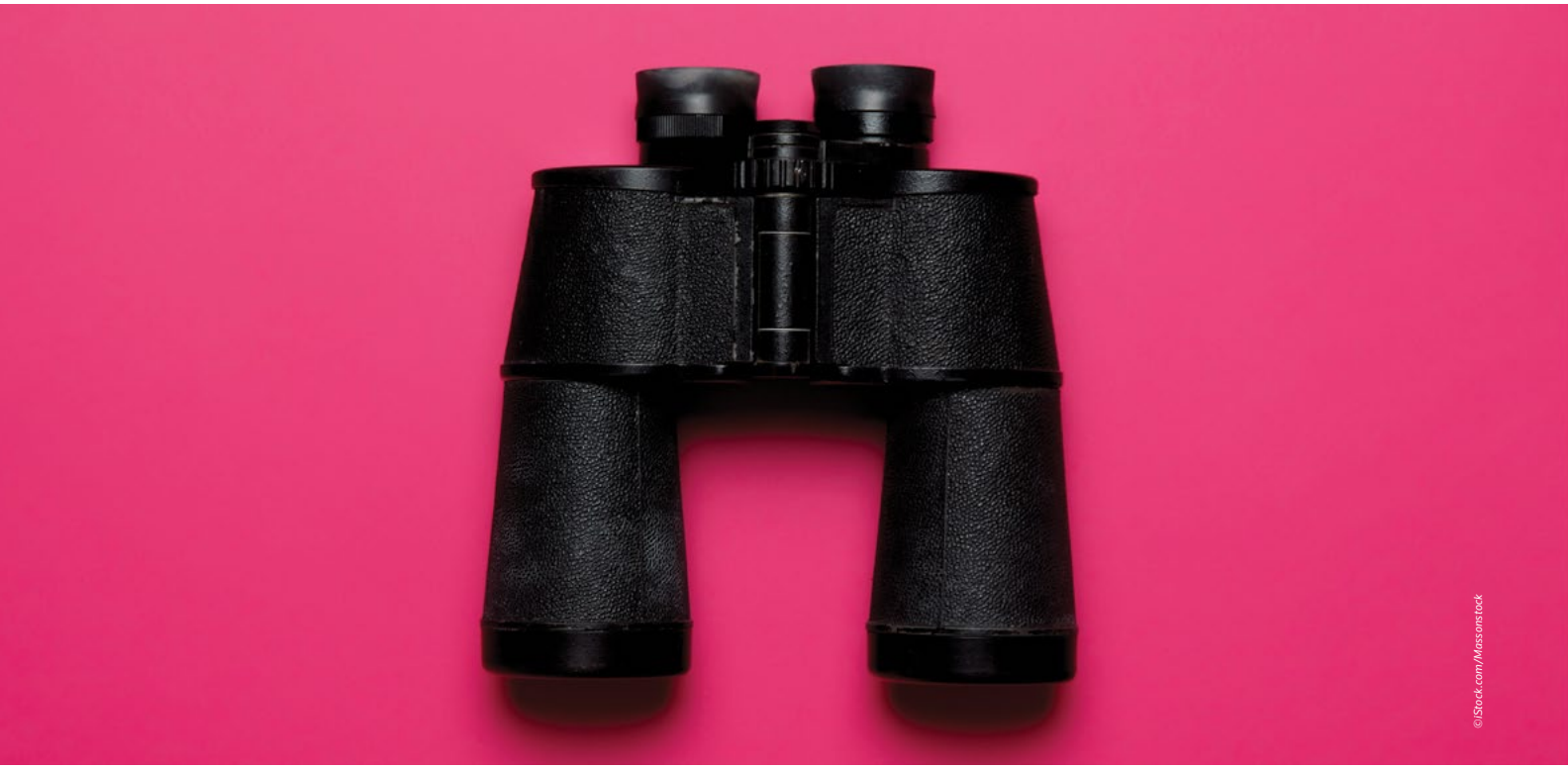

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Keeping a Transferee Judge for Trial in a Multidistrict Litigation

In a multidistrict litigation (MDL), related actions pending in different jurisdictions are transferred to a single district court for coordinated or consolidated pretrial proceedings, but the actions generally must be remanded back to their original courts at the conclusion of discovery and other pretrial matters. However, litigants may prefer to have the MDL transferee judge continue to preside over the case through trial for practical and strategic reasons. Because transferee judges are not authorized to avoid the remand requirement by unilaterally retaining MDL actions beyond the pretrial stage, litigants should understand the limited ways in which they can seek to keep a transferee judge for trial.

