

DRAFT

Rule 13. Judicial Panel on Multidistrict Litigation

[Note: This draft incorporates changes voted on during the July 2003 meeting. Additions are shown in *italics* and underline. Other comments are noted in brackets. Copies of the Committee transcript discussing this proposal may be viewed at www.jw.com/scac, selecting “publication”, and then selecting “transcripts” for the three meeting dates in July]

13.1 Definitions.

(a) *MDL panel* means the judicial panel on multidistrict litigation designated pursuant to section 74.161 of the Texas Government Code, including any temporary members designated by the Chief Justice in his discretion when regular members are unable to sit for any reason.

(b) *MDL panel clerk* means the Clerk of the Texas Supreme Court or such other clerk as ordered by the MDL panel.

(c) *Trial court* means the court in which a case is filed.

(d) *Pretrial court* means the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under this rule.

(e) *Related case(s)* means any one or more of multiple cases involving one or more common questions of fact *pending in the same or different constitutional courts, county courts at law, probate courts or district courts*

(f) *Tag-along case(s)* means any one or more cases that would fall within the definition of related cases in an MDL transfer order under these rules but that has not previously been the subject of an MDL motion or order.

[Justice Gray recommends use of uppercase for defined terms throughout rule. Justice Gray also suggests use of term MDL court rather than pretrial court. Additional terms suggested for definition-“Master file”]

13.2 Procedure for Requesting Transfer.

- (a) *Motion, response, and reply.* Any party in a related case may file a motion for transfer to a pretrial court for consolidated or coordinated pretrial proceedings pursuant to this rule. Within twenty days of service of such a motion, any party in any related case may file a response. Within ten days of service of a response, any party may file a reply.

[By a vote of 13-11, SCAC chose 20 days over 30 day period. By a vote of 22-2, the SCAC determined that a trial court should not be allowed to file a response.

Other questions discussed but no vote was taken-Is there a time restriction on filing? Should a trial court be allowed to raise the issue? Is one case enough to invoke? What do you do with dueling classes? What method of service on tag-along?]

(b) *Contents.*

(1) The motion must state:

- (A) the common question(s) of fact involved;
- (B) the reasons transfer would be for the convenience of the parties and witnesses and promote the just and efficient conduct of the cases; and
- (C) that the filing party conferred, or made a reasonable attempt to confer, with all other parties in those cases for which transfer is sought about the merits of the motion and whether they agree or oppose it.

(2) The motion shall contain an appendix that lists:

- (A) the cause number, style, and trial court of related cases and those cases for which transfer is sought; and
- (B) all parties in those cases for which transfer is sought and the names and addresses of all trial and appellate counsel.

(3) Any motion, ~~request, or response,~~ or reply must substantially be in the form of a brief conforming to the form requirements of Texas Rule of Appellate Procedure 9.4 and the page limits of Texas Rule of Appellate Procedure 53.6

(4) The MDL panel may request additional briefing.

[The SCAC voted 23-2 to make the identification of cases apply to related cases and “those for which transfer is sought”. By a vote of 22-3, the committee deleted a requirement that the motion must state “the court to which transfer is sought”. By a vote of 19-1, the SCAC made the notification requirement in subsection (b) (1) (C) only to those case for which transfer is sought. The exact wording on page limitations was not worked out. Justice Hecht indicated the Court understood the concerns of the need for clarity of which pages counted against the page limitations and which did not. A general consensus was also reached during the course of the meeting that the motion and accompanying brief were to be a single document. At least one committee member believes subsection (b)(4) is unnecessary or should be moved to another section]

(c) *Filing and service.* Any motion, response, or reply must be filed with the MDL *panel* clerk ~~and two copies must be filed with each member of the MDL panel~~ and served on each member of the MDL panel and on all parties in related cases in which transfer is sought. A one-page written notice of the filing, in a form approved by the panel, must be filed with each trial court ~~referenced in the motion~~ where a case for which transfer is sought is pending; copies of a motion, response, or reply need not be filed with the trial court. Documents shall be served in the same method as documents filed under Texas Rule of Appellate Procedure 9.5

(d) *Hearing.* The MDL panel may decide any matter on written submission, or may in its discretion conduct an oral hearing before one or more members of the panel at a time and place of its choosing. The MDL panel shall order one or more parties to give notice of the time, place, and nature of any oral hearing to all parties in all related cases.

