, what do you advise them to do in terms of building a resume?

Judge Caldwell: The multidistrict litigation (MDL) statute, 28 U.S.C. § 1407(d),[1] was enacted in 1968. It provides that the panel shall consist of seven federal judges designated from time to time by the Chief Justice of the United States. The statute further provides that no two members shall be from the same circuit. Although the statute does not specify terms of service, the Chief Justice generally appoints panel members for a term of seven years.

The panel's primary function is to determine whether centralization of civil actions pending in different districts will further the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. For that reason, panel judges tend to have extensive trial experience coupled with a good track record of managing their dockets. Although it is not a prerequisite, all current panel members are experienced MDL judges. Panel members do not receive reduced caseloads in exchange for panel service, which includes preparing for and attending hearing sessions every other month, attending to motions that require action in between hearing sessions, as well as planning the panel's annual conference, which provides MDL-specific learning opportunities for transferee judges.

There are only seven positions on the panel. So, for any given opening, there are likely to be many interested judges, even with the "one judge per circuit" limitation. Judges seeking a position on the panel should make their interest known to their chief circuit judge.

R: The JPML statute allows district court and circuit court judges to serve. But the JPML hasn't had a federal circuit judge on it since 2018. Is there a reason for that? Would the panel benefit in the future from an appellate judge's perspective?

JC: Who the Chief Justice selects to serve on the panel will always be a function of, among other things, which circuits are eligible to provide a panel member (remember, for any opening, judges from six circuits are ineligible under Section 1407(d)) and their relative qualifications and experience. All I can say is that the Chief Justice has done an excellent job selecting the current panel judges. My colleagues are seasoned and collegial judges who are well versed in the nuances of managing complicated dockets. The diversity of

experience and backgrounds of my fellow panel members informs our decisions. Their collective wisdom and insight with respect to MDLs and complex litigation is immense, and our collaborative decision-making process produces consistent and well-reasoned judgments.

Whether future panel members come from the circuit or district courts, I believe that a background in complex civil litigation is essential in panel decision-making. The panel is making a procedural and discretionary determination as to whether civil actions sharing common factual questions would be more efficiently and conveniently litigated at the pretrial stage in a centralized proceeding. Will centralization eliminate duplicative discovery? Will it avoid inconsistent pretrial rulings and schedules? Or will centralization introduce inefficiencies, for instance by bringing together actions involving disparate claims or procedural postures? What matters in the end is whether the panel member is a good judge with the ability to grasp the needs of a particular litigation.

R: When deciding where to send an MDL, what factors does the panel consider?

JC: Once the panel has decided to centralize a litigation, we must decide which district will serve as the transferee district and which judge will serve as the transferee judge for the MDL. This question is sometimes more difficult than the initial question on centralization. For instance, we may be faced with an abundance of choices to serve as the transferee district, or it could be that there are few good options. Selection of the transferee district often is a very case-specific decision. The location of the transferee court may be of great importance in a given docket because of the nature of the discovery and the concentration of witnesses. Other dockets may lack such a geographical nexus. Any single factor can only be considered in the context of the docket and facts at issue.

Ultimately, our goal is to place the MDL with a capable and available transferee judge in a convenient location. Accordingly, one of the primary panel objectives is to identify a capable judge who is available to take on the extra work of an MDL. Often that will be a judge already assigned to one or more of the cases to be centralized. Other times, there may not be a willing or 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 an instance, we might select a transferee judge with prior MDL experience, even if they are not assigned one of the constituent actions.

Other factors include: where the most procedurally advanced cases are pending; where the first-filed actions are pending, if there is a significant divergence in the time of filing of the actions; how many related actions are pending in each district; where the major parties are located; and where common discovery is likely to take place. In MDLs involving a significant common event (such as a plane crash), the panel also considers where the significant event occurred; where related state court, administrative, criminal, or bankruptcy proceedings are pending; and the centrality and accessibility of the court. The relative importance of any one factor will be litigation specific, depending on what will most benefit the litigants and the judiciary.

R: What can litigants do to better assist you and your colleagues in your deliberations? Ostensibly you don't need to be told that a venue has a great airport with lots of restaurant and hotel options.

