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Cover Page Footnote

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AN ANALYSIS OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION'S SELECTION OF TRANSFEREE DISTRICT AND JUDGE

Daniel A. Richards *

When civil cases involving one or more common questions of fact are pending in multiple district courts, 28 U.S.C. § 1407 empowers the Judicial Panel on Multidistrict Litigation (JPML) to centralize the cases in a single district court for pretrial proceedings. If the JPML chooses to centralize a multidistrict action, it possesses broad discretion to select a transferee district and judge. While many litigants believe that the selection of one transferee district or judge over another can significantly impact the outcome of the litigation, they often describe the JPML's rationale supporting selection as opaque and the resulting selection decision as difficult to predict. In order to clarify the criteria on which the JPML relies when choosing a transferee district and judge, this Note presents an empirical study of several years of JPML transfer orders. This Note argues that, while predicting where the JPML will centralize a multidistrict action is difficult, an understanding of statistical trends in JPML selection of transferee district and judge leads to a better understanding of the factors that are most likely to influence the JPML in any given multidistrict action.

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INTRODUCTION

Often, the real decision for the Judicial Panel on Multidistrict Litigation (JPML) is not whether, but where.[1] Frequently, the JPML's decision to centralize civil actions pending in multiple federal district courts for coordinated and consolidated pretrial proceedings is "all but a foregone conclusion."[2] In such a situation—or any other in which centralization is appropriate—the JPML must decide to which federal district court and judge to transfer the centralized multidistrict proceeding.[3] As the current JPML chair notes, selecting the best district and judge for a multidistrict litigation (MDL) "is often the most difficult decision the Panel faces."[4]

In addition to being a difficult issue for the JPML, the selection of a transferee district and judge is also "hotly contested."[5] Although it is common for the parties before the JPML to agree that centralization is appropriate, the parties often "vehemently disagree" as to the best transferee court.[6] On brief and at oral argument, the selection decision is often the biggest point of contention among the parties in an MDL proceeding.[7]

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1. DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 6:1 (2009) (noting that "[i]n many cases before the Panel, the selection of a transferee court is essentially the only decision to be made by the Panel because the appropriateness of transfer of the actions for coordinated or consolidated pretrial proceedings is overwhelmingly evident from the facts").

2. *Id.*

3. *See* 28 U.S.C. § 1407(a)–(b) (2006); HERR, *supra* note 1, § 6:1 ("If the Panel determines that there exists more than one action that is appropriate for transfer and coordination or consolidation, it must determine an appropriate transferee district."); *Id.* § 7:1 ("The next decision to be made by the Panel once it determines that transfer is appropriate is to select a particular judge to preside over the coordinated or consolidated pretrial proceedings.").

4. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2239 (2008).

5. Mark Herrmann, *To MDL or Not To MDL? A Defense Perspective*, 24 LITIG. 43, 44 (1998).

6. Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 721 (1991).

7. Earle F. Kyle, IV, *The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589, 597 (1998) (noting that "*where* cases should be

Parties' strong opinions regarding the selection of a transferee district and judge stem from the significant practical effect that selection of one district or judge over another can have on an MDL.[8] First, if the JPML chooses a district distant from a party's residence or place of business—or from the location of a party's counsel—that district may be less convenient for litigating pretrial proceedings than a closer district.[9] Also, because a judge will apply the choice of law rules of the transferee district in some MDL proceedings, the selection of one transferee district over another can have a dispositive impact on the litigation.[10] Finally, even in MDLs where the choice of one district over another will not change the law applied to pretrial proceedings, because judges may apply the same law differently, the selection of a transferee judge can impact the outcome of an MDL.[11]

Understanding the factors that influence the JPML's selection of transferee district and judge is critical for litigants appearing before the JPML. In some cases, the JPML allots a litigant just one minute for oral argument, during which the litigant must try to persuade the JPML regarding the selection of a transferee district and judge.[12] A litigant standing before the JPML watching the clock tick down cannot afford to waste a word. That litigant must understand not only the factors that the JPML considers as relevant to the selection of a transferee district and judge, but also which of those factors the JPML believes is most important in the MDL under consideration. Through empirical analysis, this Note sheds light on the JPML selection of transferee district and judge in order to increase understanding of the selection process.

Part I discusses the background of the JPML, the significance of JPML selection of transferee district and judge, the basics of practice before the JPML, and the information typically included in a transfer order. Part I also describes the factors that the JPML considers as relevant to the selection of a transferee district and judge as reflected in JPML transfer orders and relevant legal scholarship. Part II displays the results of an empirical investigation into JPML selection of transferee district and judge. Part III argues that, while there is no formula for predicting to which district and judge the JPML will transfer an MDL, the JPML considers certain factors to be more or less important depending on the context of the MDL. Part III further argues that by understanding into which context an MDL fits, a party can determine which factors the JPML will likely consider to be most significant in the MDL.

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transferred is typically more vehemently debated at hearing and on brief than *whether* the cases should be transferred and consolidated").

8. *See infra* notes 34–48 and accompanying text.
9. *See infra* notes 35–37 and accompanying text.
10. *See infra* notes 38–43 and accompanying text.
11. *See infra* notes 44–48 and accompanying text.
12. Heyburn, *supra* note 4, at 2235 n.53.

I. BACKGROUND ON JPML SELECTION OF TRANSFEREE DISTRICT AND JUDGE

Part I.A discusses the background and function of the JPML and the importance of the transfer decision. Part I.B describes the basics of practice before the JPML and introduces the typical structure of JPML transfer orders. Part I.C.1 describes the rationales stated in JPML transfer orders relating to the selection of transferee district and judge. Part I.C.2 then describes views on JPML selection of transferee district and judge from the perspectives of members of the Panel and other commentators.

A. *JPML Background and Function*

The JPML traces its origins to a surfeit of electrical equipment antitrust conspiracy cases that overwhelmed the federal court system in the 1960s.[13] The federal judiciary was faced with the daunting task of adjudicating over 2000 private antitrust actions pending in thirty-six federal judicial districts.[14] In order to manage the massive discovery process efficiently, Chief Justice Earl Warren created the Coordinating Committee for Multiple Litigation of the United States District Courts.[15] The Committee invited counsel and district judges to participate in pretrial hearings.[16] These hearings resulted in the successful national coordination of document discovery and depositions in the electrical equipment antitrust conspiracy cases.[17]

Despite the Committee's successful management of the electrical equipment antitrust cases, it recognized that its management process had some weaknesses.[18] The Committee believed that a truly effective coordinating body would have the power to issue binding orders with respect to case management decisions, and to consolidate proceedings in a single district court for pretrial proceedings.[19] The Committee then expressed this view of the ideal multidistrict litigation system to Congress.[20]

The Committee's recommendations did not fall on deaf ears and, in 1968, Congress established the JPML by enacting 28 U.S.C. § 1407,[21] which states,

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any

13. Heyburn, *supra* note 4, at 2226.
14. Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 211 (1976); Heyburn, *supra* note 4, at 2226.
15. Cahn, *supra* note 14, at 211; Heyburn, *supra* note 4, at 2226.
16. Cahn, *supra* note 14, at 211–12.
17. *Id.* at 212.
18. *Id.*
19. *Id.*
20. *Id.*; *see* Heyburn, *supra* note 4, at 2226.
21. Pub. L. No. 90-296, 82 Stat. 109–10 (1968) (codified as amended at 28 U.S.C. § 1407 (2006)).

> district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.[22]

Congress passed this bill because it believed that "the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by . . . centralized management."[23]

Congress also set out the basic structure of the JPML in the statute. Under § 1407(d), the JPML consists of seven court of appeals and district court judges.[24] The Chief Justice of the U.S. Supreme Court appoints the Panel members, "no two of whom shall be from the same circuit."[25] The concurrence of four members is necessary for the JPML to take action.[26]

The scope of the JPML's power is limited. The JPML makes two decisions regarding MDL centralization. First, the JPML decides whether it should centralize cases pending in multiple federal district courts for coordinated and consolidated pretrial proceedings.[27] Second, if the JPML decides that centralization is appropriate,[28] it must decide to which judicial district and judge to transfer the cases.[29] This second question, which is often the only major point of contention in an MDL proceeding,[30] is the focus of this Note.

Although the scope of the JPML's duties is narrow, it exercises broad discretion in the execution of those duties. Though § 1407 provides some guidance to the JPML regarding whether it should centralize an MDL,[31] it provides no guidance regarding the selection of a transferee district and judge.[32] The legislative history of § 1407 indicates that Congress intended

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22. 28 U.S.C. § 1407(a).

23. H.R. REP. NO. 90-1130, at 2–3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899–900.

24. 28 U.S.C. § 1407(d).

25. *Id.*

26. *Id.*

27. HERR, *supra* note 1, § 1:1. For an interesting discussion of the factors that affect the decision whether to centralize civil actions in products liability multidistrict litigation (MDL), see Mark Herrmann & Pearson Bownas, *Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?*, 8 Class Action Litig. Rep. (BNA) 110 (Feb. 9, 2007).

28. While, conceptually, the centralization decision and the selection of transferee judge and district are distinct, "the existence of a suitable transferee court undoubtedly colors the Panel's judgment as to whether transfer should be ordered." HERR, *supra* note 1, § 6:1.

29. *Id.* § 1:1.

30. David F. Herr & Nicole Narotzky, *The Judicial Panel's Role in Managing Mass Litigation*, *in* A.L.I.-A.B.A. COURSE OF STUDY: MASS LITIGATION 249, 289 (2008).

31. 28 U.S.C. § 1407(a) (stating that the Judicial Panel on Multidistrict Litigation (JPML) may centralize multiple actions in a single district court where doing so "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions").

32. *See id.*; *see also* HERR, *supra* note 1, § 6:1 (noting that § 1407 does not provide any guidance).

to vest the JPML with significant discretion in its selection of a transferee district and judge.[33]

The JPML's broad discretion is, at times, frustrating to litigators who practice before the JPML.[34] This frustration stems from the intersection of the keen interest of practitioners in the location of the transferee court and the identity of the transferee judge[35] with the unpredictability of the selection decision.[36] Litigators take a keen interest in the district and judge to which the JPML transfers an MDL for a variety of reasons.

Convenience is the first of two reasons why a litigator might care about the district to which the JPML transfers an MDL. If a New York lawyer is representing a New York client, it would be easier—and less costly—to handle pretrial matters in the U.S. District Court for the Southern District of New York than it would be to handle the same pretrial matters in the U.S. District Court for the Northern District of California. In fact, "the convenience of parties and witnesses" is a relevant consideration in the centralization decision under § 1407.[37]

The second reason why a litigator might care about the district to which the JPML transfers an MDL relates to the choice-of-law rules in multidistrict litigation. On issues of state law, an MDL transferee court will apply to each constituent action—one of the actions pending in a district court—the state law that the transferor court would have applied had the JPML decided against transfer.[38] On issues of federal law, however, the transferee court is bound by the law of the federal circuit in which the transferee court sits.[39] Also, the transferee court may exercise all the pretrial powers of a federal district court.[40] A transferee court may consider motions to dismiss, motions for summary judgment,[41] and motions for class certification, as well as resolve discovery disputes and facilitate

33. H.R. REP. NO. 90-1130, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1901 ("[T]he committee believes that the informed discretion of the judiciary is the best method for resolving questions as to when and where cases should be transferred for pretrial.").

34. *See, e.g.*, Peter Geier, *MDL Panel: 'Traffic Cop' Seeing Its Power Grow*, NAT'L L.J. (New York), Mar. 26, 2007, at 1.

35. *See supra* notes 5–6 and accompanying text.

36. *See supra* notes 5–6 and accompanying text.

37. 28 U.S.C. § 1407(a) (2006).

38. *See In re* Temporomandibular Joint Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) (noting that "the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation" (citing *In re* Air Crash Disaster Near Chi., Ill., 644 F.2d 594, 610 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981))); *see also* Heyburn, *supra* note 4, at 2225 n.2.

39. *See In re Temporomandibular*, 97 F.3d at 1055; *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987), *aff'd sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); *see also* Heyburn, *supra* note 4, at 2225 n.2.

40. *See* 28 U.S.C. § 1407(b) ("[C]oordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation."); *see also* Herr & Narotzky, *supra* note 30, at 306.