(e) *Evidence.* The MDL will accept as true facts stated in a motion, response, or reply unless another party contradicts them. The MDL panel may in its discretion order the parties to submit evidence by affidavit or deposition, and may order them to file documents, discovery, or stipulations from related cases. A party may, without an order, file evidence with the MDL panel clerk.

[By a vote of 28-0, the SCAC added the presumption of TRAP Rule 38.1(f) to the MDL rule and allowed parties, without an MDL panel order, to lodge material with the MDL panel clerk.]

(f) *Decision.* The MDL panel may order transfer if three panel members concur in a written order finding that related cases involve one or more common questions of fact, and that transfer to a specified district court will

- (1) be for the convenience of the parties and witnesses and
- (2) promote the just and efficient conduct of the related cases.

[By a vote of 26-2, the SCAC voted not to include a list of “factors”, in rule or comment, explaining items that parties or courts could consider in making a determination under subsection (f)]

(g) *Retransfer.* On its own initiative or motion by a party or at the request of the pretrial court, the MDL panel may in its discretion order transfer from one pretrial court to another pretrial court upon the death, resignation, recusal or disqualification, replacement at an election, or request of the judge of the pretrial court, or in other circumstances when retransfer is necessary to promote the just and efficient conduct of the cases ~~or when required by recusal or disqualification of a judge.~~

~~(h) *Request by Judges.* The trial court in which related cases are pending or a regional presiding judge may request a transfer of related cases to a pretrial court for consolidated or coordinated pretrial proceedings pursuant to the this rule. The MDL panel shall adopt rules that govern a request under this subsection and may employ such procedures, including show cause orders and the procedures in subparts (a)-(e,) as may be necessary for its decision.~~

[The SCAC voted by 25-0 to include Presiding judges in the list of courts that can request. By votes of 19-7 and 21-7, the SCAC voted to exclude the MDL panel and the Local Administrative Judge from the list of courts that may request. By a vote of 15-12, the SCAC voted to allow trial courts and others to also request a transfer of related cases.]

[Other Issues-Several SCAC members asked for further clarification of the language on who is served –parties in the related cases or parties in cases in which transfer is requested. Other members also suggested verification of evidence.]

13.3 Effect of Filing a Motion for Transfer on the Trial Court

(a) *No automatic stay*. The filing of a motion under this rule does not limit the jurisdiction or suspend proceedings or orders in the trial court.

(b) *Order of sStay*. The trial court or the MDL panel may stay all or part of any trial court proceedings until a ruling by the MDL panel. |

[By a vote of 25-3, the SCAC voted to allow the MDL panel to enter a stay. The SCAC also discussed whether an automatic stay should accompany a MDL filing. The issue of whether a motion for stay must be filed in the trial court before it is filed in the MDL panel was also discussed]

13.4 Transfer to Pretrial Court.

(a) *Transferred upon notice.* Related cases are deemed transferred from the trial court to the pretrial court when a notice of transfer with a copy of the MDL transfer order attached is filed with the trial court and the pretrial court. The notice shall include:

(1) a list of all parties who have appeared , their status in the lawsuit, and the name, address, phone number, and bar number of their attorneys, or, if the party is pro se, the party's name, address, and phone number; and

(2) a list of those parties who have not yet appeared in the lawsuit.

(b) *No further action in trial court.* After notice of transfer is filed in the trial court, the trial court may take no more action in the case except for good cause stated in the order in which further action is taken and after conferring with the pretrial court. Service may be completed on any process issued by the trial court, but returns should be filed in the pretrial court.

(c) *Transfer of trial court files and Opening New Files in the Pretrial Court.* If the trial court and pretrial court are in the same county, files must be transferred pursuant to that county's local rules. The clerk of the pretrial court, after consultation with the judge of the pretrial court, will establish a master file and will open new files for each case[didn't we leave this in the pretrial judge's discretion??] transferred using the information provided in the notice of transfer. Unless the MDL panel otherwise assesses costs, the party moving for transfer must pay the cost of opening new files in the pretrial court (including filing fees and other reasonable costs). The pretrial court may enter orders directing the manner in which pretrial documents are filed, including electronic filing.