JC: Litigants should focus, in both their briefing and at oral argument, on the centralization factors set forth in Section 1407: common questions of fact; convenience of the parties, witnesses, and the courts; and the just and efficient conduct of the litigation. The standard for centralization is well settled, so the strongest arguments are going to be fact based. Counsel should focus on how centralization will (or will not) prevent duplicative discovery and inconsistent pretrial rulings. Counsel should not gloss over the explanation of the common and complex factual questions at issue and the common discovery that will be required.

Litigants also should not spend an inordinate amount of time reciting general standards or centralization factors. The standard for centralization is not only well established but it is the only standard that governs panel decisions. A better use of time and space is to explain previous panel orders that are particularly relevant. However, avoid string citing past panel orders. Instead, discuss one or two that are on point in depth.

Litigants should avoid arguing the merits of their case. We understand that counsel often want to show the strength of their positions, but the panel is only concerned with whether the litigation should be centralized and, if so, where. Also, counsel should be prepared to discuss what alternatives to centralization the parties have pursued. The panel considers centralization a last resort after the parties have considered the feasibility of other options, such as transfers under 28 U.S.C. § 1404[2] and voluntary coordination of discovery and pretrial proceedings. There may be a reason those alternatives are not feasible for a given litigation. Be ready to explain why this is so.

The accessibility and ease of traveling to large cities is obvious. We all know that big cities have lots of travel and lodging options. Accordingly, such arguments are not helpful. If, however, a proposed location is unusually hard to get to, it may not be the best place for an MDL and that argument is worth making. In recent years, the availability of electronic discovery coupled with the capacity to conduct virtual court proceedings has expanded the choices of venues available to the panel and the parties. Generally, however, litigants should focus on noteworthy capacity issues (e.g., that a district has a significantly high number of vacant judgeships or is widely recognized as congested). But reciting general caseload statistics (e.g., comparing district A's caseload to district B's caseload) usually is not helpful. Counsel should not argue the favorability (or not) of a relevant circuit's law or a particular judge's decision.

Counsel should also be ready with alternative venue choices. The panel may learn before oral argument that a proposed district is overloaded or does not have an available transferee judge. In such situations, the panel may direct counsel to speak to other districts.

R: The JPML does allow very short oral arguments on whether to centralize a litigation and where to assign the MDL. Do you think the JPML would benefit from expanding the time for those arguments? Or, potentially, dispensing with them?

JC: The panel hears oral argument on new Section 1407 motions (that is, motions to create a new MDL) at different locations around the country every two months. The panel's oral argument docket might include only a handful of motions, but it often includes more, sometimes as many as twenty motions. For those larger hearing sessions, the panel may have to accommodate dozens of lawyers seeking argument time. Accordingly, each arguing counsel generally is allowed between two and five minutes to present their position,

though that can vary depending on the party's positions and the complexity of the arguments.

We have found this an adequate amount of time for counsel to present their arguments. Again, the only questions counsel should address are the propriety of centralization and the choice of transferee district. Skilled counsel can focus our attention on the relevant issues that most affect these two questions within the time allotted.

It is noteworthy that during the pandemic, when the panel had to conduct hearings using videoconferencing technology, we changed the format of the arguments slightly. To avoid the confusion of people talking over one another on Zoom, counsel were given their entire allotted time to present their arguments without interruption, followed by a question period. We have thus far maintained this format since transitioning back to in-person hearings. This effectively gives counsel additional time for their arguments, which previously would have been subject to interruption with questions from the panel.

The insight we receive from counsel during oral argument is invaluable to our decision-making. Panel members prepare extensively for each argument, and often come into the argument with some tentative views and questions. The argument helps the panel coalesce around the correct decision and sometimes will reveal insights that change our view. Panel hearing sessions also provide counsel an opportunity for in-person meetings, which can result in the parties themselves coalescing on a position. We are sensitive to the expense of preparing for and traveling to an oral argument of limited duration, but this is mitigated by the Panel Rules, which allow parties to waive oral argument. From the panel's perspective, we find oral argument remains essential to our work.

R: The reality is that substantive and evidentiary law (*e.g.*, preemption and the *Daubert*[3] standard) vary by Circuit. That could be dispositive for many proposed MDLs. Does that factor at all into your decisions? Should it?