41. *In re Temporomandibular*, 97 F.3d at 1055 (noting that the transferee court has the power to "enter dispositive orders").

settlement.[42] Accordingly, if the law of the federal courts of appeals differs with respect to a pretrial motion, discovery, or settlement issue, the selection of one transferee district over another can have a substantive impact on the litigation.[43]

JPML selection of a transferee judge is also important to litigators[44] because, simply put, "judges are different from one another."[45] Transferee judges make decisions on a wide variety of pretrial matters.[46] They can decide motions to dismiss and motions for summary judgment, grant class certification, resolve discovery disputes, facilitate settlement, and select lead and liaison counsel.[47] Differences in how judges exercise these powers can have a significant—and sometimes dispositive—impact on the individual actions consolidated into an MDL.[48]

Compounding the importance of the selection of a transferee district and judge is the high percentage of cases that never returns to the transferor district for trial. Section 1407 anticipates that after pretrial proceedings are complete, the JPML will remand the constituent actions back to their respective transferor districts for trial.[49] In practice, however, less than twenty percent of cases are remanded to the transferor district.[50] The other eighty percent are disposed of by other means, such as a transferee judge's ruling on a dispositive motion or settlement.[51] Therefore, when the JPML selects a transferee district and judge for an MDL, there is an overwhelming chance that it is assigning the constituent actions to their final resting place.

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42. *In re* Phenylpropanolamine Prods. Liab. Litig., 460 F.3d 1217, 1230–31 (9th Cir. 2006); *see also* Herr & Narotzky, *supra* note 30, at 306–07.

43. *See* Herrmann, *supra* note 5, at 46 ("Assume hypothetically that Second Circuit law is very favorable to your client, but Ninth Circuit law is very unfavorable. If the MDL Panel selects a judge in New York to handle your MDL proceeding, a celebration is in order. If, however, the MDL Panel sends all of your cases to Los Angeles, Chapter 11 may seem more fitting.").

44. Drug and Device Law, http://druganddevicelaw.blogspot.com/2008/06/on-mdl-panel-and-transparency.html (June 9, 2009, 5:00 EST) (writing that "the temperament and attitude of the presiding judge makes a real difference to the litigants").

45. Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2284 (2008).

46. *See* HERR, *supra* note 1, § 9 (describing the various powers of an MDL transferee court).

47. *Id.* §§ 9:12–9:16.

48. *See* Drug and Device Law, *supra* note 44.

49. *See* 28 U.S.C. § 1407(a) (2006) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.").

50. DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 158 (1983); *see also* Herr & Narotzky, *supra* note 30, at 306 (noting that "[i]n practice remand has proven the exception rather than the rule in multidistrict litigation").

51. Herr & Narotzky, *supra* note 30, at 309. A § 1404 transfer by a transferee judge also makes remand by the JPML unnecessary. *Id.*

B. *Practice Before the JPML and an Introduction to the Transfer Order*

Once a litigator determines his or her favored transferee district and judge, he or she must utilize JPML procedures to express this preference to the JPML. JPML procedures provide litigants with several opportunities to persuade the Panel regarding the exercise of its broad discretion in the selection of a transferee district and judge. Often, the first step on the road to JPML selection of transferee district and judge is the filing of a motion for centralized proceedings.[52] Any party in a prospective constituent action can initiate a proceeding for transfer by filing a motion with the JPML.[53] Other parties potentially affected by the motion have twenty days to oppose the motion.[54] A lack of opposition, however, does not guarantee transfer, as the JPML considers each motion on its merits.[55]

Next, through briefs[56] and oral argument, the parties attempt to persuade the JPML regarding the selection of a transferee district and judge. The briefs are limited to twenty pages; they typically describe the nature of the action, identify the factual and legal commonalities of the individual actions, provide reasons for the party's support or opposition to transfer, and articulate reasons for transferring a set of cases to a particular district and judge.[57] The JPML holds hearings at various locations around the country—usually in federal courthouses—approximately every two months.[58] In a morning session, the JPML hears approximately fifteen to twenty § 1407 motions for the creation of a new MDL.[59]

One of the most striking features of oral argument before the JPML is the relatively short time that the JPML allots to counsel.[60] Each lawyer typically receives between one and five minutes to articulate his or her client's views on transfer and the selection of a transferee district and

52. 28 U.S.C. § 1407(c)(ii); *see* Mark A. Chavez, *The MDL Process*, *in* 13TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 2008, at 117, 124–25 (PLI Corporate Law & Practice, Course Handbook Series No. B-1656, 2008); Herr & Narotzky, *supra* note 30, at 260.

53. 28 U.S.C. § 1407(c)(ii). In addition, the JPML can initiate transfer proceedings by a sua sponte order to show cause. 28 U.S.C. § 1407(c)(i). The JPML, however, rarely exercises its sua sponte power to initiate an MDL proceeding. Herr & Narotzky, *supra* note 30, at 260.

54. R.P.J.P.M.L. 7.2(c); *see also* Chavez, *supra* note 52, at 125.

55. *See* Chavez, *supra* note 52, at 125 (noting that the JPML considers "each motion" on its merits).

56. With the motion for centralization, the moving party must submit its brief and a list of known potentially related actions to the JPML. R.P.J.P.M.L. 7.2(a); *see also* Chavez, *supra* note 52, at 125.

57. Kyle, *supra* note 7, at 594–95.

58. Heyburn, *supra* note 4, at 2235; *see also* U.S. Judicial Panel on Multidistrict Litigation, Notice of Hearing Session (Dec. 18, 2008), *available at* http://www.jpml.uscourts.gov/Hearing_Info/2009HearingSessionOrders.pdf (listing date and location of JPML hearing).

59. Heyburn, *supra* note 4, at 2235–36.

60. *See id.* at 2235 (describing oral argument as the most "remarked-upon" part of the MDL process).

judge.[61] After the morning hearing session, the JPML retires to its executive conference, in which its members discuss that morning's cases.[62]

If the JPML decides to centralize and transfer a case, it issues a written transfer order.[63] These transfer orders are "brief and to the point,"[64] typically spanning fewer than two pages in the *Federal Supplement*.[65] The transfer orders generally discuss the issues before the JPML in the following formulaic sequence: first, the order discusses the distribution of the constituent actions,[66] identifies the moving party or parties, and describes the preferences of the parties; then, the order discusses the JPML's rationale for deciding to centralize the actions; finally, the order lays out reasons for the selection of the transferee district, and sometimes reasons for the selection of a particular transferee judge.[67] Often, the JPML devotes significantly greater attention in its transfer orders to the initial centralization decision than it does to the subsequent selection of transferee district and judge.[68] Of the typical one or two page transfer order, rarely does the JPML devote more than a few sentences to the selection of a transferee district and judge. For example, in one recent case, the JPML limited its discussion of transferee district and judge selection to the following single sentence:

> We are persuaded that the Southern District of New York is an appropriate transferee district for pretrial proceedings in this litigation, because two of the four actions are already pending there and, by

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61. *See id.* at 2235 & n.53; Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, ME. B.J., Winter 2004, at 16, 21.

62. Rhodes, *supra* note 6, at 717.

63. *See, e.g.*, *In re* Heparin Prods. Liab. Litig., 559 F. Supp. 2d 1403 (J.P.M.L. 2008) (written order granting motion for § 1407 transfer).

64. Heyburn, *supra* note 4, at 2235.

65. *See, e.g.*, *In re Heparin Prods.*, 559 F. Supp. 2d 1403; *In re* Mattel, Inc. Toy Lead Paint Prods. Liab. Litig., 528 F. Supp. 2d 1367 (J.P.M.L. 2007).

66. In addition to discussing the distribution of actions included in a motion for centralization, the JPML sometimes will describe the distribution of "potential tag-along actions" in a footnote. *See, e.g.*, *In re* Foundry Resins Antitrust Litig., 342 F. Supp. 2d 1346, 1346 n.1 (J.P.M.L. 2004). A "tag-along action" is "a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407." R.P.J.P.M.L. 1.1. A "potential tag-along action" is a potentially related action that came to the JPML's attention after the cutoff date for the hearing. HERR, *supra* note 1, § 4:23. Though the JPML will not transfer potential tag-along actions in the initial centralization order, the distribution of potential tag-along actions and preferences of the parties in potential tag-along actions are sometimes mentioned in transfer orders. *See, e.g.*, *In re* Nissan N. Am., Inc., Odometer Litig. (No. II), 542 F. Supp. 2d 1367, 1368 & n.2 (J.P.M.L. 2008) (identifying the location of a potential tag-along action and the preferred transferee district of a party in that action).

67. *See, e.g.*, *In re* Fasteners Antitrust Litig., 536 F. Supp. 2d 1378, 1378–80 (J.P.M.L. 2008); *In re* Terminex Employment Practices Litig., 466 F. Supp. 2d 1354, 1354–55 (J.P.M.L. 2006); *In re* Wells Fargo Home Mortgage Overtime Pay Litig., 435 F. Supp. 2d 1338, 1338–40 (J.P.M.L. 2006).

68. *See, e.g.*, *In re* Series 7 Broker Qualification Exam Scoring Litig., 444 F. Supp. 2d 1330 (J.P.M.L. 2006); *In re* Gen. Motors Corp. Sec. & Derivative Litig., 429 F. Supp. 2d 1368 (J.P.M.L. 2006).

> centralizing them before Judge Charles L. Brieant, we are assigning the litigation to a jurist who has the experience to steer it on a prudent course.[69]

The transfer orders sometimes provide no rationale for the selection of a particular transferee judge.[70]

C. *Perspectives on JPML Selection of a Transferee District and Judge*

As discussed above, practitioners take great interest in where and to which judge the JPML will transfer an MDL.[71] Despite this interest, substantial uncertainty remains regarding the factors that influence the JPML and the relative weight of those factors in the selection of a transferee district and judge. As one frequent commentator on the JPML notes, "neither the statute creating the Panel nor the Panel's own rules provide any guidance."[72] Furthermore, the JPML's precedent is "not helpful."[73]

The JPML's broad discretion[74] increases the difficulty of predicting where the JPML will transfer an MDL. As one commentator notes, the JPML "has the authority to send an MDL wherever it wants. Sometimes MDLs go to . . . districts far from either side's beaten track—to the puzzlement of lawyers who appear before the panel."[75] In fact, one commentator goes so far as to say that predicting where the JPML will transfer a case is impossible.[76]

1. Transfer Orders

JPML transfer orders provide one potential window into JPML selection of transferee district and judge. As discussed above, the JPML does not provide in-depth rationales for its selection decisions in its transfer orders.[77]

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69. *In re* Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig., 560 F. Supp. 2d 1348, 1349 (J.P.M.L. 2008).

70. *See, e.g.*, *In re* Alfuzosin Hydrochloride Patent Litig., 560 F. Supp. 2d 1372, 1374 (J.P.M.L. 2008) (transferring the MDL to Judge Gregory M. Sleet in the U.S. District Court for the District of Delaware without stating reasons for its selection of that particular judge); *In re* Aqua Dots Prods. Liab. Litig., 545 F. Supp. 2d 1369, 1370–71 (J.P.M.L. 2008) (transferring the MDL to Judge David H. Coar in the U.S. District Court for the Northern District of Illinois without discussing its rationale for transfer to that particular judge); *see also* Herr & Narotzky, *supra* note 30, at 296 (noting that "[i]n many cases the Panel will assign the transferred cases to a judge without stating reasons for selecting that judge").

71. *See, e.g.*, HERR, *supra* note 1, § 6:1 (noting that where the JPML will transfer an MDL is an "important question"); Herr & Narotzky, *supra* note 30, at 289 (noting the "serious" nature of the JPML's selection of a transferee district and judge); James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 FOOD & DRUG L.J. 325, 334 (1999) (discussing factors that influence JPML selection of a transferee district and judge in drug and device cases).

72. Herr & Narotzky, *supra* note 30, at 289.

73. Wood, *supra* note 71, at 334.

74. *See supra* notes 31–33 and accompanying text.

75. Geier, *supra* note 34.

76. Herrmann, *supra* note 5, at 44.

77. *See supra* notes 63–70 and accompanying text.