(d) *Transfer of tag-along cases.* Tag-along cases are deemed transferred to the pretrial court when a notice of transfer, in the form described in Rule 13.4(a), is filed in both the trial court and the pretrial court with a copy of the original MDL transfer order attached. Any party objecting that a tag-along case does not fall within the terms of an MDL transfer order must ~~move~~ file a motion to remand with the pretrial court within 30 days after service of the notice. If remand is granted, the case must be returned to the trial court, and costs including attorney's fees may be assessed by the pretrial court in its remand order. The order of the pretrial court may be appealed to the MDL panel by a motion for rehearing.

[Various methods for moving the records of the trial court to the pretrial court were discussed. Adoption of a uniform numbering system for MDL claims was discussed. Suggestions were made regarding the specificity of the terms of the transfer order. By a vote of 24-1, the SCAC adopted the tag-along procedure.]

13.5 Proceedings in Pretrial Court.

(a) *Judges who may preside in pretrial court.* The MDL panel may assign as judge of the pretrial court any district judge. The MDL panel may appoint a ~~visiting senior~~ or retired judge if all parties, at the time the assignment is made, agree to the assignment and the assignment of the judge has been approved by the Chief Justice [I don't remember this]. Assignment under this rule are not subject to objection under chapter 74 of the Government Code. Upon assignment and transfer, the judge assigned as judge of the pretrial court has exclusive jurisdiction over related cases transferred pursuant to this rule (unless retransferred by the MDL panel) until disposed or remanded to the trial court for trial.

(b) *Authority of pretrial court.* The pretrial court will preside over all pretrial proceedings in transferred cases in place of the trial court, and may set aside or modify any pretrial ruling made by the trial court before transfer ~~over which the trial court still has plenary power~~ to the same extent as the trial court. The pretrial court may enter orders regarding jurisdiction, joinder, venue, discovery, preparation for trial (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, and settlement).

(c) *Trial settings.* The pretrial court may set transferred cases for trial at such times and on such dates as will promote the convenience of the parties and witnesses and the just and efficient disposition of all related proceedings. The pretrial court must confer, or order the parties to confer, with the trial court regarding potential trial settings or other matters regarding remand.

(d) Case management. Once a case is consolidated or coordinated, the pretrial court shall, at the earliest practical date, conduct a hearing and enter a case management order promptly thereafter. The order shall also include any necessary provisions to ensure the just and efficient conduct of the actions and should apply judicial management methods early, continuously and actively, based on knowledge of the circumstances of each case and use time limits tailored to the circumstances of each case, firmly and fairly maintained, and accompanied by other methods of sound judicial management, to expedite phases of this litigation.

Among the subjects that should be considered at such a conference are:

(1) Settling the pleadings;

(2) Determining whether severance, consolidation, or coordination with other actions is desirable and whether identification of separable triable portions of the case is desirable;

(3) Scheduling preliminary motions;

(4) Scheduling discovery proceedings and setting limitations, if necessary, on discovery, including the establishment and timing of discovery procedures;

(5) Issuing protective orders;

(6) Scheduling alternative dispute resolution conferences;

(7) Appointing organizing or liaison counsel;

(8) Scheduling dispositive motions;

(9) Providing for exchange of documents, including adopting a uniform numbering system for documents, establishment of a document depository, determining whether electronic service of discovery materials and pleading is warranted;

(10) Determining if the use of technology, videoconferencing, or teleconferencing is appropriate;

(11) Consideration of such other matters the court or the parties deems appropriate for the just and efficient resolution of the cases; and

(12) Scheduling further conferences as necessary.

[In addition to the votes relating to the assignment of judges, the SCAC also discussed various methods for adopting lists of judges to preside as MDL pretrial judges. Questions

were also raised on the ability of the pretrial court to revisit a decision of the trial court that occurred before the transfers. The Committee also discussed adding instructions relating to the time lines for the progress of an MDL case in the pretrial court.]

