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May 19, 2017

Honorable John Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W. Room 4114
Washington DC, 20001

Dear Chairman John Bates:

I write to propose that a new Rule 23.3 be added to the Federal Rules of Civil Procedure to address problems arising from unique procedures fashioned by transferee judges to govern large MDL actions, which consist of hundreds or thousands of individual, centralized cases.

MDL procedures are the subject of a growing chorus of concern and criticism. The House of Representatives passed H.R. 985, in part, to address perceived procedural unfairness in MDLs. Distinguished academic proceduralists raised multiple issues with MDLs at a recent roundtable hosted by the George Washington Law School. (By way of background and to reflect a range of views on MDLs, links to their roundtable papers are contained at the end of the attached proposal. Please note that several papers are draft and not finalized for general circulation.) The reach and complexity of the MDL problem warrant a full and open debate that can only be provided by the inclusive and transparent Rules Enabling Act rulemaking process.

The attached suggestion addresses only a single MDL aspect, the diffusion of a transferee judge's authority, and is proposed primarily to initiate the rulemaking process. A new Rule 23.3 should be comprehensive and address the many other problems created by procedures dealing with large MDLs, several of which are described in the roundtable academic papers. In accordance with the instructions posted on the Administrative Office's rulemaking website, I look forward to following the suggestion's progress after an agenda number is assigned to it. ("Upon receipt of a suggestion, an agenda number is assigned to prepare an

advisory committee's reporter and members for preliminary discussion at an upcoming meeting.")

The MDL Problem

More than 130,000 civil cases are pending in MDLs today, roughly 35% of the entire U.S. pending civil cases, and nearly 50%, if social security appeals and prisoner cases are excluded.

Over the past two decades, 20 very large MDLs on average have been pending in the federal courts at any given point in time. These 20 cases include roughly 90% of the 130,000 individual cases centralized by the 250 pending MDLs. This is no temporary phenomenon. Bench and bar reliance on the MDL process will continue because Supreme Court jurisprudence has closed off the class-action procedure to treat aggregated personal injury actions, and MDLs are the only game in town.

The JPML has adopted a policy of spreading out its appointments to designate new transferee judges who have little or no prior MDL experience. Although commendable, inexperienced transferee judges have little guidance, and must rely on serendipitous conversations with experienced MDL judges or unofficial guidance, like the *Duke Law MDL Best Practices*. Left largely to their own devices, transferee judges have developed procedures out of whole cloth. These innovative procedures include: (1) appointment of attorneys to plaintiffs' steering committees; (2) establishment of common-benefit funds; (3) screening of complaints—especially added tag-along complaints; and (4) selection of bellwether cases.

The fairness and legitimacy of these procedures are crucial because approximately 95% of the centralized cases are terminated by the transferee judges, notwithstanding the limited stated intent of the underlying enabling statute (28 U.S.C. § 1407), which authorizes courts to centralize cases for pretrial discovery rulings. The MDL procedures have evolved under the traditional trial-and-error process of common law. That tradition may be defensible when only the interests of individual litigants are involved. But the stakes are much higher in every large MDL when the consequences of well-intentioned, but flawed, procedures can penalize thousands of individual litigants.

No Principled Reason to Exclude MDLs from Rulemaking Scrutiny

Notwithstanding the admirable ingenuity and determination of individual transferee judges in working through the managerial MDL nightmares, there is no

principled reason to continue to exclude such a large percentage of cases from the rulemaking process. That debate was decided more than 80 years ago with the enactment of the Rules Enabling Act.

The JPML historically has offered informal advice on the management of cases centralized in MDLs since 1968, but the unprecedented surge in cases centralized in MDLs demand uniform and consistent procedures. Individual JPML judges, and for that matter, the JPML, are outstanding jurists, but they are no substitute for the rulemaking process, which brings together not only judges, but also Congress, Supreme Court, practitioners, academics, government officials, and all other interested parties.

The MDL procedures raise complicated issues, which require careful scrutiny by all interested parties under the disciplined and orderly rulemaking review process. There is a new urgency to initiate the rulemaking process because in the absence of judicial rulemaking, Congress has stepped in and, if not deterred, may preempt belated judiciary action.

Thank you for considering the proposal.

Sincerely,

John K. Rabiej

Attachment

cc: Hon. David Campbell
Hon. Sarah Vance
Professor Edward Cooper
Professor Rick Marcus
Professor Dan Coquillette

PROPOSED RULE 23.3

BACKGROUND

The legal authority for many of the procedures undertaken by MDL transferee judges is not self-evident, e.g., establishing million-dollar common benefit funds, assessing attorney fee's in state-related cases. Although Rule 16(c)(2) provides judges with broad pretrial authority, relying exclusively on Rule 16 for ordering such far-reaching actions is troubling.