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Under the Multidistrict Litigation Act of 1968, where there are multiple civil actions involving one or more common questions of fact that are pending in different federal district courts, the Judicial Panel on Multidistrict Litigation (JPML) can transfer those actions to a single district court for coordinated or consolidated pretrial proceedings (28 U.S.C. § 1407(a)). In large-scale, multi-party, and time-intensive cases, this helps to administer discovery and pretrial rulings more efficiently than if each case progresses through the various federal district courts separately.

The cases are temporarily centralized in a transferee court until, at the latest, the conclusion of final pretrial proceedings. At that time, the transferee court must remand them back to their original transferor courts for trial. (28 U.S.C. § 1407(a).) A transferee judge may not self-transfer a proceeding to themselves due to the plain language of Section 1407(a) mandating that the JPML remand the case back to the transferor court for trial (*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998)).

Therefore, a party wishing to keep the transferee judge for trial must use mechanisms that do not violate the plain terms of Section 1407(a). There are multiple reasons why parties may want to retain for trial the same judge who is handling the pretrial proceedings, for example, because:

- The transferee judge already has an understanding of the facts of the case. Keeping the transferee judge for trial may make the trial more efficient and eliminate the need for the transferor judge to acquaint themselves with those same facts. (See Letter from the Court Regarding Inter-Circuit Assignment Request, *Cline v. Mentor Worldwide LLC*, No. 10-5060 (M.D. Ga. Feb. 25, 2014) (ECF No. 83).)
- The transferee judge already has familiarity with the parties and their attorneys and vice versa. This can be particularly beneficial in complex cases with numerous parties and also can be strategically advantageous for counsel who, during the discovery process, have gained insight into the judge's preferences and views on the merits of the case and how the judge may rule on certain issues.
- Keeping the same judge can minimize the delay and expense that is necessitated by transferring the case back to the transferor court (see *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2014 WL 715579, at *2 (M.D. Ga. Feb. 24, 2014)).

This article examines the procedural options that counsel may pursue to attempt to avoid the statutorily mandated transfer back to the original transferor court and keep the transferee judge for trial. The limited ways to retain the transferee judge for trial include:

- Waiving *Lexecon* rights.
- Refiling the action or filing an amended complaint in the transferee court.
- Requesting that the transferee judge support a transfer from the transferor court back to the transferee court.
- Seeking an intercircuit assignment for the transferee judge.

WAIVE *LEXECON* RIGHTS

A party's right under Section 1407 and *Lexecon* to have its trial in the transferor court is a venue issue, as opposed to a jurisdictional limitation, and a party can waive this right (see *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1325-26 (11th Cir. 2000) (quoting *Lexecon*, 523 U.S. at 42)).

TIMING FOR WAIVING *LEXECON* RIGHTS

Unless a party is considering participating in a bellwether trial (see below *Other Considerations for Waiving Lexecon Rights*), a party wishing to waive its *Lexecon* rights should do so closer to a potential trial. By waiting, the party can gain a rapport with the transferee judge and gauge whether it is in the party's best interest to stay with the transferee judge for trial. Waiver is completely within the party's control. Absent objections by the other parties, there is no disadvantage to waiting.

REQUIRED STEPS FOR WAIVING *LEXECON* RIGHTS

The precise mechanism by which a party waives its *Lexecon* rights can vary. However, no matter what mechanism a party uses, to properly waive its *Lexecon* rights, the party must:

- Ensure that the transferee court has subject matter jurisdiction over the claim. If the transferee court does not have subject matter jurisdiction, a *Lexecon* waiver is not possible because jurisdiction does not extend past pretrial proceedings under Section 1407.
- Ensure that the transferee court has personal jurisdiction over the other party in the case.
- Clarify to the transferee court exactly what *Lexecon* rights the party is waiving (see below *Clear and Unambiguous Waiver*).

MECHANISMS TO EFFECT A WAIVER

Mechanisms that parties have used to waive their *Lexecon* rights include:

- Submissions to the court for pretrial orders.
- Case management orders.
- Representations made during a pretrial hearing.
- Emails to the court.

(See, for example, *In re Carbon*, 229 F.3d at 1325-26; *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 351-52 (5th Cir. 2017).)

One advisable approach is for a party to file a letter with the transferee court expressly setting out its *Lexecon* waiver (see below *Clear and Unambiguous Waiver*).

