ADVISORY COMMITTEE ON CIVIL RULES

HEARING ON PROPOSED AMENDMENTS TO CIVIL RULES 16, 26, AND PROPOSED NEW RULE 16.1

October 16, 2023

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TAB 1

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October 5, 2023

SUMMARY OF TESTIMONY BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: R. Keeling Testimony Regarding Proposed Amendments to Civil Rules 16 and 26 Relating to Privilege Logging Practice

Dear Members of the Advisory Committee:

I am a partner at Sidley Austin LLP with a practice specializing in discovery and have wide-ranging experience with privilege issues in large, complex litigation.[1] On September 8, 2023, I submitted a Comment on the Proposed Amendments to Civil Rules 26(f)(3) and 16(b)(3), to provide my informed perspective on the excessive burdens and costs of document-by-document privilege logs in high-volume cases and to make specific recommendations to help the Advisory Committee as it continues its work to modernize privilege logging practice.

I am scheduled to testify at the public hearing on the Proposed Amendments to Civil Rules 16 and 26, which is scheduled for October 16, 2023 in Washington, DC. I have summarized my planned testimony below, which follows my submitted Comment. Primarily, I would like to explain to the Advisory Committee, based on my significant experience working on privilege logs in document-intensive cases, why the proposed changes do not adequately address the challenges of privilege logs in modern litigation, and may even make the problems worse.

1. **First, I plan to speak about the broad consensus that reform is necessary to alleviate the burdens of outdated privilege logging practices.**

Privilege log rules are outdated and are ill-suited to address the massive volume of ESI in modern litigation. There is a consensus among the legal community that reform is needed in this area of discovery, and the question now is what this reform should look like. I believe that my

[1] The views and opinions expressed in this Comment are those of the author only and do not reflect in any way the views and opinions of any law firm, company, agency, or other entity to which the author is affiliated.

considerable work on privilege logs in large, complex cases makes me well-positioned to offer guidance on this issue.

Our outdated privilege logging practice frustrates the goals of Rule 1. In large cases, the privilege log can easily reach tens of thousands (if not hundreds of thousands) of log entries, require thousands of hours of attorney time, and cost more than a million dollars. In some cases, this process can turn an otherwise reasonable discovery request into one that is disproportionate to the case. I will share my own experience, which confirms these points. Since January 2022, I have managed large-scale document reviews in five separate matters. Collectively, the privilege log entries that were compiled in just these five matters totaled more than 250,000 log lines. The process of conducting the privilege review cost more than $1 million for *each* of these matters.

This kind of tremendous effort is required in many large cases even though, in my experience, privilege logs provide relatively minimal value to parties or courts. In the matters discussed, for example, I received no substantive follow-up on the privilege log from the receiving party, confirming my view that the receiving party rarely reviews the majority of entries in large logs. Moreover, many courts have recognized that the traditional privilege log is often useless in furthering discovery. Rather, preparation of a traditional log in these cases is usually a substantial waste of resources for all involved.

2. **Second, I plan to explain, based on my significant experience, why the proposed amendments to Civil Rules 16 and 26 will not alleviate privilege logging burdens.**

I believe that changes to the proposed amendments and Advisory Committee Notes are necessary to achieve the legal community's shared goal of privilege log reform. Specifically, the proposed amendments do not address the heart of the problem—the need for clarity on the substantive standard for asserting privilege—and they may even be counterproductive and create new logging burdens in some cases, as I will discuss in further detail.

Fundamentally, the proposed amendments are insufficient because the meet and confer requirement does not correct the misapplication of Rule 26(b)(5) or clarify the legal requirements for asserting a claim of privilege. The Rule itself does not define what is required. And although the Advisory Committee Note to the 1993 Amendment expressly states that document-by-document logs may be too burdensome in large volume cases, the traditional log has become entrenched as the standard, both in practice and the caselaw. Even today, courts are misinterpreting the rule and ignoring the 1993 Advisory Committee Note by insisting on a traditional log in every case. The proposed amendments are insufficient because they do not clarify that Rule 26(b)(5)(A) does not require a traditional privilege log in every case. Importantly, given the massive increase in documents and privileged communications since the time of the 1993 Advisory Committee Note, a privilege log that would have been considered "voluminous" in 1993 would now be considered relatively small.

In addition, the proposed amendments are likely to be unworkable in many cases. Parties are usually not in a position to fully discuss and negotiate privilege logging issues at the outset of the case. Based on my experience, at this early stage, producing parties will not know their full custodian list, the prevalence of privileged communications in the production set, or the complexity of privilege issues that are likely to arise once the review really begins. The parties will not be able to meaningfully discuss burdens or costs, and the lack of certainty may cause needless disputes. Even if the parties can agree on certain aspects of a privilege protocol at this point, it may be too generic to be helpful and unanticipated factors are certain to arise and cause issues as the review progresses. Further, if the court gets involved in resolving these disputes, it will be challenging because key information, such as the number of privileged documents and the cost of production, will be missing at this stage of the case.

Moreover, a substantial concern that the proposed amendments does not address is the fact that current privilege logging practice places disproportionate discovery burdens on producing parties in asymmetric litigation, where one party has few privileged documents and the other party has a large number of privileged documents. This often happens in class action litigation, where individual plaintiffs have significantly fewer privileged documents than corporate defendants. The proposed amendment does not address this concern because there is no incentive for a party to agree to reasonable privilege logging requirements where the burdens will unevenly fall on his opponent who has many more documents to review, produce, and log.

3. **Third, I plan to testify that the call for rolling privilege logs in the Advisory Committee Notes is inconsistent with modernizing privilege logging practice, and to suggest alternatives to rolling logs.**

The proposed guidance on rolling privilege logs is contrary to Rule 1, and I respectfully encourage the Committee to remove or modify the proposed Notes that call for rolling logs. Based on my extensive experience, rolling privilege logs are ineffective and inefficient. They cause delay, increase costs, and result in lower quality logs, particularly in large document cases where resources are intensely focused on the document production itself. In addition, rolling logs often must be corrected and reproduced later based on new information from subsequent document review, which wastes time and money. Parties may initially over-withhold because they are not familiar enough with the documents to make informed decisions, especially when juggling the production and the log. Having to correct and redo prior logs (and make supplemental productions) is extremely inefficient and costly. Finally, rolling logs increase the risk that privileged communications will be inadvertently produced because parties are unable to complete sufficient quality control in favor of preparing productions and logs simultaneously. It is most efficient to compile the privilege log after the majority of documents have been reviewed and the lawyers are most familiar with the relevant facts, issues, and players involved.

Instead of calling for rolling logs, the Advisory Committee should consider alternatives that would better address the need to reduce burdens, achieve proportionality, and provide flexibility in modern privilege logging practice.

One possible modification may be to call for "tiered" or "staged" logs (rather than "rolling" logs) in the Advisory Committee Notes. This would have the benefit of prioritizing both the production and logging of key documents and resolving potential disputes early in the discovery process. Moreover, this approach would generally give the court an opportunity to provide early guidance on issues and documents likely to be most relevant to the case.

In addition to a tiered approach, there are two general principles that have been embraced in other areas of modern e-discovery that would be equally applicable and beneficial here. First, the Committee should embrace Sedona Principle 6, which gives responding parties relative autonomy in the procedures, methodologies, and technologies appropriate for producing documents and logically extends to privilege logging. As with document production, the withholding party is in the best position to determine how to establish its claim of privilege and should have the flexibility to decide what type of log is best suited to meet the needs of the case.

Second, and relatedly, the Committee should endorse standards that focus on whether the party claiming privilege engaged in a reasonable *process* for logging privileged documents, and not whether every document was perfectly logged. It is well-established that the standard in modern e-discovery is reasonableness, not perfection. But some courts continue to impose an incredibly high burden—something akin to perfection—in the logging process. Expressly adopting a reasonableness standard for privilege logs would bring privilege logging practice in line with modern principles of e-discovery.

I look forward to addressing the Advisory Committee at the upcoming public hearing and appreciate the opportunity to share my views on this important discovery issue.

Sincerely,

Robert D. Keeling
Partner

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September 8, 2023

COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: R. Keeling Comment Regarding Proposed Amendments to Civil Rules 16 and 26 Relating to Privilege Logging Practice

Dear Members of the Advisory Committee:

I am a partner at Sidley Austin LLP with a practice specializing in discovery and have wide-ranging experience with privilege issues in large, complex litigation. I have managed document productions that have resulted in the compilation of hundreds of thousands of privilege log lines. I serve as the co-chair of my firm's e-discovery team and have published extensively in the area of e-discovery, including on privilege issues.[1]

In response to the Advisory Committee's Invitation for Comment on Privilege Log Practice, I submitted a Comment dated July 30, 2021, in which I outlined the excessive burdens and costs of document-by-document privilege logs in high-volume cases. I also recommended several specific, potential reforms to Rule 26(b)(5) to modernize privilege logging practice. Specifically, I suggested that the amended Rule include: (1) a presumption that document-by-document logs are not required in large document matters and may violate proportionality; (2) a presumption that categorial or metadata logs are acceptable in large document matters; (3) a presumption that redacted documents do not need to be logged where the face of the document provides sufficient information to assess the claim; and (4) a rule that allows threading of email or chat messages for logging purposes.

In October 2022, the Advisory Committee on Civil Rules initially proposed amendments to Rules 26(f)(3) and 16(b)(3), as well as proposed Advisory Committee Notes to accompany the proposed amendments. The proposed amendment to Rule 26(f) would require parties to discuss and include in their discovery plan the timing and method for complying with Rule 26(b)(5)(A) related to privilege claims. The proposed amendment to Rule 16(b) would give the court

[1] The views and opinions expressed in this Comment are those of the author only and do not reflect in any way the views and opinions of any law firm, company, agency, or other entity to which the author is affiliated.

discretion to address the timing and method of such compliance in its scheduling order. Neither proposed rule amendment, however, addresses the substance of Rule 26(b)(5)(A)'s directive that a producing party describe the nature of documents withheld as privileged in a way that "enable[s] other parties to assess the claim."

Based on my review of the current proposed rule amendments and accompanying Advisory Committee Notes, as well as my significant experience working on privilege logs in document-intensive cases, I believe the proposed changes do not adequately address the challenges associated with privilege logs in modern litigation, and in fact certain Committee Notes will make the problem worse. I respectfully submit this comment on the proposed amendments to Rules 16 and 26 to share my views and to assist the Advisory Committee as it continues to discuss and refine the proposed amendments and Advisory Committee Notes.

I. There is Broad Consensus that Reform is Needed to Address the Burdens of Outdated Privilege Logging Practices.

Privilege log rules were developed in a paper world and are ill-suited to address the massive volume of electronically stored information ("ESI") that practitioners routinely must handle as part of discovery in litigation today. Although many other aspects of discovery practice have been modernized to account for the ease and prevalence of electronic communication and the staggering growth of ESI that has followed,[2] privilege logging norms and rules have not been addressed. Thus, there has been a growing consensus among the legal community—as has been recognized by the Advisory Committee—that reform is needed in this area of discovery.[3]

As explained in my July 2021 letter, the failure to bring privilege logging practice in line with modern times routinely frustrates the goals of Rule 1 to facilitate the just, speedy, and inexpensive resolution of litigation, particularly in large document cases. Specifically, the size, complexity, and cost of the privilege log can easily reach tens of thousands (if not hundreds of thousands) of log entries, require thousands of hours of attorney time, and often cost more than a million dollars. Moreover, with such enormous costs and burdens, the privilege logging process itself may render an otherwise reasonable discovery request disproportionate to the needs of the case. The tedious nature of compiling detailed information about each privileged document is

[2] *See, e.g.*, Fed. R. Civ. P. 37(e) & advisory committee's note to 2015 amendment (related to spoliation of ESI); *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y 2012) (approving use of technology-assisted review in document review), adopted, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

[3] *See, e.g.*, Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron, III, Committee on Rules of Practice and Procedure (Jan. 31, 2023), *available at* https://www.uscourts.gov/file/62395/download (noting "a broad (but not universal) consensus" that amendments to the privilege logging rules could be beneficial); Electronic Discovery Reference Model, EDRM Streamlined Privilege Log Protocol 1 (Nov. 30 2020), https://edrm.net/wp-content/uploads/2020/11/EDRM_Privilege-Log-Protocol_Draft-as-of-11_30_20.pdf ("In cases with large productions and a significant number of privileged documents, the traditional preparation of privilege logs is burdensome, time consuming, and frequently not particularly useful for requesting parties to evaluate the privilege claims.").

heightened not only where there is a substantial volume of documents, but also in complex cases where documents often involve numerous individuals from various corporate entities. Quite simply, compiling a document-by-document privilege log in large, complex cases is not only burdensome but can often become unmanageable.

The burdens of document-by-document privilege logging are not merely hypothetical or hyperbole. Since January 2022, I have managed large-scale document reviews in five separate matters. Collectively, the privilege log entries that were compiled in just these five matters totaled more than 250,000 log lines. The process of conducting the privilege review alone—including identifying privileged documents, composing document-by-document log entries, and performing quality control privilege review by outside counsel—cost more than $1 million for *each* of these matters.

In comparison to these tremendous costs, in my experience, the relatively minimal value privilege logs provide further underscores the need for reform. In four of the five matters discussed above, I received no substantive follow-up on the privilege log entries from the receiving party.

Similar to my recent experience and despite the overwhelming effort and resources that must be dedicated to completing a document-by-document privilege log in large cases, numerous courts have recognized that such a log is often "on the whole useless."[4] Moreover, in my experience, the receiving party (including its attorneys) virtually never reviews the majority of individual privilege log entries in large logs—because they simply do not have the time, money, or resources to do so—making the preparation of a traditional log in these cases a substantial waste of resources for both parties.

Having reviewed the current proposed rule amendments and Advisory Committee Notes with these points in mind, I respectfully submit that the Advisory Committee's proposed amendments fail to remedy the significant burdens of privilege logs in modern e-discovery and that additional changes are necessary to achieve the goals of such reform. The Committee's recognition of modern privilege log challenges and its efforts to address them are laudable. But the proposed amendments do little to address the crux of the problem—the need for clarity on the substantive standard for asserting privilege—and they may even be counterproductive and create new logging burdens in some cases, as outlined below. To that end, I believe the following observations may be helpful for the Committee to consider as it continues to discuss the proposed rule amendments and Advisory Committee Notes.

[4] *Covad Commc'ns Co. v. Revonet, Inc.*, 267 F.R.D. 14, 28 (D.D.C. 2010) (citing *Mitchell v. Nat'l R.R. Passenger Corp.*, 208 F.R.D. 455, 461 (D.D.C. 2002)). *See also In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489(PLF/JMF/AK), 2009 WL 3443563, at *10 (D.D.C. Oct. 23, 2009) ("Too often I have found the traditional privilege log useless.").

II. The Advisory Committee's Proposed Amendments Fail to Remedy the Significant Burdens of Privilege Logs in Modern e-discovery.

A. The proposed meet and confer requirement does not clarify the substantive standard for asserting privilege.

Fundamentally, the proposed amendments are insufficient because they fail to correct the misapplication of Rule 26(b)(5) or clarify the legal requirements for asserting a claim of privilege. As the Committee is aware, the 1993 Amendment to Rule 26(b)(5) set the requirement that litigants must "provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection," but it did not "define for each case what information must be provided."[5] The Advisory Committee Note to the 1993 Amendment, however, expressly contemplated a flexible standard based on the needs of the case, noting that document-by-document logs may be too burdensome in large volume cases.

Despite this guidance, the traditional, document-by-document privilege log emerged as the default expectation and has become entrenched, both in practice and in caselaw, over the past 30 years, notwithstanding the 1993 Advisory Committee Note. Although the proposed amendments to Rules 16(b) and 26(f) call on parties and the courts to address the "timing and method of complying with Rule 26(b)(5)(A)," they fail to provide much-needed clarity directing the parties and courts that Rule 26(b)(5)(A) does not require a specific method of compliance—namely, a traditional privilege log—in every case. Just like the failure of the 1993 Note to clarify the requirements, the proposed new amendments will likely miss the mark.

Without this clarification, there is no reason to believe that parties and courts will not continue to insist on the status quo of traditional privilege logging, thwarting the goal of modernizing privilege logging practice. In short, while the proposed amendments add procedural requirements that direct parties and courts to address privilege logging as part of the discovery plan, they fall far short of correcting the prior misapplication of Rule 26(b)(5)(A) or clarifying that the standard for asserting privilege does not require a traditional log. This is especially problematic because, even today, courts continue to misinterpret the rule and ignore the 1993 Advisory Committee Note, insisting instead on document-by-document privilege logging in all cases.[6]

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[5] Fed. R. Civ. P. 26(b)(5) advisory committee's note to 1993 amendment. The Committee thought that the requirement of providing "pertinent" information would "reduce the need for in camera examination of … documents." *Id.*

[6] *See, e.g.*, *Metz Culinary Mgmt., Inc. v. OAS, LLC*, 2022 WL 17978793, at *2-3 (M.D. Pa. Dec. 28, 2022) (ordering party "to provide a privilege log asserting any of its objections to each request and as applying to each document, rather than as a general, blanket assertions" and citing multiple Third Circuit cases for the proposition that "claims of privilege '*must* be asserted document by document, rather than as a single, blanket assertion'") (citations omitted; emphasis added).

B. The proposed amendments are insufficient because the burdens of creating a privilege log are not ascertainable at the outset of discovery and often prove to be disproportionate to the requested discovery.

Another significant challenge of the current proposed amendments is that parties typically are not in a position to fully discuss and negotiate privilege logging issues at the outset of the case, as required by the proposed rules. Indeed, Rule 26(f)(1) requires that the parties' discovery conference takes place "as soon as practicable" and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).[7] At this early stage of the case, however, parties generally do not have a complete picture of what will be required during discovery, including as it relates to privilege logs. For example, producing parties will not know their full custodian list, the prevalence of privileged communications in the production set, or the complexity of privilege issues that may arise once the review begins. Thus, at the time of the Rule 26 and 16 conferences, parties lack critical information about the scope of discovery, including privilege, and they will be unable to predict the burden or cost of the forthcoming privilege review.

Given these uncertainties, the proposed amendments may prove to be unworkable in many cases. Without "a full appreciation of the factors that bear on proportionality," producing parties will be unable to meaningfully participate in discussions about what is reasonable in terms of privilege logging.[8] Disputes may therefore arise at the outset before the parties have an informed view of what is likely to be proportional discovery requests. Even if the parties are able to reach agreement on a privilege protocol at the outset, it may be so generic as to be unhelpful in establishing key aspects of the privilege review. Further, unanticipated factors may arise during the privilege review that requires—perhaps in the eyes of only one party—changes to the privilege protocol in order to maintain proportionality and address undue burdens. At this point, discovery disputes are likely to arise.

If the parties cannot resolve these discovery disputes, the court will step in and consider the questions of proportionality and undue burden.[9] But the analysis will similarly be difficult for the court when the number of privileged documents is unknown and the cost of production is still theoretical. Some logs may take "thousands of hours and hundreds of thousands of dollars to prepare,"[10] but it usually will not be apparent that a logging protocol is non-proportional until the

[7] Fed. R. Civ. P. 26(f)(1).
[8] Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.
[9] *Id.* ("But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.").
[10] Order, *Cooper v. IBM Pers. Pension Plan*, No. 3:99-cv-829-GPM, at 4 (S.D. Ill. Oct. 31, 2002), ECF No. 139; *see also CS Bus. Sys., Inc. v. Schar*, No. 5:17-cv-86-Oc-PGBPRL, 2017 WL 8948376, at *4 (M.D. Fla. June 15, 2017) (permitting categorial privilege log based on defendants' argument that "creating a privilege log collecting the relevant emails … would be unduly burdensome and expensive—exceeding one-hundred-thousand dollars in costs and over four-hundred hours in time ….").

parties are nearing the end of a review. Many responding parties encounter unexpectedly large numbers of privileged communications in their review universe, exponentially increasing the expense and burden of complying with otherwise proportional discovery requests. The proposed rule amendments simply do not take into account these challenges of modern e-discovery, especially in large, complex cases, and they are likely to prove unworkable in many cases.

C. The proposed amendments do not address the burdens of asymmetric litigation.

Nor do the proposed amendments to Rules 16(b) and 26(f) account for the fact that current privilege logging practice places disproportionate discovery burdens on producing parties in asymmetric litigation. Many privilege disputes in civil litigation involve asymmetrical litigation, where one party has few, if any, privileged documents and the other party has a large number of privileged documents that it must log. Courts have recognized that "asymmetric discovery burdens are often the byproduct of asymmetric information."[11]

In class action litigation, for example, plaintiffs often have fewer documents to produce and log, while defendants typically have large amounts of ESI and bear most of the privilege log burden.[12] As the Seventh Circuit has observed, these plaintiffs sometimes "us[e] discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff[s] regardless of the merits of [their] suit."[13] The burdens of current privilege log practice are particularly unjust in this situation, where one party holds the majority of relevant documents and the opposing party insists on burdensome privilege log requirements.