JC: No, the panel never considers how a particular circuit's law may apply to a case. Nor do we consider the legal or factual strength of a given case. Section 1407 focuses the panel on the factors of justice, convenience, and efficiency. That is as it should be. Introducing merits considerations into the panel's deliberations could well undermine the statutory goals of eliminating duplicative discovery and inconsistent pretrial rulings and schedules. It also would entail the panel taking a side in these disputes. For example, if the panel avoided centralizing in Circuit A because of, say, a lenient application of *Daubert*, we would explicitly be placing a thumb on the scale in favor of one side or the other in the litigation. Moreover, differences among the circuits as to application of preemption or *Daubert* are matters best resolved through the appellate process or rulemaking.

R: You lead a group of seven diverse and talented jurists. But I cannot think of a single JPML decision where there was a dissenting opinion. Do you really always agree?

JC: There are occasions, of course, where panel members initially have different takes on a particular motion. After hearings, the panel engages in deliberations with robust discussions. Although the concurrence of four panel members is necessary to any action by the panel, we generally reach a consensus decision. Keep in mind, the panel's decision is a narrow one: Do the actions involve common factual questions and will centralization create efficiencies and enhance the convenience of the parties, witnesses, and the judiciary? While these can be tricky issues and some decisions are closer than others, panel members have generally not elected to write concurring or dissenting opinions. Early in the history of the panel, there were on occasion concurrences or dissenting opinions. This was a period when the panel was fleshing out the standards for centralization. As those standards became settled, the need for concurrences or dissents declined.

Panel decisions generally are very case specific. Just like a district court's decisions, they do not set precedent other than for the parties in the constituent actions. Furthermore, Section 1407(e)[4] provides that the only appellate review of any panel order is through a mandamus petition, which means that any concurrence or dissent generally is not going to be informative to a reviewing court.

R: How closely do you monitor MDLs after you've sent them to a transferee judge? Are there certain metrics litigants and judges should be aware of that you view as particularly important?

JC: The panel's statutory authority does not specifically include the direct supervision of transferee judges. In any event, the panel cannot understand a case as well as the transferee judge, who is dealing with it on a day-to-day basis. Moreover, excessive "second guessing" of transferee judge decisions by the panel likely would limit our ability to attract transferee judges.

That said, the panel actively monitors the status and progress of MDL dockets after centralization. For instance, we need to know the procedural posture of the MDL to determine whether the continued transfer of tag-along actions to the MDL is appropriate. In addition to looking at the dockets, every year we ask transferee judges to provide status updates on their MDLs. The panel staff closely reviews these updates to determine issues, trends, and appropriate methods for assisting transferee judges. The staff also consults these reports when determining whether to approve new tag-along cases for placement on conditional transfer orders (CTOs) and in making recommendations to the panel on motions to vacate CTOs and other motions regarding a particular MDL.

Additionally, the panel staff conducts an annual review of MDL dockets we deem "longstanding." The purpose of this review is to ascertain why the MDL remains pending and identify any common problems or areas of concern. Generally, the longevity of these dockets is due to factors such as pending (and sometimes multiple) appeals and ongoing settlement administration. Complicated and contentious issues take time to resolve. Our main concern is that pretrial proceedings in the MDL continue to move forward. If any MDL is truly bogged down, we may make inquiries and try to prompt the transferee judge to get the litigation back on track. In rare and extreme situations, we can reassign MDL dockets when a transferee judge is no longer able to efficiently manage the litigation.

I should also note that, since 2011, the Federal Judicial Center has, on the panel's behalf, surveyed transferee judges who have closed their MDLs. These surveys give transferee judges an opportunity to inform the panel about successful or problematic techniques or approaches employed in their MDLs, and to offer recommendations for the panel and future transferee judges. The information gleaned from these resources (status updates, longstanding reports, exit surveys) contributes to the panel's educational programs for transferee judges.

R: There is a serious tension between MDLs centralizing individual actions where individual plaintiffs in theory get represented

by their counsel of choice and MDL leadership structures that essentially relegate non leadership counsel to the sidelines. Do you think the current system strikes the right balance between necessary efficiency and individual rights?