CLEAR AND UNAMBIGUOUS WAIVER

A party's waiver of its *Lexecon* rights must be clear and unambiguous (*In re Depuy*, 870 F.3d at 351). This means that the party must expressly state exactly what it is and is not waiving. For example, a party must make it clear if it wishes to waive its *Lexecon* rights:

- Only for specific bellwether trials (see below *Other Considerations for Waiving Lexecon Rights*).
- For all potential trials (see, for example, *In re Depuy*, 870 F.3d at 352 (holding that the MDL court had reached a "patently

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erroneous" result by applying the waiver to all potential trials where the party had waived its *Lexecon* rights only for certain bellwether trials)).

On the other hand, if a party does not wish to waive its *Lexecon* rights, it must take care not to make any assertion that a transferee court may interpret as a waiver. Doing so may eliminate that party's ability to exercise its right to return to the transferor forum (see, for example, *In re Carbon*, 229 F.3d at 1326-27 (holding that a party that failed to raise the issue of remand and stipulated to trial in the transferee court was precluded from seeking remand to the transferor court)).

> If a party is considering participating in a bellwether trial, then it must waive its *Lexecon* rights earlier rather than later. If the party waits, it may miss the opportunity to participate in the bellwether selection pool and case-specific discovery.

OTHER CONSIDERATIONS FOR WAIVING *LEXECON* RIGHTS

A party can also use a *Lexecon* waiver to effectuate participation in a bellwether trial in the MDL. A bellwether trial is a case selected by either the parties or the court as being exemplary of the parties' respective claims and defenses. The purpose of a bellwether trial is to inform the parties on likely outcomes of future trials on these claims and issues and encourage settlement of the other cases. If a party's goal is to have the transferee judge preside over trial, the party can ask that its case be considered as one of the bellwether cases.

If a party is considering participating in a bellwether trial, then it must waive its *Lexecon* rights earlier rather than later. If the party waits, it may miss the opportunity to participate in the bellwether selection pool and case-specific discovery. Counsel should note that transferee courts considering bellwether trials may require parties to affirmatively maintain their *Lexecon* objections (see, for example, Pretrial Order No. 9: Selection of Bellwether Plaintiffs for Discovery & Trial, *In re Chantrix (Varenicline) Prods. Liab. Litig.*, No. 09-2039, at 4-5 (N.D. Ala. Mar. 10, 2011) (ECF No. 206)).

Additionally, a party should consider whether the law of the transferor circuit is favorable before proceeding with waiving *Lexecon* rights.

REFILE THE ACTION IN THE TRANSFEREE COURT OR FILE AN AMENDED COMPLAINT

If the plaintiff wishes to keep the action in the transferee court for trial, another option is to either:

- Voluntarily dismiss the action in the transferor court and refile it in the transferee court (see, for example, *In re Conagra Peanut Butter Prod. Liab. Litig.*, 251 F.R.D. 689, 695 (N.D. Ga. 2008); see also *Scherer v. Eli Lilly & Co.*, 2015 WL 1246486, at *1-2 (E.D. Mo. Mar. 17, 2015) (providing an example in an "informal MDL," which is not a formally approved MDL by the JPML but rather an informal coordination among parties with many similar actions)). This may be a risky option because at this point in the litigation, the statutes of limitations on the claims are likely to have run.
- File an amended complaint asserting venue in the transferee court, which may require an agreement from the opposing party or leave from the court.

(See below *Required Steps for Refiling the Action or Amending the Complaint*.)

By taking either of these approaches, the case continues to be part of the MDL. There is no transferor court to return to because the original jurisdiction of the case then falls to the transferee judge.

TIMING FOR REFILING THE ACTION OR AMENDING THE COMPLAINT

To avoid any statute of limitations issues, a plaintiff should act quickly and, soon after the transfer, either voluntarily dismiss the action and refile it in the transferee court or file an amended complaint asserting venue in the transferee court.

REQUIRED STEPS FOR REFILING THE ACTION OR AMENDING THE COMPLAINT

Before seeking to refile the action or file an amended complaint in the transferee court, the plaintiff should:

- Ensure that the transferee court has:
  - subject matter jurisdiction over the claims; and
  - personal jurisdiction over the parties in the action.
- Ensure that venue is proper within the transferee district or obtain a waiver of venue objections from the defendant.
- Obtain any required consents from the defendants or the court, if necessary, such as where:
  - the statute of limitations has run; or
  - the plaintiff is amending the complaint more than 21 days after serving it (Fed. R. Civ. P. 15(a)(2)).

If refiling the complaint in the transferee court, the plaintiff should also move to voluntarily dismiss the original complaint in the transferor court without prejudice.