It is no surprise that experienced judges see the possibility of rules governing MDLs as obstacles, because they narrow a judge's discretionary authority. But the oft-repeated argument that MDLs are too different for rulemaking is weak. First, the Civil Rules cover all types of cases, dwarfing the range of issues in MDLs. Second, only the 20 mega-MDLs are causing the biggest problems. Crafting rules governing only this small number would be relatively easy compared with typical rules that must govern all types of cases.

RULE 23.3

The specific procedural proposal targets only the largest MDLs out of the total 250 MDLs, which I define as any MDL consisting of more than 900 cases. There are three reasons for this limitation: First, these 20 mega-MDLs contain about 90% of all centralized cases, or about 120,000 cases. Second, the number of mega-MDLs has remained remarkably consistent over the years. Third, these mega-MDLs raise unique but common issues, including PSC selection, common-benefit fund, screening of complaint filings, and bellwether trials that are susceptible to common solutions.

To ensure that mega-MDLs are resolved fairly and with the most possible attention paid to each claim, transferee judges' power to dispose of mega-MDLs should be diffused. There is no doubt that centralizing thousands of cases under a single judge's purview vastly increases the efficiency of the process. Indeed, the 20 currently pending mega-MDLs—which include 90% of cases centralized in *all* pending MDLs—can be disposed of entirely by transferee judges. But investing individual judges with such power creates unforeseen consequences that adversely affect the proceedings' fairness.

The first fairness concern involves the attention a single judge can pay to each claim in a mega-MDL. It is difficult for a single judge to provide the adequate time or attention necessary to screen thousands of initial filings. Second, on the back end of the proceeding, one judge cannot provide the same amount of individualized care in disposing of thousands of aggregated cases as she would be

able to provide when disposing of a standalone case. This limited amount of attention has raised criticism about questionable rulings, most recently noted in the House Committee Report accompanying H.R. 985: "[s]ome MDL judges have issued questionable rulings on pivotal issues that are not subject to immediate appellate review, including the admissibility of expert evidence and the appropriateness of multi-plaintiff trials."[1]

The risk of questionable rulings increases not only because the judge has limited time available per case, but also because the judge is highly motivated to reach settlement, even at the cost of pressing parties to withdraw reasonable objections. There are two reasons motivating a judge to reach settlement. The first reason has been regularly raised at conferences. Transferee judges often view remand as a personal failure. Remands irritate colleagues, because transferor judges must start fresh and re-acclimate themselves to remanded cases. Thus, peer pressure strongly incentivizes settlement. Moreover, because remanding cases is perceived as failure, the judge risks losing future, highly desired MDL assignments.

The second reason has been largely ignored but applies an equal—if not more subtle—degree of pressure on transferee judges to settle mega-MDLs. That reason is the personal stake a transferee judge has in the disposition of her cases. Unlike class actions, in mega-MDLs, the transferee judge takes an active role in setting up the complex machinery needed to govern the case and hand-picking lawyers to serve on the plaintiffs' steering committee. When a mega-MDL commences, the transferee judge inserts herself into the adversarial proceedings often authorizing a multi-million dollar common-benefit fund, which reimburses lawyers for common-benefit work. Creating and administering such a fund requires elaborate procedural machinery and creates high expectations of a pay-out.

This machinery demands a large investment of time and money by the PSC and plaintiff lawyers—all of which must be set in motion and authorized by the transferee judge. Unless a settlement is reached, all efforts to create and operate this procedural machinery, which was established by the judge, and the scores of individual lawyers performing common-benefit discovery work over several years—not to mention the expenses incurred by the plaintiffs' steering committee—will go uncompensated. It is easy to see how establishing such a robust machinery can exert pressure on a transferee judge to do all in her power to settle a mega-MDL.

Unlike Rule 23 class actions, where the judge does not authorize the fund at the beginning of the case, in mega-MDLs the transferee judge takes on the personal responsibility for authorizing the fund at the beginning of the proceedings.

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[1] H.R. REP. NO. 115-25, at (2017).

Although discovery lawyers recognize that no compensation is guaranteed in a mega-MDL, they have come to expect settlement (and hence compensation). As a result, if the transferee judge fails to settle the case, she must face the uncomfortable proposition of dealing not only with the 20 or so lawyers she hand-picked to serve on the steering committee, but also the scores of other lawyers who took on the discovery work in anticipation of eventually being compensated. Informing a small army of lawyers that millions of their collective dollars will go unreimbursed because the judge failed to persuade the parties to settle the mega-MDL must be difficult.

To combat these pressures and to mitigate the impact of a single ruling affecting thousands of individual litigants, case-disposition authority should be distributed to—and shared among—multiple judges. There are at least two ways to do this. One way would be for the JPML to divvy up cases among several judges at a mega-MDL's outset. But that would defeat § 1407's purpose to preserve efficiency by centralizing discovery responsibility in a single judge.

