

# THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION: THE VIRTUES OF UNFETTERED DISCRETION

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## INTRODUCTION

The federal multidistrict litigation (MDL) statute,<sup>1</sup> enacted in 1968, provides in relevant part that “[w]hen civil actions involving one or more common questions of fact are pending in different [federal] districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”<sup>2</sup> Such transfers are ordered by a special panel, known as the Judicial Panel on Multidistrict Litigation (the “JPML”).<sup>3</sup> The JPML determines whether to create an MDL, and if so, it selects the judicial district and the individual judge to handle the cases.<sup>4</sup> The JPML consists of seven federal circuit and district court judges designated by the Chief Justice of the United States (no two of whom can be from the same circuit).<sup>5</sup> The statute specifies no term of service for JPML members, but in recent years, members of the JPML have served, on average, for ten years.<sup>6</sup> Although the stated purpose of § 1407 is to achieve judicial efficiency in “pretrial proceedings,”<sup>7</sup> the reality is that only about three percent of the cases end up being transferred back to the transferor courts for trial.<sup>8</sup> The other ninety-seven percent are resolved by the MDL judge, either through settlement or dismissal.<sup>9</sup>

The JPML’s decisions have profound consequences for our civil justice system. A majority of the federal civil docket consists of MDL cases.<sup>10</sup> Many of

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<sup>1</sup> 28 U.S.C. § 1407.

<sup>2</sup> § 1407(a).

<sup>3</sup> *Id.*

<sup>4</sup> § 1407(b).

<sup>5</sup> § 1407(d).

<sup>6</sup> Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 434 (2013).

<sup>7</sup> § 1407(a) (emphasis added).

<sup>8</sup> Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Civil Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017).

<sup>9</sup> *Id.*

<sup>10</sup> As of September 30, 2018, MDL cases constituted 51.9 percent of the civil caseload in the federal district courts. *Fact Sheet: Why Federal Rules of Civil Procedure Need to be Designed to Apply to Multidistrict Litigation Cases*, RULES 4 MDLS, <https://www.rules4mdls.com/fact-sheet> (last visited July 16, 2020). (These numbers exclude Social Security cases and cases brought by prisoners, other than death penalty cases). Because the average MDL case “lasts about twice as long” as non-MDL cases, some commentators focus on the percentage of civil cases filed each year that are included in MDL proceedings. Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1271 (2019). That number has been as high as 21 percent in recent years, still a very high percentage. *Id.* at 1272.

the cases (especially the mass tort cases) could not have been certified as class actions because individualized issues predominated over common issues.<sup>11</sup> Thus, MDL has served a critical role of achieving aggregation in cases that could not proceed as class actions. Because MDLs play such an important role in federal civil litigation, it is not surprising that judges, lawyers, and scholars have debated whether various aspects of the MDL process should be reformed.

The possibility of civil rule changes focusing on MDL practice has been taken up by a Subcommittee of the Federal Advisory Committee on Civil Rules (“MDL Subcommittee”). Since November 2017, the MDL Subcommittee has been examining numerous possible reform proposals, urged primarily by the defense bar and various academics. Interestingly, however, there has been virtually no focus on reforming the JPML’s decision-making process. Instead, the focus has been entirely on reforms addressed to the MDL judges assigned to handle the cases. Thus, in its most recent public statements (from April and May 2020), the MDL Subcommittee has focused on early judicial review of the strength of claims; interlocutory appellate review of orders of MDL judges; review of settlements by MDL judges; MDL judges’ appointment of leadership attorneys; and the awarding of attorneys’ fees in MDLs.<sup>12</sup> Additional topics that the MDL Subcommittee has examined include filing fees for MDL cases; criteria for master complaints; third-party litigation funding; and possible rules addressing the trial of test cases (known as bellwether trials).<sup>13</sup>

At no time has the MDL Subcommittee indicated any interest in considering rules or statutory recommendations relating to the JPML’s role in the MDL process. Nor have any concrete proposals regarding the JPML’s decision-making process been put forward. Thus, I have seen no proposals urging more stringent (or more relaxed) criteria governing the JPML’s decision whether to centralize. Nor have I seen proposals urging specific criteria that the JPML should use in selecting the district court and district judge to handle specific MDL cases. The only criticism I have seen regarding the JPML process is that the JPML could do a better job in selecting a diverse array of MDL judges.<sup>14</sup> And those arguments

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<sup>11</sup> ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL § 1.4 at 13 (2020) (hereafter MDL NUTSHELL).

<sup>12</sup> See, e.g., U.S. COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 490-508 (June 23, 2020), available at [https://www.uscourts.gov/sites/default/files/2020-06\\_standing\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2020-06_standing_agenda_book.pdf) (containing May 27, 2020 summary of the MDL Subcommittee’s work); U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES 145-64 (Apr. 1, 2020), available at [https://www.uscourts.gov/sites/default/files/04-2020\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf).

<sup>13</sup> See U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES 207-20 (Apr. 2-3, 2019), available at [https://www.uscourts.gov/sites/default/files/2019-04\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf); U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES 154-57 (Nov. 1, 2018), available at [https://www.uscourts.gov/sites/default/files/2018-11\\_civil\\_rules\\_agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf).

<sup>14</sup> See, e.g., Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. 1713, 1718, 1734 (2019) (reviewing MDL assignments from 2012–2016 and observing that “...while the Panel’s choices have mostly matched the racial and gender diversity of the federal bench, that is a low bar that we do not mean to endorse”). “In the largest MDLs, transferee judges are more likely to be male and white than federal district judges overall. Meanwhile, new MDL judges are slightly more likely to be female and liberal than the pool overall, but not dramatically so. New MDL judges are not more racially diverse than the pool overall.” *Id.* at 1734.

have been only general criticisms that the JPML should be more attentive to diversity; no one (to my knowledge) has proposed quotas or other specific statutory or rule changes governing the selection of MDL judges.

This lack of focus on the JPML process as a subject for reform is remarkable; the decision to create an MDL, and the decision to designate a particular district court and judge, are profoundly important. Indeed, the success or failure of an entire category of litigation may turn on whether the cases are centralized in an MDL, and if so, which judge is designated to oversee the cases. One would think that the plaintiffs' bar, the defense bar, or both would have strong views on those issues. This has not been the case. Nonetheless, although there is no groundswell of support for reform of the JPML's role, it is worth considering whether reform would be useful. The MDL Subcommittee is now focused on MDL reform, and once this opportunity passes, it could be a decade or more before the rules process again focuses on MDL reform.