In contrast, in large, complex corporate litigations—where both sides possess significant volumes of privileged documents—the parties are typically more cooperative and practical in their privilege log requests. In those cases, full document-by-document privilege logs are rarely used because privilege logs would impose an undue burden on both parties.

The proposed amendment requiring parties to meet and confer about the method of compliance for asserting a privilege claim does not address the realities of asymmetric litigation. Under the amended rules, there is no incentive for a party to agree to reasonable privilege logging requirements where that party knows the discovery burdens will unevenly fall on his opponent who has many more documents to review, produce, and log. In this situation, at best, the parties are likely to meet and reach an impasse that requires judicial intervention regarding what is a reasonable privilege logging protocol in light of the circumstances of the case. And, at worst, one party will be able to leverage the asymmetric privilege log burdens to its strategic advantage at the outset of the case, violating the principle of Rule 1 that calls for the just, speedy, and inexpensive resolution of every matter. Without proscribing a one-size-fits-all approach to privilege logging, the amended rules could provide some general guidelines, along the lines of

[11] *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 591 (4th Cir. 2015) (Wynn, J., dissenting in part).
[12] *See, e.g.*, *Babare v. Sigue Corp.*, No. C20-0894-JCC, 2020 WL 8617424, at *2 (W.D. Wash. Sept. 30, 2020) ("It is well-recognized that discovery in class actions is expensive and asymmetric, with defendants bearing most of the burdens.").
[13] *Am. Bank v. City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010).

those suggested in my July 2021 letter, that would help parties in asymmetric litigation to level the playing field in terms of privilege logging burdens.

III. The Advisory Committee Notes Encouraging the Production of Rolling Privilege Logs are Inconsistent with Modernizing Privilege Logging Practice.

A. Requiring the production of rolling privilege logs is contrary to Rule 1.

As explained above, despite the tremendous effort and resources required to compile a privilege log in large document cases, courts have recognized the relatively minimal benefit it confers in return.[14] Moreover, despite the significant time and careful attention required to draft individual log lines for each privileged document—which often number in the tens or hundreds of thousands—the majority of individual privilege log entries in traditional logs are *never* reviewed by the receiving party or its attorneys. It simply is not feasible for attorneys to review all (or even most) individual entries on lengthy privilege logs, given the limited time and resources available and the high costs of litigation. Rather than alleviate these concerns, the proposed Advisory Committee Notes calling for the production of rolling privilege logs will magnify them.

Based on my extensive experience managing large document productions and the compilation of privilege logs, providing multiple privilege logs on a rolling basis is an ineffective and inefficient process that leads to even more needless waste and costs. Because the proposed Advisory Committee Notes encourage the use of rolling privilege logs, they are contrary to the mandate of Rule 1.[15] Thus, the Committee should remove or modify the proposed Advisory Committee Notes on this point.

The proposed Advisory Committee Note to accompany the proposed amendment to Rule 26(f)(3)(D) recommends that a producing party provide discovery, including privilege logs, on a rolling basis. Specifically, it states: "Often it will be valuable to provide for 'rolling' production of materials *and an accompanying listing of withheld items*. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution." (emphasis added). Similarly, the proposed Advisory Committee Note to the proposed amendment to Rule 16(b) encourages the use of rolling privilege logs: "It may be desirable for the Rule 16(b) order to provide for 'rolling' production that may identify possible disputes about whether certain withheld materials are indeed protected."

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[14] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489(PLF/JMF/AK), 2009 WL 3443563, at *10 (D.D.C. Oct. 23, 2009) ("[T]oo often I have found the traditional privilege log useless."); *see also Lurensky v. Wellinghoff*, 271 F.R.D. 345, 355 (D.D.C. 2010) (finding "privilege logs to be on the whole useless"); *Marshall v. D.C. Water & Sewage Auth.*, 214 F.R.D. 23, 25 n.4 (D.D.C. 2003) (finding privilege logs are "useless"); *Mitchell v. Nat'l R.R. Passenger Corp.*, 208 F.R.D. 455, 461 (D.D.C. 2002) ("While Fed.R.Civ.P. 26(b)(5) requires what lawyers call a 'privilege log,' I have held that such logs are nearly always useless.").

[15] Fed. R. Civ. Proc. 1.

The Advisory Committee guidance encouraging the provision of rolling privilege logs will have the opposite of the intended result of streamlining the process; the guidance will lead to delay, increased costs, and lower quality logs in many large document cases. Foremost, the document production process is itself incredibly burdensome, and having to provide privilege logs at or near the same time as corresponding document productions will compound those burdens, decreasing the quality and accuracy of the privilege log. Resources are not infinite. Providing privilege logs on a rolling basis substantially delays the completion of document productions to the other side because it pulls resources away from finalizing the document production, directing them instead toward the completion of privilege log entries. Similarly, attention spent on ensuring the document production is of high quality takes away attention spent improving the quality of the privilege log.

Further, more often than not, rolling log requirements create needless "fire drills" where not enough time (or resources) exists to simultaneously provide quality productions and quality log entries. Because document productions are more immediate and may be subject to court order, the privilege log often suffers between the two. Parties typically care much more about receiving documents than receiving a privilege log, and therefore it is more important to the efficient management and resolution of cases to prioritize productions over logging. This results in privilege logs of inferior quality, which often leads to disputes (including motion practice requiring court attention) where the receiving party objects to various log entries.

Second, privilege logs that are produced on a rolling basis often must be corrected and reproduced later in the process based on newly discovered information from subsequent document review that sheds light on the privilege claim. For example, the question of whether an individual copied on a communication is a third-party recipient who breaks privilege may not be clear from review of a single document, but subsequent review of additional documents may assist lawyers in making the correct privilege determination in the first instance. As another example, an email discussion that may, at first glance, seem legal in nature may actually be about a business issue that becomes apparent only when the document review is far enough along to put certain conversations into context. In these instances, and many others, parties may over-withhold because they cannot engage in sufficient due diligence about these issues when juggling the production and the log. Having to correct and redo prior logs (and make supplemental productions from documents in the previous log population) is extremely inefficient and costly.

Finally, rolling logs increase the risk that privileged communications will be inadvertently produced because parties are unable to complete sufficient quality control in favor of preparing productions and logs simultaneously. Because many litigations proceed without a Rule 502(d) order in place, the proposed rule will lead to needless sideshows on whether the producing party took reasonable steps to prevent the disclosure of privileged information. This will further delay the resolution of the matter on the merits, in violation of Rule 1.

In contrast, it is far more efficient, from both a time and cost perspective, to compile the privilege log after the majority of documents have been reviewed and the reviewing lawyers are most familiar with the relevant facts, issues, and players involved. Completion of one or more privilege logs towards the end of the production process saves the producing party from wasting time and money. It also will result in a higher-quality privilege log—one that is based on a more comprehensive understanding of the case and therefore contains the most accurate information possible. Without the burden of simultaneously producing documents, parties can devote dedicated resources to improve the quality of the log. As discussed above, compiling privilege logs later in the litigation also reduces the risk of clawbacks.

B. The Advisory Committee should consider alternatives to recommending rolling privilege logs.

The proposed Advisory Committee Notes present a risk that parties or courts will point to the guidance on rolling privilege logs as a basis for arguing that the production of rolling logs is required in every case, even where the circumstances make rolling logs unduly burdensome or impractical. In light of the significant inefficiencies and burdens of rolling logs, as explained above, the Committee should modify the Advisory Committee Notes to reflect principles that will better address the need to reduce burdens, achieve proportionality, and provide flexibility in modern privilege logging practice.

One possible modification may be to substitute the word "rolling" with "tiered" or "staged" in the comments, as it relates both to the production of documents and accompanying privilege logs. This modification would align with the Advisory Committee's desire to prioritize the production and logging of documents that are most likely to contain information that is material to the issues in the case. Thus, the Advisory Committee Notes could encourage an agreement or court order that prioritizes production and logging for certain priority documents (*e.g.*, tier 1 / stage 1 documents) so that any potential disputes related to such claims could be resolved as early as possible in the discovery process. Moreover, the tiered approach would not only allow for early resolution of disputes, but would generally give the court an opportunity to provide early guidance to the parties on the issues and documents likely to be most relevant to the case.

In addition to encouraging a tiered approach, there are two general principles that have been embraced in other areas of modern e-discovery that would be equally applicable and beneficial in the context of privilege logging guidance and would be an alternative to suggesting that parties should provide rolling logs. First, the Committee should embrace Sedona Principle 6, which states: "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored

information."[16] Numerous courts have cited Sedona Principle 6 for the proposition that responding parties should have relative autonomy in the procedures, methodologies, and technologies appropriate for producing documents.[17] This principle logically extends to privilege logging since the production of documents necessarily includes the decision to withhold documents deemed privileged and to defend that privilege claim. Thus, Sedona Principle 6, which affords deference to the producing party to determine the best method for complying with production requirements, should apply equally to privilege logging practice. In other words, courts should recognize that the withholding party is in the best position to determine how to establish its claim of privilege and should have the flexibility to decide what type of log is best suited to meet the needs of the case.

Second, and relatedly, the Committee should adopt rules and standards that focus on whether the party claiming privilege engaged in a reasonable and defensible *process* for logging privileged documents, and not whether every individual document on a log with hundreds of thousands of entries has been perfectly logged. The standard in modern e-discovery is reasonableness, not perfection.[18] Indeed, there are several examples within the Federal Rules that

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[16] Sedona Conf., *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 118 (2018), https://thesedonaconference.org/sites/default/files/publications/The%20Sedona%20Principles%20Third%20Edition.19TSCJ1.pdf.

[17] *See, e.g.*, *Hyles v. New York City*, 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016) (citing Sedona Principle 6 when declining to "force the City as the responding party to use TAR when it prefers to use keyword searching"); *Nichols v. Noom Inc.*, No. 20-CV-3677 (LGS) (KHP), 2021 WL 948646, at *2 (S.D.N.Y. Mar. 11, 2021) (stating that a responding party "could use its preferred software to collect email documents, finding that method reasonable and deferring to the principle that a producing party is best situated to determine its own search and collection methods so long as they are reasonable"); *see also Kleppinger v. Tex. Dep't of Transp.*, No. L-10-124, 2013 WL 12137773, at *3 (S.D. Tex. Jan. 24, 2013) ("Rule 26 provides very little guidance on discovery of ESI, and courts have used the ESI discovery principles published by the Sedona Conference as a guide in resolving ESI discovery disputes.").

[18] *See, e.g.*, *Malone v. Kantner Ingredients, Inc.*, No. 4:12CV3190, 2015 WL 1470334, at *3 (D. Neb. Mar. 31, 2015) ("The discovery standard is, after all, reasonableness, not perfection." (quoting Sedona Conf., *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 204 (2007))); *Da Silva Moore*, 287 F.R.D. at 191 ("[T]he Federal Rules of Civil Procedure do not require perfection."). *See also* Sedona Conf., *The Sedona Conference Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, at 5 (Sept. 2016 Public Comment Version), https://thesedonaconference.org/sites/default/files/publications/The%2520Sedona%2520Conference%2520Commentary%2520on%2520Defense%2520of%2520Process_Public%2520Comment%2520Version_Sept%25202016.pdf (Principle 1) ("An e-discovery process is not required to be perfect, or even the best available, but it should be reasonable under the circumstances."); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) ("In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection."), *abrogated in part on other grounds by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

illustrate this principle.[19] Moreover, courts have repeatedly explained in the context of e-discovery that perfection is not attainable and not required: "Courts cannot and do not expect that any party can meet a standard of perfection."[20]

Despite the overwhelming consensus that perfection in e-discovery is not the standard, some courts continue to impose an incredibly high burden on parties and require a standard akin to perfection in the logging process. Bringing privilege logging practice in line with modern principles of e-discovery, the Committee should adopt the same reasonableness standard in the context of privilege logs that applies to the discovery process generally. There is no basis for holding privilege logging to a higher (and unachievable) standard than other aspects of modern e-discovery.

Sincerely,

Robert D. Keeling
Partner

[19] *E.g.*, Fed. R. Civ. P. 26(g)(1) (requiring that certification of discovery responses be informed by "a reasonable inquiry").
[20] *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, No. 13-373-SDD-EWD, 2018 WL 276941, at *6 (M.D. La. Jan. 3, 2018) (alteration omitted) (quoting *Enslin v. Coca-Cola Co.*, No. 2:14-cv-06476, 2016 WL 7042206, at *3 (E.D. Pa. June 8, 2016)) (denying motion to compel production where defendants' efforts were reasonable).

TAB 2

My name is Doug McNamara, and I am a plaintiffs-side attorney specializing in consumer class actions in products cases, data breaches, and environmental litigation.[1] I have served various leadership roles in multidistrict litigations on the plaintiffs' side. Before that, I was public defender in Brooklyn, and then spent a few years defending pharmaceutical companies while at Arnold & Porter. I have also taught as an adjunct at George Washington University School of Law on environmental and toxic torts.

I support the proposed amendments to Rules 16 and 26 because they will aid the courts and parties to address privileged claims surrounding documents. The new language will focus the parties and court to resolve the timing of the production of logs and the method of the log format at the beginning of a case, hopefully avoiding unnecessary delays and costs associated with late production of inadequate logs or belatedly discovered over-withholding of documents as privileged.

Changes to Rule 16 and 26 – the Benefits of Early Discussion of Logs and Their Production

First, timing. The sooner is better. It is very common that producing parties sit on producing a privilege log until "substantial completion" of documents which may be right before the end of fact discovery. This is consistent with how document productions often go, with junior lawyers or contract attorneys – who may not know what a legitimate claim for attorney client privilege or work product is – making the first cuts. By the time senior counsel review the logs, depositions may have already been taken. Then with the log, deprivileged documents are produced, and redepositions may be needed, adding additional time and expense to the litigation.

This was my experience recently in *In re* Marriott International Customer Data Sec. Breach Litig., MDL No., 19-md-2870, where the parties have been aided by retired Magistrate Judge John Facciola[2] as a Special Master. The parties met and conferred on categorical logging for months but could not agree on the scope and descriptions. Special Master Facciola suggested the parties just proceed with traditional logging. Then between March and July of 2021—supposedly *after* the bulk of documents had been produced and several depositions had already been taken—Marriott produced over 13,000 "de-privileged" documents. The documents included incident timelines, risk assessments, and nonlawyer emails that Plaintiffs relied on in their recently filed class certification brief. These documents would have likely remained unproduced, having fallen within the broad categories suggested for logging. The late production necessitated creativity between the parties through interrogatories or 30(b)(6) depositions, to avoid re-deposing key witnesses. Earlier direction from the Court on the log format and timing of its production would have avoided this.

Committee Note on Log Formats – Categorical Logs Exacerbate Over-Withholding

Secondly, I would like to discuss the Committee's note on log formatting. My experience

[1] My full bio is at https://www.cohenmilstein.com/professional/douglas-j-mcnamara.
[2] Judge Facciola has written on the topic of categorical logging. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. Rev. 19 (2009).

with categorial logging is categorically bad. The reasons are two-fold: first, producing parties tend to over-designate documents as privileged, and second, categorical logs make it harder to catch such over-designation.

Over-designation or over-withholding of documents has long been a problem. That was my experience as a junior associate at a defense firm in the 1990s, reviewing documents for my pharmaceutical client for relevance and privilege. No one wanted to be the lawyer who gave plaintiffs a really hot document. So, you put in the "maybe privileged" pile as instructed for now until someone more senior eventually made the decision or came up with a basis to withhold it.

Though I have changed since then, the eternal worries of junior lawyers have not. In February of this year, Judge Chhabria in the Northern District of California considered a sanctions motion against Facebook and Gibson Dunn in the *Cambridge Analytica* case. Facebook and Gibson Dunn produced a 180,000 document log. After a 3,062 document sampling was reviewed, Gibson de-privileged **63% of the docs.**[3] *In re Facebook, Inc. Consumer Priv. User Profile Litig.,* No. 18-MD-02843-VC, 2023 WL 1871107, at *19 (N.D. Cal. Feb. 9, 2023).

At the sanctions hearing, Gibson admitted to rampant over-withholding of documents as privileged for the same reasons 25-year-old Doug McNamara flagged hot docs to withhold:

> Second, Gibson Dunn designated a massive number of documents as privileged, even though for many of them it's difficult to imagine any conceivable argument in support of that assertion. **Gibson Dunn's only response is that nervous associates over-designated the documents to avoid waiving privilege**. But Gibson Dunn has an obligation to ensure that even its nervous associates follow the law.

Id. at *27 (emphasis added).

Categorical logging cannot correct over-withholding and can only exacerbate it. To simplify things, privilege claims[4] can boil down to four questions and five scenarios:

[3] *In re Facebook, Inc. Consumer Priv. User Profile Litig.,* No. 18-MD-02843-VC, 2023 WL 1871107, at *19 (N.D. Cal. Feb. 9, 2023).

[4] For attorney client privilege, the producing party must show: "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *United States v. Jones,* 696 F.2d 1069, 1072 (4th Cir. 1982).

Questions as to Privilege	Likely Result
1. Who sent the document? 2. Who got the document? 3. When was it sent? 4. What was in it?	1. Not written by a lawyer, probably not legal advice.[5] 2. Sent to many non-lawyers, probably business advice; [6] Sent outside the company, unlikely meant to be confidential or privilege is waived.[7] 3. Created well before a case was filed, probably not done in anticipation of litigation.[8] 4. Recapitulating underlying facts, probably not work product.[9]

With categorical logging, who sent it, who received it, what was it and when is often reduced to generic buckets like, "communications between client and outside counsel" with an appendix that may list who is included. Lumping documents together by category complicates or prevents an opposing party from to competently assessing the legitimacy of an asserted privilege,

[5] *Neuder v. Battelle Pac. Nw. Nat'l Lab.,* 194 F.R.D. 289, 295 (D.D.C. 2000) ("[D]ocuments prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice.").

[6] *Compare Wengui v. Clark Hill, PLC,* 338 F.R.D. 7, 10-11 (D.D.C. 2021) (finding forensic report created for remediation discoverable as primary purpose not litigation advice), with *In Re Experian Data Breach Litig.,* No. 15-01592-AG, 2017 WL 4325583, at *3 (C.D. Cal. May 18, 2017) (shielding third-party forensic report commissioned by outside counsel where it was only shared with legal team and not with entire incident response team).

[7] *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289, 304, 306 (6th Cir. 2002) (finding a party's voluntary disclosure of protected documents to the federal government, even under a confidentiality agreement, constituted a complete waiver of privilege); *In re Premera Data Breach Litig.,* 329 F.R.D. 656, 662–66 (D. Or. 2019) (finding draft documents regarding customer notification, press, and timelines for remediation distributed among company employees or to third-party vendors for general discussion, with an attorney merely copied were not privileged).

[8] *Hertzberg v. Veneman,* 273 F. Supp.2d 67, 75 (D.D.C. 2003) ("While litigation need not be imminent or certain in order to satisfy the anticipation-of-litigation prong of the test, this circuit has held that at the very least some articulable claim, likely to lead to litigation, must have arisen, such that litigation was fairly foreseeable at the time the materials were prepared." (internal quotations omitted)); *In re Dominion Dental Services USA, Inc. Data Breach Litigation*, 429 F. Supp. 3d 190, 194 (E.D. Va. 2019) (finding the fact that a report was done by third-party vendor with pre-breach obligation to conduct such forensic reports contradicted claims it should be shielded by the attorney work product doctrine).

[9] "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney[.]" *Upjohn Co. v. United States,* 449 U.S. 383, 395 (1981).

giving the producing party a massive adversarial advantage.[10] Further, if privilege designations are challenged, a producing party may end up belatedly creating a document-by-document log anyway so the court may assess the propriety of the asserted privilege.[11] Thus any supposed efficiency is lost. For example, while the Southern District of New York includes categorical logging as a presumptively permissible option in its Local Rule 26.2,[12] there are many decisions finding in practice such logs are inadequate.[13]

Some corporate defendants bemoan the costs associated with a document-by-document log. These concerns are overblown. First, technology assisted review can easily capture the metadata of authors, recipients, and dates or communications to help with log creation. This data

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[10] 2 Paul R. Rice et al., *Attorney-Client Privilege in the U.S.* § 11:8 (2022) (noting "categorical privilege logs have been accepted only in the limited circumstances that such a format can provide sufficient information for a party to determine that the communications would be privileged, as required by Rule 26(b)(5)").