Another, more workable way to diffuse authority would be to equally assign individual cases to, for example, five judges for final disposition at some point *after* most discovery in the mega-MDL is complete, but before any bellwether trial takes place. Ideally, case assignments would be made shortly after the bellwether cases have been selected. At that point, the mega-MDL's individual cases would be allocated among and distributed to the five judges—including the transferee judge, who would receive a proportionate share of cases. Each judge's primary responsibility would be to oversee final disposition of her assigned cases; that is, to decide whether to dispose of a case on motion, settle, or remand. Although implementing this change might require a change in existing Judicial Conference policies, inter-circuit assignment rules could be relaxed to allow assignments to judges outside the district to handle the 20 mega-MDLs in the same district.

Allocating mega-MDLs in this way would certainly impose additional burdens on the Judiciary, but those burdens are proportionate to the interest in allocating authority and the share of the federal docket represented by the 20 mega-MDLs. Currently, the 20 mega-MDLs represent more than 35% of all pending civil cases in the federal trial courts and more than 50% of the civil docket if prisoner and social security cases are excluded. Approximately 1,000 federal judges are available to take cases. In light of those statistics, any increased burdens arising from the diffusion of disposal authority would be reasonable.

Diffusing authority in this way would provide many benefits. First, assigning more judges would afford greater attention to individual cases. This greater attention could mitigate some of the fairness concerns raised when case-

disposition authority is vested solely in the transferee judge. Nevertheless, the extent of individualized treatment should not be over-stated, particularly with respect to the three pending mega MDLs that each consist of more than 15,000 cases. Even if five judges were assigned to a mega-MDL with 15,000 cases, each judge would still be responsible for 3,000 cases. Although 3,000 cases is a large number, it is more manageable than 15,000 cases.

Second, if authority is distributed after bellwether trials are identified but before they are heard, those cases would be handled by different judges, which could potentially give parties a more accurate picture of their cases' true worth. Doing so would also relieve the pressure on any one judge to settle a litigation after creating a multi-million dollar common-benefit fund, raising expectations of a payout, and watching lawyers she appointed spend large amounts of money on discovery. Further, it would also relieve pressure on a judge who makes a ruling that disposes of all of her case's main issues. Under the current regime, such a ruling would affect every case in the mega-MDL. Instances of judges permitting "*Daubert* do-overs" illustrate the difficulties in making a single ruling governing thousands of individual cases. The effect would be mitigated if the mega-MDL's cases are divided up among multiple judges. Finally, dividing up disposal authority among five judges later in the MDL's life cycle would carry out Congress's original intention in enacting § 1407 by ensuring that the transferee judge retains authority to efficiently address early discovery issues.

Of course, diffusing the transferee judge's authority has its drawbacks. Doing so would create added transactional costs by requiring the formation of smaller, added steering committees to manage cases once they are reassigned to the five judges. Shared authority would also create the potential for conflicting or inconsistent rulings on similar later-stage issues. It would also increase inefficiency by introducing four judges to the case who would need to quickly familiarize themselves with the litigation. But these drawbacks are both tolerable and manageable in light of the benefits that such a diffusion of authority would provide.

PAPERS SUBMITTED AT GW ROUNDTABLE

Robert G. Bone - "Compared to What?: A Qualified Defense of the MDL"

Andrew Bradt - "Geography, Personal Jurisdiction, and MDL Case Assignments"

Stephen B. Burbank - "The MDL Court and Case Management in Historical Perspective"

Elizabeth Burch - "Rethinking the Selection and Compensation of Lead Lawyers in Multidistrict Litigation"

Abbe Gluck - "Unorthodox Civil Procedure"

Deborah R. Hensler - "No Need to Panic: The Multi-District Litigation Process Needs Improvement Not Demolition"

David Proctor and Sam Issacharoff - "Selection and Compensation of Counsel in Multi-District Litigation" (.ppt)

Linda S. Mullenix - "Developments Relating to the European Union's Recommendations for Collective Redress, and the Opt-Out/Opt-In Problem"

Linda S. Mullenix - "Policing MDL Non-Class Aggregate Settlement: Empowering Judges through the All Writs Act"

John Rabiej - "Two Proposals to Improve How Courts Manage 'Mega-MDLS'"

Judith Resnik - "Doing the State's Business: From Collective Actions for Fair Labor Standards and Pooled Trusts to Class Actions and MDLs in the Federal Courts"

Judith Resnik – "'Vital' State Interests: From Representative Actions for Fair Labor Standards and Pooled Trusts to Class Actions and MDLs in the Federal Courts"

Charles Silver - "Some Questions About Lead Counsels' Appointment, Duties, and Compensation"

Jay Tidmarsh - "The MDL as De Facto Opt-In Class Action"

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