Section I of this article examines the virtually unlimited discretion of the JPML in making its decisions. It explains that, under the current scheme, it is virtually impossible to challenge the JPML's crucial decisions. Section II considers possible areas of reform, but ultimately concludes that any attempt to constrain the JPML's virtually unlimited discretion would be difficult to codify and, ultimately, self-defeating. As Section II explains, the JPML is doing an excellent job, and there is no indication that it needs to be reined in through the adoption of more rigorous and explicit criteria for determining whether to centralize cases and selecting the district courts and judges for MDL assignments.

## I. DISCRETIONARY DECISIONS OF THE JPML

The JPML makes two critical decisions: (1) whether to grant centralization, and (2) if so, which district court and district judge should be assigned to oversee the cases.

The Federal Rules of Civil Procedure have little or no relevance to the JPML's work because the JPML does not manage cases, oversee discovery, rule on dispositive motions, or conduct trials.<sup>15</sup> Moreover, while the MDL statute provides broad criteria for determining whether transfer should be ordered, it offers no details.<sup>16</sup> And the statute offers *no* guidance whatsoever on the criteria for selecting either the MDL district court or the MDL district judge.<sup>17</sup> Although the JPML has promulgated its own rules of procedure,<sup>18</sup> those rules relate mainly to administrative and mechanical matters, such as filing deadlines and other matters relating to briefing and oral argument. The rules say nothing about the decision to centralize or the criteria for selecting the district court and judge.

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<sup>15</sup> See DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 1:1 (2020). Of course, the Federal Rules are directly relevant to the judges who are assigned to oversee MDL cases. See, e.g., *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 841 (6th Cir. 2020) (noting that MDL judges cannot "disregard[]" the Federal Rules of Civil Procedure).

<sup>16</sup> See *infra* Section IA.

<sup>17</sup> See *infra* Section IB.

<sup>18</sup> See Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.D.R. 561 (1978).

As discussed in Sections IA and IB, the standards applied by the JPML in making its crucial decisions vary from case to case, with decisions in one putative MDL having little or no precedential value in other cases. And as discussed in Section IC, under the MDL statute, the JPML's decisions are almost entirely unreviewable. There is *no* review, even by extraordinary writ, for a decision *denying* transfer.<sup>19</sup> And decisions in favor of transfer (as well as the selection of the district courts and judges) are reviewable only by extraordinary writ, not by appeal. Moreover, under the strict mandamus standard, the JPML has almost never been second-guessed by any federal appellate court.<sup>20</sup> As a practical matter, therefore, the JPML's decisions are unreviewable.

### A. The Decision Whether to Transfer

A potential MDL action may be initiated by any party in any constituent action, or by the JPML on its own motion.<sup>21</sup> The JPML decides whether centralization is warranted after considering the statutory criteria, i.e., looking at whether there are “one or more common questions of fact,”<sup>22</sup> and whether an MDL “will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>23</sup> Although the JPML typically issues written opinions explaining its rulings, those decisions are conclusory (often only a couple of pages), and as a practical matter those rulings do not constrain the JPML's decisions in other cases. Indeed, as discussed below, the decisions are heavily fact-specific and often appear to be contradictory.

First, with respect to whether there is a common question of fact, the JPML sometimes finds that a single issue of fact is sufficient, even if there are many individualized issues. This can be seen, for example, in a number of mass tort cases.<sup>24</sup> Yet, the JPML sometimes denies transfer, even when indisputable common questions of fact exist, reasoning that individualized factual questions *predominated* over the common questions.<sup>25</sup> In these latter cases, the JPML has

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<sup>19</sup> 28 U.S.C. § 1407(e).

<sup>20</sup> See *infra* Section IC (discussing research revealing only a single case granting mandamus against the JPML).

<sup>21</sup> § 1407(c).

<sup>22</sup> § 1407(a).

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, 330 F. Supp. 3d 1378, 1379 (J.P.M.L. 2018) (holding that numerous civil actions based on alleged injuries from a shingles vaccine involved common questions of fact and warranted transfer to MDL proceedings; although each plaintiff had individualized injuries, those variations were “not an obstacle” because the claims “share[d] a common factual core”); *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, 316 F. Supp. 3d 1380, 1380–81 (J.P.M.L. 2018) (holding that numerous civil actions alleging defects in the defendants’ hernia mesh product involved common questions of fact despite the plaintiffs’ claims of individualized injuries).

<sup>25</sup> See, e.g., *In re Table Saw Prods. Liab. Litig.*, 641 F. Supp. 2d 1384, 1384 (J.P.M.L. 2009) (denying centralization of dozens of actions involving injuries from allegedly defective table saws, noting that the “common issues [were] overshadowed by the non-common ones” because “[e]ach action arises from an individual accident that occurred under necessarily unique circumstances”); *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L.

applied a more exacting test (similar to a class action under Federal Rule of Civil Procedure 23(b)(3)) than simply the presence of a single common question of fact. The JPML can decide how rigorous it wants to be in applying the common question of fact test.

Second, the JPML rarely discusses the statutory convenience and justice/efficiency criteria as freestanding tests.<sup>26</sup> And when it does, it usually does so in a conclusory fashion, which makes it difficult for counsel who are arguing for or against centralization in a particular set of cases to identify overarching principles. For instance, the JPML has noted, with little elaboration, that “[c]entralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel, and the judiciary.”<sup>27</sup> The JPML has taken into account party preferences and agreements in determining convenience.<sup>28</sup> But as a practical matter, the convenience and justice/efficiency tests do not constrain the JPML’s discretion in deciding whether to centralize. Indeed, when cases are spread out in multiple states, as is common in putative MDLs, what is convenient for some parties and attorneys will necessarily be inconvenient for others.

Third, the JPML has cited other criteria in deciding whether to transfer but has done so inconsistently. For instance, the presence of multiple defendants or products has sometimes defeated a request for an overarching MDL,<sup>29</sup> but in other cases it has not.<sup>30</sup> The JPML has sometimes found that consolidation was unnecessary because coordination among judges and attorneys in various cases

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2010) (rejecting centralization of mass tort personal injury cases in part because “individual issues of causation and liability . . . predominate, and are likely to overwhelm any efficiencies that might be gained by centralization”); *In re Mortg. Lender Force-Placed Ins. Litig.*, 895 F. Supp. 2d 1352, 1353 (J.P.M.L. 2012) (denying centralization of multiple actions involving alleged abusive practices in the banking and insurance industry, finding that “[c]ommon questions of fact . . . do not predominate”).