Despite their brevity, MDL transfer orders provide some basic insight into the factors that the JPML considers as relevant to the selection of a transferee district and judge. The factors that the JPML cites fall into sixteen[78] categories: significant pretrial progress of an action pending in the transferee district,[79] the docket conditions or resources of the transferee judge or district,[80] the location of the first-filed action,[81] the geographic centrality or proximity of the transferee district to the filed actions,[82] the concentration of the actions between or among district courts,[83] the concentration of potential tag-along actions between or among district courts,[84] the proximity of the transferee forum to relevant documents or potential witnesses,[85] the location of related court proceedings,[86] the general experience of the transferee judge,[87] the experience of the

78. Occasionally, the JPML cites a miscellaneous factor that does not fit into one of these sixteen categories. *See, e.g.*, *In re* Wells Fargo Loan Processor Overtime Pay Litig., 493 F. Supp. 2d 1380, 1380 (J.P.M.L. 2007) (selecting the U.S. District Court for the Northern District of California as the transferee district because the action in that district was "the broader of the two [actions] before the [Panel]"); *In re* Pilgrim's Pride Fair Labor Standards Act Litig., 489 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007) (citing as relevant the fact that plaintiffs in the transferee-district action were "seek[ing] collective action status under the [Fair Labor Standards Act]").

79. *See, e.g.*, *In re* Refined Petrol. Prods. Antitrust Litig., 528 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007) (noting that the action pending in the transferee district was the "most advanced").

80. *See, e.g.*, *In re* Classicstar Mare Lease Litig., 528 F. Supp. 2d 1345, 1347 (J.P.M.L. 2007) (noting that the transferee district's "general docket conditions permit us to make the Section 1407 assignment knowing that the court has the resources available to manage [the] litigation"); *In re* Vonage Mktg. & Sales Practices Litig., 505 F. Supp. 2d 1375, 1377 (J.P.M.L. 2007) (noting that the transferee judge "has the time" to efficiently manage the litigation).

81. *See, e.g.*, *In re* Household Goods Movers Antitrust Litig., 502 F. Supp. 2d 1356, 1357 (J.P.M.L. 2007) (noting the presence of the "first-filed" action as an influential factor in the selection of the transferee district).

82. *See, e.g.*, *In re* The TJX Cos., Fair & Accurate Credit Transactions Act (FACTA) Litig., 505 F. Supp. 2d 1379, 1380 (J.P.M.L. 2007) (selecting the U.S. District Court for the District of Kansas, inter alia, because it was "centrally located" to the "nationwide docket").

83. *See, e.g.*, *In re* Vonage Initial Pub. Offering (IPO) Sec. Litig., 471 F. Supp. 2d 1354, 1356 (J.P.M.L. 2007) (choosing the U.S. District Court for the District of New Jersey as the transferee district because, inter alia, "all but one of the actions . . . were initially" filed there).

84. *See, e.g.*, *In re* Tyson Foods, Inc., Fair Labor Standards Act Litig., 502 F. Supp. 2d 1358, 1360 (J.P.M.L. 2007) (noting the pendency of "two potential tag-along actions" in the U.S. District Court for the Middle District of Georgia as a factor weighing in favor of selection of that district).

85. *See, e.g.*, *In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 293 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003) (noting the proximity of the transferee district to documents and witnesses); *In re* Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig., 254 F. Supp. 2d 1368, 1370 (J.P.M.L. 2003) (noting that the transferee district was "conveniently located for many . . . witnesses").

86. *See, e.g.*, *In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (citing the U.S. District Court for the District of Columbia as the appropriate transferee district because, inter alia, selection of that district would allow "the transferee judge and the Court of Federal Claims judge . . . to coordinate discovery").

87. *See, e.g.*, *In re* Ocean Fin. Corp. Prescreening Litig., 435 F. Supp. 2d 1350, 1352 (J.P.M.L. 2006) (noting that Judge Amy J. St. Eve was "an experienced transferee judge");

transferee judge due to presiding over one of the constituent actions,[88] the familiarity of the transferee judge with the factual or legal issues in the MDL due to presiding over a previous action involving similar issues,[89] the preferences of the parties,[90] the proximity of the transferee district to the operations or residence of a party to the action,[91] the proximity to an important third party,[92] the accessibility of the transferee district court,[93] and the proximity of the transferee district to the conduct or event at issue.[94]

The above factors relate to both the selection of the transferee district and judge. While one might view the selection of a transferee district and the selection of a transferee judge as, at least conceptually, distinct, it is clear that the JPML considers them to be related in some cases. Some JPML transfer orders clearly display that the characteristics of a particular transferee judge were influential in the selection of a transferee district.[95] For example, in *In re Silica Products Liability Litigation*,[96] the JPML selected the U.S. District Court for the Southern District of Texas as the transferee district because by doing so it could assign the case to Judge

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In re Paxil Prods. Liab. Litig., 296 F. Supp. 2d 1374, 1375 (J.P.M.L. 2003) (describing the transferee judge as "a seasoned jurist").

88. *See, e.g.*, *In re Ocean Fin.*, 435 F. Supp. 2d at 1352 (noting that the transferee judge had "already developed familiarity with the issues present in [the] docket as a result of presiding over motion practice and other pretrial proceedings in the action pending before her for the past year").

89. *See, e.g.*, *In re* Pharmastem Therapeutics, Inc., Patent Litig., 360 F. Supp. 2d 1362, 1364 (J.P.M.L. 2005) (selecting a transferee judge who was "already familiar with many of the technological and legal issues" in the MDL as a result of presiding over a 2002 patent infringement case involving the same party).

90. *See, e.g.*, *In re* SFBC Int'l, Inc., Sec. & Derivative Litig., 435 F. Supp. 2d 1355, 1356 (J.P.M.L. 2006) (relying on the fact that the District of New Jersey was "the preferred transferee forum of several responding parties" in deciding to transfer the MDL to that district).

91. *See, e.g.*, *In re* Live Concert Antitrust Litig., 429 F. Supp. 2d 1363, 1364 (J.P.M.L. 2006) (noting the location of defendant Clear Channel's headquarters as a relevant factor in the selection of transferee district).

92. *See, e.g.*, *In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (selecting the District of Columbia as the transferee district because, inter alia, "most, if not all, discovery will likely come from the federal Government").

93. *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., 435 F. Supp. 2d 1342, 1344 (J.P.M.L. 2006) (noting that the U.S. District Court for the Eastern District of New York "provides a locale that is . . . easily accessible" as a relevant consideration in the selection of the district).

94. *See, e.g.*, *In re* Dep't of Veterans Affairs (VA) Data Theft Litig., 461 F. Supp. 2d 1367, 1369 (J.P.M.L. 2006) (selecting the District of Columbia as the transferee district because, inter alia, "the theft [of data] occurred in the Washington, D.C., metropolitan area").

95. *See, e.g.*, *In re* Transpacific Passenger Air Transp. Antitrust Litig., 536 F. Supp. 2d 1366, 1367 (J.P.M.L. 2008) (citing the experience of Judge Charles R. Breyer, a judge in the Northern District of California, as a reason for selecting that district as the transferee district); *In re* Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig., 560 F. Supp. 2d 1348, 1349 (J.P.M.L. 2008) (citing the experience of Judge Charles L. Brieant as supporting the selection of the U.S. District Court for the Southern District of New York as the transferee district).

96. 280 F. Supp. 2d 1381 (J.P.M.L. 2003).

Janis Graham Jack, "an experienced transferee judge for multidistrict litigation . . . with a relatively low civil caseload."[97] In other transfer orders, the JPML appears to select a transferee district without assigning any particular significance to the characteristics of the transferee judge.[98] For example, in *In re Saturn L-Series Timing Chain Products Liability Litigation*,[99] the JPML transferred the MDL to the U.S District Court for the District of Nebraska without citing the characteristics of the transferee judge as a factor that influenced its selection.[100]

Although JPML transfer orders occasionally cite to the experience of the transferee judge, the particular aspect of the transferee judge's experience to which the orders refer varies. Occasionally, the JPML will refer to a specific aspect of the transferee judge's experience when stating its reasoning for selecting that judge.[101] For example, the JPML has noted the significance of the transferee judge's status as "an experienced MDL transferee judge" in assigning an MDL to that judge.[102] Also, the JPML occasionally notes the relevance of a judge's experience in a prior case. For example, in *In re Brimonidine Patent Litigation*,[103] the JPML noted the relevance of the transferee judge's experience with an earlier action involving some of the same patents at issue in the MDL.[104] The JPML also sometimes cites to the transferee judge's experience presiding over one of the constituent actions as a reason for the selection of that judge.[105] For example, in *In re Levaquin Products Liability Litigation*,[106] the JPML selected Judge John R. Tunheim as the transferee judge, in part, because the constituent actions pending in the U.S. District Court for the District of Minnesota had been related before him, affording him an opportunity to

97. *Id.* at 1383.

98. *See, e.g.*, *In re* Radioshack Corp. "ERISA" Litig., 528 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007) (selecting the U.S. District Court for the Northern District of Texas without citing the characteristics of the transferee judge as an influential factor); *In re* Pilgrim's Pride Fair Labor Standards Act Litig., 489 F. Supp. 2d 1381, 1381–82 (J.P.M.L. 2007) (selecting a transferee district without mentioning the characteristics of the transferee judge).

99. 536 F. Supp. 2d 1367 (J.P.M.L. 2008).

100. *Id.* at 1368 (noting only the presence of the first-filed action and the unopposed preference of the moving party as relevant factors in its decision).

101. *See, e.g.*, *In re* Vonage Mktg. & Sales Practices Litig., 505 F. Supp. 2d 1375, 1377 (J.P.M.L. 2007) (noting that the transferee judge "already presides over another MDL docket involving Vonage"); *In re* Conagra Peanut Butter Prods. Liab. Litig., 495 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007) (describing the transferee judge as "a jurist experienced in multidistrict litigation").

102. *In re* Wellnx Mktg. & Sales Practices Litig., 505 F. Supp. 2d 1380, 1381 (J.P.M.L. 2007).

103. 507 F. Supp. 2d 1381 (J.P.M.L. 2007).

104. *Id.* at 1382.

105. *See, e.g.*, *In re* Train Derailment near Tyrone, Okla., on April 21, 2005, 545 F. Supp. 2d 1373, 1374 (J.P.M.L. 2008) (noting that Judge Barbara S. Jones, the transferee judge, had "developed familiarity with the issues involved as a result of presiding over motion practice and other pretrial proceedings for the past two years"); *In re* Refco Sec. Litig., 530 F. Supp. 2d 1350, 1351 (J.P.M.L. 2007) (noting that the transferee judge was familiar with the issues in the MDL from presiding over several constituent actions for the previous two years).

106. 560 F. Supp. 2d 1384 (J.P.M.L. 2008).

familiarize himself with the litigation.[107] The JPML occasionally mentions the time that a transferee judge has to devote to a docket as an influential factor in the selection of a transferee judge.[108]

The JPML is not always so clear. In some transfer orders, the JPML does not specify which aspect of the transferee judge's experience it considers relevant to the assignment of the MDL.[109] In *In re Trasylol Products Liability Litigation*,[110] for example, the JPML reasoned that Judge Donald M. Middlebrooks was the appropriate transferee judge because he had "the experience to steer th[e] litigation on a prudent course."[111]

The JPML has provided very little guidance in its transfer decisions, or elsewhere, as to how it balances the various factors it cites when explaining its rationale for the selection of a particular transferee district and judge.[112] It has never articulated a consistent "'formula' or standard."[113] The JPML rarely discusses the characteristics of any district other than the transferee district. Accordingly, gleaning from transfer orders the relative weight of the factors that the JPML cites is quite difficult.

2. Views of Commentators

Considering the extent to which parties fight about the selection of a transferee district and judge[114] and the relative mystery of the selection decision,[115] it is not surprising that commentators have written quite a bit about the factors that influence the JPML.[116] JPML members, scholars, and practitioners have all written about the factors that influence the JPML selection of a transferee district and judge. Part I.B.2 discusses these efforts to elucidate JPML selection of transferee district and judge.

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107. *Id.* at 1385.

108. *See, e.g.*, *In re* Gadolinium Contrast Dyes Prods. Liab. Litig., 536 F. Supp. 2d 1380, 1382 (J.P.M.L. 2008) (noting that the transferee judge had "the time . . . to steer this docket on a prudent course"); *In re* Silica Prods. Liab. Litig., 280 F. Supp. 2d 1381, 1383 (J.P.M.L. 2003) (noting that the transferee judge had ample "time" to preside over the MDL docket).

109. *See, e.g.*, *In re* Motor Fuel Temperature Sales Practices Litig., 493 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007) (refraining from referring to any specific aspect of the transferee judge's experience); *In re* Rembrandt Techs., LP, Patent Litig., 493 F. Supp. 2d 1367, 1370 (J.P.M.L. 2007) (describing the transferee judge as "a seasoned jurist").

