

A Comparison of Federal and Texas Multidistrict Litigation Procedure: Three Key Differences

By [Adam M. Dinnell](#), and [Adam J. Greiner](#)

In recent years, the use of the federal multidistrict litigation (“MDL”) process to address complex multijurisdictional disputes has increased dramatically. Nearly 60% of all civil cases filed in federal court now become part of an MDL. Currently, there are 170 federal MDLs that, together, contain over 400,000 constituent actions.¹ These aggregated litigations address everything from products liability to antitrust claims and, in some instances, they have become notorious. Recent MDLs, including MDL 2885, *In re: 3M Combat Arms Earplug Products Liability Litigation* (224,418 pending actions); MDL 2738, *In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation* (58,052 pending actions); and MDL 2804, *In re: National Prescription Opiate Litigation* and (4,349 pending actions), have each taken turns dominating the legal news cycle.²

As a result, many parties and practitioners have become familiar with the federal MDL process, but far fewer have navigated the eccentricities of its state counterparts. For states that have an MDL process, the overriding goal is often identical to that of the federal regime – to provide a method by which cases pending in different judicial districts or jurisdictions that possess a common factual core can be aggregated for coordinated or consolidated proceedings. But, although most state MDL processes were modeled after the federal MDL rules, there are often significant differences that can have a material impact on the proceedings. This is especially true in Texas.

¹ *Pending MDLS by Actions Pending (As of October 1, 2024)*, UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, https://jpmi.uscourts.gov/sites/jpmi/files/Pending_MD_Litigation_By_Actions_Pending-October-1-2024.pdf.

² *Id.*

There are three major differences between federal and Texas MDL procedure that can impact the course of the proceedings: (1) whether the parties are entitled to a hearing on an initial motion to transfer; (2) whether the parties are expected to inform the selection of the transferee court; and (3) the treatment of tag-along actions. Each difference is discussed in turn below.

1. In Texas MDLs, the parties are not entitled to a hearing on an initial motion to transfer.

In federal MDL practice, each initial motion to transfer (the motion seeking MDL treatment) is heard by the United States Judicial Panel on Multidistrict Litigation (“JPML”). These hearings before the Panel (and their abbreviated time allotments for oral argument) are nothing if not a unique experience. Federal Multidistrict Litigation Rule 11.1 requires that the JPML “shall not consider transfer or remand of any action pending in a federal district court when any party timely opposes such transfer or remand without first holding a hearing session for the presentation of oral argument.” Although the Rule allows the JPML to discretionarily dispense with oral argument if it would significantly aid the decision-making process, customarily the JPML insists on oral argument.³

There are three major differences between federal and Texas MDL procedure that can impact the course of the proceedings: (1) whether the parties are entitled to a hearing on an initial motion to transfer; (2) whether the parties are expected to inform the selection of the transferee court; and (3) the treatment of tag-along actions.

In contrast, the Texas Multi-District Litigation Panel (“Texas Panel”) does not customarily set a hearing on a party’s motion to consolidate and transfer cases to an MDL pretrial court. Texas Panel Rule 13 does not provide for any presumption in favor of setting a hearing and the Texas Panel does not customarily hear oral arguments on transfer orders. Specifically, Rule 13 states that the “MDL Panel may decide any matter on written submission or after an oral hearing before one or more of its members at a time and place of its choosing.” Thus, the Texas Panel can (and usually does) decide motions to transfer on submission only.

³ Parties also have a duty to confer prior to oral argument, unlike in Texas.

2. In Texas MDLs, the parties do not typically inform the Panel's selection of a transferee court.

In federal MDL practice, the parties will often make arguments to the JPML concerning what specific transferee court and judge should be selected. These arguments have been based on everything from where key documents are located to docket conditions and even which court has accessible ports nearby.⁴