<sup>26</sup> See MDL NUTSHELL § 3.4 (discussing cases).

<sup>27</sup> *In re Uber Techs., Inc., Data Sec. Breach Litig.*, 304 F. Supp. 3d 1351, 1353 (J.P.M.L. 2018); see also *In re Local TV Adver. Antitrust Litig.*, 338 F. Supp. 3d 1341, 1343 (J.P.M.L. 2018) (using same language).

<sup>28</sup> See, e.g., *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, 325 F. Supp. 3d 1362, 1363–64 (J.P.M.L. 2018) (noting that “[a]ll responding parties agree that the actions share factual issues,” and that centralization was supported by numerous responding plaintiffs and defendants); *In re Opana ER Antitrust Litig.*, 65 F. Supp. 3d 1408, 1409 (J.P.M.L. 2014) (centralizing actions when “[a]ll plaintiffs and defendants in the actions support centralization”); *In re Gen. Motors LLC Ignition Switch Litig.*, 26 F. Supp. 3d 1390, 1390 (J.P.M.L. 2014) (same).

<sup>29</sup> See, e.g., *In re Power Morcellator Prods. Liab. Litig.*, 140 F. Supp. 3d 1351 (J.P.M.L. 2015) (declining to create an industry-wide MDL against multiple defendants that manufactured allegedly defective power morcellators used for surgical procedures); *In re Yellow Brass Plumbing Component Prods. Liab. Litig.*, 844 F. Supp. 2d 1377 (J.P.M.L. 2012) (declining centralization in multi-defendant litigation challenging the chemical composition of certain plumbing components).

<sup>30</sup> See, e.g., *In re AndroGel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378 (J.P.M.L. 2014) (finding that centralization was appropriate in cases against numerous defendants alleging injuries from the use of testosterone replacement therapies); *In re Nat’l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1377–78 (J.P.M.L. 2017) (centralizing numerous claims against multiple defendants in an MDL involving “the alleged improper marketing of and inappropriate distribution of various prescription opiate medications into cities, states and towns across the country”).

could occur informally,<sup>31</sup> but in other cases it has found that informal coordination would not suffice and that formal MDL treatment was necessary.<sup>32</sup> In some instances, the possibility of transfer of venue under 28 U.S.C. § 1404(a)<sup>33</sup> has been a reason to deny centralization,<sup>34</sup> but in other cases the JPML will centralize cases notwithstanding the availability of a Section 1404 transfer.<sup>35</sup> In some instances, the JPML has transferred cases despite different kinds of plaintiffs (e.g., private plaintiffs and government entities),<sup>36</sup> but in other cases, the existence of different kinds of plaintiffs has prevented transfer or has prompted the JPML to create multiple MDLs.<sup>37</sup> Similarly, the fact that various lawsuits raise different types of claims or allegations is sometimes a basis for denying centralization.<sup>38</sup> At other times that factor is not a basis for denying transfer.<sup>39</sup> At times, the extent of plaintiff or defense opposition to MDL transfer has been an important factor in denying transfer,<sup>40</sup> but at other times transfer has been ordered despite significant

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<sup>31</sup> See, e.g., *In re Uponor, Inc.*, F1960 Plumbing Fittings Prods. Liab. Litig., 895 F. Supp. 2d 1346, 1349 (J.P.M.L. 2012); *In re Dry Bean Revenue Prot. Crop Ins. Litig.*, 350 F. Supp. 3d 1381, 1382 (J.P.M.L. 2018).

<sup>32</sup> See, e.g., *In re Generic Pharms. Pricing Antitrust Litig.*, MDL No. 2724, 2017 U.S. Dist. LEXIS 67521, at \*2 (J.P.M.L. May 3, 2017); *In re Viagra (Sildenafil Citrate) Prods. Liab. Litig.*, 224 F. Supp. 3d 1330, 1331 (J.P.M.L. 2016).

<sup>33</sup> 28 U.S.C. § 1404(a) provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”

<sup>34</sup> See, e.g., *In re Best Buy Co.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011); *In re Gerber Probiotic Prods., Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1380–81 (J.P.M.L. 2012).

<sup>35</sup> See, e.g., *In re Natrol, Inc. Glucosamine/Chondroitin Mktg. & Sales Practices Litig.*, 26 F. Supp. 3d 1392, 1393 (J.P.M.L. 2014); *In re Oxycontin Antitrust Litig.*, 314 F. Supp. 2d 1388, 1390 (J.P.M.L. 2004).

<sup>36</sup> See, e.g., *In re Generic Pharms. Pricing Antitrust Litig.*, MDL No. 2724, 2017 U.S. Dist. LEXIS 67521, at \*2 (J.P.M.L. May 3, 2017) (finding that the actions brought by the states could be handled as part of the existing MDL involving private plaintiffs); *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL 2672, 2016 U.S. Dist. LEXIS 103485, at \*2 (J.P.M.L. Aug. 5, 2016) (same).

<sup>37</sup> See, e.g., *In re Pfizer Inc. Mktg. & Sales Practices Litig.*, 657 F. Supp. 2d 1367, 1367–68 (J.P.M.L. 2009) (denying centralization of claims alleging that defendants “engaged in a fraudulent scheme and conspiracy to promote eleven different prescription drugs” because “the named plaintiffs allege that they themselves each took only one of those eleven drugs, and that neither took the same drug as the other”); *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010) (centralizing claims for personal and economic injuries arising from Deepwater Horizon oil spill); *In re BP p.l.c. Secs. Litig.*, 734 F. Supp. 2d 1376, 1379 (J.P.M.L. 2010) (creating a separate MDL for securities and ERISA claims arising from Deepwater Horizon oil spill).

<sup>38</sup> See, e.g., *In re Urban Outfitters Fair Labor Standards Act*, 987 F. Supp. 2d 1381, 1382 (J.P.M.L. 2013) (denying centralization of actions for unpaid overtime because there appeared to be “substantial variation between the duties of the subject employees,” and “their allegations differ[ed] markedly from action to action”).

<sup>39</sup> See, e.g., *Dabon v. GlaxoSmithKline, Inc. (In re Avandia Mktg.)*, 528 F. Supp. 2d 1339 (J.P.M.L. 2007) (centralizing marketing, sales practices, and product liability claims in a single MDL); *In re Vytarin/Zetia Mktg., Sales Practices, & Prods. Liab. Litig.*, 543 F. Supp. 2d 1378 (J.P.M.L. 2008) (same).