110. 545 F. Supp. 2d 1357 (J.P.M.L. 2008).

111. *Id.* at 1358.

112. *See* HERR, *supra* note 1, § 7:2 (noting that "little is usually said in the Panel decisions regarding reasons for selecting a particular judge"); Herr & Narotzky, *supra* note 30, at 296.

113. *See* Herr & Narotzky, *supra* note 30, at 296.

114. *See supra* notes 5–7 and accompanying text.

115. *See supra* notes 75–76 and accompanying text.

116. *See, e.g.*, HERR, *supra* note 1, at §§ 6:1–7:14 (noting relevant factors in the selection of transferee district and judge); Chavez, *supra* note 52, at 130–31; Herr & Narotzky, *supra* note 30, at 289–300 (citing twenty-three factors that are relevant to JPML selection of a transferee district and seven factors that are relevant to the selection of a transferee judge); Herrmann, *supra* note 5, at 44; Kyle, *supra* note 7, at 597–99; Yvette Ostolaza & Michelle Hartmann, *The Judicial Panel on Multidistrict Litigation and Coordinating Multijurisdictional Disputes*, PRAC. LITIGATOR, July 2005, at 23, 26–27.

a. *Views of JPML Members*

The JPML's self-perception—at least through the eyes of its members—seems to be something of an oxymoron. On the one hand, as one former chair describes the JPML's role, the JPML sees itself as a mere "traffic cop;"[117] it simply decides "whether the case should go, and if so, where."[118] On the other hand, the JPML is not unaware of the broad discretion it possesses when making those decisions. As Judge John G. Heyburn II, the current chair of the JPML, notes in *A View from the Panel: Part of the Solution*, the JPML exercises "considerable and largely unfettered discretion" when making the transfer decisions.[119] He also acknowledges that the selection of transferee district and judge requires substantial "intuition."[120]

Judge Heyburn has provided some guidance regarding his views on the selection of transferee district. Among the factors that he considers as relevant to the selection of a transferee district are the proximity to a factually related grand jury proceeding or *qui tam* action,[121] the possibility of discovery coordination with a related state-court suit, and the location of the district in which the majority of the actions or the first-filed action are pending.[122] This list of factors, however, is hardly exhaustive. Judge William Terrell Hodges, Judge Heyburn's predecessor as chair of the JPML, notes "the accessibility of the court" as a relevant factor.[123] He notes that because judges occasionally have "to see the lawyers and look them in the eye[,] . . . courts in metropolitan areas with busy airports are much more convenient."[124]

JPML members have also provided some guidance regarding the factors that they consider to be important when selecting a transferee judge. Judge Heyburn describes the "ideal transferee judge" as "one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases, if the new docket appears to require it."[125] Usually, he argues, the panel prefers to assign the MDL to "a judge already assigned many of the transferee cases," unless the judge "is unable to devote the time to the combined transferee cases."[126] Ultimately, the

117. Hansel, *supra* note 61, at 21–22.

118. *Id.* at 22.

119. Heyburn, *supra* note 4, at 2228.

120. *Id.* at 2241.

121. A *qui tam* action is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).

122. Heyburn, *supra* note 4, at 2239–40.

123. Hansel, *supra* note 61, at 19.

124. *Id.*

125. Heyburn, *supra* note 4, at 2240 (citing *In re* Refco Sec. Litig., 530 F. Supp. 2d 1350, 1351 (J.P.M.L. 2007); *In re* Nat'l Sec. Agency Telecomms. Records Litig., 444 F. Supp. 2d 1332, 1335 (J.P.M.L. 2006)).

126. *Id.*

"willingness and motivation"[127] of a prospective transferee judge to manage an MDL are "the true keys to whether centralization will benefit the parties and the judicial system."[128]

According to Judge Heyburn, the JPML also considers whether a prospective transferee judge's docket will permit him or her to devote the time necessary to manage the centralized MDL proceeding.[129] Making this determination can be difficult.[130] As he describes it, the time that a prospective MDL transferee judge has to devote to an MDL docket "may have little to do with the number of cases on the judge's docket and more to do with the presence of a few complex and time-consuming actions."[131] Accordingly, the JPML often arranges a telephone conference with the transferee judge to inquire about the nuances of that judge's docket conditions.[132]

Judge Heyburn notes that "any single factor can only be properly evaluated in the context of both the particular docket and the other factors that may be relevant."[133] Generally, he describes the selection of a transferee district as a decision that "involve[s] considerable discretion and intuition."[134]

As noted above, JPML transfer orders provide little guidance as to how to balance the relevant factors that influence the selection of a transferee district and judge.[135] Judge Heyburn, however, has provided some guidance. Ultimately, he says, the JPML applies the influential factors in a way that "benefit[s] the system as a whole rather than a particular party or a particular point of view within the litigation."[136] Specifically, Judge Heyburn discusses the relative importance of the proximity of the transferee district to potential evidence.[137] He notes that if relevant witnesses and documents are concentrated in one particular area, the proximity of the potential transferee courts to that area will be an important factor in the selection of the transferee district.[138] Conversely, if the "litigation lacks a

127. *Id.* Interestingly, the JPML will often gauge the "willingness and motivation" of a prospective transferee judge by placing a personal call to that judge. *Id.* at 2240–41.

128. *Id.* at 2240.

129. *Id.*

130. *See id.* at 2240–41.

131. *Id.* at 2240.

132. *Id.* at 2240–41.

133. *Id.* at 2240.

134. *Id.* at 2241.

135. *See supra* notes 112–13 and accompanying text.

136. Heyburn, *supra* note 4, at 2241.

137. *See id.* at 2239.

138. *See id.* As an example of this type of case, Judge John G. Heyburn II cites *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 528 F. Supp. 2d 1339, 1340–41 (J.P.M.L. 2007), an MDL in which the JPML transferred the centralized cases to a district where the pharmaceutical manufacturer defendant had its principal place of business and where, accordingly, many relevant documents and witnesses would be located. Heyburn, *supra* note 4, at 2239 n.72.

singular geographical focal point," the location of the transferee court may be less significant.[139]

b. *Views of Other Commentators*

Essentially, there are as many categorizations of the factors that influence the JPML as there are commentators on the subject.[140] A fairly comprehensive list of factors that influence JPML selection of transferee district, however, can be found in David F. Herr's *Multidistrict Litigation Manual*.[141] The factors that Herr lists are as follows: the location of evidence, the place of a tort event, geographic centrality, the venue of the various pending actions, size of the actions, the nature of the pending actions, the potential for transfer under 28 U.S.C. § 1404(a), possible coordination with other federal proceedings, possible coordination with state court proceedings, the familiarity of a prospective transferee judge with the issues in the MDL, the overall experience of the prospective transferee judge, the relative advancement of cases on the constituent actions' dockets, the overall docket conditions of the prospective transferee district, the preferences of the parties, the potential for centralizing the MDL in a district where trial will probably occur, the availability of jurisdiction in a prospective transferee district, the pendency of motions in a prospective transferee court, and the pendency of other MDLs in a prospective transferee court.[142]

Although most commentators discuss MDL transfer without substantially differentiating between different categories of MDLs, in a recent article, several defense lawyers analyzed the selection of transferee district and judge in products liability, pharmaceutical, medical device, and vaccine products liability litigation.[143] The article identifies ten distinct rationales that the JPML uses and then analyzes fifty-one products liability MDLs to ascertain the frequency with which the JPML cited each of the rationales. The rationales, from most frequently employed to least, are

> 1) the capacity of the district court to handle multidistrict litigation; 2) the number of actions pending in the transferee district; 3) the location of relevant discovery, such as at a corporate headquarters; 4) selecting a geographically central location for the litigation; 5) selecting a judge with experience conducting multidistrict litigation; 6) selecting a judge with expertise in the subject area; 7) the stage of the actions pending in the

139. Heyburn, *supra* note 4, at 2239. As an example of this type of case, Judge Heyburn cites *In re Motor Fuel Temperature Sales Practices Litigation*, 493 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007), where no district stood out as a "'geographic focal point'" of the nationwide docket. Heyburn, *supra* note 4, at 2239 n.73 (quoting *Motor Fuel*, 493 F. Supp. 2d at 1367).

140. *See supra* note 116.

141. *See* HERR, *supra* note 1, §§ 6:3–6:22.

142. *See id.*

143. James M. Wood, Monique Hunt McWilliams & Delaney M. Anderson, *The Selection of a Transferee Court for MDL: Examining Rationales Used by the Judicial Panel on Multidistrict Litigation*, FOR DEF., Nov. 2007, at 12.

> transferee district; 8) whether either party favors selection of the transferee court; 9) selecting a neutral judge; and 10) coordinating the federal multidistrict litigation with related state actions.[144]

Although knowing the factors that the JPML considers when selecting a transferee district and judge is critical to understanding the transfer decision, understanding the relative weight of these factors is also important. Herr has come to several conclusions regarding the relative weight of the factors that the JPML cites. First, he contends that some factors carry more weight with the JPML than others. For example, he contends that the relative advancement of cases in prospective transferee courts "may be the most important factor" that the JPML considers when selecting a transferee district.[145] Among the other factors that he considers to be particularly important are the venue of the pending actions,[146] the transfer of cases to a prospective transferee district pursuant to § 1404 prior to the MDL proceeding,[147] the possibility of coordination with related federal proceedings,[148] the possibility of coordination with related state proceedings,[149] the familiarity of a judge in a prospective transferee district with the issues in the litigation,[150] the unanimous support of the parties of transfer to a prospective transferee district,[151] and the pendency of MDL matters in the prospective transferee district.[152] Of lesser importance, however, are the location of a government agency,[153] the amount in controversy of the various pending actions,[154] the nonunanimous preferences of the parties with respect to transferee district,[155] and the pendency of a motion in a prospective transferee district.[156]

Also, Herr makes several observations about the selection of a transferee judge. He notes that the relative docket conditions of a prospective transferee judge "may be the most important factor" in selecting a

144. *Id.* at 18.

145. *See* HERR, *supra* note 1, § 6:16.

146. *See id.* § 6:8 (noting that the JPML is reluctant to transfer an MDL to "a district in which no action is then pending").

147. *See id.* § 6:11 (noting that the district selected by a § 1404 transferor judge is given "great weight").

148. *See id.* § 6:12 (noting that the JPML will rarely pass up an opportunity to coordinate with other federal proceedings because coordination is the "hallmark of management of complex and multiple litigation").

149. *See id.* § 6:13 (describing state coordination as a "very compelling" factor).

150. *See id.* § 6:14 (describing the familiarity of a prospective judge with the issues in the litigation as a "very important" factor in the selection of a transferee district).

151. *See id.* § 6:18 (noting that unanimous agreement on a prospective transferee district will carry "significant weight" with the JPML).

152. *See id.* § 6:22 (noting that the tendency of the JPML to transfer MDLs broadly throughout the federal system may "trump" another strong factor).

153. *See id.* § 6:5 (noting that although the JPML may consider the location of a relevant government agency, it is unlikely to be "a controlling factor").

154. *See id.* § 6:9 (noting that the size of an action is "probably not a significant factor").

155. *See id.* § 6:18 (noting that the nonunanimous preferences of the parties are given "some weight").

156. *See id.* § 6:21 (noting that the pendency of motions in the transferee court is "unlikely to dictate the selection process").

transferee judge.[157] Conversely, the preferences of the parties with respect to the selection of a transferee judge are likely of little importance.[158]

Another group of commentators notes several trends regarding the JPML's weighing of relevant selection factors in pharmaceutical, medical device, and vaccine products liability litigation.[159] First, the commentators note that the number of actions pending in the transferee district is cited most frequently when a single district houses a disproportionate number of the constituent actions.[160] The authors observe that the location of relevant discovery appears to be a more persuasive factor in MDLs that have a small number of defendants.[161] They also note that the rationale of selecting a geographically central location for the litigation was used more frequently where the constituent actions were pending in geographically disperse districts.[162]

II. EMPIRICAL ANALYSIS OF JPML SELECTION OF TRANSFEREE DISTRICT AND JUDGE

Part II describes the results of a study of four and one-half years of JPML selection of transferee district and judge. The analysis includes every transfer order during this period, for a total of 303 transfer orders. For an in-depth discussion of the research methodology supporting this Note, see Appendix A.

