

7 Tips For Maximizing Your Time Before The JPML

By Julie Zeveloff

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Oral arguments before the U.S. Judicial Panel on Multidistrict Litigation are more mad dash than marathon: The roving board, which meets bimonthly, allots just a few minutes for attorneys to make their pitches for or against consolidation or advocate for a particular court. How can you make the most of your time before the panel? Experienced JPML litigators shared their strategies with Law360.

1. Do Your Homework

Hearings before the JPML bear little resemblance to typical court proceedings, so take some time to learn the panel's procedural guidelines. The seven-member panel hears arguments on 15 to 20 matters per session, and with as many as a dozen lawyers vying for time to speak, it's no surprise that the panel "is very stingy with its time," as one seasoned litigator put it. Those who have not seen the panel in action should attend a session to get a feel for the pace, attorneys suggested.

"It's sort of overwhelming if it's your first time," said Fine Kaplan & Black RPC's Roberta D. Liebenberg, who co-chairs the special committee on multidistrict litigation of the American Bar Association's Section of Litigation. "There are a lot of cases being heard and there can be 200 or 300 people in the galleries."

It can also be advantageous to study the panel's past precedent — which is publicly available — when crafting a case. "If you can persuade the panel that a decision it rendered six months or a year ago was based on facts that are comparable to your case, you have a good chance of getting a similar outcome in your case, whether you are arguing for or against consolidation," said Shook Hardy & Bacon LLP's William R. Sampson, who recently argued against the consolidation of suits over defective domestic drywall product on behalf of Lowe's HIW Inc.

2. Make Your Brief Count

Given the small window for oral arguments, it's critical to submit a persuasive brief to the panel, attorneys said. "I believe the panel has 99 percent made up its mind based on the written briefs," said Lawrence Sucharow of Labaton Sucharow LLP, who has argued for the consolidation of numerous cases before the JPML. "There are very few nuanced arguments that can't be made in a brief, and that can be made in oral arguments, that will change its view."

Leave the detailed arguments for the brief, attorneys advised. That way, precious time before the panel can be spent updating the judges on any new developments in the litigation, answering questions and driving home key points, they said. But make sure the brief supports the ultimate goal: persuading the panel that centralization would help — or hinder — the efficient and consistent resolution of the litigation, said John H. Beisner, co-head of Skadden Arps Slate Meagher & Flom LLP's mass torts and insurance group, who has argued more than a dozen cases before the JPML.

Beisner also warned against using the brief to argue the merits, or otherwise, of the litigation. "The panel is there to figure out if the cases should be transferred at all and, if so, where," he said. "So getting into a discussion of the merits or showing the strength of your position on some issue in the case isn't what they are looking for."

3. Know Your Speakers and Time Limits

The JPML advises attorneys arguing the same viewpoint to designate a single representative, and experienced panel litigators say it pays to heed the advice. "Put egos aside," Sucharow said, adding that by doing so, attorneys advocating for the same position can aggregate time that might otherwise be parceled out into minute-long segments.

Sampson said that to avoid making a racket in front of the JPML clerks, the parties should select representatives ahead of time. And once a lawyer is in front of the judges, he should be sure to mind the yellow and red lights that indicate when time has run out, attorneys said. The JPML "is not a court that likes it when you go beyond the time that's been prescribed," Liebenberg said. "It's important to recognize that the panel is watching the clock — and you need to be, too."

4. Be Concise and Fact-Oriented

Given the time constraints and the fact that the panel deals strictly with the transfer of litigation, it's imperative to keep arguments brief and focused, attorneys said. That means no pleasantries, no flowery statements and no jokes, they said. Presenters should lead with their strongest arguments, especially since the panel's questions may eat into time, Sampson advised.

And before the JPML, the strongest arguments are typically facts-based, according to experts. "Unlike in arguments before other courts, where you may be talking about the law and legal standards, the JPML judges are experienced and standards for transfer are pretty well-settled, so you won't be arguing a lot of legal precedent," Liebenberg said. "What you want to do is focus on the facts."

Learn how to deliver a concise argument, Sucharow suggested. "Most people forget that [the JPML] is a judicial time-saving device — it's not about wanting to make things easy for the attorneys or even the witnesses," he said. "It's about how the courts can best handle these cases and making sure that there's a coherence among decisions that are made. So you really need to focus on that purpose."

5. Know the Court You're Advocating

For attorneys advocating transfer to a particular district, it's imperative to know some persuasive specifics about your proposed destination, attorneys said.

Depending on the case, those facts may include the suggested district's proximity to a related grand jury proceeding, the possibility of coordinated discovery with related state court actions, and the location where the majority of the cases or first-filed cases are pending, Liebenberg said.

The panel is interested in finding a judge with experience handling complex litigation and whose docket is not too bogged down with other matters, so it pays to emphasize those points, according to Beisner.

6. Against Consolidation? Focus on the Facts

It's become increasingly common for parties on both sides to agree that a case should be afforded MDL treatment, leaving them to battle out the appropriate transfer district. But when it comes to arguing against consolidation, a facts-based approach is best, Sampson said. "For those opposing centralization, the key is to identify the ways in which the facts of the candidate cases are different — that's the most compelling reason for the panel to deny a motion to centralize," he said.

Sampson noted the difference between the litigation over defective drywall from China — which was consolidated — and the litigation over U.S.-made versions of the product — which was not.

In arguments before the panel earlier in 2010, domestic drywall producers and retailers explained that unlike Chinese drywall, which all has similar origins, U.S.-made drywall comes from various gypsum mines and undergoes unique processes depending on the manufacturer, he said.

That argument persuaded the panel that the cases over domestic drywall should proceed individually, Sampson added.

7. Avoid Sounding Like a Travel Guide

Convenience may factor into the judges' decision on where to transfer litigation, but it's not their top priority — so don't build your argument around size of the local airport or number of nearby hotels, attorneys said.

Beisner called it a Fodor's pitch. "I've heard some people give a description of the city to which they want it to move — great airport, lots of flights, good restaurants and accommodations," he said. "That stuff isn't irrelevant — if a city is hard to get to, it may not be the best place for an MDL proceeding."

But be sure to focus on the merits of the district court, not the locale, he advised.

Sucharow recalled an argument where an attorney's proposed forum was the U.S. District Court for the Northern District of Illinois, in Chicago, because it was "equally inconvenient for everyone," but close to a major airport.

"The JPML is intended to relieve the burden of the courts and to provide coordinated judicial oversight," he said. "It's typically not intended to relieve counsel."