

Survey of Federal Transferee Judges in MDL Proceedings
Regarding Coordination with Parallel State Proceedings

*Report to the Judicial Panel on Multidistrict Litigation
and the Judicial Conference Committee on
Federal-State Jurisdiction*

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Executive Summary

The Federal Judicial Center conducted a survey of federal judges about their experiences as transferee judges in multidistrict litigation (“MDL”) proceedings in coordinating with parallel state proceedings.

More than 40% of MDL transferee judges reported having become aware of parallel state proceedings. Of those judges, 60% reported communicating, either directly or indirectly, with state counterparts.

The most common forms of coordination were scheduling of dispositive motions and establishing a common document depository.

The most severe problem arising from parallel state proceedings, as rated by respondents, was attempts by parties to use state proceedings to strategic advantage in the federal proceeding, which received an average rating of 2.75 out of 5.

Report

The Judicial Conference Committee on Federal–State Jurisdiction and the Judicial Panel on Multidistrict Litigation (“JPML”) asked the Federal Judicial Center to survey transferee judges in multidistrict litigation (“MDL”) proceedings about their experiences in coordinating with state judges.* The purpose of the survey was to provide the committee and the JPML with information to assist in the development of practical resources to facilitate coordination between federal and state parallel proceedings in complex litigation.

The decision was made, in consultation with the JPML, to send the survey to every transferee judge with an open MDL in the spring of 2011** or who had closed an MDL proceeding in the prior two years. Transferee judges with multiple proceedings meeting these criteria were sent one survey asking for their overall experiences. The survey was sent to 287 federal transferee judges; 204 (71%) responded to the survey.

Of the 204 survey respondents, 89 respondents (43%) indicated that, as an MDL transferee judge, they had at some point become aware of parallel state proceedings. Of the judges reporting such awareness, 53 (60%) indicated that they communicated with at least some judges presiding in the parallel state proceedings.

These were the most common types of coordination reported by respondents:

- scheduling of dispositive motions (22, or 42%);
- establishing a common document depository (22);

* My FJC colleagues Meghan Dunn and Jill Curry assisted in this research.

** In error, the original version of this report said “2010” at this point.

- scheduling of trial dates (21, 40%); scheduling of *Daubert/Frye* hearings (16, or 30%);
- using a website to communicate orders (15, or 28%);
- scheduling of fact-witness depositions (15);
- scheduling pretrial hearings (14, or 26%);
- scheduling of expert depositions (12, or 23%);
- appointing the same lead/liaison counsel (11, or 21%);
- appointing the same special master (11); and
- conducting a joint mediation/settlement conference (10, or 19%).

Less common forms of coordination included appointing the same mediator (8, or 15%), holding joint hearings (7, or 13%), following an agreed-upon emergency motions procedure (4, or 8%), and holding a joint trial (1, or 2%).

Respondents were also asked to rate the severity of several problems or issues that could conceivably arise with parallel proceedings. The scale ranged from 1, “Not at all a problem,” to 5, “A serious problem.” Interestingly, the average rating of every potential problem was less than 3, suggesting that, in general, federal judges do not perceive any of these potential problems as particularly severe. The average rating of the potential problems were, in order of severity:

- attempts by parties to use state proceedings to strategic advantage (2.75);
- conflict over pace of proceedings (2.15);
- duplicative discovery (2.11);
- jurisdictional conflicts (2.04);
- delay in resolution (1.94);
- procedural head start of state proceedings (1.75);
- compensation of attorneys in state proceedings (1.68); and
- reluctance of state judges to coordinate (1.60).