The JPML divides MDLs into ten categories: air disaster, antitrust, common disaster, contract, employment practices, intellectual property, products liability, sales practices, securities, and miscellaneous.[163] As Figure 1 shows below, cases that the JPML categorized as securities, products liability, and antitrust constitute a large portion of the sample of 303 MDLs.[164] Cases that the JPML categorized as contract, air disaster, and common disaster, however, were relatively rare in the sample.[165]

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157. *Id.* § 7:8.

158. *Id.* § 7:7 (noting that the JPML is "quite ready to ignore the positions taken" with respect to transferee judge).

159. *See* Wood et al., *supra* note 143.

160. *Id.* at 20.

161. *Id.*

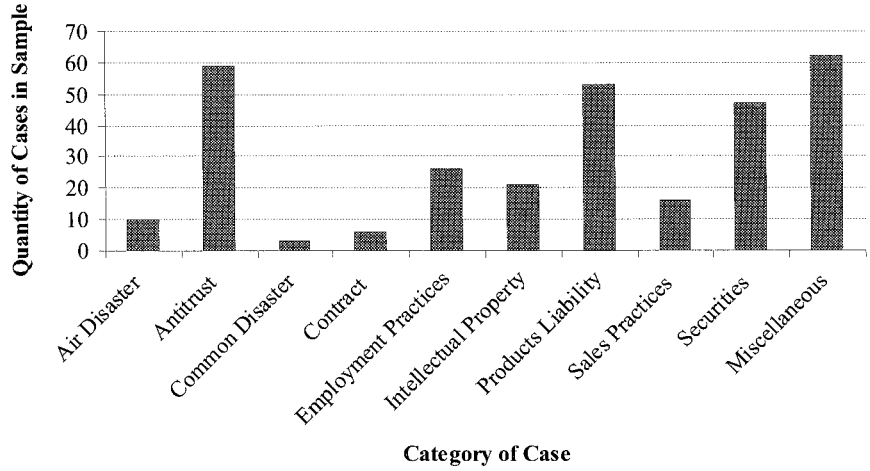
162. *Id.*

163. *See* Judicial Panel on Multidistrict Litigation, Citation Summary (Oct. 14, 2008) (on file with the Fordham Law Review). MDLs in the miscellaneous category involve a variety of claims. *See, e.g.*, *In re* Sony BMG Audio Compact Disc Litig., 429 F. Supp. 2d 1378, 1380 (J.P.M.L. 2006) (involving allegations that the use of content protection software on compact discs was not properly disclosed and harmed consumers); *In re* Grand Theft Auto Video Game Consumer Litig., 416 F. Supp. 2d 1350, 1351 (J.P.M.L. 2006) (involving allegations that a video game developer engaged in deceptive marketing by failing to disclose that their video game contained hidden sexually explicit content); *In re* COBRA Tax Shelters Litig., 408 F. Supp. 2d 1348, 1348–49 (J.P.M.L. 2005) (involving allegations that the U.S. government improperly identified a generic tax product as an "abusive tax shelter").

164. *See infra* fig.1.

165. *See infra* fig.1.

Figure 1: Quantity of Cases by JPML Classification



A. *Factors That the JPML Cites by Category of Case*

One potential window into the JPML's selection of transferee district and judge is the array of factors that it cites in transfer orders when explaining its reasoning for selecting a transferee district and judge. The factors to which the JPML cites vary depending on the category of case before the JPML.[166] What follows is an analysis of the factors that the JPML cites in several of the JPML's ten categories of cases.[167]

Figure 2 lists the sixteen factors that the JPML cites when explaining its selection of transferee district and judge.

166. *See infra* figs.3, 4, 5.

167. This section does not analyze common disaster or contract cases because the low number of cases present in those samples reduces the likelihood that these cases are representative of the greater universe of cases. *See supra* fig.1. In addition, this section does not analyze the miscellaneous category of cases.

Figure 2: Summary of Factors Cited by the JPML

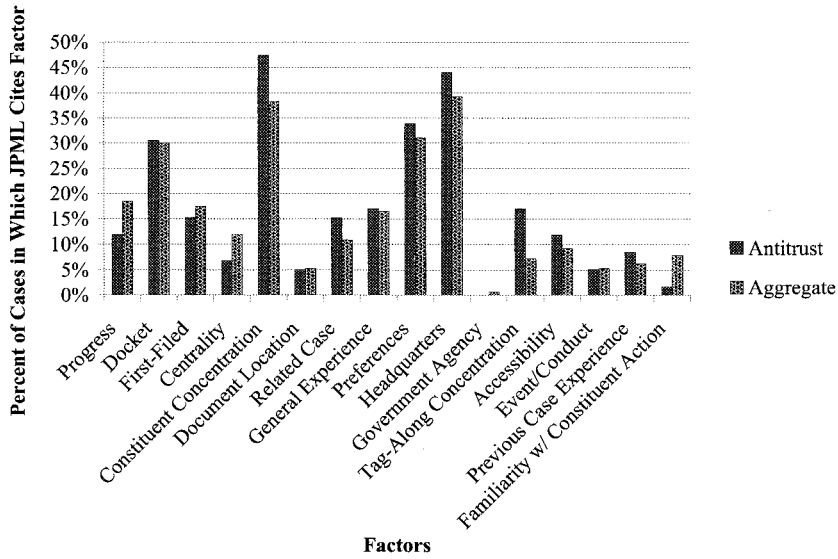
Short Name[168]	Factor Description
Progress	Progress in the transferee district
Docket	Docket conditions or resources of the transferee district or judge
First-Filed	Location of the first-filed action
Centrality	Geographic centrality or proximity of the transferee district to the pending constituent actions
Constituent Concentration	Concentration of the constituent actions (includes a reference to the presence of a single action in the transferee district)
Document Location[169]	Location of documents or witnesses (excludes the "Headquarters" and "Government Agency" factors)
Related Case	Pendency of related court proceedings in transferee district
General Experience	General experience of the transferee judge (e.g., experienced transferee judge, "seasoned jurist")
Preferences	Preferences of the parties
Headquarters	Proximity to an important party in a constituent action (e.g., proximity to a defendant's headquarters)
Government Agency	Proximity to a relevant government agency
Tag-Along Concentration	Concentration of potential tag-along actions
Accessibility	Accessibility of the transferee court
Event/Conduct	Proximity to the event or conduct at issue
Previous Case Experience	Familiarity of judge with factual or legal issues of the MDL from experience presiding over a previous case
Familiarity with Constituent Action	Familiarity of judge with factual or legal issues of the MDL from presiding over one of the constituent actions

168. The "Short Name" identifies each factor on the graphs below.

169. The JPML frequently cites to the location of an important party in the litigation—usually a corporate defendant's headquarters—or the location of a government agency because it assumes that relevant documents and witnesses will be located there. *See, e.g.*, *In re* Cessna 208 Series Aircraft Prods. Liab. Litig., 408 F. Supp. 2d 1349, 1350 (J.P.M.L. 2005) (noting that the District of Kansas is "likely to be the location of significant discovery because sole common defendant Cessna is headquartered there"). Under the categorization of factors utilized in this Note, such citations are not included in the "Document Location" factor. The "Document Location" factor is intended to be a catchall for any reference in a transfer order to the proximity of the transferee district to relevant documents or witnesses that does not explicitly mention the location of an important party or relevant government agency. Accordingly, under this Note's factor categorization, most of the JPML references to the location of documents will fall within the "Headquarters" or "Government Agency" factors.

Figure 3, Figure 4, and Figure 5 display the frequency with which the JPML cites each of the sixteen factors when explaining its selection of transferee district and judge in antitrust, products liability, and securities cases, respectively.

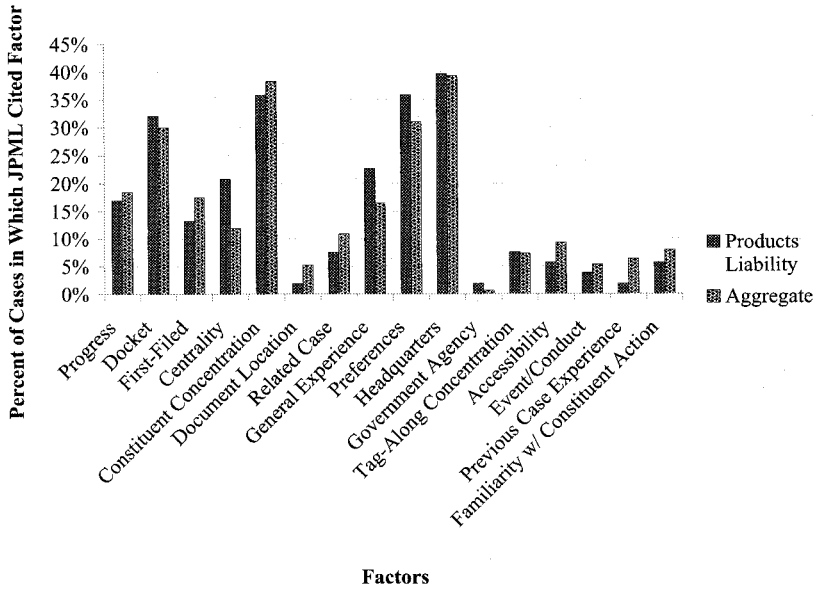
Figure 3: Factors Cited by the JPML in Antitrust Cases



The most frequently cited factors in antitrust cases are the concentration of constituent actions, the preferences of the parties, the location of an important party—usually the headquarters or significant operation of a defendant—near the transferee district, and the docket conditions of the transferee district or judge.[170] Overall, the frequency with which the JPML cites the factors in antitrust cases seems to fairly closely mimic the frequency with which the JPML cites those same factors in the aggregate sample.[171] There are, however, a few notable exceptions. The JPML cites the concentration of the constituent actions and the concentration of potential tag-along actions more frequently in antitrust cases.[172] It also cites the geographic centrality of the transferee district less frequently in antitrust cases.[173] Finally, the JPML appears to cite the familiarity of the judge with the issues due to presiding over a constituent action and progress in the transferee district less frequently in antitrust cases.[174]

170. *See supra* fig.3.
171. *See supra* fig.3.
172. *See supra* fig.3.
173. *See supra* fig.3.
174. *See supra* fig.3.

Figure 4: Factors Cited by the JPML in Products Liability Cases



Similarly to antitrust actions, in products liability cases the JPML most frequently cites the concentration of constituent actions, the preferences of the parties, the location of an important party near the transferee district, and the docket conditions of the transferee district or judge.[175] Although JPML citation of factors in products liability cases fairly closely tracks citation of the same factors in the aggregate, there are a few notable differences. The JPML cites the preferences of the parties and the geographic centrality of the transferee district more frequently in products liability cases than it does in the aggregate.[176] In addition, the JPML cites the familiarity of the transferee judge with the issues in the MDL from presiding over a previous case less than half as frequently in products liability cases.[177] Finally, the JPML cites to the general experience of the transferee judge more frequently in products liability cases.[178]

175. *See supra* figs.3, 4.
176. *See supra* fig.4.
177. *See supra* fig.4.
178. *See supra* fig.4.