<sup>40</sup> See, e.g., *In re CVS Caremark Corp. Wage & Hour Emp. Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010); *In re “Lite Beer” Trademark Litig.*, 437 F. Supp. 754, 755–56 (J.P.M.L. 1977).

opposition.<sup>41</sup> Similarly, although certain types of cases tend to be especially suitable for transfer, there are no hard-and-fast rules.<sup>42</sup> The JPML has emphasized that it does not “rubber stamp in any docket.”<sup>43</sup> In short, the JPML is all over the map in assessing the appropriateness of centralization, with the tests seemingly changing depending on whether the JPML wishes to grant or deny centralization.

## **B. Decision Regarding the JPML’s Selection of the Transferee District and Transferee Judge**

### **1. Selection of District Court**

The JPML invokes a variety of factors in selecting the transferee district. But here again, the JPML has articulated no formula or standard for selecting the district court. Depending on the case, the JPML may be persuaded by a single factor or a confluence of factors, and factors that might be pivotal in one MDL may be given little or no weight in another.<sup>44</sup>

**Party Preferences.** While the JPML may select any federal district court in the country, it is more likely to select a court for which the parties have

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<sup>41</sup> See, e.g., *In re Nat’l Century Fin. Enters., Inc.*, 293 F. Supp. 2d 1375, 1376 (J.P.M.L. 2003); *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 416–17 (J.P.M.L. 1991).

<sup>42</sup> For instance, the JPML has noted that air crash cases are often suitable for MDL treatment. See, e.g., *In re Air Crash Disaster at Falls City, Neb.*, 298 F. Supp. 1323, 1324 (J.P.M.L. 1969); *In re Air Crash Near Rio Grande*, 787 F. Supp. 2d 1361 (J.P.M.L. 2011). Yet, the JPML has not hesitated to deny transfer in air crash cases. See, e.g., *In re Air Crash Near Lake Wales, Fla.* on June 7, 2012, 118 F. Supp. 3d 1374, 1375 (J.P.M.L. 2015); *Harp v. Airblue, Ltd. (In re Air Crash Near Islamabad, Pak.)*, 777 F. Supp. 2d 1352 (J.P.M.L. 2011). Likewise, the JPML has frequently granted centralization in antitrust cases. See, e.g., *In re Ranbaxy Generic Drug Application Antitrust Litig.*, 355 F. Supp. 3d 1382 (J.P.M.L. 2019); *In re Capacitors Antitrust Litig. No. III*, 285 F. Supp. 3d 1353 (J.P.M.L. 2017). But it has also denied centralization in such cases. See, e.g., *In re Dental Supplies & Equip. Antitrust Litig.*, 289 F. Supp. 3d 1330, 1330–31 (J.P.M.L. 2018); *In re H&R Block Employee Antitrust Litig.*, 355 F. Supp. 3d 1380 (J.P.M.L. 2019).

<sup>43</sup> *In re CVS Caremark Corp. Wage & Hour Emp. Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) (internal quotation marks omitted).

<sup>44</sup> See, e.g., Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1215 (2017) (“When assigning cases to a transferee judge, the JPML gives a variety of reasons. What matters in one case may not matter in another. What one can say about JPML transfer orders is that they seem to give decent, practical reasons for choosing the transferee court and judge. But it is also fair to say that those reasons vary considerably”).

expressed a preference.<sup>45</sup> Yet, in many cases the JPML has given little weight to party preferences.<sup>46</sup>

**Location of Parties, Witnesses, and Evidence.** The JPML often tries to select a convenient transferee court for the litigants. But when parties are geographically dispersed, it is impossible to choose a convenient venue for everyone, and often the JPML will either favor some parties over others<sup>47</sup> or find a compromise venue somewhere in the geographical center.<sup>48</sup> Sometimes (but not always) the JPML will pick the district where the defendant is located.<sup>49</sup> The JPML has often cited the location of relevant documents and witnesses as an important consideration in selecting the transferee district,<sup>50</sup> but in other cases that factor has not been given substantial (or any) weight.<sup>51</sup> Of course, if the witnesses and

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<sup>45</sup> See, e.g., *In re* Equifax, Inc., Customer Data Sec. Breach Litig., 289 F. Supp. 3d 1322, 1326 (J.P.M.L. 2017) (selecting the Northern District of Georgia as the transferee court in part because that district was “supported by defendants and the vast majority of responding plaintiffs”); *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., 65 F. Supp. 3d 1402, 1405 (J.P.M.L. 2017) (choosing the Eastern District of Louisiana as the transferee court, the JPML noted that the district had “the support of a number of plaintiffs and also [was] supported by the opposing defendants as an appropriate alternative”).

<sup>46</sup> See, e.g., *In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 949 F. Supp. 2d 1369, 1370 (J.P.M.L. 2013) (centralizing cases in Eastern District of Wisconsin, despite the fact that all parties supported the Northern District of Illinois); *In re* Biomet M2A Magnum Hip Implant Prods. Liab. Litig., 896 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (centralizing cases in Northern District of Indiana, “even though no party suggested it and no plaintiff ha[d] yet filed a case there”).

<sup>47</sup> See, e.g., *In re* Hard Disk Drive Suspension Assemblies Antitrust Litig., 396 F. Supp. 3d 1374, 1375 (J.P.M.L. 2019) (centralizing cases in Northern District of California, over the opposition of responding defendants); *In re* Uber Techs., Inc., 304 F. Supp. 3d 1351, 1355 (J.P.M.L. 2018) (transferring cases to the Central District of California, despite the fact that a number of responding plaintiffs supported other districts).

<sup>48</sup> See, e.g., *In re* Library Editions of Children’s Books, 297 F. Supp. 385, 387 (J.P.M.L. 1968) (case in which constituent actions spanned the country, with many actions in California and on the East Coast; JPML transferred all actions to the Northern District of Illinois, noting that “there is . . . something to be said for the convenience of a geographically central forum in coast-to-coast litigation”); *In re* Sonic Corp. Customer Data Sec. Breach Litig., 276 F. Supp. 3d 1382, 1383 (J.P.M.L. 2017) (centralizing cases in the Northern District of Ohio, “a centrally-located and easily accessible location”); *In re* Nat’l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379 (J.P.M.L. 2017) (centralizing cases in the Northern District of Ohio, “a geographically central and accessible forum”).