[11] *NLRB v. Interbake Foods, LLC,* 637 F.3d 492, 502 (4th Cir. 2011) ("Because Interbake has not presented a document-by-document privilege analysis of the reply e-mails or offered a specific reason why the e-mail string should be treated as a group, we conclude that the district court must assess the privilege claim with respect to each e-mail in the string to determine whether Interbake has carried its burden." (citations omitted)).

[12] Local Civil Rule for the U.S. District Courts for the Southern and Eastern Districts of New York 26.2(a)(2)(A) permits the parties to agree to exchange categorical privilege logs, which group like documents into categories, instead of listing each document individually. U.S.Dist.Ct. Rules S.&E.D.N.Y., Civ. R. 26.2(a)(2)(A). It explains that such information includes:

> (i) the type of document, e.g., letter or memorandum;
> (ii) the general subject matter of the document;
> (iii) the date of the document; and
> (iv) the author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other[.]

Id.

[13] *See, e.g., Aviles v. S&P Glob., Inc.,* 583 F. Supp. 3d 499, 504 (S.D.N.Y. 2022) (rejecting a categorical log for grouping documents with date ranges exceeding six months and the failing to identify the roles of non-attorney individuals); *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC,* 18-cv-4044 (BCM), 2021 WL 1968325, at *4 (S.D.N.Y. Mar. 31, 2021) (noting local rule permits categorical logging – which parties agreed to – but finding log's categorical descriptions vague and repetitive and the categories prevented the receiving parties from any evaluation of the asserted privilege); *Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey,* 297 F.R.D. 55, 63-64 (S.D.N.Y. 2013) (requiring a categorical log to be supplemented to provide lists of the authors and recipients of documents, or exemplars of such, and the number of documents in each category); *Deutsche Bank Sec. Inc. v. Kingate Glob. Fund Ltd.,* No. 19-cv10823 (ER), 2022 WL 3644822, at *8 (S.D.N.Y. Aug. 24, 2022) (rejecting categorical log that grouped the communications of 11 lawyers and 7 nonlawyers over a nine-year period into three broad categories and included no titles or roles of non-lawyers).

can then be converted from CSV files into spreadsheets and exported.[14] Second, the Federal Rules of Evidence 502(d) already precludes inadvertent waiver as risk to a producing party, and producing parties can clawback privileged documents.

The Committee Should Consider Giving Examples in its Note for Adequate Logs

Finally, if the Committee is considering revisions to the Committee Note, I suggest giving examples of competent logs. Very often there is a needless exchange of vituperative emails about the adequacy of the log, or even sanctions for failing to contain necessary information.[15] A privilege log "must set forth specific facts which, taken as true, establish the elements of the privilege for each document for which privilege is claimed. A privilege log meets this standard, even if not detailed, if it identifies 'the nature of each document, the date of its transmission or creation, the author and recipients, the subject, and the privilege asserted.'"[16] The Committee could consider quoting from former federal judge Paul Grimm:

> To properly demonstrate that a privilege exists, the privilege log should contain a brief description or summary of the contents of the document, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met for that document.[17]

Judge Waxse also gave a useful template for a privilege log.[18] He wrote for a document-by-document log, the log should provide: "1. A description of the document (e.g., correspondence, memorandum); 2. Date prepared; 3. Date of document (if different from # 2); 4. Identity of the person(s) who prepared the document [and their role] … 5. Identity of the person(s) for whom the document was prepared and to whom the document was directed (including all copies), including

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[14] *See, e.g.,* Everlaw, Creating Privilege Logs, https://youtu.be/oHrvFUAQUoM?si=A3pLULuwFEweVot7 (last accessed Sept. 22, 2023).

[15] *See, e.g., RG Abrams Ins. v. L. Offs. of C.R. Abrams,* 342 F.R.D. 461, 496-97, 501 (C.D. Cal. 2022) (sanctioning defendant for logs that repeatedly failed to include information needed to assess the assertion including document type, date, subject matter); *Johnson v. Ford Motor Co*., 309 F.R.D. 226, 235 (S.D.W. Va. 2015) (denying sanction of waiver of privilege, but ordering Ford to supplement its log within 10 days with more detailed descriptions of the withheld documents so the parties could evaluate the asserted claims, and awarding fees and expenses); *Williams v. Taser Int'l, Inc.,* 274 F.R.D. 694, 697-98 (N.D. Ga. 2008) (awarding sanction of waiver of all privilege claims where, after two years, Taser had failed to provide an adequate log identifying who sent or received the logged documents, information about its actual contents, and only withdrew privilege assertions or provided additional information after multiple motions).

[16] *Clark v. Unum Life Ins. Co. of Am.,* 799 F.Supp.2d 527, 536 (D. Md. 2011) (*quoting N.L.R.B. v. Interbake Foods, LLC,* 637 F.3d 492, 502 (4th Cir.2011)) (citation and footnote omitted).

[17] Paul W. Grimm, Charles S. Fax, & Paul Mark Sandler, *Discovery Problems and Their Solutions,* 62 (2005).

[18] *Hill v. McHenry,* No. CIV.A. 99-2026-CM, 2002 WL 598331, at *2–3 (D. Kan. Apr. 10, 2002).

information sufficient to allow the Court to determine whether the document is a communication to the client; 6. Purpose of preparing the document; 7. Number of pages of the document; 8. Basis for withholding discovery of the document, *i.e.*, the specific privilege or protection being asserted; and 9. Any other pertinent information necessary to establish the elements of each asserted privilege."

Considering the above, I suggest the following edit to the Draft Committee Note (page 108 of 157):

> In some cases, it may be suitable to have the producing party deliver a document-by-document ~~listing with explanations of the grounds for withholding the listed materials~~. privilege log. Courts have found as adequate privilege logs that provide a brief description or summary of the contents of the document; the number of pages and type of document; the date the document was prepared; who prepared and received the documents; the purpose in preparing the document; and the specific basis for withholding the document. *See, e.g.,* Paul W. Grimm, Charles S. Fax, & Paul Mark Sandler, *Discovery Problems and Their Solutions,* 62–64 (2005); *Hill v. McHenry,* No. CIV.A. 99-2026-CM, 2002 WL 598331, at *2–3 (D. Kan. Apr. 10, 2002).

Thank you for this opportunity to be heard on this important matter, and I am happy to answer any questions.

TAB 3

PLUNKETT COONEY

TESTIMONY OF MARY MASSARON
TO THE
ADVISORY COMMITTEE ON CIVIL RULES

October 5, 2023

Mary Massaron submits this written testimony to the Advisory Committee on Civil Rules in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on the proposed new Rule 16.1.

As an appellate lawyer with an abiding faith in the importance of the judiciary and civil justice system to our democracy, I offer some thoughts about the need for rules to govern multi-district litigation and a critique of the current proposal.

The Federal Rules of Civil Procedure have formed the underpinnings to a civil litigation system that has been the envy of the world. Since the rules were first adopted in 1937, they have governed civil litigation in the district courts of the United States. They have provided parties to litigation with an understanding in advance of what will and won't be allowed, of how the litigation will advance to a judgment, and of the procedural vehicles for trying to prevail on the claims at issue. Ad hoc decision-making is the antithesis of a rules-based system. A recognition that judges need "discretion" does not justify the lack of governing rules. The federal rules were initially adopted to provide for uniform procedure and to end the "chaotic and complicated condition" caused by the lack of rules. Burbank, Stephen B., *The Rules Enabling Act of 1934* (1982), http://scholarship.law.upenn.edu/faculty_scholarship/1396. The idea was to make litigation move more quickly, to allow for a reduction in expense, and to ensure that artifice and technicalities would not be used to deprive litigants of a just result. *Id*.

While this may seem so basic as not to deserve saying, I repeat it here because it is crucial to the fundamental fairness that is a hallmark of the American judicial system. I believe the lack of rules in multidistrict litigation imperils this system. "In a democracy, citizens and litigants must have confidence in the rule of law, which requires that a judge's decisions must not be – and must not seem to be – arbitrary, based on personal preferences, or unbounded." Rupert Cross, Precedent in English Law 14 (1968). Under the rule of law, the judiciary must provide a "system characterized by fidelity to rules of principled predictability derived from valid authority external to individual government decision makers." Ronald A. Cass, The Rule of Law in America, pp 4-22 (2001).

When Congress enacted 28 U.S.C. §1407 to provide for multidistrict litigation, it sought to allow coordinated pretrial proceedings to enhance the "convenience of the parties and witnesses" and to "promote the just and efficient conduct of such actions." *Id*. It sought to ensure that the multidistrict litigation was not slowed by appeal, limiting review of the orders of the judicial panel that would decide whether cases would be transferred to be

part of coordinated or consolidated pretrial proceedings. Review could be had only by extraordinary writ under 28 U.S.C. §1651.

But in my work as an appellate lawyer, I have seen all too often that judges (like all people) make decisions that are sometimes wrong as a matter of fundamental fairness. And in many areas in which the rules normally guide litigation, courts have issued decisions in multidistrict litigation that departs from the federal rules or that deprives parties of the benefits of those rules. We have seen these problems in the obligation to discern whether a plaintiff has a good-faith basis to bring a claim, in the defendant's ability to seek a speedy and inexpensive end to the suit by filing an early motion to dismiss or for summary judgment, in excessive discovery that extends beyond what the rules permit, and in other areas.

In circumstances in which the litigation goes awry, the current system depends on the parties succeeding with an extraordinary writ and on the appellate courts stepping in to correct the error. In egregious instances, they sometimes do. See, e.g., *In re National Prescription Opiate Litigation*, No. 20-3075, 956 F.3d 838 (6th Cir. 2020).

But using the appellate courts as a backstop for failings created by the lack of rules is not a sound solution. Rather, rules need to be enacted that assure that the basic parameters of litigation under the purview of multidistrict litigation are clear and enforceable. I will focus on these principles and some problems with the proposed rule during my presentation at the hearing on October 16, 2023.

Sincerely,

PLUNKETT COONEY

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MM/slp

TAB 4

TAB 4A

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

A RULE, NOT AN EXCEPTION: HOW THE PRELIMINARY DRAFT OF RULE 16.1 SHOULD BE MODIFIED TO PROVIDE RULES RATHER THAN PRACTICE ADVICE AND TO AVOID THE CONFUSION OF ENSHRINING PRACTICES INTO THE FRCP THAT ARE INCONSISTENT WITH EXISTING RULES AND OTHER LAW

September 18, 2023

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on the proposed new Rule 16.1 (the "Preliminary Draft").[2]

INTRODUCTION

The Preliminary Draft of Rule 16.1 for multidistrict litigation proceedings ("MDLs") is unusual in three important respects. First, unlike other provisions of the Federal Rules of Civil Procedure ("FRCP"), the Preliminary Draft contains no requirements; to call it a "rule" is aspirational.[3] Second, the proposed accompanying committee note ("Draft Note") does not explain why the

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 36 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

[3] Draft Minutes, Civil Rules Advisory Committee, March 28, 2023, Agenda Book, Committee on Rules of Practice and Procedure, June 6, 2023, at 855 ("In a sense, the rule offers the judge a 'cafeteria plan' to direct counsel to provide needed input up front without constricting the judges flexibility…."); January 2023 Standing Committee Meeting Minutes, Agenda Book, Committee on Rules of Practice and Procedure, June 6, 2023, at 37 ("The draft rule is designed to maintain flexibility.").

Committee is proposing an FRCP amendment in the manner envisioned by the Rules Enabling Act[4] and in accordance with the Committee's custom,[5] but merely offers advice and options to judges.[6] Third, the Preliminary Draft and Draft Note include topics that are not suitable for FRCP rulemaking because they are either unsettled matters of law or disallowed by (or in serious tension with) existing FRCP provisions.

If the shibboleth that "there's no one-size-fits-all" is steering the Committee to eschew a bona fide rule or any genuine structure in a Rule 16.1, then the Committee should re-think this presupposition. The FRCP govern "all civil actions and proceedings in the United States district courts,"[7] and the Committee's fundamental responsibility is to maintain and update the rules to serve this purpose. No one could doubt that MDLs are included within "all civil actions and proceedings," and that MDLs already have rules.[8] The problem—the reason the Committee's work on this topic is so needed and important—is that some FRCP provisions are not working to provide reasonable guidance in MDLs as they do in all other proceedings. As a consequence, MDLs suffer from too little structure, predictability, and uniformity.[9] The most serious problems in MDLs result from *ad hoc* practices invented to fill gaps in the FRCP, not from overly stringent procedural rules.[10] The FRCP have never fastened a straightjacket on district court judges'

[4] 28 U.S.C. § 2073(d) ("the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views").

[5] *See* section I.C., below.

[6] Draft Minutes, Civil Rules Advisory Committee, March 28, 2023, Agenda Book, Committee on Rules of Practice and Procedure, June 6, 2023, at 855 ("The basic concept is to give the transferee judge a set of prompts….").

[7] FED. R. CIV. P. 1.

[8] *In re National Prescription Opiate Litigation*, No. 20-3075, 956 F.3d 838, 844 (6th Cir. 2020) ("MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance. For neither §1407 nor Rule 1 remotely suggests that, whereas the Rules are law in individual cases, they are merely hortatory in MDL ones.").

[9] The 1926 Senate Judiciary Committee Report on the Rules Enabling Act stated the following reasons for the need for federal rules governing civil procedure:

> First, to make uniform throughout the United States the forms of process, writs, pleadings, and motions and the practice and procedure in the district courts in actions at law. It is believed that if this were its only advantage that lawyers and litigants would find, in uniformity alone, a tremendous advance over the present system.
>
> Second, these general rules, if wisely made, would be a long step toward simplicity, a most desirable step in view of the chaotic and complicated condition which now exists.
>
> Third, it would tend toward the speedier and more intelligent disposition of the issues presented in law actions and toward a reduction in the expense of litigation.
>
> Fourth, it would make it more certain that if a plaintiff has a cause of action he would not be turned out of court upon a technicality and without a trial upon the very merits of the case; and, likewise, if the defendant had a just defense he would not be denied by any artifice of the opportunity to present it.

Burbank, Stephen B., *The Rules Enabling Act of 1934* (1982), http://scholarship.law.upenn.edu/faculty_scholarship/1396.

[10] The work of the first Advisory Committee provides useful insight about the Committee's work on proposed Rule 16.1. A major focus of the original drafting enterprise was to fix the problem that parties and lawyers did not know what procedures would govern a case until the judge told them how things ran in that particular courtroom. Only

discretion, and neither will the new provision for early MDL management even if the Committee revamps it into a *rule*.

The concept underpinning the Preliminary Draft is that "a rule could assist the transferee court in addressing a variety of matters that often proved important in MDL proceedings."[11] This explains why the Preliminary Draft is fashioned as a list of topics that might be important for a newly appointed MDL judge to consider and obtain counsels' views on early in the proceeding. Although this concept holds merit, its breadth is a temptation to veer away from rules of practice and procedure and instead take the FRCP into a novel venture of providing practice options, a prospect that is concerning to Committee members.[12] The tension is this: Not every topic that comes up in court is appropriate for incorporation into the FRCP. Rule amendments are justified when a "rules problem" exists and an amendment will help solve it without causing countervailing negative consequences. When a particular technique—even if commonplace in MDL practice—is not appropriate to be a *rule*, then it should not be incorporated into the FRCP.

An FRCP amendment providing guidance about MDL management is greatly needed. However, the Preliminary Draft and Draft Note should be revised to provide rules guidance to ensure claim sufficiency and to remove the subsections that could do more harm than good by enshrining into

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"repeat players"—the lawyers who routinely appeared in front of the assigned district judge—could know what pleadings, motions, and discovery devices would be allowed. The effect was confusion, complexity, delay, and injustice. To solve these problems, the first Advisory Committee drafted rules (and inspired future rules amendments) that provide clear guidance on procedures, including rules that:

- Specify what pleadings are allowed (Rule 7);
- Prescribe the standards for pleadings (Rules 8, 9, 10, and 11);
- Allow dismissal of pleadings that do not meet the rules' standards (Rule 12);
- Define the permissible discovery devices (Rules 26 through 36); and
- Delineate how discovery obligations are enforced (Rule 37).

This precedent is directly analogous to the Committee's effort to provide guidance about the procedural needs of today's MDLs, which resemble pre-1938 practices in material ways.

[11] Agenda Book, Advisory Committee on Civil Rules, March 28, 2023, at 111.

[12] Draft Minutes, Civil Rules Advisory Committee, March 28, 2023, Agenda Book, Committee on Rules of Practice and Procedure, June 6, 2023, at 858-60:

> A judge on the full Committee warned of "mission creep." This is not really a rule; there is only one "must" in it. This proposal seems almost entirely to be a best practices guidance document. And beyond that, it seems that the idea is that the Note is equally as important as the rule. That seems backward; the Note ought only provide commentary, and is not of equal dignity. Courts have to follow rules; they do not have to follow Notes.
>
> Another Committee member agreed. This is really a "best practice" guide. It is not giving new authority or commanding judges to do anything….
>
> A consultant noted that the proper role of the Note raises jurisprudential issues. For one thing, one must be careful about giving advice in a Note, in part because there is a risk of a negative pregnant. In this proposal, we have only one "must," and even it is contingent….
>
> A judge observed that this proposed rule could be put out for comment, but continued to believe that was really just a best practices item.

the FRCP concepts that raise complicated or undecided questions about existing FRCP or statutory provisions. Section I describes how Rule 16.1's subsection (c)(4) and the accompanying note should alert the MDL judge to take action to avoid the management problems that follow from the mass filing of unexamined claims. Subsection (c)(6)'s prompt to develop a proposed discovery plan is a separate matter. These provisions should not conflate the problem of claims sufficiency, which is the reason the Committee took up the topic of MDLs,[13] and discovery.

Because it is far from clear that federal MDL courts have authority to appoint leadership counsel to supplant (in whole or in part) an MDL plaintiff's own lawyer, it would be imprudent to enshrine this ill-defined concept in the FRCP (Section II). Similarly, the FRCP should not be in the business of suggesting ways for courts to facilitate settlement (Section III). Three other topics—consolidated pleadings, "direct filing," and appointing masters—also do not belong in the FRCP because they pertain to matters that are already governed by FRCP provisions and laws (Sections IV, V, and VI). All five of these topics should be removed from the Preliminary Draft.

I. RULE 16.1 SHOULD ADDRESS THE OVERRIDING CHALLENGE OF MDLS – CLAIM INSUFFICIENCY – AND SHOULD NOT CONFLATE FOUNDATIONAL PLEADING REQUIREMENTS WITH THE "EXCHANGE" OF DISCOVERY

The mass filing of unexamined claims undermines transferee courts' ability to manage MDLs by complicating early case management decisions, slowing the litigation, impeding bellwether case selection,[14] and thwarting the possibility of timely resolution by depriving counsel and parties of the information they need to assess litigation risks and valuation. In addition, unexamined claims prevent transferee judges from fulfilling their obligation to ensure standing and subject matter jurisdiction.[15] As the MDL Subcommittee reported to the Committee, a significant number of MDL claims do not belong in the litigation and are found to be meritless much later in the case.[16]

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[13] The MDL Subcommittee reported to the Committee:

> The unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. Were there no MDL centralization, arguably, this would not be a problem. Defendants would have an opportunity to challenge individual claims one by one. Indeed, but for the MDL centralization order, many of those claims might not have reached court at all.

MDL Subcommittee Report, Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, pp. 142, 143 https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[14] *See* Judge M. Casey Rodgers, *Vetting the Wether: One Shepherds View*, 89 UMKC L. Rev. 873, 873 (2021) (explaining that "high volumes of unsupportable claims … interfere with a court's ability to establish a fair and informative bellwether process.").

[15] "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *U.S. v. Hays*, 515 U.S. 737, 742 (1995) (cleaned up) (quotations and citation omitted).

[16] The MDL Subcommittee of the Advisory Committee on Civil Rules explained that:

Transferee courts and counsel need rule guidance because the FRCP provisions that function to enforce the basic elements of a legal claim in unconsolidated cases have proven impractical in MDLs with hundreds or thousands of claimants.[17] Protecting courts and parties from non-meritorious claims is the heart of the FRCP, including rules 3, 7, 8, 9, 10, 11, and 12; and ensuring that every plaintiff has Article III standing and an actual case or controversy is a constitutional requirement. But many MDL courts regard the FRCP provisions as impractical in MDLs with hundreds or thousands of claims.[18] This absence of functional rules is what beckons masses of unexamined claims—hence the MDL Subcommittee's reference to the "Field of Dreams" phenomenon, which is: "If you build it, they will come."[19] The unaddressed FRCP problem is "building it" because it *causes* the amassing of unexamined claims;[20] it invites counsel to "get a name, file a claim." Transferee judges, particularly first-time transferee judges, should understand this phenomenon and how to avoid it.[21]

A. Subsection 16.1(c)(4) Should Provide a Tool for Handling—and Forestalling—Claim Insufficiency

Rule 16.1 should provide judges and parties a tool for handling—and more importantly, averting—the phenomenon of claim insufficiency and the problems it engenders. As drafted, subsection (c)(4) is inadequate for the task, primarily because it conflates the foundational problem of claim insufficiency (the rules problem) with managing discovery. The Preliminary Draft has a separate discovery provision, subsection (c)(6), but any distinction between the two

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> There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations -- perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices -- a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit. The reported proportion of claims falling into this category varies; the figure most often used is 20 to 30%, but in some litigations it may be as high as 40% or 50%. ...