13.6 Remand to Trial Court.

(a) *Disposition.* The pretrial court may render final and appealable judgments in one or more transferred cases. Such cases are not to be remanded to the trial court.

(b) *Remand.* The pretrial court may order remand of one or more cases transferred or separable triable portions thereof under this rule when pretrial proceedings have been completed to such a degree that the purposes of the transfer have been fulfilled or no longer applyies.

(c) *Transfer of Files.* If the pretrial court remands the case to the trial court, the clerk of the pretrial court will send its case file to the trial court without retaining a copy unless otherwise ordered. The parties may also file copies of any pleadings or orders from the pretrial court's master file in the file of the remanded case. The clerk of the trial court will reopen the trial court file under the old cause number of the trial court, without a new filing fee.

[The SCAC also discussed the ability of the pretrial court to remand cases in “waves” or “to dribble the cases out” to the trial court. By a vote of 18-9, the SCAC added the ability of “separable triable” portions of a case to be remanded. It was suggested that the MDL panel adopt a form remand order]

13.7 Proceedings in trial court after remand.

Effect of pretrial orders.

[There was no final written text adopted by the SCAC and after extensive debate, the SCAC moved on following the assurances of Justices Hecht and Jefferson that the Court understood the concerns of the SCAC on the issues. The issue is to what extent is the trial court bound by the decision of the pretrial court following the remand of the case from the pretrial court to the pretrial court? (E.g. If the pretrial court has made a partial summary judgment ruling, may the trial court vacate it?)

Several options were discussed. After deciding to depart from the original draft, the SCAC, by a vote of 25-2, began to work with a proposal by Mr. Jacks of Austin.

Mr. Jack's proposal stated:

Binding Effect of Orders of the Pretrial Court. (1) Orders of the pretrial court relating to summary judgment, jurisdiction, venue, joinder, special exception, discovery, sanctions, privilege, and expert testimony shall govern the case after remand to the trial court. Such orders may not be vacated, set aside, or modified by the trial court, over objection, without the written concurrence of the pretrial court.

(2) Orders of the pretrial court relating to scheduling matters set to occur after remand may not be modified over objection to advance the dates of such matters without the written concurrence of the pretrial court.

(3) Other orders of the pretrial court, including rulings on the admissibility of trial exhibits or evidence other than expert testimony, may be modified by the trial court only with the written concurrence of the pretrial court, except when a modification is necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice, in which event the trial court must state in detail in a written order or on the record its findings and conclusions supporting such modification.

There was a lengthy discussion about the meaning of the terms "manifest injustice" and "changed circumstances". Additional methods were also discussed including the method set out in the Federal Manual on Complex Litigation: "although the transferor court has the power to vacate or modify rulings made by the transferee court, subject to comity and "law of the case" considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings".

After several hours of debate and the need to continue to review the remainder of the document, the SCAC agreed to leave the matter here]

13.8 Review

(a) MDL panel decision. Orders of the MDL panel, including those that grant or deny motions for transfer of related cases, may be reviewed only by the Supreme Court in original proceedings.

(b) Orders by pretrial court. Before remand to the trial court, a party, to the extent permitted by law, may seek review of orders and judgments of the pretrial court from the appellate courts that, under law, review orders and judgments of the pretrial court.

(c) Orders by trial court. After remand to the trial court, a party, to the extent permitted by law, may seek review of orders and judgments of the trial court (including rulings of the pretrial court that are reviewable as part of a final judgment) from the appellate courts that, under law, review orders and judgments of the trial court.

13.9 Applicability. This rule applies to any civil action involving one or more common questions of fact filed in a constitutional county court, county court at law, probate court, or district court of this state on or after September 1, 2003. Cases filed before that date are governed by Rule 11 of these rules.

Comment: When related cases are filed both before and after September 1, 2003, the pretrial court should confer and coordinate proceedings with any judge assigned pursuant to Rule 11 of these rules.

[The Committee also discussed whether “Old” Rule 11 cases could be consolidated into “new” Rule 13 cases. Various proponents suggested either the consolidation of the suits or suggested that policy considerations suggested that the cases remain separate]