<sup>49</sup> See, e.g., *In re* Toyota Motor Corp. Unintended Acceleration Mktg. Sales Practices & Prods. Liab. Litig., 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010) (picking district where defendant is located); *In re* Equifax, Inc., Customer Data Sec. Breach Litig., 289 F. Supp. 3d 1322, 1326 (J.P.M.L. 2017) (same); but see, e.g., *In re* Ethicon Physiomesch Flexible Composite Hernia Mesh Prods. Liab. Litig., 254 F. Supp. 3d 1381, 1383 (J.P.M.L. 2017) (choosing district other than the defendant’s location); *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig., 273 F. Supp. 3d 1377, 1379 (J.P.M.L. 2017).

<sup>50</sup> See, e.g., *In re* Uber Techs., Inc., Data Sec. Breach Litig., 304 F. Supp. 3d 1351, 1355 (J.P.M.L. Apr. 4, 2018); *In re* BP p.l.c. Secs. Litig., 734 F. Supp. 2d 1376, 1379 (J.P.M.L. 2010); *Dabon v. GlaxoSmithKline, Inc.* (*In re* Avandia Mktg.), 528 F. Supp. 2d 1339, 1341 (J.P.M.L. 2007).

<sup>51</sup> See, e.g., *In re* Nat’l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379 (J.P.M.L. 2017) (centralizing cases in the Northern District of Ohio with no mention of the location of relevant documents or witnesses); *In re* Samsung Top-Load Washing Mach. Mktg., 278 F. Supp. 3d 1376, 1378 (J.P.M.L. 2017) (centralizing cases in the Western District of Oklahoma without mention of the location of relevant documents or witnesses).

evidence are dispersed across the country, this factor necessarily takes on much less significance.<sup>52</sup>

**Location of Pending Actions.** The JPML has often found the location of the various actions to be relevant to the choice of transferee court.<sup>53</sup> In other cases, however, the location of various actions has not been dispositive or even important.<sup>54</sup>

**Docket Conditions of Potential Transferee Courts.** The JPML sometimes cites the light workload of a transferee district in selecting a district.<sup>55</sup> At other times, the JPML may find a district attractive if it has few or no pending MDL cases.<sup>56</sup> Nonetheless, the JPML frequently selects districts in major urban areas that already have many MDLs or are otherwise very busy with existing cases.<sup>57</sup>

**Location of First-Filed Action.** In a number of decisions, the JPML has referred to the location of the first-filed action as supporting a particular transferee court.<sup>58</sup> But in many other cases, the venue of the first-filed action is not selected.<sup>59</sup>

<sup>52</sup> See, e.g., *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367, 1369 (J.P.M.L. 2015) (noting that “any number of transferee districts could ably handle this litigation,” given that the controversy “touches multiple districts across the United States and that the various VW entities hold ties to many districts”).

<sup>53</sup> See, e.g., *In re Nat’l Arbitration Forum Antitrust Litig.*, 682 F. Supp. 2d 1343, 1345–46 (J.P.M.L. 2010) (selecting the District of Minnesota, in part because seven of the ten actions were already pending in that district); *In re Total Body Formula Prods. Liab. Litig.*, 582 F. Supp. 2d 1381, 1382 (J.P.M.L. 2008) (finding that the Northern District of Alabama was an appropriate transfer district, given that fourteen of the twenty actions were pending there).

<sup>54</sup> See, e.g., *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (transferring cases to district and judge with no pending cases); *In re BP p.l.c. Secs. Litig.*, 734 F. Supp. 2d 1376, 1379 (J.P.M.L. 2010) (transferring cases to Southern District of Texas and noting that the fact “that no constituent action is currently pending in the Southern District of Texas is not an impediment to its selection as the transferee district”) (citation omitted).

<sup>55</sup> See, e.g., *In re Maxim Integrated Prods., Inc., Patent Litig.*, 867 F. Supp. 2d 1333, 1336 (J.P.M.L. 2012) (selecting the Western District of Pennsylvania in part because that district “enjoy[ed] favorable caseload conditions”); see also *In re Halfone Color Separations (’809) Patent Litig.*, 547 F. Supp. 2d 1383, 1385 (J.P.M.L. 2008) (“Current docket conditions in the Eastern District of Texas counsel against assignment of this MDL to that district where other appropriate districts are available to handle the litigation.”) (citation omitted).

<sup>56</sup> See, e.g., *In re Chantix (Varenicline) Prods. Liab. Litig.*, 655 F. Supp. 2d 1346, 1346–47 (J.P.M.L. 2009) (noting that the transferee district “currently is home to only one multidistrict litigation proceeding”); *In re Total Body Formula Prods. Liab. Litig.*, 582 F. Supp. 2d 1381, 1382 (J.P.M.L. 2008) (selection of transferee district was supported by the fact that “no multidistrict litigation dockets [were] currently pending” there).

<sup>57</sup> See, e.g., *In re Nine West LBO Secs. Litig.*, 2020 WL 2847269 (J.P.M.L. 2020) (transferring cases to Southern District of New York); *In re ZF-TRW Airbag Control Units Prods. Liab. Litig.*, 410 F. Supp. 3d 1357, 1361 (J.P.M.L. 2019) (transferring cases to Central District of California).

<sup>58</sup> See, e.g., *In re Smith & Nephew BHR & R3 Hip Implant Prods. Liab. Litig.*, 249 F. Supp. 3d 1348, 1352 (J.P.M.L. 2017) (selecting transferee district in part because the first-filed action was pending there); *In re GMAC Ins. Mgmt. Corp. Overtime Pay Litig.*, 342 F. Supp. 2d 1357, 1358 (J.P.M.L. 2004) (same).

<sup>59</sup> See, e.g., *In re Dealer Mgmt. Sys. Antitrust Litig.*, 291 F. Supp. 3d 1367, 1369 (J.P.M.L. 2018) (transferring cases to the Northern District of Illinois, even though the first-filed action was filed in another district); *In re Unified Messaging Sols. LLC Patent Litig.*, 883 F. Supp. 2d 1340, 1342 (J.P.M.L. 2012) (same).