OTHER CONSIDERATIONS FOR REFILING THE ACTION OR AMENDING THE COMPLAINT

Counsel should be aware that:

- It is possible the transferor court may not grant a voluntary dismissal.

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- Once the action is refiled in the transferee district, it may not be assigned to the transferee judge. However, as a practical matter, it is likely that the case can be assigned to the transferee judge given that they are already dealing with similar cases.

Before proceeding with refiling the action in the transferee court or filing an amended complaint, counsel should consider whether the law of the transferor circuit is favorable, in which case they may wish to forgo these options.

Multiple Claims and Cases Toolkit (Federal)

The Multiple Claims and Cases Toolkit (Federal) on Practical Law offers a collection of resources to help counsel with procedural motions related to the administration of multiple claims and cases in federal civil litigation. It features a range of continuously maintained resources, including:

- Product Liability Multidistrict Litigation
- Motion for a Multidistrict Litigation Transfer
- Class Action and Multidistrict Litigation Comparison Chart
- Notice of Tag-Along Action (Federal)
- Motion to Sever Under FRCP 21
- Class Action Toolkit: Certification
- Motion to Consolidate Under FRCP 42(a) Checklist
- Motion for Separate Trials (Bifurcation) Under FRCP 42(b): Motion or Notice of Motion
- Motion to Transfer Venue Factors by Circuit Chart (Federal)
- Class Action Toolkit: Settlement

REQUEST THAT THE TRANSFEREE JUDGE SUGGEST A TRANSFER BACK TO THE TRANSFEREE COURT

Another option is for the transferee judge to remand the case back to the original transferor court which, in turn, transfers it back to the transferee court under 28 U.S.C. § 1404. This circular mechanism is necessary because the transferee court is not permitted to transfer the case to itself for trial. (See *Lexecon*, 523 U.S. at 40.)

To aid the transferor court in its determination to transfer the case back to the transferee court, the transferee judge typically provides support for the notion that the case should be transferred back to the transferee court in their suggestion of remand order (see *Kenwin Shops, Inc. v. Bank of La.*, 1999 WL 294800, at *1 (S.D.N.Y. May 11, 1999)).

TIMING OF SEEKING A TRANSFER BACK TO THE TRANSFEREE COURT

This option occurs right after the case is remanded to the transferor court. However, if a party believes that a transferee judge is amenable to keeping the case for trial, it may provide some form of communication to the judge before remand to indicate that it supports having the case tried in the transferee court.

REQUIRED STEPS FOR SEEKING A TRANSFER BACK TO THE TRANSFEREE COURT

The process for effectuating a transfer back to the transferee court is as follows:

- A party seeking to keep the transferee judge for trial must ensure that, at the time the action was commenced in the original court:
  - the transferee court had both subject matter jurisdiction over the claims and personal jurisdiction over the parties in the action; and
  - venue was proper in the transferee court.

  (See *Kenwin Shops*, 1999 WL 294800, at *2-3.)
- The party must file a motion for suggestion of remand to remand the action back to the transferor court. To state its support for having the case tried in the transferee court, the party may either:
  - advise the transferee court by letter that it supports a transfer back to the transferee court for trial before making the motion; or
  - state its support for a trial in the transferee court in its actual motion, in which case the party may also provide language for the transferee judge to use in an accompanying proposed remand order and attach the proposed order to its motion.
- If the transferee judge is willing to preside over the case for trial, they set out in their suggestion of remand order their support for a transfer of the case back to the transferee court following remand.
- The party must file a motion to transfer the action back to the transferee court under Section 1404 once remanded.

OTHER CONSIDERATIONS FOR SEEKING A TRANSFER BACK TO THE TRANSFEREE COURT

When deciding whether to opt for this alternative, counsel should consider that they may need to brief two motions, that is, the original remand motion and then the transfer motion. This route may take a substantial amount of time. If the opposing party objects, counsel will need to prepare a full set of briefing for the remand motion, then potentially engage in oral argument in front of the JPML, and then complete a full set of briefing and potential oral argument in front of the transferor court to have the action transferred back to the transferee court. This process can take months. If counsel believes that the opposing party may object, then a potentially better, though difficult, option is to have the transferee judge sit by intercircuit assignment in the transferor court (see below *Seek an Intercircuit Assignment for the Transferee Judge*).