Agenda Book, Advisory Committee on Civil Rules, Nov. 1, 2018, pp. 142, 143 *available at* https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[17] One federal judge explained that the usual procedural safeguards that test claims sufficiency are "difficult to employ at scale in the MDL context, where the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands." Judge M. Casey Rodgers, *Vetting the Wether: One Shepherds View*, 89 UMKC L. REV. 873, 873 (2021).

[18] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. Rev. 1669, 1674 (2017).

[19] Agenda Book, Advisory Committee on Civil Rules, Nov. 1, 2018, 142-43.

[20] *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*, Case No. 4:08-MD-2004, 2016 WL 4705827, at *2 (M.D. Ga. 2016) ("MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.").

[21] *Id*. ("At a minimum, transferee judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly."). *See also* Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEX. L. REV. 1623, 1628 (2019) ("the mass tort MDL process distorts contingency-fee-fueled screening incentives").

provisions is lost because draft subsection (c)(4) prompts the parties to discuss "how and when *the parties* will *exchange* information about the factual bases for their claims *and defenses*" (emphasis added). The word *exchange* connotes discovery, so this language is easily misread as prompting a discussion about mutual discovery rather than a plan for ensuring that plaintiffs' claims meet their essential requirements. A modest edit to draft subsection (c)(4) would avoid confusion with subsection (c)(6) by prompting transferee judges and parties to craft a procedure for an early check into the most basic elements of the claims. A revised subsection should look like this:

> **(4)** how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's alleged injury ~~about the factual bases for their claims and defenses~~;

B. The Draft Note to Subsection 16.1(c)(4) Should Avoid Conflating Claim Insufficiency with Discovery

As with the text of subsection 16.1(c)(4), the Draft Note should also be revised to correct its misidentification of the claim insufficiency problem as a discovery matter. The Draft Note uses the word "exchange" five times, refers to information about claims *and defenses,* and specifically promotes the use of abbreviated discovery methods such as fact sheets and census orders. Moreover, the Draft Note conveys the sense that requiring claims to meet the most basic requirements of standing and stating a claim could be an "undue burden[]" and "unwarranted." This language destroys the whole point of subsection (c)(4) by conveying that courts should likely ignore the mass filing of unexamined claims—the Field of Dreams problem—because discovery will take care of it. But if fact sheets were an effective means of addressing claim insufficiency, surely there would not be a problem; as the Committee well knows, fact sheets are widely used,[22] yet lack of standing and the meritless claim problems persist. The MDL

[22] Research by the Federal Judicial Center ("FJC") shows that plaintiff fact sheets ("PFS") are "already used very frequently in larger MDL proceedings, and used in virtually all of the 'mega' MDL proceedings with more than 1,000 cases." Agenda Book, Advisory Committee on Civil Rules, Oct. 29, 2019, at 192, *https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf*; Meeting Minutes, Civil Rules Advisory Committee, Oct. 29, 2019, Agenda Book, Advisory Committee on Civil Rules, April 1, 2020, at 74, https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf ("Plaintiff fact sheets … have come to be used in almost all of the largest MDL proceedings."). See also, Paul D. Rheingold, *Plaintiff's fact sheets; use of a census*, *in* LITIGATING MASS TORT CASES § 8:9 (August 2023 Update) ("In recent years, the use of routine interrogatories for the plaintiff to answer has become replaced by a plaintiff's fact statement (PFS).").

Subcommittee acknowledges the view that fact sheets are "not really a screening method so much as a useful way to 'jump start' discovery . . . ."[23] Moreover, because "months may be needed to develop the [fact sheet] form," the inherent delay in using fact sheets "can *impede* the next steps in managing the proceeding."[24]

In contrast to subsection (c)(4)'s focus on claim insufficiency, the purpose of subsection (c)(6) is to prompt the MDL court and parties to develop a discovery plan. Subsection (c)(6) should be distinct from (c)(4) rather than redundant or confusing to it. Subsection (c)(6) could help newly appointed MDL transferee judges and counsel understand the potential advantages and disadvantages of various discovery instruments in the MDL.[25] For example, a well-designed fact sheet could help group cases for motions practice or into litigation tracks, identify cases for targeted discovery, select bellwether cases, and facilitate settlement negotiations.[26] On the other hand, as the Federal Judicial Center has recognized, deficient or missing plaintiff fact sheets can be a "recurring issue" that requires "substantial judicial resources" to manage through a "slow and costly" enforcement process.[27]

Properly revised, subsections (c)(4) and (c)(6) would facilitate rather than trip over each other. Initial information disclosed to establish the fundamentals of standing and the sufficiency of claims under section (c)(4) will ensure compliance with Article III and help develop core factual issues to inform what discovery is needed under section (c)(6). The discussion about discovery belongs in the note to subsection (c)(6).

C. The Note to Subsection 16.1(c)(4) Should Explain Why the Subsection Is Being Written and Clarify That It Does Not Create Exceptions to Other FRCP Rules

The Rules Enabling Act requires the Committee to provide "an explanatory note on the rule" when making a rule recommendation.[28] In keeping with this law, the Committee's practice is to explain the problem that a rule proposal is meant to address. For example, notes to past Rule 26

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[23] Agenda Book, Committee on Rules of Practice and Procedure, June 25, 2019 at 236, *https://www.uscourts.gov/sites/default/files/2019-06_standing_agenda_book_0.pdf*.

[24] Meeting Minutes, Civil Rules Advisory Committee, Oct. 29, 2019, Agenda Book, Advisory Committee on Civil Rules, April 1, 2020, at 74, https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf (emphasis added).

[25] A better and more appropriate way for the FRCP to provide guidance would be to define such discovery tools in the rules, just as they do with depositions, interrogatories, document requests, physical and mental examinations, and requests for admission.

[26] *See* Margaret S. Williams et al., *Plaintiff Fact Sheets in Multidistrict Proceedings; A Guide for Transferee Judges*, nn. 4-7 and accompanying text (Fed. J. Ctr. 2019) ["*Plaintiff Fact Sheets*"]. *See also* Guidelines and Best Practices for Large and Mass-Tort MDLs, Best Practice 1C(v), at 10, Bolch Judicial Institute, Duke Law School (2d ed.) (enumerating uses for fact sheets), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1004&context=bolch.

[27] *See Plaintiff Fact Sheets*, nn. 76-77 and accompanying text (discussing *In re Xarelto* MDL).

[28] 28 U.S.C. § 2073(d) ("the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views").

amendments explain "[t]here has been widespread criticism of abuse of discovery,"[29] "[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems,"[30] "[a] major purpose of the revision is to accelerate the exchange of basic information about the case,"[31] and "initial disclosure provisions are amended to establish a nationally uniform practice."[32] On the rare occasion when the Committee discusses practice in addition to a proposed amendment's purpose, it typically does so only in direct reference to the rule provision, such as: "In applying the rule, a court may need to decide whether and when a duty to preserve arose."[33]

In profound contrast, the Draft Note to subsection 16.1(c)(4) makes no mention of why the Committee is proposing the rule, what problem it addresses, or what the rule is meant to accomplish.[34] Rather, the Draft Note makes observations about what "[e]xperience has shown" and what techniques "[s]ome courts have utilized." It opines that early exchanges of information "may depend on a number of factors" and their timing "may depend on other factors." In fact, the Draft Note does more to discourage courts from using (c)(4) than explain its purpose. It skims over the need for essential claim information and the benefits of obtaining basic information about claims early in an MDL, instead proclaiming that providing the elemental basis of claims may be an "undue burden" and listing several factors that would put the topic of claim insufficiency on the courts' back burner. The Draft Note does not mention the benefit that an early examination of claims sufficiency would provide by helping the court and parties understand the shape of the litigation.

The Draft Note should be revised to include the Committee's description of the problem that gave rise to section (c)(4): the amassing of unexamined claims. Here is how the MDL Subcommittee described the problem to the Committee:

> The unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. Were there no MDL centralization, arguably, this would not be a problem. Defendants would have an opportunity to challenge individual claims one by one. Indeed, but for the MDL centralization order, many of those claims might not have reached court at all.[35]

The note should explain the requirement that the court be provided with sufficient information to establish the "constitutional minimum of standing" with respect to each plaintiff before it asserts

[29] FED. R. CIV. P. 26(f) advisory committee's note to 1980 amendment.

[30] FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

[31] FED. R. CIV. P. 26(a) advisory committee's note to 1993 amendment.

[32] FED. R. CIV. P. 26(a)(1) advisory committee's note to 2000 amendment.

[33] FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

[34] This observation applies to the entirety of the Draft Note.

[35] Agenda Book, Advisory Committee on Civil Rules, Nov. 1, 2018, 142-43.

jurisdiction over their claims.[36] The "first and foremost of standing's three elements" is an "injury in fact,"[37] and the second requirement is a "causal connection" showing the injury is "fairly traceable to the challenged [conduct] of the defendant, and not the result of the independent action of some third party … not before the court."[38]

The note should describe the potential benefits of an early examination of claims sufficiency, including: providing judges better information for making early management decisions on the scope of discovery, motion practice, and bellwether trials; enabling parties to understand the risks of litigation earlier and therefore to accelerate resolution; faster resolution of plaintiffs' cases and, for some, a better recovery and/or better representation by their counsel;[39] and satisfying defendants right to know the basis of the action and helping plaintiff leadership ensure that clients' needs are understood.

Importantly, the note should explain how the proposed Rule 16.1(c)(4) relates to existing FRCP provisions. Specifically, the note should make clear that (c)(4) complements, rather than displaces, the rules defining pleading standards. Although the Committee has given no indication that Rule 16.1(c)(4), if adopted, would obviate those FRCP provisions, the MDL environment is mercurial, contentious, and frequently unreviewed by the appellate courts, so any uncertainty should be avoided. After all, the fundamental reason for amending the FRCP to accommodate MDLs is to deal with the rule problems that have led some to proclaim an "MDL exception" to the FRCP. Of course, there is no such thing as an "MDL exception" and appellate courts have made it clear that MDLs are governed by the FRCP. Rule 1 states that the FRCP apply to all civil actions including MDLs, and Rule 1, like all of the FRCP, has the force of law.[40] Every court that has squarely considered the question has affirmed.[41]

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[36] "[T]he irreducible constitutional minimum of standing [contains] three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotations omitted). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*.; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements," *Spokeo*, 578 U.S. at 338.

[37] *Spokeo*, 578 U.S. at 338.

[38] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up, brackets removed).

[39] *See* letter from Shanin Specter to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Dec. 18, 2020) at 2 ("The incentive to amass as many cases as possible directly conflicts with an attorney's obligation to advocate vigorously for their clients. A plaintiff's attorney cannot realistically discover or try all of his cases if he amasses more than he can adequately handle."); Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 Tex. L. Rev. 1595, 1617-1618 (2023).

[40] 28 U.S.C. § 2072 ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

[41] *See, e.g.*, *In re National Prescription Opiate Litigation*, No. 20-3075, 956 F.3d 838, 844 (6th Cir. 2020) ("MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance. For neither §1407 nor Rule 1 remotely suggests that, whereas the Rules are law in individual cases, they are merely hortatory in MDL ones.").

An appropriate note could look like this:

> Subsection (c)(4) addresses a significant problem with multidistrict litigation: insufficient claims. An unfortunate problem in MDL proceedings is that a significant number of plaintiffs do not have constitutional standing or plausible claims because the plaintiff did not use the product at issue, did not suffer an actual injury (as alleged by others in the litigation), did not transact business with the defendants, or because the pertinent statute of limitations has run. Such insufficient claims often constitute more than 20 percent of an MDL. S. Todd Brown, *Specious Claims and Global Settlements,* 42 U. MEMPHIS L. REV. 559, 606 (2012). Insufficient claims fail to present a "case or controversy," complicate management of the MDL, slow resolution of the litigation, and require significant expenditures of time and money to identify and dismiss.
>
> Existing Federal Rules of Civil Procedure definitions of pleading standards are effective in ensuring claim sufficiency in individual litigation, but are failing to do so in MDL proceedings involving allegations of personal injury, which constitute more than 90 percent of cases consolidated into MDLs. Without a specified mechanism requiring basic information to demonstrate standing and the elemental sufficiency of each claim, an incentive exists to file claims without conducting any investigation into their basis. *See, e.g., In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.,* 2016 WL 4705807, at *1 (M.D. Ga. Sep. 7, 2016) (explaining how MDLs "become[] populated with many non-meritorious cases"). The result is a large percentage of claims with unknown basis, which would not occur in an individual case. While Rules 3, 7, 8, 9, 10, 11, 12, and 26 establish uniform standards and procedures to ensure claim sufficiency, and apply to cases consolidated into MDLs, they are not proving sufficient to address the problem when claims are aggregated pursuant to 28 U.S.C. Section 1407. Subsection (c)(4) addresses this problem by prompting transferee courts to require basic information early in the proceedings, which deters the filing of unexamined claims and helps courts and parties manage the filed claims.
>
> Subsection (c)(4) does not pertain to discovery, which is addressed subsection (c)(6). Rather, this subsection reflects that threshold disclosures of the factual basis for standing and claim sufficiency are independent of discovery obligations such as fact sheets, profile forms, or census requirements. Because standing is a constitutional requirement and the information necessary to show claim sufficiency is already required to be known prior to filing and is in the plaintiffs' possession, providing that information is not unduly burdensome. *See In re Silica Prods. Liab. Litig*., 398 F. Supp. 2d 563, 632 (S.D. Tex. 2005) ("The doctors undertook the burden of diagnosing each of these Plaintiffs — just as the attorneys undertook the burden of representing each one of them . . . and the sheer volume of Plaintiffs does not mean that these professionals' obligations toward each Plaintiff has been lessened").
>
> Requiring such factual disclosures allows transferee judges to ensure that the constitutional minimum of standing is satisfied and offers several additional benefits to the MDL proceeding that accomplish the purposes of Rule 16.1. Disclosures will provide judges better information for making early management decisions, including scope of

discovery, timing of any motion practice, selection of initial trial cases. To the extent that leadership decisions are made in part on the basis of claim volume, early disclosures help the judge make appropriate decisions about plaintiffs' leadership. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig*., No. 14-MD-2543, 2016 WL 1441804, at *9 n.4 (S.D.N.Y. Apr. 12, 2016) (giving "some credence" to accusation that lead counsel "flooded the MDL with meritless cases" to gain position in leadership contest). Disclosures enable parties more accurately to estimate the risks of litigation, aiding in timely resolution of the litigation.

II. APPOINTMENT OF LEADERSHIP COUNSEL IS TOO FRAUGHT WITH LEGAL UNCERTAINTY TO BE ENDORSED BY THE FRCP

The Preliminary Draft's prompt to consider "whether leadership counsel should be appointed"[42] would interject difficult and unanswered legal questions into the FRCP. Although intended to facilitate a discussion that may need to occur (particularly in mass tort MDLs),[43] the topic is adequately covered in the Manual for Complex Litigation (Fourth)[44] and including this concept in Rule 16.1 would cause more problems than it would solve.

A. Because No Accepted Definition of "Leadership Counsel" Exists, Injecting this Concept into the FRCP Would Sow Confusion

There is no prevailing definition of the MDL "leadership counsel" concept. The leadership appointment orders issued by MDL courts in recent years have been described as reflecting the most extreme level of "ad hockery" in the MDL realm.[45] Unfortunately, the case law is not developing any new clarity; one scholar's examination of MDL leadership appointment orders issued in 201 federal MDLs pending as of June 2019 concluded that "there is no grand progression toward more perfect, more fully specified orders."[46] Rather, such orders "simply appoint attorneys to specified positions and say nothing more."[47] Only about half endeavor to enumerate leaders' duties.[48] The study observed that "[n]one of the [reviewed] orders . . .

[42] Preliminary Draft Rule 16.1(c)(1).

[43] These comments are focused primarily on mass tort-type MDL proceedings where most constituent actions are individual plaintiff lawsuits in which claimants are each represented by their own retained counsel. In contrast, many other MDL proceedings are constituted largely of class action cases, which seek to assert the claims of numerous unnamed persons who are ***not*** individually represented by their own counsel. In those cases, appointment of leadership counsel (that is, counsel for the putative class members) is governed primarily by Fed. R. Civ. P. 23(g). Nevertheless, appointment of leadership counsel for the overall MDL proceeding may be desirable in such matters to coordinate the multiple class actions in the proceeding. If the Advisory Committee proceeds toward adoption of a Rule 16.1, this distinction between "mass tort" and class action-based MDL proceedings should be addressed more explicitly.

[44] *See* Manual for Complex Litigation (Fourth) §§ 10.22, 22.62.

[45] David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders,* 24 Lewis & Clark L. Rev. 433, 465-66 (2020) ("Noll Study").

[46] *Id.*

[47] *Id.*

[48] *Id.* at 444.

attempted to define the legal relationship between court-appointed leaders and non-client plaintiffs."[49] Further, the study noted that only around five percent of the orders "specify duties that lead plaintiffs' counsel hold toward MDL plaintiffs."[50] This absence of meaningful "leadership counsel" definitions does not reflect efforts to tailor the concept to the needs of particular MDL proceedings. To the contrary, the definitional fuzziness shows that MDL courts are unable, because of the thicket of unanswerable questions, to advance any meaningful definition of leadership appointments—or worse, a practice of allowing leadership counsel to self-define their roles.[51] Incorporating the significant uncertainty about this concept into Rule 16.1 would not clarify what "leadership counsel" means for newly appointed (or even experienced) transferee judges, but rather would suggest a degree of certainty and predictability that does not exist.

B. Rule 16.1 Should Not Invite MDL Courts to Limit the Activity of Non-Leadership Counsel Because the Legal Authority to Do So Is Unsettled and Raises Complicated Questions Under State Law, Ethics Rules, and the Rules Enabling Act

The Preliminary Draft's suggestion to consider imposing "limits on activity of nonleadership counsel"[52] is highly inappropriate for inclusion in the FRCP because of the legal and ethical duties MDL plaintiffs' lawyers owe to their clients. As the Preliminary Draft and Draft Note suggest, when plaintiffs' leadership counsel are designated in an MDL proceeding, they are directed to act on behalf of all plaintiffs, which means that the plaintiffs' counsel ***not*** selected for a leadership roles are effectively ordered to stand down, even though their clients' claims remain in the MDL proceeding and likely will be substantially affected by leadership counsel's actions.

Some MDL courts—22 percent, according to Professor Noll's study[53]—explicitly direct nonleadership counsel to cease active representation of their clients and defer to leadership counsel's decision-making. For example, one order states that "Counsel for Plaintiffs who disagree with Lead and Liaison Counsel, or have individual or divergent positions, may ***not*** act separately on behalf of their clients without prior authorization of this Court."[54] Another MDL appointment order states that "no papers shall be served or filed, and no process, discovery, or other procedure shall be commenced by any counsel other than Lead Counsel, except with specific leave of Court."[55] The Noll Study concluded that even where an appointment order does not explicitly restrict nonleadership counsel practice, "the division of labor between leaders and non-leads in these MDLs is [likely] governed by informal norms or directions from the court or

[49] *Id.* at 452-53.

[50] *Id.*

[51] *Id.* at 450.

[52] Preliminary Draft Rule 16.1(c)(1)(E).

[53] Noll, *What Do MDL Leaders Do?,* 24 Lewis & Clark L. Rev. at 455.

[54] *Id.* at 455-56 (quoting Case Management Order at 9, *In re MONAT Hair Care Prods. Mktg., Sales Practices, and Prod. Liab. Litig.,* No. 1:180md-02841-DPG (S.D. Fla. June 6, 2018), ECF No. 59) (emphasis added).

[55] *Id.* (quoting Order Appointing Leadership Counsel at 4, *In re Ashley Madison Consumer Data Security Breach Litig.,* No. 4:15-md-02669-JAR (E.D. Mo. Dec. 9, 2015), ECF No. 87).

court-appointed leaders about the work that non-leads can and cannot perform."[56] In short, it appears that in all MDL proceedings, nonleadership counsel are explicitly or implicitly constrained from fully representing their clients in the manner they otherwise would.