Figure 5: Factors Cited by the JPML in Securities Cases

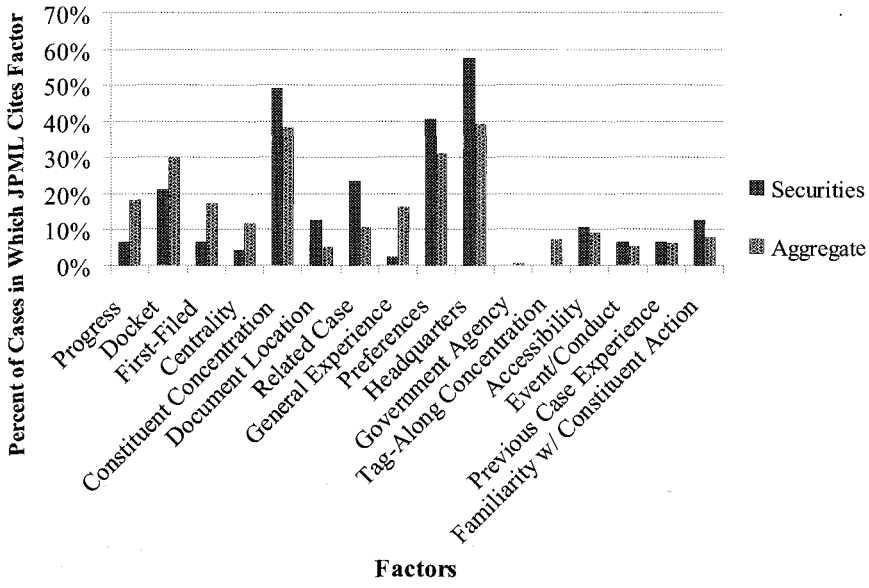


Figure 5 displays several differences in the frequency with which the JPML cites factors in securities cases and the frequency with which the JPML cites the same factors in all transferred MDLs.[179] In securities MDLs, the JPML most frequently cites the concentration of constituent actions, the preferences of the parties, and the location of an important party near the transferee district.[180] The JPML also cites these three factors more frequently in securities cases than it does in the aggregate.[181]

Notably, the docket conditions of the transferee district or judge, a factor that was among the most frequently cited in antitrust and products liability MDLs, is missing from the list of most frequently cited factors.[182] While the JPML cites docket conditions in thirty percent of all MDLs, it cites docket conditions in only about twenty percent of securities MDLs.[183] Also, the JPML cites progress-related factors—progress in the transferee district and the location of the first-filed action—far less frequently in securities cases.[184]

Though there are several differences between the citation of factors in securities cases and the citation in products liability and antitrust cases, perhaps the starkest is the relative rarity with which the JPML cites the

179. *See supra* fig.5.
180. *See supra* fig.5.
181. *See supra* fig.5.
182. *See supra* figs.3, 4, 5.
183. *See supra* fig.5.
184. *See supra* fig.5.

general experience of the transferee judge in securities cases.[185] In only one securities case did the JPML cite to the experience of the transferee judge.[186] In this case, *In re Bayou Hedge Funds Investment Litigation*,[187] the JPML transferred the MDL to Judge Colleen McMahon, who was presiding over three related government civil actions and two related criminal proceedings.[188] After noting that Judge McMahon was familiar with the litigation, the JPML went on to note that the transferee judge had "the experience necessary to steer th[e] litigation on a prudent course."[189]

Several interesting trends are also present in sales practices, intellectual property, air disaster, and employment practices MDLs. In sales practices cases, the JPML cites the experience of the transferee judge—both the general experience of the judge and familiarity of the judge with the factual or legal issues in the litigation from presiding over a prior case—more than twice as frequently as it does in the aggregate.[190] In intellectual property cases the JPML cites the preferences of the parties with relative rarity. In addition, the JPML cites the accessibility of the transferee district in just under thirty percent of intellectual property MDLs, as compared to just under ten percent in all cases. Although the JPML cites docket conditions as a relevant factor to its selection decision in about thirty percent of all MDLs, in employment practices MDLs the JPML cites to the docket conditions of the transferee district over forty-five percent of the time.

Finally, in air disaster cases, as one might expect, the proximity of the transferee district to the conduct or event at issue—the air disaster—is a frequently cited factor. Generally, the JPML cites this factor in about five percent of all cases. In air disaster cases, however, the JPML cites to the proximity of the transferee district to the event or conduct at issue in fifty percent of the cases.

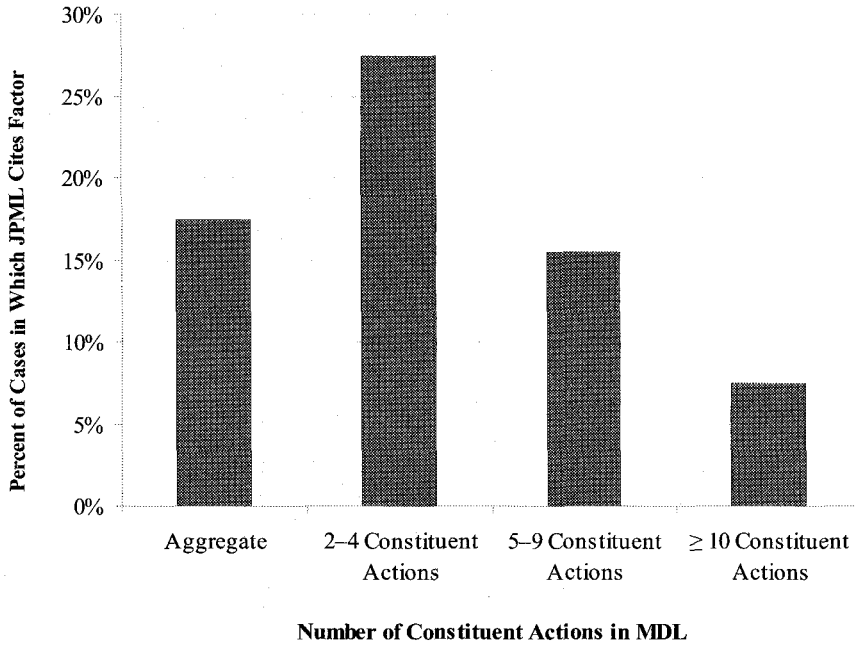
B. *Factors That the JPML Cites by Number of Constituent Actions in the MDL*

At least one commentator has hypothesized that the number of constituent actions before the JPML will affect the Panel's selection of transferee district and judge.[191] JPML citation of factors remains fairly consistent as the number of constituent actions before the JPML

185. *See supra* figs.3, 4, 5.
186. *See supra* fig.5.
187. 429 F. Supp. 2d 1374 (J.P.M.L. 2006).
188. *Id.* at 1376.
189. *Id.*
190. The JPML cites to the general experience of the transferee judge in thirty-eight percent of sales practices cases and about sixteen percent of aggregate cases. The JPML cites to the familiarity of the transferee judge with the issues in the MDL from presiding over a previous case in twenty-five percent of sales practices cases and about six percent of aggregate cases.
191. *See, e.g.*, HERR, *supra* note 1, § 6:7 (noting that the advantages of a centralized forum will increase as the number of actions increases).

increases.[192] There is, however, a trend in the JPML's citation of two factors as the number of constituent actions before the JPML increases: the JPML cites progress in the transferee district and the location of the first-filed action less frequently as the number of constituent actions increases.[193]

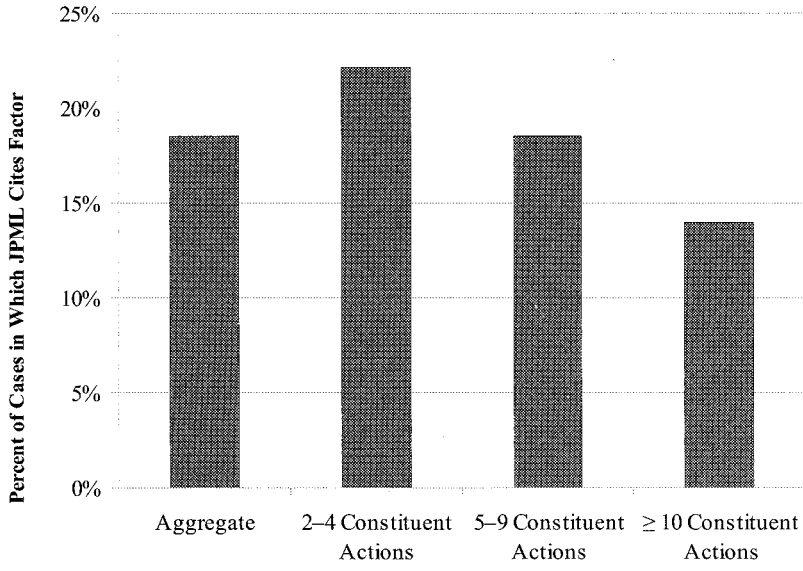
Figure 6: JPML Citation of Progress in Transferee District



192. The analysis supporting this section involved splitting the 303 MDLs in the sample into three roughly equal groups based on the number of constituent actions in each MDL. The first group contained 113 MDLs, each with two to four constituent actions. The second group contained 97 MDLs, each with five to nine constituent actions. The third group contained 93 MDLs, each with ten or more constituent actions.

193. *See infra* figs.6, 7.

Figure 7: JPML Citation of First-Filed Action



C. *JPML Citation of Factors When No Constituent Actions*[194] *Are Pending in the Transferee District*

Occasionally, to the dismay of the practitioners involved in an MDL proceeding, the JPML's selection of transferee district surprises the parties involved in the litigation.[195] Sometimes, this surprise is at least partially the result of the JPML's decision to transfer an MDL to a district in which no constituent actions are pending.[196] For example, in one case, seventeen constituent actions were pending in the U.S. District Court for the Southern District of Mississippi and five actions were pending in the U.S. District

194. A grasp of the distinction between a constituent action and a potential tag-along action is essential to understanding this section. A constituent action is a related action pending in a district court that, if centralization is appropriate, the JPML will transfer in the initial transfer order. *See In re* Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig., 536 F. Supp. 2d 1369, 1370–71 (J.P.M.L. 2008) (distinguishing between constituent actions and potential tag-along actions). A potential tag-along action is a related action pending in a district court that comes to the JPML's attention after the administrative cutoff date to be included as a constituent action for the purposes of the initial transfer order. *See* HERR, *supra* note 1, § 4:24. The JPML later revisits the potential tag-along actions to determine whether it should include them in the centralized MDL proceeding. *See id.* Despite the fact that the JPML does not transfer potential tag-along actions in the initial transfer order, it sometimes relies on the characteristics of the potential tag-along actions when deciding to which district and judge to transfer the constituent actions. *See, e.g.*, *In re Aurora Dairy*, 536 F. Supp. 2d at 1370–71.

195. *See supra* notes 75–76 and accompanying text.

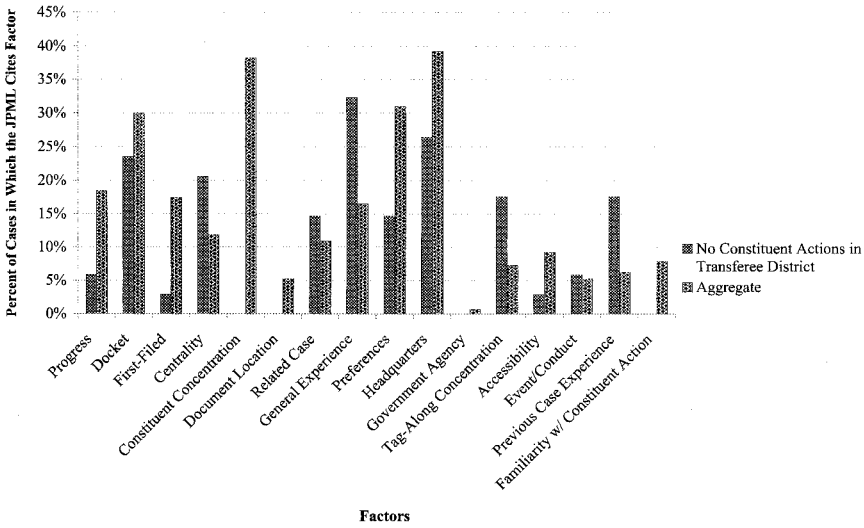
196. *See supra* note 75 and accompanying text.

Court for the Northern District of Mississippi.[197] In addition, all of the twenty-two potential tag-along actions were pending in one of the two Mississippi districts.[198] The JPML, citing the experience and docket conditions of the transferee judge, transferred the case to Judge Janis Graham Jack in the Southern District of Texas, where no actions were pending.[199] This result was particularly unexpected because none of the parties expressed a preference that the JPML transfer the case to that district.[200]

Figure 8 displays the frequency with which the JPML cites the sixteen factors listed above[201] in MDLs where there were no constituent actions pending in the transferee district.[202]

197. *In re* Silica Prods. Liab. Litig., 280 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003).
198. *Id.* at 1382 n.1.
199. *Id.* at 1382 n.1, 1383–84.
200. *Id.* at 1382.
201. *See supra* fig.2.
202. It is important to note that this section involves looking at MDLs where no constituent action was pending in the transferee district; there were, however, potential tag-along actions pending in the transferee district in some of the MDLs. The JPML always lists in transfer orders the district courts in which constituent actions are pending. *See, e.g.*, *In re* Hypodermic Prods. Antitrust Litig., 408 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005); *In re* The Thaxton Group Inc. Sec. Litig., 323 F. Supp. 2d 1374, 1374 (J.P.M.L. 2004). The JPML, however, sometimes refrains from identifying in transfer orders the districts in which potential tag-along actions are pending. *See, e.g.*, *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 398 F. Supp. 2d 1356, 1357 n.2 (J.P.M.L. 2005) (stating that twenty-one potential tag-along actions are pending without identifying in which districts they are pending). In those MDLs where the JPML does not specify the distribution of potential tag-along actions, one cannot glean from transfer orders whether the JPML transferred the actions to a district where no potential tag-along actions were pending. As such, this section analyzes MDLs where no constituent actions are pending in the transferee district, not MDLs where no constituent actions and no potential tag-along actions are pending in the transferee district.

