

## Your Case Has Been Remanded By The MDL Court — Now What?

By **Brandon Cox and Charissa Walker** (February 9, 2018, 11:41 AM EST)

Multidistrict litigation remains an ever-expanding driver of product liability litigation, but when the MDL process runs its course there is often still a trial to be had. And there are several strategic and practical decisions to consider once a case has been remanded under 28 U.S.C. § 1407(a) from the MDL court (the “transferee” court) to the district court from which it originated (the “transferor” or “remand” court).

In this article, we discuss practical tips on how to navigate the remand process from transfer to trial based on lessons learned from our first experience with a remanded case. The goal of this article is to provide guidance to young lawyers and briefly discuss important topics such as ensuring that the remand court’s docket includes all of the necessary and relevant pleadings from the MDL court’s docket; assessing whether there is any outstanding discovery that needs to be conducted before trial; substantively analyzing whether to file dispositive and evidentiary motions, including addressing any legal and evidentiary issues that the MDL court may have reserved for the remand court; and preparing the final pretrial order.

### Ensure That the Remand Court’s Docket Is Complete

One of the biggest practical challenges you may encounter is ensuring that the remand court’s docket includes all of the necessary and relevant pleadings from the MDL court’s docket. When pretrial proceedings are complete in the MDL court, the Judicial Panel on Multidistrict Litigation will issue a formal order remanding your case from the MDL court to the district court from which it originated. Rule 10.4 of the JPML Rules of Procedure governs the transfer of files from the MDL court to the remand court.

Under Rule 10.4(a), upon receipt of an order to remand, the parties must “forthwith” provide the MDL court with a “stipulation or designation of the contents of the record or part thereof to be remanded.” Rule 10.4(b) requires the clerk for the MDL court to transfer these files to the clerk for the remand court.

Your first task under Rule 10.4 is to determine which pleadings to identify on the Rule 10.4(a) stipulation or designation. During the course of the MDL, it is very likely that the parties filed various motions and other pleadings on the member case docket pending in the MDL court.



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In addition, the parties' respective lead counsel and/or liaison counsel may have also filed relevant pleadings on the "master" MDL docket. The MDL court, too, may have issued pertinent rulings and orders both on the member and master MDL dockets. Consider which pleadings are relevant to the issues in your case and identify them on your Rule 10.4(a) stipulation or designation.

This process is particularly critical to ensuring that the official record is complete for appellate purposes. Under Fed. R. App. P. 10(a), the record on appeal only includes the papers and exhibits filed in the remand court, not those filed with the MDL court. Although Fed. R. App. P. 10(e) permits the parties to correct or modify the record, the process for doing so can be complex.

It is also important to contact the remand court's clerk's office to determine the proper procedure and protocol for ensuring that the pleadings from the MDL court are transferred and docketed correctly on the remand court's docket. Some clerk's offices have a designated clerk — such as an MDL clerk — who handles cases that have been remanded from an MDL.

The clerk will provide invaluable guidance on whether multiple filings from the MDL court will be filed as a single entry on the remand court's docket, or entered separately. The latter option is generally preferred because it allows the parties and the court to easily access documents, just as if they were originally filed in the remand court.

Most importantly, you should contact the remand court and speak with the judge's docket clerk or law clerk to see if the court has a preference on how to receive the information from the MDL. For example, the court may request that the parties provide it with an electronic copy of all of the relevant pleadings so that the court has immediate access to the documents before receiving them from the MDL court. The remand court may also request hard copies of select documents.

### **Assess Whether There Is Any Outstanding Discovery That Needs to Be Completed**

During the course of the pretrial proceedings in the MDL, the MDL court may have limited and/or restricted the amount of discovery in which the parties could engage. As you prepare your trial strategy, review the MDL court's orders to determine whether there is any discovery that the MDL court permitted the parties to defer until closer to trial, and assess whether you need to conduct this discovery.

Additionally, the parties may have entered stipulations or other agreements to defer certain discovery (such as depositions) until the case was remanded or set for trial. Now that your case has been remanded, you should evaluate whether these stipulations and agreements are still valid and enforceable, and whether they remain necessary in light of the current posture of the case.

You should weigh the benefits and risks of additional discovery and ensure that any decision is consistent with your overall trial strategy. If there is outstanding discovery, it is important to apprise the remand court of these issues sooner rather than later so the court can set appropriate deadlines.

You should also consider whether there is a need and sufficient basis to conduct limited supplemental depositions of individuals who have previously been deposed. For example, to the extent that the plaintiff has received additional medical treatment, there may be a basis to conduct a limited deposition to explore that medical treatment, particularly if it is relevant to the plaintiff's alleged injuries and/or your overall trial strategy. You should also assess whether to conduct an independent medical

examination if one has not already been completed.

Finally, consider whether you need to supplement your prior responses to discovery requests. Now that discovery is either completed and/or substantially underway, there may be new or additional information or documents that you are required to disclose. Likewise, follow up with plaintiff's counsel on any outstanding discovery responses that should be supplemented.

### **Analyze Whether to File Dispositive or Evidentiary Motions**

There are a number of issues you will need to review with respect to motion practice. Over the course of the MDL, you may or may not have filed dispositive motions, Daubert motions to exclude expert testimony and motions in limine. If you did not file any of these motions, you should consider whether you are still permitted to do so.

For example, the MDL court may have informed the remand court that no additional discovery or motion practice is necessary and that the case is ready for trial. If this is the case, you will have to consider a strategy for approaching the remand court to obtain a briefing schedule and be prepared to specify the issues that need to be addressed, as well as explain why they were not raised before the MDL court.

On the other hand, if you did file any of these motions, you should analyze the MDL court's rulings to determine whether it applied the correct law in reaching its conclusions. Consider whether it is worthwhile to present these issues to the remand court.

Similarly, you should review the MDL court's rulings to identify what issues or rulings the MDL court expressly deferred to the remand court. For example, the MDL court may have deferred several case-specific issues to the remand court, such as expert and evidentiary issues that are best addressed by the trial judge. You should develop a strategy to ensure that the remand court timely rules on these outstanding issues well in advance of trial.

One way to accomplish this is by filing a motion for final ruling, which will allow you to persuasively frame the issues before the remand court. This is especially critical for any issues where the MDL court may have interpreted state law incorrectly. Throughout this entire process, you will want to consider the implications of previous rulings issued by the remand court in other cases, as well as the likelihood that the remand court will revisit any of the MDL court's rulings.

Keep in mind that the remand court's rulings on any pending motions and evidentiary briefing may impact your theory of the case, including the selection of deposition testimony to affirmatively designate. Consider suggesting to the court, and negotiating with plaintiff's counsel, case management deadlines that contemplate the court's final rulings on dispositive and evidentiary issues before you begin designating deposition testimony to present at trial. This will eliminate the need to revise your designations each time the court excludes evidence or argument.

### **Prepare the Final Pretrial Order**

Preparing the final pretrial order is perhaps one of the most time-consuming and cost-intensive phases of the pretrial process, so it is important for young lawyers to plan and prepare for this process well in advance of trial.

Most courts have standing orders addressing the court's particular preferences for preparing and filing the final pretrial order. As an initial step, you should consult with those standing orders to ensure compliance.

It is common for courts to require the parties to engage in at least one meet and confer regarding the final pretrial order before it is filed with the court. Some pretrial orders contain requirements for the parties to exchange deposition designations, witness lists, exhibit lists, motions in limine, jury instructions and/or verdict forms before providing these documents to the court. You will need to build in a sufficient amount of time and a large enough team to adequately manage preparing each of these items so that they are timely submitted to the court before trial.

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