**Coordination with Other Proceedings.** At times, the JPML will consider the possibility of coordinating MDL proceedings with other judicial proceedings. If a potential district is located where criminal, civil, or bankruptcy proceedings relating to the MDL are taking place, the JPML may be inclined to transfer the MDL to that district.<sup>60</sup> But the JPML has also frequently rejected the possibility of coordination with related proceedings as a reason for selecting a particular venue.<sup>61</sup>

## 2. Selection of District Judge

**Transferee Judge Is Presiding over Some Pending Cases.** A transferee judge is frequently selected because that judge is already presiding over one or more of the pending cases.<sup>62</sup> But in a number of cases, that factor has not been decisive or even mentioned.<sup>63</sup>

**Experience of the Judge.** The experience of potential transferee judges in complex litigation generally or in MDLs specifically is sometimes a factor in the JPML's selection determination.<sup>64</sup> But the JPML frequently selects judges as being "experienced" without referencing specific experience, if any, in complex

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<sup>60</sup> See, e.g., *In re Orthopaedic Implant Device Antitrust Litig.*, 483 F. Supp. 2d 1355, 1355 (J.P.M.L. 2007) (transferee district was "where related grand jury proceedings [were] located"); *In re Neurontin Mktg. & Sales Practices Litig.*, 342 F. Supp. 2d 1350, 1351–52 (J.P.M.L. 2004) (transferee district was "where a False Claims Act *qui tam* action predicated on the same facts as those at issue in the [MDL] actions had been pending for eight years" prior to settlement).

<sup>61</sup> See, e.g., *In re Am. Med. Collection Agency, Inc. Customer Data Sec. Breach Litig.*, 410 F. Supp. 3d 1350, 1354 n.9 (J.P.M.L. 2019) (declining to transfer cases to the district where a defendant's bankruptcy was pending, JPML noted that "the transferee judge and the bankruptcy judge need not sit in the same district to be able to coordinate informally on matters arising in the MDL that implicate the bankruptcy proceeding") (citation and internal quotation marks omitted); *In re Takata Airbag Prods. Liab. Litig.*, 84 F. Supp. 3d 1371, 1373 n.4 (J.P.M.L. 2015) (same).

<sup>62</sup> See, e.g., *In re Natrol, Inc. Glucosamine/Chondroitin Mktg. & Sales Practices Litig.*, 26 F. Supp. 3d 1392, 1394 (J.P.M.L. 2014) (noting that the transferee judge selected was "presid[ing] over two MDLs that raise[d] similar factual and legal claims concerning the effectiveness of dietary supplements containing glucosamine and chondroitin in promoting joint health"); *In re Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig.*, 289 F. Supp. 3d 1350, 1353 (J.P.M.L. 2018) (noting that the transferee judge was already presiding over several actions); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. No. II*, 997 F. Supp. 2d 1354, 1357 (J.P.M.L. 2014) (same).

<sup>63</sup> See, e.g., *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (transferring cases to district and judge with no pending cases); *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010) (assigning cases to a judge without explicitly relying on the fact that multiple cases were already pending before the transferee judge).

<sup>64</sup> See, e.g., *In re Qualcomm Antitrust Litig.*, 273 F. Supp. 3d 1373, 1376 (J.P.M.L. 2017) ("[W]e select a jurist with multidistrict litigation experience and the ability to steer this complicated litigation on an efficient and prudent course."); *In re Chrysler-Dodge-Jeep EcoDiesel Mktg. Sales Practices & Prods. Liab. Litig.*, 273 F. Supp. 3d 1377, 1379 (J.P.M.L. 2017) (judge selected was "well-versed in the nuances of complex and multidistrict litigation").

litigation or MDLs.<sup>65</sup> And the JPML is also willing (as it must be) to select judges with no prior MDL experience.<sup>66</sup>

**The Judge’s Workload.** The JPML sometimes relies on a district’s light or manageable workload in selecting the particular district and judge.<sup>67</sup> In other cases, however, the JPML will select a judge from a district with heavy docket conditions<sup>68</sup> or will make a selection without any reference to workload considerations.<sup>69</sup>

### C. Appellate Review

Consistent with the statutory framework, there is virtually no opportunity for a litigant to challenge either the JPML’s decision whether to create an MDL or its selection of the district court or district judge. Under 28 U.S.C. § 1407, judicial review of JPML decisions is severely constrained. Mandamus is available for a decision granting centralization (and for decisions regarding the selection of the district court and district judge),<sup>70</sup> but the mandamus standard is exceedingly difficult to satisfy. To obtain mandamus, a petitioner must demonstrate that it has a “clear and indisputable” right to the issuance of the writ.<sup>71</sup> Moreover, under §1407(e), even the narrow remedy of mandamus is unavailable to challenge JPML

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<sup>65</sup> See, e.g., *In re ZF-TRW Airbag Control Units Prods. Liab. Litig.*, 410 F. Supp. 3d 1357, 1361 (J.P.M.L. 2019) (“[the judge] to whom we assign the litigation, is an experienced jurist, and already is presiding over nine of the ten Central District of California actions”); *In re Hill’s Pet Nutrition, Inc., Dog Food Prods. Liab. Litig.*, 382 F. Supp. 3d 1350, 1351 (J.P.M.L. 2019) (noting only that “[the judge] to whom we assign the litigation, is an experienced jurist”).

<sup>66</sup> See, e.g., *In re TransUnion Rental Screening Sol., Inc., FCRA Litig.*, 437 F. Supp. 3d 1377, 1378 (J.P.M.L. 2020) (“assign[ing] this litigation to an able jurist who has not yet had the opportunity to preside over an MDL.”); *In re Sorin 3T Heater–Cooler Sys. Prods. Liab. Litig. No. II*, 289 F. Supp. 3d 1335, 1337 (J.P.M.L. 2018) (transferring cases to “an experienced jurist who has not had the opportunity to preside over an MDL”).

<sup>67</sup> See, e.g., *In re Maxim Integrated Prods., Inc., Patent Litig.*, 867 F. Supp. 2d 1333, 1336 (J.P.M.L. 2012) (selecting the Western District of Pennsylvania in part because that district “enjoy[ed] favorable caseload conditions”); *In re Chantix (Varenicline) Prods. Liab. Litig.*, 655 F. Supp. 2d 1346, 1346 (J.P.M.L. 2009) (noting that the transferee district “currently is home to only one multidistrict litigation proceeding”).

<sup>68</sup> See, e.g., *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010) (rejecting the argument that “docket conditions” in the Central District of California made that district a poor candidate for an MDL, the JPML concluded that the transferee judge was “positioned to devote all the time necessary to manage and decide the important issues that these cases raise”); *In re Rosuvastatin Calcium Patent Litig.*, 560 F. Supp. 2d 1381, 1382–83 (J.P.M.L. 2008) (assigning MDL to the District of Delaware over a defendant’s argument that the JPML should select another district with “more favorable docket conditions”).