Figure 8:[203] *Factors Cited by JPML in MDLs Where No Constituent Actions Were Pending in the Transferee District*



At the outset, it is important to note that the JPML transfers the vast majority of MDLs to districts where at least one constituent action is pending. The JPML selects such a district in about eighty-nine percent of transfers.[204] When there are no constituent actions pending in the transferee district, the JPML cites the concentration of tag-along actions more than twice as frequently as it does in the aggregate.[205] In addition, in at least[206] thirty-eight percent of the no-constituent-action MDLs, a potential tag-along action was pending in the transferee district at the time of transfer.[207]

203. Figure 8 reflects that the JPML cited the Progress and First-Filed factors several times. These factors relate to procedural progress and the location of the first-filed action in the transferee district. *See supra* fig.2. Citation of these factors is possible in cases where no constituent action is pending in the transferee district because the transferee district can be a district in which only a potential tag-along action is pending.

204. Of the 303 aggregate sample MDLs that the JPML transferred, the JPML sent 269 to a district in which there was a constituent action pending.

205. *See supra* fig.8.

206. In five of the thirty-four MDLs where the JPML transferred the case to a district in which there were no constituent actions pending, the JPML noted that there were potential tag-along actions pending, but did not identify the districts in which those actions were pending. *See In re* Merscorp Inc., Real Estate Settlement Procedures Act (RESPA) Litig., 473 F. Supp. 2d 1379, 1379 n.1 (J.P.M.L. 2007); *In re* Seroquel Prods. Liab. Litig., 447 F. Supp. 2d 1376, 1377 n.1 (J.P.M.L. 2006); *In re Payment Card*, 398 F. Supp. 2d at 1357 n.2; *In re* Ephedra Prods. Liab. Litig., 314 F. Supp. 2d 1373, 1374 n.1 (J.P.M.L. 2004); *In re* Janus Mut. Funds Inv. Litig., 310 F. Supp. 2d 1359, 1360 n.5 (J.P.M.L. 2004).

207. In thirteen of the thirty-four no-constituent-action MDLs, at least one potential tag-along action was pending in the transferee district.

In one such case, seven constituent actions were pending in six districts.[208] Instead of selecting one of these six districts as the transferee district, the JPML selected the U.S. District Court for the Central District of California, where six potential tag-along actions were pending.[209] In selecting the Central District of California, the JPML stated the following: "The Panel is persuaded that the Central District of California is an appropriate transferee district for this litigation. The six related actions pending in this district are proceeding well under the guidance of Judge David O. Carter and this California district has the capacity to handle this litigation."[210]

The JPML also cites the general experience of the transferee judge more than twice as frequently when no constituent action is pending in the transferee district.[211] In addition, transferee judges in no-constituent-action MDLs are more experienced in multidistrict litigation than the average MDL transferee judge.[212] In one notable case, no constituent actions or tag-along actions were pending in the U.S. District Court for the District of Massachusetts, and none of the parties had selected the District of Massachusetts as their preferred district.[213] Despite this, the JPML transferred the MDL to the District of Massachusetts and assigned the case to Judge Joseph Tauro, a thirty-four-year veteran jurist who had presided over five MDLs at the time of transfer.[214] In another case consisting of three constituent actions pending in the Northern District of Mississippi and the Central District of California, the JPML chose to transfer the case to the U.S. District Court for the Northern District of Texas and assign it to Judge Barefoot Sanders, a former member of the JPML who had presided over one previous MDL at the time of transfer.[215] Finally, the JPML cites the familiarity of the transferee judge with the factual or legal issues in the litigation from a previous case more than twice as frequently as it does in the aggregate.[216]

208. *In re* Wachovia Sec., LLC, Wage & Hour Litig., 469 F. Supp. 2d 1346, 1347 (J.P.M.L. 2006).

209. *Id.*

210. *Id.*

211. *See supra* fig.8.

212. The average no-constituent-action MDL transferee judge had presided over 1.82 prior MDLs at the time of transfer. In the aggregate sample, the average MDL transferee judge had presided over 1.37 prior MDLs at the time of transfer.

213. *In re* Volkswagen & Audi Warranty Extension Litig., 452 F. Supp. 2d 1354, 1355–56 (J.P.M.L. 2006).

214. *Id.*; Judicial Panel on Multidistrict Litigation, *supra* note 163; Federal Judicial Center, Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj (last visited Sept. 1, 2009).

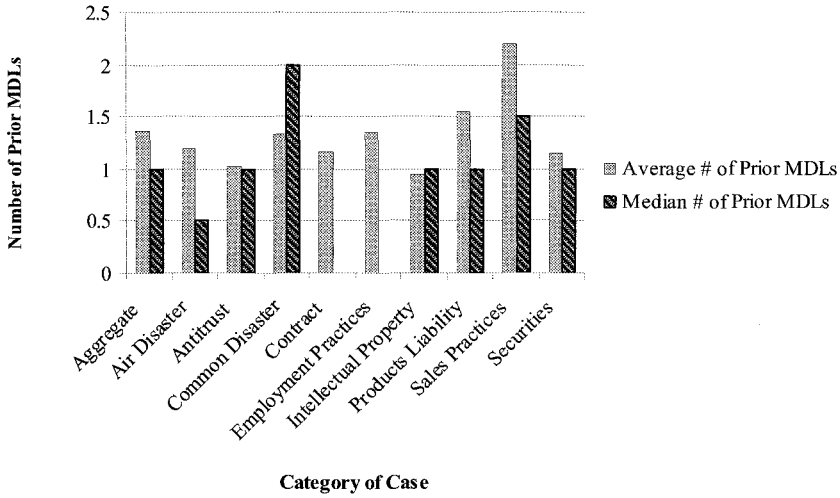
215. *In re* Sw. Life Ins. Co. Sales Practices Litig., 268 F. Supp. 2d 1377, 1377–78 (J.P.M.L. 2003); HERR, *supra* note 1, § 2:4; Judicial Panel on Multidistrict Litigation, *supra* note 163.

216. *See supra* fig.8.

D. *An Analysis of Transferee Judge Experience*

As noted above, the JPML cites to the general experience of the transferee judge more frequently in certain categories of MDL.[217] A question remains, however, as to whether the transferee judges in these cases are actually more experienced. Figure 9 below displays, by MDL category, the average and median number of prior MDLs that a transferee judge had presided over at the time of transfer.[218] Figure 10 displays, by MDL category, the average and median number of years on the bench that transferee judges had served at the time of transfer.[219]

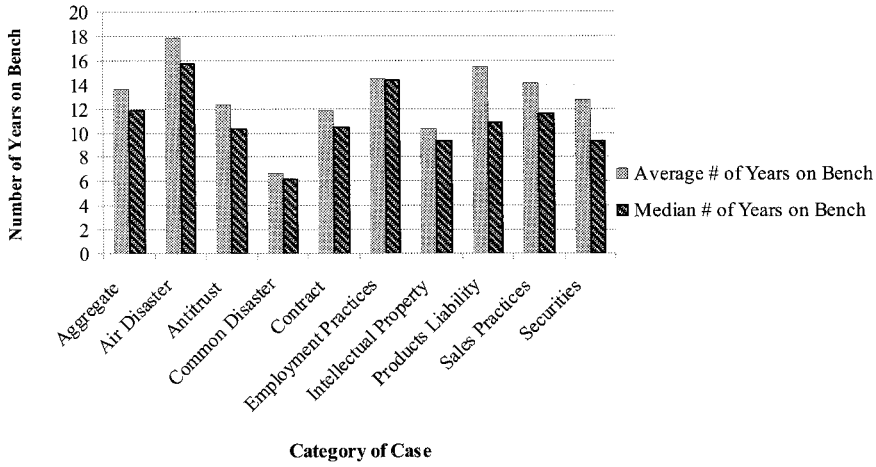
Figure 9: Prior MDL Experience of Transferee Judges



The experience of the transferee judge appears to vary depending on the category of MDL.[220] Judges in antitrust, intellectual property, and securities MDLs have a relatively low number of prior MDLs.[221] Conversely, judges in products liability and sales practices litigation MDLs, on average, have more experience presiding over MDLs.[222] Overall, the average number of prior MDLs of a transferee judge at the time of transfer is 1.37.[223]

217. *See supra* figs.3, 4, 5.
218. *See infra* fig.9.
219. *See infra* fig.10.
220. *See supra* fig.9.
221. *See supra* fig.9.
222. *See supra* fig.9.
223. *See supra* fig.9.

Figure 10: Time on Bench of Transferee Judges



Another possible aspect of a transferee judge's experience to which the JPML may be referring if it cites the general experience of the transferee judge is the number of years the transferee judge has been on the bench. The JPML does not explicitly cite the tenure of the transferee judge, but it often makes ambiguous references to a transferee judge's experience.[224] Generally, the experience of the transferee judge is fairly consistent across the different categories of cases.[225] Excluding the categories of MDL with particularly small sample sizes,[226] the average time on the bench of transferee judges in every category is between ten and sixteen years.[227]

As discussed above, JPML citation of influential factors in the selection of transferee district and judge varies depending on the number of constituent actions in an MDL.[228] The time on the bench of the transferee judge, however, does not differ significantly. Judges in MDLs with two to four, five to nine, and greater than ten constituent actions all have an average number of prior MDLs of between 1.32 and 1.42. In addition, the average number of years on the bench of transferee judges in these three groups of MDLs is between thirteen and fourteen years. Thus, there appears to be little correlation between the number of constituent actions in an MDL and the experience of the transferee judge.

224. *See supra* notes 109–11 and accompanying text.
225. *See supra* fig.10.
226. The sample of air disaster cases included ten MDLs and the sample of common disaster cases included only three. *See supra* fig.1.
227. *See supra* fig.10.
228. *See supra* figs.6, 7.

III. IMPLICATIONS OF TRENDS IN JPML TRANSFER DECISIONS

The selection of a transferee district and judge in multidistrict litigation is an important decision.[229] Accordingly, it is also a decision in which MDL parties take great interest.[230] Despite this interest, commentators often express frustration with the lack of transparency in the JPML's selection of one district or judge over another.[231] Parts I and II of this Note examined transfer orders, legal scholarship, and empirical data with an eye to clarifying the operation of the JPML's selection of a transferee district and judge. Part III argues that, while there is no formula for predicting to which district and judge the JPML will transfer an MDL, the JPML considers certain factors to be more or less important depending on the characteristics of the MDL. Trends in the JPML's previous transfer decisions suggest that a party may be able to predict, based on the specific circumstances of an MDL, which factors will control the JPML's selection decision.

Understanding which factors are most salient in the context of a particular MDL is important because parties have a relatively limited opportunity to influence the JPML regarding the selection of a transferee district and judge.[232] A party in an MDL proceeding has only two opportunities to persuade the JPML.[233] First, the party can attempt to persuade through a twenty-page brief.[234] After the parties submit briefs, the JPML will provide each party with one to five minutes of oral argument.[235] With such a short period of time for a party to articulate its views on selection of transferee district and judge, the party must have a carefully considered strategy that involves highlighting only those factors that the JPML considers to be most important in the context of the MDL under consideration.

In general, when the JPML is explaining its reasoning for selecting a transferee district and judge, it most frequently cites the docket conditions of a transferee district or judge, the preferences of the parties, the concentration of constituent actions, and the location of an important party in the litigation—usually evidencing an assumption that relevant documents and witnesses are located there.[236] The JPML likely considers these factors in every MDL. An understanding of how these factors apply in a particular case is the foundation of an understanding of JPML transfer.

The primary utility of the concentration of constituent actions is to identify districts in which at least one constituent action is pending. There is an overwhelming likelihood—at least a ninety-three percent chance—that the JPML will select a transferee district in which a constituent action or

229. *See supra* notes 35–51 and accompanying text.
230. *See supra* notes 5–7 and accompanying text.
231. *See supra* notes 34–36 and accompanying text.
232. *See supra* notes 56–61 and accompanying text.
233. *See supra* notes 52–62 and accompanying text.
234. *See supra* note 57 and accompanying text.
235. *See supra* note 61 and accompanying text.
236. *See supra* figs.3, 4, 5.

potential tag-along action is pending.[237] Accordingly, considering the location of constituent actions and potential tag-along actions is useful because doing so helps to rule out districts in which no actions are pending.[238] In MDLs where actions are pending in a relatively small number of districts, virtually ruling out districts where no actions are pending will be particularly useful.