Additionally, if the action in the MDL is a federal question case, then the law of the transferee circuit, not the transferor circuit, also most likely applies following transfer (see, for example, *Belmora LLC v. Bayer Consumer Care AG*, 987 F.3d 284, 292 (4th Cir. 2021) (quoting *In re Korean Airlines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987)); *AER Advisors, Inc. v. Fidelity Brokerage Servs., LLC*, 921 F.3d 282, 288 (1st Cir. 2019) (quoting *In re Korean Airlines*, 829 F.2d at 1175)). As a result, if

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the law of the transferor circuit is favorable, a party may wish to forgo this option.

SEEK AN INTERCIRCUIT ASSIGNMENT FOR THE TRANSFEREE JUDGE

A rarely chosen but possible option is for the transferee judge to seek an intercircuit assignment under 28 U.S.C. § 292(d). This avenue allows a litigant to keep their transferee judge while also keeping the law of the district in which the case was originally filed.

The Chief Justice of the United States may assign a judge to another district if the chief judge of the circuit where service is needed provides a certificate of necessity (28 U.S.C. § 292(d)). At least one circuit has suggested that this necessity is a rarity and that an intercircuit assignment is made only during a "severe or unexpected over-burdening" (*In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050, 1053 (9th Cir. 2013)).

TIMING FOR SEEKING AN INTERCIRCUIT ASSIGNMENT

A party hoping to keep its transferee judge through an intercircuit assignment should communicate this preference to the transferee judge at the end of coordinated pretrial proceedings. There is no need to do so any earlier. Just like seeking to be transferred back to the transferee court after remand, holding off until later in the proceedings also allows a party to assess its rapport with the transferee judge.

REQUIRED STEPS FOR SEEKING AN INTERCIRCUIT ASSIGNMENT

Unlike the other options set out above, the transferee judge must initiate and complete the steps for an intercircuit assignment.

However, a party can alert the transferee judge that it is interested in keeping the transferee judge for trial and help further the assignment, if requested by the judge. In particular, a party may:

- File a letter expressing its interest in retaining the transferee judge and outlining the steps required for the transferee judge to obtain an intercircuit assignment (see Sanofi Letter re Notice Seeking Intercircuit Assignment, *In re EpiPen Mktg., Sales Practices, & Antitrust Litig.*, No. 17-md-2785 (D. Kan. June 25, 2020) (ECF No. 2117) (outlining the process for the court to request an intercircuit assignment under Section 292(d) to the District of New Jersey)).
- Express its support for the intercircuit assignment in its motion for suggestion of remand and provide language for the transferee judge to use in an accompanying proposed order attached to the motion.

The transferee judge must:

- Obtain formal approval for the intercircuit assignment from:
  - the circuit chief judge of the transferor court, who must request the transfer and provide the Chief Justice of the United States with a certificate of necessity;
  - the transferee circuit chief judge permitting the transfer;
  - the chairman of the Judicial Conference Committee on Inter-Circuit Assignments; and
  - the Chief Justice of the United States.
- File a suggestion of remand order requesting the intercircuit assignment.

(See, for example, *Jowers v. Airgas-Gulf States, Inc.*, No. 7-wf-17010, at 4 (N.D. Ohio Nov. 8, 2007) (ECF No. 136); see also Sanofi Letter re Notice Seeking Intercircuit Assignment, *In re: EpiPen Mktg., Sales Practices, & Antitrust Litig.* (ECF No. 2117).)

> Not all courts agree that an intercircuit assignment is an appropriate method to keep a transferee judge for trial. This mechanism also requires consent from multiple judges and refusal by any one of those judges is fatal.

For example, in *Jowers v. BOC Group, Inc.*, the transferee judge presided over trial in the transferor court after obtaining all required formal approvals and seeking intercircuit assignment in their suggestion of remand order to the JPML (608 F. Supp. 2d 724, 729 n.2 (S.D. Miss. 2009); see also *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2014 WL 715579, at *2 (M.D. Ga. Feb. 24, 2014) (noting in the court's suggestion of remand order that the transferee judge would "seek an inter-circuit assignment with the understanding that [the transferee judge] would preside over the trial of th[e] matter in the [transferor court]")).

OTHER CONSIDERATIONS FOR SEEKING AN INTERCIRCUIT ASSIGNMENT

Not all courts agree that an intercircuit assignment is an appropriate method to keep a transferee judge for trial. In fact, despite recognizing that having a transferee judge sit by designation in the transferor court may aid judicial efficiency, one judge still refused to sign a certificate of necessity because "necessity," as defined by the Guidelines for Intercircuit Assignment of Article III Judges, is narrow and was not met under the circumstances. (*In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d at 1053-55.) As noted above, this mechanism also requires consent from multiple judges and refusal by any one of those judges is fatal. PL

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