The Preliminary Draft therefore gives rise to a series of thorny legal questions that appear largely unresolved, even though MDL courts have used the leadership counsel device for many years. Many of these questions have escaped judicial examination because of the tendency of mass tort MDL proceedings to be resolved on the basis of broad legal determinations (resulting in dismissal of most claims) or settlements. Hence, because of the failure of MDL courts to screen claims in the early phases, the presence of ill-considered claims and litigation funding influences have made settlements more difficult to achieve, and increasing numbers of case remands should be expected going forward. They will likely give rise to disputes that will require resolution of these issues, including:

1. **What authority allows courts to assign leadership counsel the duty to represent clients of nonleadership counsel?**

At least one court has stated that leadership counsel assume responsibility for representing the clients of nonleadership counsel with respect to all duties assigned in the leadership order.[57] Some other courts' orders reflect this practice, according to Professor Noll's study: "A leadership appointment order . . . picks out functions that will be handled on a centralized basis by court-appointed leaders and leaves individually retained plaintiffs' attorneys responsible for the rest of the duties that inhere in the attorney/client relationship."[58] However, there is no explicit authority for courts to do this, and no general judicial embrace of this power. In fact, MDL leadership orders typically do not detail the division of responsibility between leadership and nonleadership counsel as to the representation of nonleadership counsels' clients. The Committee should not enshrine the notion of appointing leadership counsel into the FRCP—a notion that would conflict with state laws and ethics rules, and would not be consistent with the Rules Enabling Act.

2. **What authority allows MDL courts to override a client's choice of counsel by shifting their representation to different counsel (at least in part) *without their consent?***

Although appointment of leadership counsel is common in MDL proceedings and is mentioned in the Manual for Complex Litigation (Fourth), there is no identified source of authority for federal courts to abrogate and restructure attorney-client relationships in this manner. It certainly does not flow from the MDL statute. Indeed, if anything, the concept of transferring responsibility from the counsel retained by a plaintiff to a "leadership" group is contrary to the Supreme Court's holding that cases transferred into an MDL proceeding "retain their separate

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[56] *Id.*

[57] *Casey v. Denton,* 2018 WL 4205153, at *4 (S.D. Ill. Sept. 4, 2018) (quoting Manual for Complex Litigation, § 10.22) ("to avoid being bogged down and wasteful of judicial resources, a court will need to institute procedures 'under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients *with respect to specified aspects of the litigation*'").

[58] Noll, *What Do MDL Leaders Do?,* 24 Lewis & Clark L. Rev. at 465.

identities."[59] The Court has stressed that "Section 1407 refers to individual 'actions' which may be transferred to a single district court, not to any monolithic multidistrict 'action' created by transfer."[60] The Committee should not enshrine the notion of overriding clients' choice of counsel into the FRCP when doing so is unsupported by law, contradicts state ethics rules, and is not consistent with the Rules Enabling Act.

3. What authority allows an MDL court to replace (at least in some respects) plaintiff's retained counsel, who owe traditional fiduciary duties to their clients, with leadership counsel who do not, without the client's consent?

Leadership counsel do not owe standard fiduciary duties to clients of nonleadership counsel, at least according to caselaw. For example, when several plaintiffs represented by nonleadership counsel asserted a breach of fiduciary duty claim against lead counsel in the *Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products. Liability Litigation,* the MDL court concluded:

> [L]ead and liaison counsel do not owe a fiduciary duty to each and every MDL plaintiff in the traditional sense. Rather, lead and liaison counsel should put the common and collective interests of all plaintiffs first while they carry out their enumerated functions. . . . It is obvious to this Court that the hallmarks of a traditional fiduciary relationship are absent from the MDL context in that there is no underlying offer and acceptance of power of attorney or agency between appointed leadership counsel and the plaintiffs.[61]

Similarly, in the *In re General Motors LLC Ignition Switch Litigation* proceeding, a nonleadership attorney alleged that lead counsel breached a fiduciary duty owed to all plaintiffs in the MDL proceeding when he (a) asked the court to schedule one of his own cases as the first bellwether trial, (b) voluntarily dismissed that case due to that bellwether plaintiff's potential perjury, and (c) negotiated an inventory settlement with the defendant that covered most of his other clients.[62] In support of that motion, Prof. Charles Silver, a legal ethics expert, opined that by virtue of his role, lead counsel owed to all MDL plaintiffs a fiduciary duty to "operate free of any incentive" to perform his duties in a manner that would disserve their interests.[63] In opposition, Prof. Geoffrey Miller, another legal ethics expert, denied the existence of any such

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[59] *Gelboim v. Bank of America Corp.,* 574 U.S. 405, 413 (2015).

[60] *Id*. *See also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 37 (1998) (section 1407 does not "imbue transferred actions with some new and distinctive . . . character"); *In re Fosamax Prods. Liab. Litig.,* 852 F.3d 268 (3d Cir. 2017) (cautioning that in MDL proceedings, plaintiffs each retain the right to develop their own cases, because "[a] mass tort MDL is not a class action" but rather "is a collection of separate lawsuits that are coordinated for pretrial proceedings—and *only* pretrial proceedings—before being remanded to their respective transferor courts"), *vacated and remanded on other grounds, Merck Sharpe and Dohme Corp. v. Albrecht,* 139 S.Ct. 1668 (2019).

[61] *Casey v. Denton*, 2018 WL 4205153, at *5-6 (S.D. Ill. Sept. 4, 2018).

[62] *In re General Motors Ignition Switch Litig.,* 2016 WL 1441804, at *2–5 (S.D.N.Y. Apr. 12, 2016).

[63] *In re General Motors Ignition Switch Litig.,* No. 14-MD-2543, Declaration of Charles Silver at 13, ECF No. 2182.

duty.[64] The court adopted a middle ground closer to Professor Miller's view, concluding that lead counsel's obligations to nonleadership counsel's clients are "not as strong as the duties that lead counsel owes to absentee [class] members of a class action."[65]

Since leadership counsel do not owe the same duties to plaintiffs as nonleadership counsel, the FRCP should not prompt courts, without consent of each plaintiff, to substitute leadership counsel for the plaintiff's retained counsel.

4. Does ordering leadership counsel to consult with nonleadership counsel solve the ethical dilemmas?

In a few instances, MDL courts have sought to sidestep this concern by ordering that in performing their duties, leadership counsel must consult with nonleadership counsel. For example, the leadership order in one proceeding states: "In carrying out the [specified] duties, Plaintiffs' Co-Lead Counsel are . . . required to consult with all Plaintiffs' counsel throughout this case to assure that all interests are represented."[66] And in another, an MDL court stated: "I anticipate that the Robins Kaplan group will solicit and consider the views of others, particularly the Milberg Weiss firm, in making litigation decisions on behalf of the plaintiffs."[67] However, nothing required leadership counsel to obtain any form of consent from nonleadership counsel (or their clients) as to any strategy decisions. Orders requiring consultation do not ameliorate concerns that leadership appointments in MDL proceedings seriously disrupt attorney-client relationships. Proposed Rule 16.1 merely suggests that in crafting the initial case management conference report, the parties should consider "proposed methods for [leadership counsel] to regularly ***communicate with*** and report to the court and nonleadership counsel." (Emphasis added.) The Draft Note speaks only in terms of leadership counsel allowing nonleadership counsel to "monitor" proceedings; there is no mention of leadership counsel having any obligation to confer with nonleadership counsel about litigation decisions. Observing that "it may be necessary for the court to give priority to the leadership counsel's pretrial plans with they conflict with initiatives sought by nonleadership counsel," the Draft Note says only that "[t]he court should . . . ensure that nonleadership counsel have suitable opportunities to express their views to the court." [68]

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[64] *In re General Motors Ignition Switch Litig.,* No. 14-MD-2543, Declaration of Geoffrey Parsons Miller at 4, ECF No. 2200-1.

[65] *In re General Motors Ignition Switch Litig.,* 2016 WL 1441804 at *7.

[66] Order Appointing Leadership Counsel at 4, *In re Ashley Madison Consumer Data Security Breach Litig.,* No. 4:15-md-02669-JAR (E.D. Mo. Dec. 9, 2015), ECF No. 87).

[67] Memorandum and Order at 6, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* No. 1:05-md-01720-MDB-JO (E.D.N.Y. Oct. 20, 2005), ECF No. 278.

[68] A few MDL courts have sought to dodge the representational responsibility issue by including in their appointment orders statements seemingly deny that any representational duty has been transferred to leadership counsel. For example, one such order states: "All attorneys representing parties to this litigation, regardless of their role in the management structure of the litigation and regardless of this court's designation of [leadership counsel] . . . continue to bear the responsibility to represent their individual client or clients." Pretrial Order No. 4 at 2, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.,* No. 2:12-md-02327 (S.D. W. Va. Feb. 7, 2012(, ECF No. 120. However, it is difficult to see how nonleadership counsel can continue to fully "bear [that] responsibility" if most of

5. Are leadership counsel obliged to comply with ethics requirements, including obtaining written consents (as necessary) from the nonleadership counsel's clients?

Nonleadership counsel presumably have given their clients appropriate disclosures and possibly received informed consents to their representation of multiple plaintiffs as to the claims in the MDL proceeding pursuant to applicable ethics rules, such as ABA Model Rules 1.7 (as to the representation of multiple plaintiffs as to similar claims) and 1.8(g) (as to "participat[ing] in making an aggregate settlement" involving multiple clients). To the extent that elements of nonleadership counsel's representational responsibilities are transferred by court order to leadership counsel, it is unclear if leadership counsel are also obliged to comply with these ethics requirements, including obtaining written consents (as necessary) from the nonleadership counsel's clients.

6. Who has responsibility for keeping the nonleadership counsel's clients apprised of developments in the litigation?

The Preliminary Draft and Draft Note appear to envision that leadership counsel should keep nonleadership counsel informed about developments. It is unclear if leadership counsel are also responsible for updating the clients of nonleadership counsel, which might be expected since nonleadership counsel can, at most, "monitor" the proceedings.

7. Does the Preliminary Draft invite the appearance of impropriety by green-lighting MDL courts' appointment of leadership counsel?

Even though virtually all plaintiffs in an MDL proceeding are represented by their own counsel, appointing leadership counsel affords the court the opportunity to choose its own team to litigate the overall matter—to decide who will best handle the pretrial proceedings. Indeed, it has been observed that "[t]he universal goal in any MDL is to assemble the *best team."*[69] The court may be involved in *ex parte* discussions with the leadership team about supplementing or rearranging the team to improve its performance. In the common benefit fee process, the court will decide how much the plaintiffs represented by nonleadership counsel will be taxed to pay the fees and costs of the chosen group. Although none of these circumstances necessarily crosses ethical lines, they do create the troubling appearance of an MDL court having active involvement in managing plaintiffs' side of the litigation.

This appearance concern may be exacerbated where, in the words of the Draft Note, "tension [develops] between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel." The Draft Note observes that "nonleadership counsel [should] have suitable opportunities to express their views to the court." But will those opportunities occur on the public record or *ex parte*? For example, if leadership counsel insists on using a particular science expert on causation issues common to all plaintiffs

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their authority to perform representational duties has been shifted to leadership counsel and their awareness of what is occurring in the litigation is necessarily limited by the distance they are required to maintain.

[69] Judge Stephen R. Bough & Elizabeth Chamblee Burch, *Collected Wisdom on Selecting Leaders and Managing MDLs,* 1 Judicature 69 (2022).

but nonleadership counsel has received information showing that a different expert would be better equipped to rebut defendant's positions, how will that dispute be aired with the court? Presumably, the plaintiffs' side would prefer that the dispute be discussed *ex parte* to avoid giving defense counsel a window on plaintiff strategies. But how can a federal court possibly justify discussing and possibly expressing views on merits issues *ex parte*? Doing so could be exceedingly unfair to defendants and certainly create an appearance of impropriety.

Given all of the foregoing concerns and uncertainties about the meaning, authorization, and ramifications of the MDL leadership counsel concept, it would be imprudent to include subsection (c)(1) in the proposed Rule 16.1. It should be removed from the Preliminary Draft.[70]

III. TIPS FOR JUDICIAL FACILITATION OF SETTLEMENT DO NOT BELONG IN THE FRCP—GOOD LITIGATION MANAGEMENT IS THE KEY

The Preliminary Draft acknowledges that Rule 16 already prompts judges to consider actions to facilitate settlement,[71] but escalates settlement into a top priority in MDLs by making suggestions that transferee courts consider "measures to facilitate settlement,"[72] provide "judicial assistance [to] facilitate the settlement of some or all actions,"[73] facilitate the role of leadership counsel "in settlement activities,"[74] and refer matters to a magistrate judge or master "to play a part in settlement negotiations."[75] The words "settle" or "settlement" appear 12 times in the Preliminary Draft and Draft Note.[76] In particular, the Draft Note stresses the "important role for leadership counsel in some MDL proceedings … to facilitate possible settlement"[77] As the Draft Note puts it:

> It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.[78]

Many federal judges would disagree that a court should be "regularly apprised of developments regarding potential settlement" of matters before them and should "make every effort" to supervise lawyers (on one side of the case) as to their settlement efforts. Although the Draft

[70] If the Advisory Committee decides to pursue addressing the leadership counsel concept in Rule 16.1, the Rule should directly address the concerns noted above by, *inter alia,* stressing the need to define clearly the division of responsibilities between leadership and nonleadership counsel and requiring substantial involvement of nonleadership counsel in decision-making.

[71] *See* Preliminary Draft Rule 16.1(c)(9) and accompanying advisory committee's note.

[72] Preliminary Draft Rule 16.1(c)(9).

[73] Preliminary Draft Rule 16.1 (c)(9) advisory committee's note.

[74] Preliminary Draft Rule 16.1(c)(1)(C).

[75] Preliminary Draft Rule 16.1(c)(12) advisory committee's note.

[76] At lines 33, 62, 206, 207, 211, 213, 217, 320, 322, 324, 330, and 336.

[77] Preliminary Draft Rule 16.1(c)(1)(C) advisory committee's note.

[78] Preliminary Draft Rule 16.1(c)(1)(C) advisory committee's note.

Note offers a nod to the fact that settlement is "a decision to be made by the parties," the over-emphasis on settlement at the initial conference is inappropriate because it fosters a presumption of liability, conveys that the judge has an agenda, is inconsistent with the MDL statute's boundaries as a pre-trial mechanism, and is counterproductive because it puts the "cart" of settlement well before "horse" of litigating claims, defenses, and liability.

Taking actions to propel settlement is inconsistent with the MDL statute,[79] which does not mention settlement. The Preliminary Draft implies that the decision to consolidate—a decision that is not informed by the merits of the cases—gives rise to a presumption that settlement is the appropriate resolution and that judges should take an active role in facilitating that result. That is simply not the case.[80]

The existence of a large number of claims does not mean those claims have merit—especially since the mass filing of unexamined claims is a defining characteristic of many MDLs (see section I, above). Often, claims are generated by extravagant spending on advertising, and, as the Committee acknowledges, between 20 and 50 percent of these claims are unsupportable.[81] Many of these should be dismissed due to lack of product use, lack of injury, or on statute of limitations grounds. Others present insurmountable legal or factual deficiencies and should be dismissed at summary judgment on common issues, including lack of scientific support[82] or preemption.[83] Still others, consistent with 28 U.S.C. Section 1407, should be remanded to their originating courts for individual adjudication on the merits.[84] In all of these situations, the merits should guide the resolution of claims. To conclude instead that settlement is the judicial objective would be improper.

The Preliminary Draft furthers the misperception that an MDL is primarily a vehicle for paying—rather than adjudicating—claims. MDLs are not victim-compensation funds akin to the September 11th Victim Compensation Fund or the Deepwater Horizon Oil Spill Trust. In those situations, liability had already been determined and claimants were entitled to receive money based on their injury. In contrast, in most MDLs, liability is hotly contested and settlement

[79] 28 U.S.C. § 1407.

[80] *See* Hon. Clay D. Land, *Multi-District Litigation after 50 Years: A Minority Perspective from the Trenches,* 53 Ga. L. Rev. 1237, 1242 (2019); *see also In re Mentor Corp. Transobturator Sling Prods.,* No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 n.2 (M.D. Ga. Sept. 7, 2016) (noting that, of 850 cases filed, 100 were decided against plaintiffs on summary judgment, 458 were dismissed by stipulation of parties, and 74 were dismissed voluntarily).

[81] Agenda Book, Advisory Committee on Civil Rules, Nov. 1, 2018, at 142, https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[82] *See, e.g., In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No II),* MDL 2502, 892 F.3d 624, 631 (4th Cir. 2018) (trial court granted summary judgment against all claims after Rule 702 motion, ending the litigation).

[83] Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?,* 23 Widener L.J. 97, 129 (2013) (noting disposition of *Kurns v. Railroad Friction Prods. Corp.,* 565 U.S. 625 (2012) resulted in dismissal of 3,000 asbestos cases as pre-empted by Locomotive Inspection Act).

[84] *See, e.g., In re Chinese-Manufactured Drywall Prods. Liab. Litig*., MDL No. 2047, 2018 WL 3972041, at *5 (E.D. La. Aug. 20, 2018) (Fallon, J.).

before a determination of liability is often not appropriate for some or all of the individual claimants. Moreover, suggesting MDL courts immediately focus on settlement at the initial management conference does not encourage sound management of proceedings. In an empirical study of MDL settlements for her book *Mass Tort Deals,* Elizabeth Chamblee Burch found that most MDL judges (52.9 percent) actively promote settlement,[85] and a substantial number did so before hearing expert witnesses or reviewing summary judgment motions.[86] Settlements resulting from artificially shortened processes risk inferior agreements, where potentially deserving plaintiffs are undercompensated while plaintiffs without cognizable claims are overcompensated.

If the Committee wishes to offer advice to transferee judges for creating a favorable environment for settlement, it should emphasize that settlements are most often the by-product of case management focused on resolving merits issues—the same approach judges take when hearing individual claims.[87] At the Initial MDL Management Conference, the court should focus on working through pre-trial issues so the various parties may evaluate the merits of the litigation generally and the veracity of each claim. Resolving these issues will provide the parties with the information they need to assess the litigation—and settle only if and as appropriate, again just as in individual cases. If early settlement is appropriate in a case, the parties can and will drive that outcome.

IV. THE FRCP SHOULD NOT INVITE "PLEADINGS" THAT RULE 7(A) DOES NOT ALLOW

Rule 7(a) lists seven pleadings and states that "[o]nly these pleadings are allowed" in district courts.[88] The Committee views this rule strictly, as evidenced by the 2007 amendment that added subsection (a)(7) allowing a reply to an answer – but only "if the court orders one."[89] In other words, the Rule rejects any notion that courts should permit pleadings absent Rule 7(a) authority. Problems arise when courts grapple with non-standard pleadings.[90] Although Rule 7(a) does not list "consolidated pleadings" or give any indication that such pleadings are allowed—even if ordered by the court—subsection (c)(5) of the Preliminary Draft inappropriately suggests consideration of "[w]hether consolidated pleadings should be prepared to account for multiple actions filed in MDL proceedings."

It would be a mistake to advance an FRCP amendment that contradicts an existing Rule. Subsection (c)(5) would create considerable confusion. The term "pleading" has a meaning in

[85] Elizabeth Chamblee Burch, *Mass Tort Deals*: *Backroom Bargaining in Multidistrict Litigation* (2019) at 104.

[86] Burch, *Mass Tort Deals* at 104.

[87] Burch, *Mass Tort Deals* at 108 ("When judges don't engage with the merits through pretrial motions and trials, the relative strength of plaintiffs' cases may matter little in settlement negotiations.").

[88] FED. R. CIV. P. 7(a).

[89] FED. R. CIV. P. 7(a)(7) and advisory committee's note to 2007 amendment ("For the first time, Rule 7(a)(7) expressly authorized the court to order a reply to a counterclaim answer.").

[90] *See*, *e.g.*, *In re Zantac (Ranitidine) Products Liability Litigation*, 339 F.R.D. 669, 682 & n.15 (S.D. Fla. 2021) (addressing unanticipated problems caused by use of non-standard MDL "short form complaints").

the FRCP and appears in numerous rules. The FRCP establish standards for pleadings and procedures for testing those standards. Subsection (c)(5)'s use of the word "pleadings" will create a presumption that the word has the same meaning as in other rules, but litigation is sure to arise as to the function and limits of such documents. Those questions are not answered by a note that gives consolidated pleadings a wink and a nod by mentioning that "some courts" have required them and they "may be useful,"[91] especially with the particularly unhelpful editorial that the relationship between consolidated pleadings and real pleadings "depends."[92] The Draft Note's mere reference to the Supreme Court's opinion in *Gelboim v. Bank of America*[93] is no substitute for rule clarity. In fact, the *Gelboim* Court expressly questioned the legal effect of such documents.[94] Subsection (c)(5) should be removed from the proposed rule.

If the Committee wants to give MDL courts authority to order parties to use a new type of pleading, it should amend Rule 7(a), just as it did with Rule 7(a)(7). But if the Committee is determined to mention consolidated pleadings, master complaints, and master answers in a Rule 16.1, then the Preliminary Draft should be modified to provide courts and parties tangible guidance including a statement that such documents must provide the required notice[95] and should be treated as if they were actually pleadings under the FRCP.