JC: This tension is not unique to MDLs. It always exists where multiple plaintiffs' claims are litigated in a coordinated fashion. Rule 23, for instance, governs how this coordination occurs with respect to class actions and provides for the appointment of class counsel on behalf of the entire class. Individuals must opt out of the class if they wish to pursue their claims individually.

Transferee judges in MDLs—at least, those MDLs that are not comprised of class actions—have more discretion as to how to coordinate the actions. Sometimes, particularly for smaller MDLs, there is no need to appoint lead counsel at all. In larger MDLs, though, the only way to efficiently organize the litigation often requires the creation of leadership structures. Otherwise, the benefits of centralization may be lost. For instance, if counsel for every plaintiff were allowed to separately depose the defendant, the MDL would not have eliminated duplicative discovery.

It should be noted that the use of lead counsel, in MDLs and elsewhere, is not a new phenomenon. The 2004 edition of the Manual for Complex Litigation has extensive commentary on appointing leadership counsel for complex litigation.[5] Many of the factors the manual suggests for consideration by the court in appointing lead counsel mirror the Rule 23[6] factors (such as ensuring counsel can fairly represent the various interests in the litigation). There also are other organizational structures, such as steering committees and subcommittees, as well as the appointment of liaison counsel, that can broaden the participation of individual plaintiffs' counsel in the coordinated proceedings. The proposed new Rule 16.1 for MDLs, which is currently open for public comment,[7] suggests similar considerations for transferee judges when organizing their MDLs.

This is an evolving area. From the perspective of the panel, our goal is to provide transferee judges with educational resources that inform them of the options available for coordinating their MDL. For instance, we have collected more than 1,400 sample orders from transferee judges, many of which pertain to counsel organization issues, and made them available to judges in a text searchable database on the panel's website. Lead counsel organization is also a regular topic at our annual Transferee Judges' Conference. Speakers at those conferences include judges, lawyers, and law professors.

The potential that centralization can limit, at the pretrial stage, the ability of some plaintiffs' counsel to prosecute their case in the exact manner they envision is something the panel considers when we centralize a litigation. In every case, we must ask whether the benefits of convenience and efficiency to the litigation as a whole outweigh

In Memoriam

Thomasenia P. Duncan

U.S. Judicial Panel on Multidistrict Litigation – Panel Executive, 2010-2024

On April 23, 2024, longtime panel executive of the U.S. Judicial Panel on Multidistrict Litigation, Thomasenia "Tommie" P. Duncan, passed away. Tommie was well known for her breadth of knowledge of complex litigation, her grace and wisdom in advising the members of the Panel, and skillfully leading the Panel's staff. She worked extensively with the bench and bar to advance education in the field of multidistrict litigation and played a pivotal role in the Panel's collaborative work with academia.

Tommie was a graduate of Brown University, where she received an A.B. in Economics and International Relations. She received her J.D. from the University of Pennsylvania, where she was a member of the Law Review. She began her legal career at Covington & Burling, LLP, where she handled employment cases and complex commercial litigation. She later served as special assistant to the solicitor at the U.S. Department of Labor and as senior legal advisor to the administrator of the Federal Aviation Administration. Immediately prior to her work at the Panel, she served as general counsel of the Federal Election Commission. She was an elected member of the American Law Institute.

Tommie understood the importance of contributing to the next generation of civic-minded activists. She served at the America's Promise Alliance, a partnership of groups devoted to improving the lives of children, as senior vice president, general counsel, and corporate secretary. She also served as general counsel for the Corporation for National and Community Service. During her career, she taught at the University of the District of Columbia David A. Clarke School of Law and Georgetown University Law Center.

Tommie's exemplary leadership, guidance, humor, and kindness will be greatly missed by all past and current judges of the Panel, her dedicated staff, and those throughout the legal profession who worked with her. She is survived by her son, Hunter Harold, of whom she was prouder than any of her numerous professional accomplishments, as well as countless family and friends.

the potential inconvenience and prejudice to some individual parties. Not every group of complex cases benefits from MDL treatment, and when the efficiencies to be gained do not outweigh the potential inconvenience to the parties, we will deny centralization.