<sup>69</sup> See, e.g., *In re Samsung Top-Load Washing Mach. Mktg., Sales Practices, & Prods. Liab. Litig.*, 278 F. Supp. 3d 1376, 1378 (J.P.M.L. 2017) (centralizing cases before a judge in the Western District of Oklahoma without mention of workload); *In re Epipen Mktg.*, 268 F. Supp. 3d 1356, 1360 (J.P.M.L. 2017) (centralizing cases before a judge in the District of Kansas without mention of workload).

<sup>70</sup> 28 U.S.C. § 1407(e).

<sup>71</sup> *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004).

decisions *denying* centralization,<sup>72</sup> meaning that review is unavailable even in theory. Not surprisingly, mandamus is only rarely sought to challenge a JPML decision, and virtually all such requests are denied.<sup>73</sup> Indeed, the author has found only one case since the adoption of the MDL statute in 1968 granting mandamus to overturn a JPML decision transferring cases.<sup>74</sup>

## II. WHETHER PRECISE STATUTORY OR RULE CHANGES ARE NECESSARY TO CABIN THE DECISIONS OF THE JPML

As discussed in Section I, the JPML is essentially unconstrained in whether to create an MDL and the criteria it uses to select the district court and judge. While there are at least nominal criteria for deciding whether to centralize—i.e., the existence of common questions of fact and the advancement of convenience and efficiency—there are *no* criteria whatsoever in the statute or the JPML’s rules regarding the selection of the district court and judge. One would think, therefore, that at least some scholars or practitioners would favor reform of the JPML’s decision-making process, and that they would have offered proposed statutory or rule changes to constrain the JPML’s decisions or make them more consistent. But there have been no such calls for reform, other than some general calls for the JPML to be more receptive to diversifying the pool of MDL judges.<sup>75</sup>

A basic concept of medicine is “first do no harm.” That principle should also apply in the consideration of any proposed statutory or rule change. In my view, the JPML is doing an excellent job, and there is no need for statutory or rule changes.

I have read countless JPML transfer decisions. On the issue of whether to create an MDL, I cannot recall a single opinion in which I concluded that the JPML was either egregiously wrong in declining centralization or egregiously wrong in ordering it. Perhaps there are cases at the margin that were not centralized that arguably should have been. But in those situations, the statute provides no review, not even mandamus review, and there are strong arguments for not allowing review of a decision denying MDL treatment—including the burdens placed on appellate courts and the delays in the underlying litigation that such appellate challenges would necessarily cause. Moreover, it is hard for parties to argue that they have

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<sup>72</sup> See 28 U.S.C. § 1407(e) (“There shall be no appeal or review of an order of the JPML denying a motion to transfer for consolidated or coordinated proceedings.”).

<sup>73</sup> MDL NUTSHELL § 5.6 (discussing several cases in which mandamus was denied).

<sup>74</sup> *Royster v. Food Lion (In re Food Lion)*, 73 F.3d 528 (4th Cir. 1996) (ordering that the JPML return the remanded cases to the transferee court so that the appeals from the summary judgment rulings could all be heard by the Fourth Circuit).

<sup>75</sup> See, e.g., Brooke D. Coleman, *A Legal Fempire?: Women in Complex Litigation*, 93 IND. L.J. 617, 635 (2018); Amanda Bronstad, *Women Attorneys Secure Record Number of Lead Counsel Appointments in MDLs in 2018*, LAW.COM (Mar. 6, 2019, 11:40 AM), <https://www.law.com/2019/03/06/women-attorneys-secure-record-number-of-lead-counsel-appointments-in-mdls-in-2018/?slreturn=20200921233607>. Accord, e.g., Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1283-84 (2019) (citing empirical evidence that “the percentage of non-white and female transferee judges chosen by the JPML has increased over time”).

been unfairly prejudiced by having to continue to litigate their cases without an MDL procedure. After all, MDL is an exception to the default rule that cases are litigated individually, unless another aggregation device, such as class action treatment, joinder, or consolidation applies.

Importantly, the statute does not give any party the *right* to MDL treatment; it merely states that the JPML “may” centralize cases when there are “one or more common questions of fact” and the JPML “determin[es] that transfers . . . will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>76</sup> Given that the centralization decision is itself so highly discretionary, it is hard to imagine a circumstance in which a JPML decision denying transfer would be so profoundly wrong as to warrant mandamus. Thus, the statute correctly forecloses mandamus regarding JPML decisions denying centralization.

For similar reasons, given the flexibility inherent in the “common question” and “convenience” criteria, it is hard to imagine that a JPML decision *in favor* of centralization would be so profoundly wrong as to warrant mandamus. Even the most conclusory findings of common questions and convenience would appear to demonstrate that mandamus is not warranted. Indeed, the JPML does not centralize cases unless it believes that there are strong arguments for that approach.<sup>77</sup> And if centralization proves to be unwise, the MDL judge can always advise the JPML—which decides whether and when to remand cases<sup>78</sup>—that the cases should be remanded to the transferor judges.

Likewise, I cannot recall a single JPML decision in which, in my view, the selection of the district court or district judge was so illogical or wrongheaded as to demonstrate the need for strict criteria to govern the selection process. It is inevitable that some parties will be unhappy with the selection of the district court and district judge, but that does not mean that the JPML has committed error, let alone that those decisions are sufficiently egregious as to warrant mandamus.

Moreover, it would be especially troublesome to open up appellate review (beyond mandamus) of the JPML’s selection of particular district judges. Obviously, plaintiffs’ counsel would prefer a judge who is believed to be pro-plaintiff, and defense counsel would prefer a judge who is believed to be pro-defense. But surely that should not be a ground for challenge. The goal should be to find an open-minded judge. Indeed, the JPML has in some instances rejected parties’ recommendations for particular judges precisely because each side appeared to be seeking a favorably disposed judge rather than a neutral one.<sup>79</sup>

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<sup>76</sup> 28 U.S.C. § 1407(a).

<sup>77</sup> In fact, recent statistics show that a majority of requests for MDL treatment are denied. *See Calendar Year Statistics January through December 2019*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. 3 (2019), [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2019\\_1.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf) (out of forty-eight motions for centralization filed, only twenty-one were granted). And, presumably, parties do not ask for MDL treatment unless there are at least plausible arguments that the commonality and convenience factors are satisfied.

<sup>78</sup> § 1407(a).