V. THE FRCP SHOULD NOT EMBRACE "DIRECT FILING ORDERS" BECAUSE THEIR USE CONFLICTS WITH RULE 3, CONTRADICTS THE MDL STATUTE, AND PROVOKES SERIOUS QUESTIONS ABOUT JURISDICTION AND WAIVER

Subsection (c)(10) of the Preliminary Draft invites transferee courts and parties to consider "how to manage the filing of new actions in the MDL proceedings."[96] The Draft Note clarifies that (c)(10) refers to stipulated "'direct filing' orders."[97] Inserting the concept of direct filing into the FRCP would be a radical decision because direct filing is inconsistent with Rule 3, which "governs the commencement of all actions,"[98] and with the statutory framework, which mandates that MDL transfers "shall be made by the [JPML]."[99] Moreover, because several courts have

[91] Draft Note at lines 286, 288.

[92] *Id*. at line 293.

[93] *Id*. at lines 297-98.

[94] *See Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015) (noting that "master complaints" may "supersede prior individual pleadings," but also may lack "legal effect" serve only as "an administrative summary of the claims brought by all the plaintiffs") (*quoting In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590-92 (6th Cir. 2013)).

[95] *See Bell Atl. Corp. v.* Twombly, 550 U.S. 544, 545 (2007) (complaints must provide "fair notice of what the claim is and the grounds upon which it rests").

[96] Preliminary Draft 16.1(c)(10).

[97] Draft Note at lines 337-38, 340.

[98] Fed. R. Civ. P. 3 advisory committee note to 1937 rule.

[99] *See* 28 U.S.C. § 1407(a); *see also, In re Kaba Simplex Locks Marketing and Sales Practice Litig*., No. 1:11-MD-2220 (N.D. Ohio Aug. 1, 2012) ("no basis upon which [the court] has the legal authority to issue the requested direct filing order in the instant case.").

held that MDL courts lack *subject-matter jurisdiction* over direct-filed claims,[100] subsection (c)(10) urges the filing of claims that MDL courts lack power to address.

Direct filing orders typically require defendants to waive objections to personal jurisdiction, venue, and even choice of law—sometimes to their surprise.[101] They also engender disputes about the scope of such waiver and the effect on choice-of-law questions. Subsection (c)(10) would thus set up MDL judges for unrealistic expectations about waivers and unintended complications when claims are not filed in the appropriate venue. For these reasons, subsection (c)(10) should be removed from the proposed rule.

If the Committee is nonetheless determined to prompt courts and parties to consider direct filing, the Preliminary Draft should be modified to provide meaningful guidance on procedures for, and the possible ramifications of, such filings. The rule should make plain that direct-filed claims are subject to the FRCP rules governing pleadings, and the note should address the impact that a direct-filing order can have on venue and jurisdictional defenses – in particular, it should plainly state that express agreement by defendants is necessary for any waiver of venue and jurisdictional defenses.

VI. THE SUBSECTION (C)(12) PROMPT TO APPOINT MASTERS SHOULD BE OMITTED BECAUSE IT CONTRADICTS THE GUIDANCE IN RULES 53 AND 72 AND DOES NOT FOCUS ON MDL-SPECIFIC PROBLEMS

There is little if any utility to subsection (c)(12)'s suggestion that MDL courts should obtain the parties' views on "whether matters should be referred to a magistrate judge or master."[102] Rule 53 already requires that "the court must give the parties notice and an opportunity to be heard" before appointing a master,[103] and Rule 72 provides guidance and procedures for referrals to magistrate judges.[104] Adding subsection (c)(12) to the FRCP will cause confusion by communicating an explicit endorsement of appointing masters, contrary to the Committee Note statements that "appointment of a master must be the exception and not the rule" and "[a] master should be appointed only in limited circumstances" because "[d]istrict judges bear primary responsibility for the work of their courts." [105] When a court appoints a master to address pre-trial matters, "[a]ppointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge."[106]

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[100] *See, e.g.*, *In re Jan. 2021 Short Squeeze Trading Litig.*, 580 F. Supp. 3d 1243, 1253 ("The weight of authority further supports the conclusion that an MDL transferee court lacks subject matter jurisdiction over claims by new plaintiffs asserted for the first time directly in an MDL proceeding.").

[101] *See, e.g.*, *Looper v. Cook Inc.*, 20 F.4th 387, 394 (7th Cir. 2021) (defendant "impliedly" consented to waive choice of law by agreeing to direct filing); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 351-52 (5th Cir. 2017) (MDL judge incorrectly interpreted defendant's agreement to direct filing as waiver of personal jurisdiction defenses).

[102] Proposed Rule 16.1(c)(12).

[103] FED. R. CIV. P. 53(b)(1).

[104] *See* FED. R. CIV. P. 72. *See also* 28 U.S.C. §636(b).

[105] FED. R. CIV. P. 53 advisory committee's note to 2003 amendment.

[106] *Id.*

Because the FRCP already address this topic, the only purpose for mentioning it in a Rule 16.1 would be to provide MDL-specific guidance that could help the transferee court address (or better yet, avoid) problems that often come up in MDLs. To that end, the Committee Note should advise that MDL courts must be cautious in their use of masters, and must tailor appointment orders, recognizing that "[d]irect performance of judicial functions may be particularly important in cases that involve important public issues or many parties."[107] It should also avoid perpetuating a misconception that the raison d'être of an MDL proceeding (almost literally from day one) is to steer the litigation toward settlement, rather than managing pretrial matters including adjudicating dispositive motions, where warranted. If the rule mentions the use of masters, the note should provide guidance about the following issues:

- Presumption against referral. As the Committee has stated, "appointment of a master must be the exception and not the rule."[108]

- Preference for magistrate judges. As the Committee has stated, "[o]rdinarily a judge who delegates these functions should refer them to a magistrate judge acting as a magistrate judge."[109] Before appointing a master, the court should first consider whether a magistrate judge is available.

- Delay. Research shows that the use of masters in many MDL proceedings prolongs rather than shortens the litigation, delaying resolution.[110] Before appointing a master, the court should have confidence that appointing a master will help secure "speedy" determinations.[111]

- Transparency about selection. Courts should have a transparent process for vetting and selecting masters, including opportunities to object to an appointment and to seek a master's removal. In MDLs, the employment of masters raises significant concerns about "capture and cronyism"[112] and the appearance of bias. MDL masters are often chosen from a small group of repeat players, and are often nominated by lawyers who are

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[107] *Id*.

[108] *Id*.

[109] *Id.*

[110] According to a study by Professors Burch and Williams:

> Proceedings with special masters last about 66% longer than those without such appointments, and the difference is statistically significant at conventional levels. Our findings are thus consistent with a prior study's observation that, when comparing proceedings with only special masters to those with only magistrates, "cases that used only a special master took longer to resolve than cases using only a magistrate judge."

Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129 (2020).

[111] *See* FED. R. CIV. P. 1 (the FRCP should be employed to secure "the just, speedy, and inexpensive determination of every action and proceeding" in United States district courts).

[112] Burch & Williams, 120 Colum. L. Rev. at 2206.

likewise repeat MDL players. Courts should guard against the unfairness and perception of bias because MDL lawyers and masters have the power to advance each other's self-interest in a manner that could create tension with the best interests of the court, the parties, and public trust in the judiciary.

- Transparency about process. Before appointing a master, courts should spell out a clear scope of responsibility and authority. As the Committee has said, "[t]he order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible."[113] This is even more important in MDLs than other cases due to the multiplicity of parties and the court-imposed limitations on engagement by nonleadership counsel. The order should require a master's decisions to be in writing or transcribed and part of the public record and explain the mechanism for challenging a decision or appealing an order rendered by the master. The order should include a defined process for parties to raise questions about a master's conduct.

- Transparency about cost. The use of masters in MDLs raises the cost of litigation; fees can easily run into the millions or tens of millions of dollars. Public transparency is essential in MDLs because the many claimants and parties should have the ability to understand where their money goes when masters perform judicial functions on behalf of the federal courts. Courts should provide full transparency, on the public record, about special master compensation, including hourly rates and invoices that specify how much time a special master spends on particular tasks.

- Role in settlement. Courts should be especially vigilant when delegating and defining a master's role in facilitating settlement (see section III, above). Courts should not use masters as a loophole in the ethical limitations inherent in settlement communications, particularly including discussions between the master and the court.

- *Ex Parte* Communications. As the Committee has explained, "[e]x parte communications between a master and the court present troubling questions"[114] and "[o]rdinarily the order" appointing a master "should prohibit such communications."[115] Equally important, "in most settings . . . ex parte communications [between a master and] the parties should be discouraged or prohibited."[116] MDLs are particularly vulnerable to the well-known problem that ex parte communications with the court and with individual parties create unequal access to information and taint the appearance of impartiality.[117]

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[113] FED. R. CIV. P. 53 advisory committee's note to 2003 amendment.

[114] FED. R. CIV. P. 53, advisory committee's note to 2003 amendment; *see also id.* ("Similarly difficult questions surround ex parte communications between a master and the parties.").

[115] *Id.*

[116] *Id*.

[117] Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Houston L. Rev. 1347, 1355 (2000) ("The proscription against ex parte and other improper communications is to 'accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.' Generally,

Appointment orders should prohibit ex parte communications or, at the very least, limit such communications to well-defined and narrow circumstances.

CONCLUSION

An FRCP amendment providing guidance about MDL management is greatly needed. It should explain and address the "rules problem" that led the Committee to take up the current rulemaking effort: the shortcoming in the FRCP that invites the mass filing of unexamined claims in MDLs. Subsection (c)(4) and the accompanying note should be revised to guide MDL courts to deter and manage the mass filing of unexamined claims by requiring basic information early in the case, and it should not conflate this with discovery, which is covered in subsection (c)(6). The Preliminary Draft and Draft Note should also be revised to remove the subsections that could do more harm than good by enshrining into the FRCP concepts that raise complicated or undecided questions about existing FRCP or statutory provisions, including the subsections about appointing leadership counsel, facilitating settlement, consolidated pleadings, "direct filing," and appointing masters.

no party or viewpoint should have an advantage in the presentation of information or the decision-making of a judge without notice to all interested parties. When ex parte communications are used, excluded parties lose the opportunity to rebut unfavorable or incorrect information.").

TAB 4B

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

October 4, 2023

THE DIRECT APPROACH: WHY FIXING THE RULE 26(b)(5)(A) PROBLEM REQUIRES AN AMENDMENT TO RULE 26(b)(5)(A)

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on the proposed amendments to rules 16(b) and 26(f) of the Federal Rules of Civil Procedure ("FRCP").[2]

INTRODUCTION

The proposed amendments recognize the significant problems and inefficiencies in today's complex federal court litigation involving the appropriate withholding of records on the basis of privilege – particularly the widely divergent standards and expectations across the nation. The fact that these problems exist despite the clear statement in the Committee Notes to the 1993 amendment to Rule 26(b)(5)(A) that document-by-document logs are not required in every case[3] suggests that the solution is not to issue guidance in Rules 16(b) and 26(f)(3)(D) and in the Committee Notes to those rules (the "Committee's Proposal"), particularly when the proposed comments will be inserted in notes unrelated to the rule that sets out the expectations when parties withhold documents from production on the basis of privilege, Rule 26(b)(5)(A). The fact that there are thirteen references to Rule 26(b)(5)(A) in the Committee's Proposal demonstrate that the Committee's intent is to address a Rule 26(b)(5)(A) problem. Because the

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

[3] It should be noted that the multiple amendments to Rule 26 since 1937 have caused the committee notes to become voluminous, making it difficult for courts and parties to find the relevant notes.

indirect approach will not serve the need, the Committee should modify its proposal to include an appropriate amendment to Rule 26(b)(5)(A).

The 1993 Committee Note correctly observes that detailed privilege logs "may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."[4] However, Rule 26(b)(5)(A) fails to help distinguish between appropriate and unduly burdensome logging, likely because the 1993 Committee Note has gotten lost in the voluminous notes to the 13 amendments to Rule 26 since 1937.[5] Many courts and parties continue to misconstrue Rule 26(b)(5)(A) to require document-by-document privilege logs in all cases—including in cases involving massive amounts of data, and even for categories of documents that are highly unlikely to contain discoverable information, such as communications with counsel after the filing of a complaint.[6] This misinterpretation of Rule 26(b)(5)(A) is causing significant inefficiency and injustice by imposing unsupportable and unjustifiable burdens and by hindering courts and parties from making use of more efficient alternative methods to comply with the rule. It is also suborning the unfortunate tactic of imposing asymmetric litigation burdens on litigants to force the compromise of claims and defenses in response to economic pressure rather than the merits.

To address the Rule 26(b)(5)(A) problem, the Committee is proposing to amend two other rules, Rule 26(f) and Rule 16(b), to require parties to discuss, and prompt judges to order, the timing and method for compliance with Rule 26(b)(5)(A). Although this proposal is well-intended, and might help in some cases correct the misinterpretation that leads many courts to find a presumptive requirement for document-by-document privilege logs, its utility will be limited. As Judge Facciola and Jonathan Redgrave accurately observed to the Committee:

> [T]he omission of any proposed amendments to Fed. R. Civ. P. 26(b)(5)(A)(ii) itself in the rules package unfortunately fails to address directly the progeny of cases that misapply this rule and axiomatically insist that the rule requires that a party must log each privileged document individually, including courts holding that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances.[7]

Meetings and conferences will not fix Rule 26(b)(5)(A), nor will they adequately address the problem of ever-increasing burdens of the privilege process as the volume of records and costs of discovery continue to increase. Only an amendment to Rule 26(b)(5)(A) can sufficiently clarify that the rule does not require document-by-document privilege logs but rather allows producing

[4] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment ("The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.")

[5] To find committee notes to a specific section of the rule, practitioners and courts need to know the year that section was amended. Importantly, the Committee's Proposal does not include a cross-reference in Rule 26(b)(5)(A) referring to the amendments and committee notes to Rules 16(b) and 26(f)(3)(D).

[6] *In re Imperial Corp. of America*, 174 F.R.D. 475, 478 (S.D. Cal 1997).

[7] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023), https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

parties to create categorical privilege logs or to agree on other alternatives. At very least, an amendment to Rule 26(b)(5)(A) should provide a reference to the proposed Rule 16(b) and Rule 26(f) amendments and should be accompanied by a note explaining what compliance with the rule means.

This Comment sets forth the Rule 26(b)(5)(A) problem, explains why a modification to the Committee's Proposal to add a direct amendment to Rule 26(b)(5)(A) is necessary, urges a change from "rolling" logs to "tiered" logs in the proposed Committee Notes to the proposed Rule 16(b) and 26(f) amendments, and suggests that the Committee should follow through with this rulemaking by next taking up a Rule 45 amendment to address the needs of non-parties. Modifying the Committee's Proposal as suggested here will achieve the Committee's purpose of informing and enabling parties to customize appropriate logging procedures that are effective, efficient, and proportional to the needs of each case.

I. PRIVILEGE LOGS ARE TOO EXPENSIVE, OFTEN MORE BURDENSOME THAN HELPFUL, AND FREQUENTLY INDUCE HARMFUL GAMESMANSHIP

A. Costs and Burdens

Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation.[8] The Sedona Conference recognizes that "[i]n complex litigation, preparation of [privilege] logs can consume hundreds of thousands of dollars or more."[9] The costs and complexity of privilege logs are increasing exponentially as the volume of data and communications increase at incredibly high rates. It is estimated that human beings produce 2.5 quintillion bytes of data every day. Ninety percent of the world's total data was produced in the past two years. Document and communication demands are consequently straining the current rules, which were designed for a world of paper.

The burdens of overlogging are not limited to producing parties. Because document-by-document logs treat each item as if it had equal importance, such logs force receiving parties and courts to focus often misplaced attention on items that may have no material relationship with the claims and defenses. Receiving parties often review thousands of entries, assess those entries, and fashion responses, irrespective of importance. Courts often must resolve disputes over the sufficiency of such log entries that frequently require *in camera* reviews and proceedings.

As the volume of material potentially subject to discovery has escalated, so too has the number of documents withheld for privilege. As the Committee explained to the Standing Committee, the burdens of producing document-by-document privilege logs have escalated as digital

[8] *See* New York State Bar Association, *Report of the Special Committee On Discovery And Case Management In Federal Litigation*, at 73 (June 23, 2012) ("Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.").

[9] The Sedona Conference, *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103 (2016).

communications have supplanted other means of communication.[10] As a result, the burdens and expenses of asserting privilege claims has grown dramatically. A court in the Southern District of New York has noted that "the advent of electronic discovery and the proliferation of e-mails and e-mail chains" has made "traditional document-by-document privilege logs . . . extremely expensive to prepare, and not really informative to opposing counsel and the Court."[11] While artificial intelligence and other technological advancements have increased the capability and efficiency of finding *potentially* privileged documents, litigants cannot use these tools alone to assert their privilege claims under the current rules. Instead, creating privilege logs remains a manual, burdensome, and exceptionally expensive process in litigation.

B. Limited Value

Document-by-document privilege logs are frequently of little value to the requesting party and the court in analyzing or evaluating the privilege claims, despite the time, effort and money spent preparing them.[12] The Sedona Conference explains: "Privilege logs rarely 'enable other parties to assess the claim' as contemplated by Rule 26(b)(5) [n]or do the logs 'reduce the need for *in camera* examination of the documents.'"[13] A major reason for the problem is that document-by-document logging is based on the flawed premise that each document (or redacted portion) should be treated with equal detail, rather than focusing more attention on the documents that are more important to the case and less attention to unimportant items. Preparing a privilege log requires careful and time-consuming analysis of descriptions sufficient to convey the basis for withholding the document without unintentionally conveying the substance of the communication and thus waiving privilege—an effort that should be tailored rather than applied as a blanket default to the universe of documents.

C. Gamesmanship

Although disagreements regarding the sufficiency of privilege logs can cause extensive skirmishes between the parties, rarely do such fights impact the ultimate outcome of the case. Too often, challenges to privilege logs are used as a tool by overly aggressive requesting parties to impose added expenses on producing parties, to obtain desired concessions with respect to other discovery disputes, or to delay litigation. Such actions place additional barriers to the

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[10] Memo from Hon. Robin L. Rosenberg, Chair, Advisory Committee on Civil Rules, to John D. Bates, Chair, Committee on Rules of Practice and Procedure (Dec. 9, 2022), Agenda Book, Committee on Rules of Practice and Procedure (Jan. 4, 2023), at 205, https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_agenda_book_final_0.pdf.

[11] *Auto Club of N.Y., Inc. v. Port Auth. of N.Y. and N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013).

[12] *See* The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 81 (2018) ("[o]ften, the privilege log is of marginal utility."); *see also id* at 159, Comment 10.h ("[T]he precise type and amount of information required to meet the general standards set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information to the requesting party to assess the claimed privilege.").

[13] The Sedona Conference, *Commentary on Protection of Privileged ESI, supra* at 104 n.7. *See also id* at 155 ("[T]he deluge of information and rapid response time required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs 'raise[] the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.'").

efficiency of our civil justice system and inevitably force parties to compromise rights that otherwise could be vindicated on the merits. Rarely do privilege log disputes result in the production of documents or data that are dispositive of a case or claim.

D. Lack of Uniformity

There is a troublesome lack of uniformity across federal courts in the caselaw interpreting Rule 26(b)(5)(A). Many district courts across the country have attempted to address the Rule 26(b)(5)(A) problem by promulgating local rules and standing orders that provide for limits on logging requirements and endorse alternative methods of privilege logging—a clear indication that the absence of a national standard is causing problems.[14] Local rules developed in response to the burden of document-by-document privilege logs have also been varied and inconsistent. For example, the District of Colorado urges counsel to engage in good faith to identify types of documents that do not need to be logged document-by-document,[15] while district courts in New York have local rules that presumptively find categorical groupings of documents for privilege logs to be proper.[16] Still other courts hold that Rule 26(b)(5)(A) rigidly requires a separate log for each email in a chain of emails, regardless of the circumstances.[17] There is also a lack of uniformity with respect to which kinds of documents may be categorically excluded from privilege logs, such as duplicative emails in lengthy email chains or communications between counsel and clients after the commencement of litigation.[18]

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[14] Even in jurisdictions where courts have not undertaken larger-scale efforts to address the problem of logging privileged documents in the digital age, a growing number of courts have recognized the appropriateness of categorical privilege logs based on the burden imposed by individual logs and lack of benefit they provide. *See, e.g., Asghari-Kamrani v. U.S. Auto. Ass'n,* No. 2:15-cv-478, 2016 WL 8243171, at *1– 4 (E.D. Va. Oct. 21, 2016) (finding party's categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be "unduly burdensome for no meritorious purpose*")*; *Manufacturers Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4-5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a "document-by-document listing…. would be unduly burdensome" and provide "no material benefit to Precision in assessing whether a privilege …. claim is well grounded."); *First Horizon National Corp*. v. Certain Underwriters at Lloyd's, 2013 WL 11090763, at*7 (W.D. Tenn. Feb. 27, 2013) (permitting categorical privilege log and noting that "several courts have employed such a categorical approach to balance competing concerns of, on the one hand, the burden on the withholding party to perform a detailed indexing of a large amount of documents and, on the other hand, the need for the requesting party, and even more importantly, the court, to be able to adequately assess the applicability of the privilege being asserted.")