The absence of a constituent action in a district, however, does not foreclose the possibility that the JPML will transfer an MDL to that district.[239] As discussed above, the pendency of potential tag-along actions is one factor that is frequently responsible for the JPML transferring a case to a no-constituent-action district.[240] Other important factors include the familiarity of the judge with the issues in the litigation, the general experience of the transferee judge, the location of an important party in the litigation, and the docket conditions of the transferee district or judge.[241]

The JPML's relatively frequent citation to the location of an important party—often the headquarters or significant operations of a defendant—in actions where no constituent actions are pending in the transferee district[242] also indicates the general importance of this factor. Because the presumption that the JPML will transfer an MDL to a district in which an action is pending is strong,[243] any factor that trumps this presumption is very important. The purpose of multidistrict litigation is to increase the efficiency of pretrial proceedings.[244] Because discovery is a significant part of these proceedings, anything that would increase the efficiency of discovery would help fulfill the purposes of multidistrict litigation. The JPML presumes that a party's headquarters or place of business will be a likely source of documents and witnesses and, as such, believes that selecting a district in close proximity to a party's headquarters or place of business is very desirable.[245]

The familiarity of a transferee judge with the issues in the litigation from presiding over a previous case, the general experience of the transferee judge, and the docket conditions of the transferee district or judge are also very important factors. The JPML has historically exhibited a strong preference for transferring MDLs to a district in which a constituent action is pending.[246] Thus, any factor that causes the JPML to abandon this preference is likely an important factor. When transferring an MDL to a no-constituent-action district, JPML transfer orders frequently cite the familiarity of a transferee judge with the issues in the litigation from

237. *See supra* notes 204, 207 and accompanying text.
238. *See supra* notes 204, 207 and accompanying text.
239. *See supra* fig.8.
240. *See supra* fig.8.
241. *See supra* fig.8.
242. *See supra* fig.8.
243. *See supra* notes 204, 207 and accompanying text.
244. *See supra* note 23 and accompanying text.
245. *See supra* note 169.
246. *See supra* notes 204–16 and accompanying text.

presiding over a previous case, the general experience of the transferee judge, and the docket conditions of the transferee district or judge.[247] Thus, they are likely important factors. If a judge presiding over one of the constituent actions has more experience—either specific or general—than the other prospective transferee judges and has acceptable docket conditions, the JPML is very likely to select that judge as the transferee judge. A party arguing before the JPML should be familiar with the judges who frequently act as transferee judges and check to see if any of them are presiding over a constituent action or potential tag-along action.

The JPML considers certain factors that are relevant to the selection of transferee district and judge to be more or less influential depending on the category of MDL.[248] Although the general experience of the transferee judge is likely an important factor in products liability MDLs, it is less so in securities MDLs.[249] Also, geographic centrality is an important factor in products liability MDLs and is less important in antitrust MDLs.[250] Finally, in securities cases, progress in the transferee district does not appear to be a particularly influential factor.[251]

JPML citation of factors remains fairly constant among small, medium, and large MDLs, as measured by number of constituent actions.[252] There are, however, some differences. The most notable difference in citation among these MDLs is a trend relating to the progress in the transferee district and location of the first-filed action.[253] The JPML cites these factors less frequently as the number of constituent actions in the MDL increases, indicating that progress in the transferee district is more important in relatively small MDLs.[254]

Finally, the JPML sends certain categories of cases to more experienced judges.[255] Transferee judges in sales practices and products liability MDLs tend to have relatively more experience presiding over multidistrict litigation.[256] Judges in antitrust, securities, and intellectual property MDLs, however, tend to have less experience managing multidistrict litigation.[257] This disparity likely indicates that the JPML views the management of sales practices and products liability cases as more difficult than the management of antitrust, securities, and intellectual property MDLs.

The number of years on the bench of transferee judges does not vary significantly with the category of MDL.[258] This likely indicates either that

247. *See supra* notes 204–16 and accompanying text.
248. *See supra* notes 170–90 and accompanying text.
249. *See supra* notes 175–90 and accompanying text.
250. *See supra* notes 170–78 and accompanying text.
251. *See supra* notes 179–89 and accompanying text.
252. *See supra* note 192 and accompanying text.
253. *See supra* notes 192–93 and accompanying text.
254. *See supra* notes 192–93 and accompanying text.
255. *See supra* notes 218–23 and accompanying text.
256. *See supra* notes 218–23 and accompanying text.
257. *See supra* notes 218–23 and accompanying text.
258. *See supra* notes 224–27 and accompanying text.

the JPML does not consider the number years on the bench of a potential transferee judge to be relevant to the selection decision or that it considers it to be equally relevant across the different categories of cases. In addition, the prior MDL experience of the transferee judges and average years on the bench of transferee judges do not vary significantly with the size of the action.[259] Accordingly, the JPML likely views experience of a transferee judge as equally important in large and small MDLs.

CONCLUSION

An understanding of trends in JPML selection of transferee district and judge, while perhaps not resulting in surefire prediction of which transferee district and judge the Panel will select in a particular MDL, provides litigants with a framework through which to approach advocacy before the JPML. Further study is likely necessary to expand upon the trends identified in this Note and further develop this framework. Ultimately, JPML selection of a transferee district and judge is a complex process. It involves the balancing of many relevant factors that may be present in several of the potential transferee districts. In addition, the rationales underlying JPML selection of a transferee district and judge are obscured by the brevity of JPML orders, the frequent failure to discuss nontransferee districts and judges in these orders, and the broad discretion of the JPML in general. Nevertheless, the trends identified in this Note begin to shed some light on the factors that may guide these important selection decisions.

APPENDIX A: RESEARCH METHODOLOGY

This Note involves a study of four and one-half years of JPML selection of transferee district and judge. The study stretches from the first transfer decision in 2003, MDL 1503,[260] to the last transfer decision in June 2008,[261] MDL 1955.[262] I analyzed every transfer order during this period. In total, my analysis included 303 JPML transfer orders.[263] I collected the majority of the information relating to the JPML selection of transferee district and judge from the transfer orders, although I collected some information from additional sources, as discussed *infra*.

I collected several categories of information concerning each transferred MDL. These categories included basic information regarding the transfer,

259. *See supra* notes 224–27 and accompanying text.

260. *In re* Advanced Inv. Mgmt., L.P., Pension Fund Mgmt. Litig., 254 F. Supp. 2d 1377 (J.P.M.L. 2003).

261. I selected MDL 1955 as the stopping point for my analysis because it represented the most recent published decision of the JPML as of October 14, 2008. *See* Judicial Panel on Multidistrict Litigation, *supra* note 163.

262. *In re* Orleans Homebuilders, Inc., Fair Labor Standards Act Litig., 559 F. Supp. 2d 1411 (J.P.M.L. 2008).

263. Because the focus of this Note is the selection of a transferee district and judge, I did not analyze the MDLs where the motion for transfer was declared moot, withdrawn, or denied by the JPML.

the type of MDL, the transferee judge, the reasons stated for transfer, the parties' preferences regarding centralization and transferee district, the geographic distribution of individual actions in the MDL, and the geographic distribution of potential tag-along actions of which the JPML was aware.

I first collected the basic information related to each MDL. Based on a citations list[264] that the JPML provided to me, I identified the name and MDL number of each centralized MDL in the relevant time period. I then looked to the transfer order for each centralized MDL and recorded the date of transfer and the transferee district and judge.

Once I ascertained the identity of the transferee judge, I collected further information about that judge's judicial experience. Utilizing the date of the transferee judge's commission from the Federal Judicial Center website[265] and the date of the transfer order, I calculated the number of years that the judge had been on the bench at the time of transfer. Also, by consulting a list of current and former members of the JPML,[266] I determined whether the judge was a current or former member of the JPML or had no JPML affiliation at the time of transfer. Finally, I used the JPML Citation Summary[267] to determine the number of prior occasions, at the time of transfer, on which the judge had served as an MDL transferee judge.

I also collected information relating to the category of MDL. On the MDL citations list[268]—as well as on the JPML website[269]—the JPML divides MDLs into ten categories: air disaster, antitrust, common disaster, contract, employment practices, intellectual property, products liability, sales practices, securities, and miscellaneous.[270] For each MDL, I recorded the JPML's classification.

Next, I recorded the reasons that the JPML cited in each transfer order for its selection of a particular transferee judge and district. I began by conducting a preliminary review of fifty transfer orders. From those transfer orders, I gleaned sixteen factors that the JPML cited. These sixteen factors are as follows: significant pretrial progress of an action pending in the transferee district, the docket conditions or resources of the transferee

264. *See* Judicial Panel on Multidistrict Litigation, *supra* note 163.

265. Federal Judicial Center, *supra* note 214.

266. HERR, *supra* note 1, § 2:4.

267. *See* Judicial Panel on Multidistrict Litigation, *supra* note 163.

268. *Id.*

269. United States Judicial Panel on Multidistrict Litigation, Docket Information, http://www.jpml.uscourts.gov/Docket_Information/docket_information.html (last visited Sept. 1, 2009).

270. *See, e.g.*, *In re* Grand Theft Auto Video Game Consumer Litig., 416 F. Supp. 2d 1350 (J.P.M.L. 2006) (involving allegations that a video game developer engaged in deceptive marketing by failing to disclose that their video game contained hidden sexually explicit content); *In re* Sony BMG Audio Compact Disc Litig., 429 F. Supp. 2d 1378 (J.P.M.L. 2006) (involving allegations that the use of content protection software on compact discs was not properly disclosed and harmed consumers); *In re* COBRA Tax Shelters Litig., 408 F. Supp. 2d 1348, 1348–49 (J.P.M.L. 2005) (involving allegations that the U.S. government improperly identified a generic tax product as an "abusive tax shelter").

judge or district, the location of the first-filed action, the geographic centrality or proximity of the transferee district to the filed actions, the concentration of the actions between or among district courts, the concentration of potential tag-along actions between or among district courts, the proximity of the transferee forum to relevant documents or potential witnesses, the location of related court proceedings, the general experience of the transferee judge, the experience of the transferee judge due to presiding over one of the constituent actions, the familiarity of the transferee judge with the factual or legal issues in the MDL due to presiding over a previous action involving similar issues, the preferences of the parties, the proximity of the transferee district to the operations or residence of a party to the action, the proximity to an important third party, the accessibility of the transferee district court, and the proximity of the transferee district to the conduct or event at issue.[271] When I encountered a JPML rationale in a transfer order that did not match one of the sixteen factors, I recorded the rationale as miscellaneous.[272]

The preferences of the parties with respect to MDL centralization and transfer was another category of information that I collected. I analyzed each transfer order to see whether the parties favored centralization. I recorded the plaintiffs' and defendants' preferences[273] as either unanimously in favor of centralization, unanimously opposed to centralization, or of mixed preference.[274] I also recorded their preferences regarding the selection of a transferee district.[275] If the JPML discussed the preferences of the parties in potential tag-along actions, I recorded those preferences as well.[276]

The final category of information that I collected was the geographic concentration of the constituent actions in the MDL. I recorded the number of actions pending in each district as set out in the MDL transfer order. I did the same for the cumulative concentration of constituent actions and known potential tag-along actions if the concentration of potential tag-along actions was articulated in the JPML transfer orders.[277]

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271. *See supra* notes 78–94 and accompanying text.

272. *See supra* note 78 and accompanying text.

273. In intellectual property cases, individual parties are commonly plaintiffs in some constituent actions before the JPML and defendants in others. In these cases, I did not distinguish between plaintiffs and defendants, but rather, recorded whether or not the parties agreed with respect to the appropriate transferee district.

274. When plaintiffs or defendants were neutral as to centralization, I did not record that preference.

275. While recording the preferences of the parties, I maintained a record of whether the MDL was transferred to the preferred district of a party who opposed or a party who supported the initial centralization of the MDL.

276. Part II of this Note does not include an analysis of the effect that the preferences of the parties has on JPML selection of transferee district and judge.

277. I also collected information on whether the event at issue in the MDL was a single-situs event. If it was, I recorded whether the single-situs event occurred in the transferee district.