<sup>79</sup> *See, e.g., In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 793 F. Supp. 1098, 1100–01 (J.P.M.L. 1992) (transferring cases to district judge whom neither side had urged because of “an acrimonious dispute among counsel” which “has caused the parties and counsel on each side to

As noted, there *has* been criticism that the JPML is not sufficiently sensitive to diversifying the group of judges selected to handle MDLs.<sup>80</sup> But as one commentator has noted, in recent years, the JPML “appears to be making a concerted effort to expand the gender and racial composition of the pool of MDL transferee judges.”<sup>81</sup> Although there is certainly room for more diversity among MDL judges, I believe that the codification of criteria, such as race or sex-specific criteria, would be unwise. Such criteria would be extremely difficult to craft and would ultimately hamper the JPML’s effort to find the best judge for a particular set of cases. Nonetheless, judges, attorneys, and scholars should continue to speak out about the importance of diversity in the JPML’s selection of MDL judges.

It is, of course, possible to imagine hypothetical scenarios in which the selection of a particular district judge would be sufficiently egregious as to warrant mandamus. For instance, it would be intolerable if the JPML were to assign a set of cases to a judge whose daughter or son is lead counsel for the defendant in all of the cases. But I know of no situation in which such a flagrantly improper assignment has occurred. The members of the JPML are carefully selected by the Chief Justice, and there is simply no evidence that they are prone to make mistakes of this sort. In all events, for an egregious error, such as one involving a clear conflict of interest, the statute’s existing mandamus remedy is sufficient to ensure that the parties are not prejudiced.

Even if there were strong grounds for arguing in favor of more precise criteria to govern the JPML’s decisions, it is hard to imagine what a proposed statutory or rule change would look like. Any attempt to codify specific criteria would only hamper the JPML’s ability to look at all the facts and circumstances of a particular set of cases.

Turning first to the decision whether to centralize, it would be extremely difficult to codify criteria beyond the general formulations in the statute. “Commonality” is itself a term fraught with ambiguity. For instance, even among the members of the Supreme Court, there is a serious dispute about what commonality means (in the class action context). In *Wal-Mart Stores, Inc. v. Dukes*,<sup>82</sup> the majority held that a common question must be one that has “the capacity . . . to generate common *answers* apt to drive the resolution of the litigation.”<sup>83</sup> The dissent, by contrast, accused the majority of articulating a test for predominance, not for commonality.<sup>84</sup> In short, it is difficult to envision a “one size fits all” definition of commonality.

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harbor a perception that they would be unfairly affected by selection of any of the suggested forums”); *see also In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 731 F. Supp. 2d 1352, 1355–56 (J.P.M.L. 2010) (rejecting the argument that a judge in the Eastern District of Louisiana would be biased as an MDL judge overseeing the *Deepwater Horizon* litigation).

<sup>80</sup> *See* Coleman, *supra* note 75, at 635.

<sup>81</sup> Coleman, *supra* note 75, at 651.

<sup>82</sup> 564 U.S. 338 (2011).

<sup>83</sup> *Id.* at 350 (citation omitted; emphasis in original).

<sup>84</sup> *Id.* at 378 (Ginsburg, J., concurring in part and dissenting in part) (criticizing the *Dukes* majority for “importing a ‘dissimilarities’ notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry”).

The convenience criteria would be even more difficult to codify. Almost any MDL will be convenient for some parties and witnesses but inconvenient for others. That is the necessary implication of a system that allows centralization of cases from multiple parts of the country. The weight that should be given to the location of witnesses and evidence, the convenience to major airports, the convenience to the parties, or the host of other considerations that the JPML considers will depend on the circumstances of the particular cases. A determination of convenience in the MDL context is an inherently discretionary and fact-specific one that is not suitable for rigid rules. The same is true for the justice and efficiency criteria.

With respect to the selection of the district court, it would be next to impossible to codify the criteria that should govern, given that so many factors can come into play. As discussed above, factors that may determine the selection of the district court could include, in a particular case, workload considerations; prior assignment of some of the cases; convenience to related state cases (or related federal criminal or bankruptcy cases); the location of parties, witnesses, and counsel; the location of pertinent evidence; and many others. Considerations relevant to the selection of the judge could potentially include all of the aforementioned factors, as well as the judge's prior experience in the subject area; the judge's prior experience in MDLs or other complex litigation; and the judge's own caseload. A statute or rule that attempted to prioritize these and other criteria would almost certainly be counterproductive. As with the decision whether to create an MDL in the first place, the decisions regarding the selection of the district court and district judge are inherently discretionary and not suitable for codification.

Another downside of codifying strict criteria is that, to satisfy those requirements (and avoid mandamus challenges), the JPML would need to write far more elaborate opinions. That would increase substantially the time and effort required by the JPML to decide each request for MDL treatment. The need for in-depth opinions would be even greater if the statute were amended to authorize appeals of JPML decisions (and not just mandamus petitions). Yet, the members of the JPML are all sitting federal judges with their own caseloads, and it makes little sense to put them to the burden of having to issue elaborate opinions to justify what, in the end, are gut-level decisions about whether to transfer (and if so, to whom).

Finally, appellate review is especially unwarranted given the composition of the JPML. The typical appellate scenario (other than in rare cases involving three-judge district court panels) is a decision by one district judge, reviewed by a three-judge appellate panel. Here, the JPML consists of seven district court and appellate judges, hand-picked by the Chief Justice because of their impeccable credentials and experience. At least four of the seven judges must agree to any decision for it to be binding,<sup>85</sup> and the vast majority of the JPML's decisions are unanimous.<sup>86</sup> An appeal from seven federal judges to a panel of three would be

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<sup>85</sup> 28 U.S.C. § 1407(d).

<sup>86</sup> John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2235

strange enough in any circumstance, but in the MDL context, such a scenario would be especially questionable. The JPML has vast experience deciding whether to create an MDL and to whom the cases should be assigned. It is highly unlikely that a randomly selected three-judge appellate panel, entrusted with the task of second-guessing the JPML's decisions, would bring comparable experience to bear on the issues.

### CONCLUSION

The status quo is a bit disquieting: it gives the JPML essentially unreviewable discretion over decisions of profound importance that it must make dozens of times each year.<sup>87</sup> And, at least superficially, the JPML's written opinions at times appear to be inconsistent or even contradictory. But the alternative to the status quo—rigid criteria and expanded appellate review—would be far worse.

The MDL process is not perfect, but the JPML is performing its tasks well. In my view, it would be unwise to adopt statutory or rule changes to constrain the JPML's discretion in rendering the important decisions that it must make.

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(2008) (“[O]ver the past two decades, nearly every one of [the JPML’s] decisions has been unanimous.”).

<sup>87</sup> For example, in 2019, the JPML decided forty-eight motions for centralization. In 2018, it decided fifty-six such motions. *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., *supra* note 77, at 3.