[15] Guidelines Addressing the Discovery of Electronically Stored Information cmt. 5.1 (D. Colo. 2014)

[16] S.D.N.Y. Civ. R. 26.2(c); W.D.N.Y. Civ. R. 26(d)(4).

[17] *See, e.g.*, *M & C Corp. v. Erwin Behr GmbH & Co.*, No. 91-CV-74110-DT, 2008 WL 3066143, at *2 (E.D. Mich. Aug. 4, 2008) ("As an initial matter the Court notes that the parties have approached the question of the applicability of the work product doctrine to the disputed material in general terms rather than on a more detailed, document by document, level. Kemp Klein did not serve a privilege log listing each document withheld and describing each document as required by Fed. R. Civ. P. 45(d)(2). Therefore, this Court cannot and will not decide whether any specific documents or categories of documents are protected by the work product doctrine.").

[18] *Compare Brown v. West Corp*., 287 F.R.D. 494, 499 (D. Neb. 2012) ("This Court has joined other district courts in assuming privilege for attorney-client communications that transpire after the initiation of litigation in situations where the plaintiff is requesting extensive discovery."), *with Shufeldt v. Baker, Donelson, Bearman, Caldwell and Berkowitz, P.C.*, No. 3:17-cv-01078, 2020 WL 1532323, at *6 (M.D. Tenn. 2020) ("[T]here is no apparent reason to limit the scope of the log to materials generated before the filing of the [action]").

While a categorical privilege log can be a reasonable alternative to a document-by-document privilege log in many cases, it is certainly not the only alternative. The spirit of Rule 26(b)(5)(A) calls for effective and proportional alternatives, as contemplated in the 1993 Committee Note, and for parties to select the privilege log form that best suits the case. Establishing clear guidance on the elements of a sufficient privilege log will ensure consistency across courts and relieve parties of the default document-by-document privilege log burden.

II. THE COMMITTEE'S PROPOSAL SHOULD BE MODIFIED TO INCLUDE AN AMENDMENT TO RULE 26(b)(5)(A) WITH A COMMITTEE NOTE DESCRIBING A SUFFICIENT LOG

The Committee's Proposal will best achieve its purpose if an amendment to Rule 26(b)(5)(A)(ii) provides a reference to the new amendments. As suggested by Facciola and Redgrave,[19] adding this single sentence would put the focus where it belongs—the rule that is the source of the misunderstanding:

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

Adding this provision will help ensure that courts and parties turning to Rule 26(b)(5)(A) for guidance will learn that the FRCP require parties to take the initiative in addressing and reaching agreement on the scope, structure, content, and timing of privilege logs at the appropriate time in each case. A Committee Note accompanying this amendment should clarify that Rule 26(b)(5)(A) does not specify the method of compliance and should describe the elements of a sufficient privilege log. The Committee Note should also clarify that, absent unusual circumstances, there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation. These three categories are clearly within the privilege and almost never will be admissible in the substantive case. Providing clarity on this topic is much-needed (as noted in LCJ's original submission[20]) and would reduce satellite litigation over whether documents in these categories must be logged. The Committee Note should also suggest that prioritizing logging by tier can help parties focus on the documents that are most likely to matter to the litigation. An effective Committee Note could look like this:

> Rule 23(b)(5)(A) is amended together with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to direct the parties to select a privilege log form and process that is effective and proportional to the needs of the case. The form should allow the parties to assess

[19] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023) , https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

[20] Lawyers for Civil Justice, *Privilege And Burden: The Need To Amend Rules 26(B)(5)(A) And 45(E)(2) To Replace "Document-By-Document" Privilege Logs With More Effective And Proportional Alternatives* (August 4, 2020), https://www.uscourts.gov/sites/default/files/20-cv-r_suggestion_from_lawyers_for_civil_justice_-_rules_26_and_45_privilege_logs_0.pdf (hereinafter, "LCJ Suggestion").

privilege claims and make the proper assertion as to whether privilege applies. The process should be efficient; the parties' selection should reflect the volume of documents, the burdens and expenses of producing the log, and the value of the log to the litigation. The privilege log form and process should not require judicial attention or intervention in the ordinary course.

The privilege log form will vary with the needs of the case. Elements of a sufficient privilege log form may: (1) include sampling to determine whether privilege claims are legally and factually sound; (2) utilize broad categories or summaries for secondary, nonmaterial documents; (3) provide more detailed information for subsets of important or primary, material documents; or (4) establish logging protocols for particular types of linked/serial communications such as emails or text messaging.

The process of compiling a privilege log should also reflect the needs of the case. Prioritizing the logging of documents that are more likely to be significant to the claims and defenses could help focus attention on the key issues, just as with a tiered approach to document production.

Certain categories of documents are presumed not to need logging absent unusual circumstances, including trial-preparation documents created after the commencement of litigation and communications between counsel, client regarding the litigation after service of the complaint, and communications exclusively between a party's in-house counsel and outside counsel during litigation.

Parties may select a privilege log form and process that incorporates technology and the creativity of parties and counsel, so long as the privilege log form and process are clear, efficient, and proportional to the needs of the case.

III. THE PROPOSED COMMITTEE NOTES TO THE RULE 16(b) AND 26(f) AMENDMENTS SHOULD SUGGEST TIERED LOGGING RATHER THAN ROLLING PRODUCTION

The Committee's Proposal includes a proposed note to the Rule 26(f)(3)(D) amendment stating: "Often it will be valuable to provide for 'rolling' production of materials and an appropriate description of the nature of the withheld material." Similarly, the proposed Note to the Rule 16(b) amendment says: "It may be desirable for the Rule 16(b) order to provide for 'rolling' production that may identify possible disputes about whether certain withheld materials are indeed protected." This language should be changed to substitute the word "tiered" for "rolling" because tiering is an effective management technique but rolling is frequently a counterproductive concept that often exacerbates the problems of ineffective and inefficient logging practices.

A "tiered" process allows coordination between privilege logging and the production of documents.[21] It prioritizes the production and logging of documents that are most likely to

[21] Comment by Robert D. Keeling to the Advisory Committee on Civil Rules (Sept. 8, 2023) at 9, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0003.

contain information that is material to the issues in the case. Organizing the process in this manner means that any potential disputes related to the most important documents are resolved as early as possible in the discovery process. By focusing on sources that are more likely to be material, tiering can provide more detailed logs for important withheld documents while relieving the burdens of focusing undue attention on the less significant tiers.

In contrast, rolling logs often cause substantial delay in the completion of document productions because providing privilege logs at or near the same time as corresponding document productions adds significantly to the burden while decreasing the quality and accuracy of the privilege log.[22] Devoting resources and attention to composing privilege log entries takes away resources from the document production. "More often than not, rolling logs create needless 'fire drills' where not enough time (or resources) exists to provide quality productions simultaneously with quality log entries."[23] Because document productions are typically of more immediate interest to the requesting party, when a choice must be made, the privilege log is often the second priority, which leads to disputes and motion practice. Moreover, logs that are produced on a rolling basis often must be corrected and reproduced later in the process based on information from subsequent document review. "For example, the question of whether an individual copied on a communication is a third-party recipient who breaks privilege may not be clear from review of a single document, but subsequent review of additional documents may assist lawyers in making the correct privilege determination in the first instance."[24] Correcting and redoing previously produced logs, and making supplemental productions of documents in the previous log population, is inefficient. It is better for parties and the courts if privilege logs are compiled after the majority of documents in a particular tier have been reviewed.

IV. A RULE 45 AMENDMENT IS NEEDED BECAUSE THE COMMITTEE'S PROPOSAL DOES NOT ADDRESS THE PROBLEMS OF NON-PARTY PRIVILEGE LOGS

Non-parties facing the prospect of producing a privilege log pursuant to Rule 45 have an equal, or perhaps even greater, need for guidance about requirements than parties. Although Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it expressly with respect to privilege logging. Because non-parties do not typically participate in Rule 26(f) or Rule 16 conferences, the Committee's Proposal does not address their needs and problems. If the Committee does not want to address Rule 45 in the current rulemaking, it should nevertheless take up the topic for a future proposal because an amendment to Rule 45 is the most effective way to provide non-parties the appropriate guidance and protection.

CONCLUSION

The Committee's 1993 insight has been misunderstood or ignored, and now Rule 26(b)(5)(A) and its case law progeny have institutionalized a *de facto* default to "document-by-document" overlogging. This Rule 26(b)(5)(A) problem imposes significant burdens on parties, non-parties, and courts that are not worth the price, and it also induces gamesmanship. Although the

[22] *Id*. at 7-9.
[23] *Id*. at 8.
[24] *Id*.

Committee's Proposal could help, the indirect approach of amending Rules 26(f) and 16(b) will not be as effective without direct guidance in Rule 26(b)(5)(A) to focus on finding an efficient process that best meets the needs of the case. An amendment to Rule 26(b)(5)(A) referring to the new Rule 26(f) and 16(b) provisions, together with a Committee Note as described above, will inform and enable courts, parties, and non-parties to customize logging forms and procedures to ensure effective and efficient logging.

TAB 5

TAB 5A

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Re: Written Testimony on Proposed Federal Rule of Civil Procedure 16.1

Dear Members of the Committee:

This letter is in response to the request for written testimony in advance of the Committee hearing on October 16, 2023. I am a partner in the law firm of Bartlit Beck LLP, but the views expressed here and in my testimony are exclusively my own and do not necessarily reflect the views of the firm, its other lawyers, or any of the firm's clients.

My testimony will concern Proposed Rule 16.1 regarding multidistrict litigation cases, in particular Proposed Rule 16.1(c).

For details regarding my testimony, I refer the Committee to the written comment that I intend to submit no later than October 7, 2023.

At a high level, I will address these topics:

- The extent to which the current draft of Proposed Rule 16.1(c), including its use of permissive rather than mandatory language, does not function as a traditional rule but rather encourages ad hoc rulemaking by MDL judges.

- Reasons why the Federal Rules should not encourage ad hoc rulemaking in MDLs.

    - While a certain amount of ad hoc procedure may be unavoidable, discussions of the benefits of giving MDL judges maximum flexibility in case management overlook the significant problems that accompany ad hoc rulemaking.

    - Those problems include how ad hoc rulemaking (1) contributes to the proliferation of unsubstantiated claims in MDLs and the so-called "Field of Dreams" problem; (2) may inadequately restrict an MDL judge's discretion with

respect to effectively unreviewable orders that can have a major impact on the parties' rights; (3) relies on an adversarial, party-driven process that lacks the credibility of rulemaking by disinterested parties whose sole aim is to draft rules that promote the fair and expedient administration of justice; (4) exacerbates that "repeat player" problem that has generated much criticism of current MDL practice; and (5) contributes to the lack of confidence among both plaintiffs and defendants in MDLs as a means to fairly adjudicate disputes and resolve claims.

- Revisions to the current draft of Proposed Rule 16.1, as proposed by Lawyers for Civil Justice, that would both (1) avoid unnecessarily encouraging ad hoc rulemaking in MDLs and (2) more effectively address the unsubstantiated claims problem.

I look forward to the opportunity to discuss these issues with the Committee and answer any questions you may have.

Respectfully submitted,

/s/ Kaspar J. Stoffelmayr

Kaspar J. Stoffelmayr

TAB 5B

BartlitBeck LLP

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October 7, 2023

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Federal Rule of Civil Procedure 16.1

Dear Members of the Committee:

I write regarding proposed new Rule of Civil Procedure 16.1 for multidistrict litigation cases. I am a partner in the law firm of Bartlit Beck LLP, but the views expressed here and in my testimony are exclusively my own and do not necessarily reflect the views of the firm, its other lawyers, or any of the firm's clients.

Introduction

For many years, much of my practice, both as a senior in-house lawyer and as outside counsel to major corporations, has involved the defense of mass tort claims in federal MDLs.

Based on that experience, I wholeheartedly endorse the comment submitted by Lawyers for Civil Justice ("LCJ Comment") on September 18, 2023. The LCJ Comment comprehensively addresses Proposed Rule 16.1 and suggests revisions that would significantly improve the current draft.

In particular, as the LCJ Comment lays out, the current draft is inadequate to address one of the greatest shortcomings of modern MDL practice: the so-called "Field of Dreams" problem. Today, large MDLs generally proceed in a manner that does not just permit, but encourages, the filing of large numbers of claims that have not been subject to any sort of meaningful pre-filing review. Experience shows that, after years of costly litigation, many of these unreviewed claims turn out to be unsubstantiated for the most basic reasons, such as a plaintiff's failure ever to have used the product at issue or to have suffered the relevant injury.

I submit this separate comment to address a related, overarching concern: as currently drafted, subsection (c) of Proposed Rule 16.1 threatens to codify and exacerbate the problematic extent to

which MDL courts rely on unpredictable and ad hoc procedural rulemaking. The solution, as the LCJ Comment proposes, is to revise the current language in Proposed Rule 16.1(c) so that it (1) does not include controversial subject matter for which a rule is not appropriate, and (2) addresses the unsubstantiated claims problem with mandatory language, like other Federal Rules, that provides clear requirements for litigants and courts to follow.

Proposed Rule 16.1(c) Would Unnecessarily Encourage Ad Hoc Rulemaking

As drafted, Proposed Rule 16.1(c) is not a "rule" in the traditional sense and does not, like other Rules of Civil Procedure, set forth procedures that apply across cases unless a court expressly excuses compliance under limited circumstances that the Rules define.[1] Just the opposite, the current draft of Proposed Rule 16.1(c) encourages each MDL court to make its own ad hoc rules on numerous important topics.

Proposed Rule 16.1(c) advises MDL judges that, in advance of the initial case management conference in an MDL, the court "may" (but need not) direct the parties to submit a report on extraordinary procedural orders that might (or might not):

- Put "limits on activity by non-leadership counsel" on behalf of their own clients (Proposed Rule 16.1(c)(1)(E));
- Require individual plaintiffs to provide information about the factual bases for their claims (Proposed Rule 16.1(c)(4));
- Permit atypical pleadings such as "master" and "short form" complaints (and answers), which are not recognized in Rule 7 or elsewhere in the Federal Rules and which have unclear legal effect (Proposed Rule 16.1(c)(5));[2]

[1] For example, while Rule 4 provides significant flexibility regarding the time limits for serving process, it uses mandatory language that strictly defines how a district court can—and cannot—exercise its discretion around the deadlines for service: "If a defendant is not served within 90 days after the complaint is filed, the court . . . ***must dismiss*** the action without prejudice ***or order*** that service be made within a specified time," except that "if the plaintiff shows good cause for the failure, the court ***must extend*** the time for service for an appropriate period." Fed. R. Civ. P. 4(m) (emphasis added).

Similarly, although a district court should "freely give leave" to amend pleadings "when justice so requires," Fed. R. Civ. P. 15(a)(2), the Rules strictly circumscribe a district court's discretion under Rule 16(b)(4) to modify the deadline for amending a complaint. The plaintiff must demonstrate "good cause," meaning specifically that "despite their diligence they could not meet the original deadline." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 843 (6th Cir. 2020) (quotation marks and citation omitted). Absent such a showing, a district court has no discretion to find the "good cause" necessary for a late amendment based on what the court believes would be more efficient or would otherwise promote its case management goals. *Id.* at 843-45.

[2] Subsection (c)(5) refers to "consolidated pleadings," which the Committee Note discusses in terms of "master complaints and answers in addition to short form complaints."

- Involve special "measures to promote settlement" (Proposed Rule 16.1(c)(9));[3] and
- Permit the filing of new actions in a court that the personal jurisdiction and venue rules would normally prohibit (Proposed Rule 16.1(c)(10)).[4]

It is unclear what purpose such a rule would serve. The LCJ Comment explains why numerous topics in Proposed Rule 16.1(c) involve difficult and contested legal questions on which it would be inappropriate for the Rules to take a position. And the draft rule does not purport to give federal judges any greater power than whatever discretion they already have to issue the procedural orders contemplated in Proposed Rule 16.1(c).

While a rule along the lines of the current draft is thus unnecessary, it would not be without impact. Proposed Rule 16.1(c) provides no standards or limits to govern how MDL judges should address the enumerated topics. Rather, it would enshrine in the Federal Rules the view that the topics identified in Proposed Rule 16.1(c) are appropriate areas for inconsistent and unpredictable ad hoc rulemaking in every MDL.

Concerns About the Use of Ad Hoc Rulemaking in MDLs

Many have expressed the view that ad hoc rulemaking in MDLs is a virtue of the current system and should be encouraged. There are, of course, benefits to providing district judges with maximum flexibility to manage their cases, including MDLs, as they see fit. Far less attention has been paid, however, to the important countervailing considerations that warn against the widespread use of ad hoc rules in a class of cases that makes up such a large portion of the federal civil docket.

First, there is an important way in which the unpredictability inherent in ad hoc rulemaking contributes to the unsubstantiated claims problem that has become a defining characteristic of modern MDLs. Without knowing in advance what procedural rules will apply in an MDL and what sort of early scrutiny, if any, claims will receive, it is virtually never the case that a claim is not worth filing simply because counsel does not know whether it can ever be substantiated. Given the low cost and burden of filing cut-and-paste complaints on behalf of hundreds or thousands of plaintiffs, it is not surprising that lawyers will file large numbers of unreviewed cases in the hope that the court will not adopt procedures that require parties to show that they

[3] The Committee Note tells district courts that the relevant "measures to promote settlement" do not just include encouraging (or ordering) mediation, but can include any number of other procedural devices.

[4] While subsection (c)(10) refers to "how to manage the filing of new actions," the Committee Note discusses only so-called "direct filing" orders.

have viable claims before a settlement opportunity arises.[5] An important step toward solving the unsubstantiated claims problem would be to replace the ad hoc approach with a clear rule that applies across cases and creates a firm expectation that in MDLs, no less than in other cases, plaintiffs must produce evidence to support their claims early in the process.

Second, while the benefits of broad judicial discretion are important, so too are the benefits of limiting judicial discretion. Certainly, there are highly regarded MDL judges who have adopted procedural innovations that served the court and the parties well. But judges come to the bench with very different skill sets and backgrounds. Not every judge who receives an MDL will be equally adept at MDL case management. At the same time, even the most important MDL case management orders, with the greatest impact on the parties' rights, are effectively unreviewable. Under such circumstances, there is much to be said for restricting a lone MDL judge's discretion in favor of considered rules of procedure, adopted through the formal and deliberative federal rulemaking process—which is public and which benefits from the input of judges across the judiciary and experts with a wide variety of perspectives.

Third, the process by which MDL courts adopt ad hoc procedural rules means that these rules often lack credibility as impartial rules of procedure designed to promote the fair administration of justice. It is typical for an MDL judge to rely heavily on input from the lawyers about what procedures to adopt. There are times when judges are notably deferential to counsel with the most experience in large MDLs. Yet every one of these lawyers is an advocate representing an interested party (and some may also stand to gain or lose personally from the court's procedural decisions). A leading scholar of MDLs finds that, "[w]ithout much external scrutiny, past practices quickly become best practices, and experienced agents are able to cite and replicate beneficial procedures in areas that affect their financial remuneration."[6] An adversarial rulemaking process, driven by parties looking for an advantage, is nothing like rulemaking by disinterested parties, such as this Committee, who are not concerned with who will win or lose any particular lawsuit, but rather draft rules to apply across cases with the aim of securing the "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.[7]

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[5] One often hears in response that many lawyers, including some prominent members of the mass-tort plaintiffs' bar, do not file unreviewed cases. One would hope so. The problem is that other lawyers do file these cases.

[6] Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vanderbilt L. Rev. 67, 86 (2017).

[7] The "agreed" case management orders that lawyers present to an MDL judge are not necessarily any better. While such orders may receive less judicial scrutiny, they may often reflect nothing more than "horse trading" among sophisticated parties negotiating compromise positions that secure terms of particular importance to each side. And lawyers recognize the value of agreeing to enough of the other side's demands, whether or not they are sound as a

Fourth, the reliance on ad hoc procedures in MDLs is a significant contributor to the "repeat player" problem that has generated much criticism of current MDL practice.[8] When important procedural rules in MDLs are not codified anywhere, but are recycled and modified from case to case, the only lawyers capable of playing a major role in an MDL are the insiders and their selected colleagues whom the insiders favor by sharing their knowledge and experience. To make matters worse, when MDL judges defer to the most experienced MDL lawyers for guidance on which procedures to adopt, it gives those repeat players outsized influence and standing with the court and among the other lawyers representing aligned parties.