In contrast, the Texas Panel does not hear arguments from the parties as to which court would be a suitable transferee court for pretrial MDL proceedings. Rule 13.3 sets out the necessary elements for a motion to transfer filed with the Texas Panel. It states that the written motion must (1) state the common questions of fact; (2) explain why transfer would be for the convenience of the parties and witnesses and would “promote the just and efficient conduct of the cases”; (3) state whether the parties agree to the motion; and (4) provide an appendix of the parties and cases, with contact information for the attorneys. Nowhere does the Rule suggest that the movant or any opposing party can or should identify which transferor court would best “promote the just and efficient conduct of the cases.” In fact, in one recent case, the Texas Panel explained, “This panel routinely resists a party’s request for a specific pretrial judge.” Order of Multidistrict Litigation Panel, *In re: Grape Growers Products Liability Litigation (MDL No. 23-0591)*, (Tex. M.D.L. Panel October 3, 2023) (citing *In re Farmers Ins. Co. Hurricane Harvey Litig.*, No. 18-0547, 2018 Tex. LEXIS 737, at *1 (Tex. M.D.L. Panel July 27, 2018) (a party requested specific judges and the MDL rejected the request and stated: “we remind the parties that we have repeatedly stated that we disfavor requests that we appoint specific judges requested by the parties.”); *In re Alcon Shareholder Litig.*, 387 S.W.3d 121, 125 (Tex. M.D.L. Panel 2010); *In re Digitek Litig.*, 387 S.W.3d 115, 118 (Tex. M.D.L. Panel 2009) (“[W]e consider it improper for a motion to seek transfer to a certain court or county.... Such express requests are improper because Rule 13 is not meant to be a venue-changing or judge-selecting procedure.”); *In re Petroleum Wholesale Litig.*, 339 S.W.3d 405, 409 (Tex. M.D.L. Panel 2009) (we disfavor the practice of parties suggesting a particular county or a particular judge, because the procedure is not supposed to facilitate forum shopping).

3. In Texas MDLs, tag-along cases are automatically transferred when the notice of transfer is filed.

The Texas MDL Rules further deviate from their federal counterparts in that “tag-along” cases (cases with factual allegations like those of cases consolidated in an MDL that are

⁴ John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2238-39 (2008); see also *In re One Apus Container Ship Incident on November 30, 2020*, 607 F. Supp. 3d 1344, 1345 (U.S. Jud. Pan. Mult. Lit. 2022) (“The parties assert that the *One Apus* calls at ports located in or near the Southern District of New York, which will facilitate discovery.”)

not yet assigned to that MDL) are automatically deemed transferred as soon as the notice of transfer is filed in the pretrial court.

Under the federal rules, the process of transferring a tag-along case involves a Conditional Transfer Order (“CTO”) issued by the JPML. Once the JPML has been made aware of a case with similar factual allegations to those in an ongoing MDL, the JPML can issue a CTO, triggering a fifteen-day period within which a party can choose to oppose the transfer. If a party opposes the transfer, it then has another fifteen days to file its argument in opposition. Under Federal Multidistrict Litigation Rule 2.1, the original trial court maintains its pretrial jurisdiction over the case and its orders are unaffected by any pending CTO. Transfer is only effective once the order to transfer is filed by the JPML with the clerk of the transferee court.

While the general contours of Texas MDL practice mirror federal MDL practice, Texas law deviates from the federal equivalent in ways that can have a meaningful impact on a party’s case.

In contrast, CTOs are a foreign concept in Texas MDL practice. Texas tag-along actions are not routed back through the Panel prior to transfer. Under Rule 13, once a notice of transfer is filed in both the trial court and the transferee court, the case is deemed transferred. Although a party opposing such a transfer has thirty days after service of the notice to move to remand the case, the remand decision is made by the transferor court rather than the Panel and the transferee court does not retain pretrial jurisdiction during this period. While the transferee court’s order on the motion to remand is appealable to the Texas Panel via a motion for rehearing, the transferee court’s orders are binding on the original trial court after remand and could not be overturned absent an additional appeal.

Bottom Line

Even a sophisticated party or practitioner familiar with the federal MDL process can run afoul of the intricacies of aggregate litigation practice in Texas state court. While the general contours of Texas MDL practice mirror federal MDL practice, Texas law deviates from the federal equivalent in ways that can have a meaningful impact on a party’s case. With this in mind, consultation with an attorney with Texas MDL experience is imperative to ensure successful navigation of the Texas MDL process and a positive case outcome.



Adam M. Dinnell

Partner

adinnell@hicksjohnson.com



Adam J. Greiner

Associate

agreiner@hicksjohnson.com

Adam M. Dinnell is a partner at the Houston trial firm Hicks Johnson PLLC. He has argued before the United States Judicial Panel on Multidistrict litigation and is a veteran of multiple MDLs, including federal MDLs 1873 (In re: FEMA Trailer Formaldehyde Products Liability Litigation), 2218 (In re: Camp Lejeune, North Carolina Water Contamination Litigation), and Texas MDL 23-0591 (In re: Grape Growers Products Liability Litigation). Adam Greiner is an associate at Hicks Johnson PLLC. He has filed briefs with the Texas Panel and has appeared as counsel in Texas MDL 23-0591.

About Hicks Johnson PLLC

Hicks Johnson PLLC is a premier boutique law firm with offices in Houston and Chicago, specializing in complex commercial litigation, arbitration, and appeals. Known for delivering results, our trial lawyers are well-versed in handling high-stakes cases.



DISCLAIMER:

This article is intended for informational purposes only and should not be construed as legal advice. The content provided does not constitute the formation of an attorney-client relationship. For advice specific to your situation, we recommend consulting with licensed legal counsel.