R: Are MDLs driving greater use of the bankruptcy code, or is it simply a function of the higher client counts in the age of digital marketing? Either way, should MDL rules adjust to the increasing use of bankruptcy as the potential solution to mass torts?

JC: For as long as there have been MDLs, there have been parties seeking recourse in bankruptcy. For instance, in the *Silicon Gel Breast Implant Litigation* (MDL No. 926) in the 1990s, Dow Corning filed for bankruptcy during pretrial proceedings[8]. MDLs, by their nature, are often "bet the company" litigations. Centralization may in fact reduce recourse to bankruptcy by reducing duplicative discovery and pretrial proceedings, and hence litigation costs, for defendants.

The recent discussion of bankruptcy in MDLs stems from the use of the "Texas Two-Step" in a handful of litigations. This tactic involves a company spinning off a unit and transferring its tort liability to that unit, usually via a Texas corporate law that allows so-called "divisional mergers." The spinoff is then put into bankruptcy to manage that liability without risking the assets of the original company. The Texas Two-Step arose in the context of the asbestos litigation in 2017. It does not appear to have significantly impacted the Asbestos MDL, though, which was winding down by that point.

The first use of the Texas Two-Step in an MDL was in the Talc litigation in late 2021. But that attempt has been unsuccessful to date. The Third Circuit rejected the bankruptcy petition earlier this year.[9] The other MDL involving significant bankruptcy issues is the 3M Combat Arms Earplug litigation, which involved a 3M subsidiary declaring bankruptcy and 3M arguing that the subsidiary had assumed all liabilities for the subject earplugs. That bankruptcy differed from Talc in that 3M and the petitioner strongly criticized the management of the MDL as a basis for seeking relief in bankruptcy court. But the result seemingly was the same. The bankruptcy court dismissed the bankruptcy petition.[10] These are the two largest MDLs currently. There are more than 280,000 cases pending in the Earplug litigation and more than 53,000 cases pending in the Talc litigation. The defendants in these litigations thus face potentially massive liabilities, which may explain their recourse to such novel means of obtaining bankruptcy protection. Given the small sample size of defendants attempting such tactics, however, as well as their relative lack of success, there does not seem to be an urgent need to change the rules governing MDLs to address this issue. ⊙

Endnotes

[1]28 U.S.C. § 1407(d) (2024).
[2]28 U.S.C. § 1404 (2024).
[3]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[4]18 U.S.C. § 1407(e) (2024).
[5]Manual for Complex Litigation, Fourth § 10.22 *et. seq.* (2004).
[6]Fed. R. Civ. P. 23.
[7]The comment period closed on Feb. 16, 2024, after this interview was conducted. *See* Fed. R. Civ. P. 16.1 (Preliminary Draft Proposed Amendment), *available at* https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_1.pdf.
[8]*In re* Dow Corning, 187 B.R. 919 (E.D. Mich., 1995).
[9]In re LTL Mgmt., LLC, 64 F.4th 84 (3d Cir. 2023).
[10]In re Aearo Techs., LLC, 2023 WL 3938436 (Bankr. S.D. Ind. Jun. 9, 2023).

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inal cases in courthouses large and small. We must enhance fairness and transparency by maintaining the public record and keeping our courthouses and courtrooms available to the bar and public. The current budget cycle causes costly operational issues, including: abbreviated contract periods; an inability to accurately forecast costs; contract inflation due to delay; and limited contractor options due to the abbreviated schedule. Stewardship of limited resources is a daily challenge for court administrators across the country. Our current budget process has hindered that stewardship, adding cost, delay, and uncertainty and diverting time and resources away from the Judiciary's vital mission.

Robert Farrell is a 34-year court employee having worked in the U.S. Bankruptcy Court, U.S. Probation and Pretrial Services Office and U.S. District Court in a variety of Operations, Finance, and IT positions. He has worked for the courts in the Southern District of Ohio, District of Maine, Northern District of New York and is presently the Clerk of Court for the U.S. District Court for the District of Massachusetts. He is a graduate of Franklin University and the University at Albany (SUNY). ⊙

Endnotes

[1] https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary
[2] https://www.gao.gov/blog/what-continuing-resolution-and-how-does-it-impact-government-operations
[3] https://www.gsa.gov/about-us/mission-and-background/background