Finally, ad hoc procedure in MDLs contributes to the notable lack of confidence that many parties have expressed in federal MDLs as a fair way to adjudicate disputes and resolve claims. While lawyers and judges see much to praise in current MDL practice, the parties themselves often have a very different assessment. Certain defendants' concerns about MDLs are well documented. A recent survey of plaintiffs with cases in mass tort MDLs shows enormous dissatisfaction with the process among plaintiffs as well.[9] There are doubtless numerous reasons why parties may have such a low opinion of MDLs, but one important factor is the clash between the broad reliance on ad hoc procedures in MDLs and a fundamental view "of the rule of law that equates it with fair procedures laid down in advance of disputes."[10] With so many defendants and, apparently, plaintiffs sharing the view that MDLs work to obscure the merits of individual cases while driving coercive settlements, it can only heighten the parties' distrust of the process when the court begins to craft its own procedures, not found in the Federal Rules, specifically to control their case.

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matter of the administration of justice, to satisfy the court's strong desire to see agreement among the parties on procedural matters.

[8] *E.g.*, Alissa del Riego, *Driving Diverse Representation of Diverse Classes*, 56 U. Mich. J. L. Reform 67 (2022); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vanderbilt L. Rev. 67 (2017); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell L. Rev. 1445 (2017); Dana Alvaré, *Vying for Lead in the "Boys' Club": Understanding the Gender Gap in Multidistrict Litigation Leadership Appointments* (2017 & 2018 update) (https://www2.law.temple.edu/csj/publication/mdl-study/).

[9] Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835 (2022).

[10] David L. Noll, *MDL as Public Administration*, 118 Mich. L. Rev. 403, 407 (2019). To be clear, Professor Noll believes that this is an unfair criticism: If the parties feel this way, it is because they incorrectly hold MDL courts to the same standards of procedural justice as they hold other courts. According to Professor Noll's article, that reflects a misunderstanding of MDLs' real function. He analogizes MDL courts to executive branch agencies, like the Social Security Administration, that administer public programs—but without the same legitimacy, he notes, because MDLs lack the transparency, accountability, and accessibility we demand of administrative processes.

Conclusion

None of the above is meant to say that there is no place for any ad hoc rules in MDLs. To a certain degree, ad hoc rulemaking is inevitable and sometimes appropriate in MDLs just as in other cases. But in drafting a new Rule 16.1 for MDLs, the Committee should also take seriously the major drawbacks of ad hoc rulemaking in MDLs. In light of those concerns, it would be a mistake to adopt the current draft language in Proposed Rule 16.1(c) that affirmatively encourages problematic ad hoc rulemaking by calling out certain topics as particularly appropriate for ad hoc procedural rules.

Rather, Proposed Rule 16.1(c) should be revised as suggested in the LCJ Comment to eliminate the unnecessary invitation to engage in ad hoc rulemaking on contested subjects, while still addressing one of the most pressing failures of the MDL system through mandatory language on the early evaluation of claim sufficiency.[11]

I look forward to the opportunity to discuss these issues with the Committee and to answer any questions.

Respectfully submitted,

/s/ Kaspar J. Stoffelmayr

Kaspar J. Stoffelmayr

[11] Specifically, the current draft of Proposed Rule 16.1 should be revised to include the language that the LJC Comment proposes for subsection (c)(4) and to eliminate subsections (c)(1), (c)(5), (c)(9), (c)(10), and (c)(12).

TAB 6

TAB 6A

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October 3, 2023

VIA E-MAIL

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: October 16, 2023 Civil Rules Hearing

Dear Mr. Byron:

I appreciate the opportunity to appear before the Advisory Committee on Civil Rules at its upcoming hearing on October 16, 2023. As requested in the September 23, 2023 memorandum to confirmed hearing witnesses, I wanted to report that at the hearing, I intend to address the proposed Fed. R. Civ. P. 16.1, particularly the prompt in the Preliminary Draft of Rule 16.1(c)(1) suggesting that courts and parties consider "whether leadership counsel should be appointed" in the multidistrict litigation proceeding. My views on this topic are generally reflected in the comments submitted by Lawyers for Civil Justice on September 18, 2023, at pages 11-17. (Comment ID: USC-RULES-CV-2023–0003-0004.) I therefore do not plan to offer a separate written submission.

If you have any questions, please let me know.

Sincerely,

John H. Beisner

TAB 6B

discovery, timing of any motion practice, selection of initial trial cases. To the extent that leadership decisions are made in part on the basis of claim volume, early disclosures help the judge make appropriate decisions about plaintiffs' leadership. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig*., No. 14-MD-2543, 2016 WL 1441804, at *9 n.4 (S.D.N.Y. Apr. 12, 2016) (giving "some credence" to accusation that lead counsel "flooded the MDL with meritless cases" to gain position in leadership contest). Disclosures enable parties more accurately to estimate the risks of litigation, aiding in timely resolution of the litigation.

II. APPOINTMENT OF LEADERSHIP COUNSEL IS TOO FRAUGHT WITH LEGAL UNCERTAINTY TO BE ENDORSED BY THE FRCP

The Preliminary Draft's prompt to consider "whether leadership counsel should be appointed"[42] would interject difficult and unanswered legal questions into the FRCP. Although intended to facilitate a discussion that may need to occur (particularly in mass tort MDLs),[43] the topic is adequately covered in the Manual for Complex Litigation (Fourth)[44] and including this concept in Rule 16.1 would cause more problems than it would solve.

A. Because No Accepted Definition of "Leadership Counsel" Exists, Injecting this Concept into the FRCP Would Sow Confusion

There is no prevailing definition of the MDL "leadership counsel" concept. The leadership appointment orders issued by MDL courts in recent years have been described as reflecting the most extreme level of "ad hockery" in the MDL realm.[45] Unfortunately, the case law is not developing any new clarity; one scholar's examination of MDL leadership appointment orders issued in 201 federal MDLs pending as of June 2019 concluded that "there is no grand progression toward more perfect, more fully specified orders."[46] Rather, such orders "simply appoint attorneys to specified positions and say nothing more."[47] Only about half endeavor to enumerate leaders' duties.[48] The study observed that "[n]one of the [reviewed] orders . . .

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[42] Preliminary Draft Rule 16.1(c)(1).

[43] These comments are focused primarily on mass tort-type MDL proceedings where most constituent actions are individual plaintiff lawsuits in which claimants are each represented by their own retained counsel. In contrast, many other MDL proceedings are constituted largely of class action cases, which seek to assert the claims of numerous unnamed persons who are ***not*** individually represented by their own counsel. In those cases, appointment of leadership counsel (that is, counsel for the putative class members) is governed primarily by Fed. R. Civ. P. 23(g). Nevertheless, appointment of leadership counsel for the overall MDL proceeding may be desirable in such matters to coordinate the multiple class actions in the proceeding. If the Advisory Committee proceeds toward adoption of a Rule 16.1, this distinction between "mass tort" and class action-based MDL proceedings should be addressed more explicitly.

[44] *See* Manual for Complex Litigation (Fourth) §§ 10.22, 22.62.

[45] David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders,* 24 Lewis & Clark L. Rev. 433, 465-66 (2020) ("Noll Study").

[46] *Id.*

[47] *Id.*

[48] *Id.* at 444.

attempted to define the legal relationship between court-appointed leaders and non-client plaintiffs."[49] Further, the study noted that only around five percent of the orders "specify duties that lead plaintiffs' counsel hold toward MDL plaintiffs."[50] This absence of meaningful "leadership counsel" definitions does not reflect efforts to tailor the concept to the needs of particular MDL proceedings. To the contrary, the definitional fuzziness shows that MDL courts are unable, because of the thicket of unanswerable questions, to advance any meaningful definition of leadership appointments—or worse, a practice of allowing leadership counsel to self-define their roles.[51] Incorporating the significant uncertainty about this concept into Rule 16.1 would not clarify what "leadership counsel" means for newly appointed (or even experienced) transferee judges, but rather would suggest a degree of certainty and predictability that does not exist.

B. Rule 16.1 Should Not Invite MDL Courts to Limit the Activity of Non-Leadership Counsel Because the Legal Authority to Do So Is Unsettled and Raises Complicated Questions Under State Law, Ethics Rules, and the Rules Enabling Act

The Preliminary Draft's suggestion to consider imposing "limits on activity of nonleadership counsel"[52] is highly inappropriate for inclusion in the FRCP because of the legal and ethical duties MDL plaintiffs' lawyers owe to their clients. As the Preliminary Draft and Draft Note suggest, when plaintiffs' leadership counsel are designated in an MDL proceeding, they are directed to act on behalf of all plaintiffs, which means that the plaintiffs' counsel ***not*** selected for a leadership roles are effectively ordered to stand down, even though their clients' claims remain in the MDL proceeding and likely will be substantially affected by leadership counsel's actions.

Some MDL courts—22 percent, according to Professor Noll's study[53]—explicitly direct nonleadership counsel to cease active representation of their clients and defer to leadership counsel's decision-making. For example, one order states that "Counsel for Plaintiffs who disagree with Lead and Liaison Counsel, or have individual or divergent positions, may ***not*** act separately on behalf of their clients without prior authorization of this Court."[54] Another MDL appointment order states that "no papers shall be served or filed, and no process, discovery, or other procedure shall be commenced by any counsel other than Lead Counsel, except with specific leave of Court."[55] The Noll Study concluded that even where an appointment order does not explicitly restrict nonleadership counsel practice, "the division of labor between leaders and non-leads in these MDLs is [likely] governed by informal norms or directions from the court or

[49] *Id.* at 452-53.

[50] *Id.*

[51] *Id.* at 450.

[52] Preliminary Draft Rule 16.1(c)(1)(E).

[53] Noll, *What Do MDL Leaders Do?,* 24 Lewis & Clark L. Rev. at 455.

[54] *Id.* at 455-56 (quoting Case Management Order at 9, *In re MONAT Hair Care Prods. Mktg., Sales Practices, and Prod. Liab. Litig.,* No. 1:180md-02841-DPG (S.D. Fla. June 6, 2018), ECF No. 59) (emphasis added).

[55] *Id.* (quoting Order Appointing Leadership Counsel at 4, *In re Ashley Madison Consumer Data Security Breach Litig.,* No. 4:15-md-02669-JAR (E.D. Mo. Dec. 9, 2015), ECF No. 87).

court-appointed leaders about the work that non-leads can and cannot perform."[56] In short, it appears that in all MDL proceedings, nonleadership counsel are explicitly or implicitly constrained from fully representing their clients in the manner they otherwise would.

The Preliminary Draft therefore gives rise to a series of thorny legal questions that appear largely unresolved, even though MDL courts have used the leadership counsel device for many years. Many of these questions have escaped judicial examination because of the tendency of mass tort MDL proceedings to be resolved on the basis of broad legal determinations (resulting in dismissal of most claims) or settlements. Hence, because of the failure of MDL courts to screen claims in the early phases, the presence of ill-considered claims and litigation funding influences have made settlements more difficult to achieve, and increasing numbers of case remands should be expected going forward. They will likely give rise to disputes that will require resolution of these issues, including:

1. **What authority allows courts to assign leadership counsel the duty to represent clients of nonleadership counsel?**

At least one court has stated that leadership counsel assume responsibility for representing the clients of nonleadership counsel with respect to all duties assigned in the leadership order.[57] Some other courts' orders reflect this practice, according to Professor Noll's study: "A leadership appointment order . . . picks out functions that will be handled on a centralized basis by court-appointed leaders and leaves individually retained plaintiffs' attorneys responsible for the rest of the duties that inhere in the attorney/client relationship."[58] However, there is no explicit authority for courts to do this, and no general judicial embrace of this power. In fact, MDL leadership orders typically do not detail the division of responsibility between leadership and nonleadership counsel as to the representation of nonleadership counsels' clients. The Committee should not enshrine the notion of appointing leadership counsel into the FRCP—a notion that would conflict with state laws and ethics rules, and would not be consistent with the Rules Enabling Act.

2. **What authority allows MDL courts to override a client's choice of counsel by shifting their representation to different counsel (at least in part) *without their consent?***

Although appointment of leadership counsel is common in MDL proceedings and is mentioned in the Manual for Complex Litigation (Fourth), there is no identified source of authority for federal courts to abrogate and restructure attorney-client relationships in this manner. It certainly does not flow from the MDL statute. Indeed, if anything, the concept of transferring responsibility from the counsel retained by a plaintiff to a "leadership" group is contrary to the Supreme Court's holding that cases transferred into an MDL proceeding "retain their separate

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[56] *Id.*

[57] *Casey v. Denton,* 2018 WL 4205153, at *4 (S.D. Ill. Sept. 4, 2018) (quoting Manual for Complex Litigation, § 10.22) ("to avoid being bogged down and wasteful of judicial resources, a court will need to institute procedures 'under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients *with respect to specified aspects of the litigation*'").

[58] Noll, *What Do MDL Leaders Do?,* 24 Lewis & Clark L. Rev. at 465.

identities."[59] The Court has stressed that "Section 1407 refers to individual 'actions' which may be transferred to a single district court, not to any monolithic multidistrict 'action' created by transfer."[60] The Committee should not enshrine the notion of overriding clients' choice of counsel into the FRCP when doing so is unsupported by law, contradicts state ethics rules, and is not consistent with the Rules Enabling Act.

3. What authority allows an MDL court to replace (at least in some respects) plaintiff's retained counsel, who owe traditional fiduciary duties to their clients, with leadership counsel who do not, without the client's consent?

Leadership counsel do not owe standard fiduciary duties to clients of nonleadership counsel, at least according to caselaw. For example, when several plaintiffs represented by nonleadership counsel asserted a breach of fiduciary duty claim against lead counsel in the *Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products. Liability Litigation,* the MDL court concluded:

> [L]ead and liaison counsel do not owe a fiduciary duty to each and every MDL plaintiff in the traditional sense. Rather, lead and liaison counsel should put the common and collective interests of all plaintiffs first while they carry out their enumerated functions. . . . It is obvious to this Court that the hallmarks of a traditional fiduciary relationship are absent from the MDL context in that there is no underlying offer and acceptance of power of attorney or agency between appointed leadership counsel and the plaintiffs.[61]

Similarly, in the *In re General Motors LLC Ignition Switch Litigation* proceeding, a nonleadership attorney alleged that lead counsel breached a fiduciary duty owed to all plaintiffs in the MDL proceeding when he (a) asked the court to schedule one of his own cases as the first bellwether trial, (b) voluntarily dismissed that case due to that bellwether plaintiff's potential perjury, and (c) negotiated an inventory settlement with the defendant that covered most of his other clients.[62] In support of that motion, Prof. Charles Silver, a legal ethics expert, opined that by virtue of his role, lead counsel owed to all MDL plaintiffs a fiduciary duty to "operate free of any incentive" to perform his duties in a manner that would disserve their interests.[63] In opposition, Prof. Geoffrey Miller, another legal ethics expert, denied the existence of any such

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[59] *Gelboim v. Bank of America Corp.,* 574 U.S. 405, 413 (2015).

[60] *Id*. *See also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 37 (1998) (section 1407 does not "imbue transferred actions with some new and distinctive . . . character"); *In re Fosamax Prods. Liab. Litig.,* 852 F.3d 268 (3d Cir. 2017) (cautioning that in MDL proceedings, plaintiffs each retain the right to develop their own cases, because "[a] mass tort MDL is not a class action" but rather "is a collection of separate lawsuits that are coordinated for pretrial proceedings—and *only* pretrial proceedings—before being remanded to their respective transferor courts"), *vacated and remanded on other grounds, Merck Sharpe and Dohme Corp. v. Albrecht,* 139 S.Ct. 1668 (2019).

[61] *Casey v. Denton*, 2018 WL 4205153, at *5-6 (S.D. Ill. Sept. 4, 2018).

[62] *In re General Motors Ignition Switch Litig.,* 2016 WL 1441804, at *2–5 (S.D.N.Y. Apr. 12, 2016).

[63] *In re General Motors Ignition Switch Litig.,* No. 14-MD-2543, Declaration of Charles Silver at 13, ECF No. 2182.

duty.[64] The court adopted a middle ground closer to Professor Miller's view, concluding that lead counsel's obligations to nonleadership counsel's clients are "not as strong as the duties that lead counsel owes to absentee [class] members of a class action."[65]

Since leadership counsel do not owe the same duties to plaintiffs as nonleadership counsel, the FRCP should not prompt courts, without consent of each plaintiff, to substitute leadership counsel for the plaintiff's retained counsel.

4. Does ordering leadership counsel to consult with nonleadership counsel solve the ethical dilemmas?

In a few instances, MDL courts have sought to sidestep this concern by ordering that in performing their duties, leadership counsel must consult with nonleadership counsel. For example, the leadership order in one proceeding states: "In carrying out the [specified] duties, Plaintiffs' Co-Lead Counsel are . . . required to consult with all Plaintiffs' counsel throughout this case to assure that all interests are represented."[66] And in another, an MDL court stated: "I anticipate that the Robins Kaplan group will solicit and consider the views of others, particularly the Milberg Weiss firm, in making litigation decisions on behalf of the plaintiffs."[67] However, nothing required leadership counsel to obtain any form of consent from nonleadership counsel (or their clients) as to any strategy decisions. Orders requiring consultation do not ameliorate concerns that leadership appointments in MDL proceedings seriously disrupt attorney-client relationships. Proposed Rule 16.1 merely suggests that in crafting the initial case management conference report, the parties should consider "proposed methods for [leadership counsel] to regularly ***communicate with*** and report to the court and nonleadership counsel." (Emphasis added.) The Draft Note speaks only in terms of leadership counsel allowing nonleadership counsel to "monitor" proceedings; there is no mention of leadership counsel having any obligation to confer with nonleadership counsel about litigation decisions. Observing that "it may be necessary for the court to give priority to the leadership counsel's pretrial plans with they conflict with initiatives sought by nonleadership counsel," the Draft Note says only that "[t]he court should . . . ensure that nonleadership counsel have suitable opportunities to express their views to the court." [68]

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[64] *In re General Motors Ignition Switch Litig.,* No. 14-MD-2543, Declaration of Geoffrey Parsons Miller at 4, ECF No. 2200-1.

[65] *In re General Motors Ignition Switch Litig.,* 2016 WL 1441804 at *7.

[66] Order Appointing Leadership Counsel at 4, *In re Ashley Madison Consumer Data Security Breach Litig.,* No. 4:15-md-02669-JAR (E.D. Mo. Dec. 9, 2015), ECF No. 87).

[67] Memorandum and Order at 6, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* No. 1:05-md-01720-MDB-JO (E.D.N.Y. Oct. 20, 2005), ECF No. 278.

[68] A few MDL courts have sought to dodge the representational responsibility issue by including in their appointment orders statements seemingly deny that any representational duty has been transferred to leadership counsel. For example, one such order states: "All attorneys representing parties to this litigation, regardless of their role in the management structure of the litigation and regardless of this court's designation of [leadership counsel] . . . continue to bear the responsibility to represent their individual client or clients." Pretrial Order No. 4 at 2, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.,* No. 2:12-md-02327 (S.D. W. Va. Feb. 7, 2012(, ECF No. 120. However, it is difficult to see how nonleadership counsel can continue to fully "bear [that] responsibility" if most of

5. Are leadership counsel obliged to comply with ethics requirements, including obtaining written consents (as necessary) from the nonleadership counsel's clients?

Nonleadership counsel presumably have given their clients appropriate disclosures and possibly received informed consents to their representation of multiple plaintiffs as to the claims in the MDL proceeding pursuant to applicable ethics rules, such as ABA Model Rules 1.7 (as to the representation of multiple plaintiffs as to similar claims) and 1.8(g) (as to "participat[ing] in making an aggregate settlement" involving multiple clients). To the extent that elements of nonleadership counsel's representational responsibilities are transferred by court order to leadership counsel, it is unclear if leadership counsel are also obliged to comply with these ethics requirements, including obtaining written consents (as necessary) from the nonleadership counsel's clients.

6. Who has responsibility for keeping the nonleadership counsel's clients apprised of developments in the litigation?

The Preliminary Draft and Draft Note appear to envision that leadership counsel should keep nonleadership counsel informed about developments. It is unclear if leadership counsel are also responsible for updating the clients of nonleadership counsel, which might be expected since nonleadership counsel can, at most, "monitor" the proceedings.

7. Does the Preliminary Draft invite the appearance of impropriety by green-lighting MDL courts' appointment of leadership counsel?

Even though virtually all plaintiffs in an MDL proceeding are represented by their own counsel, appointing leadership counsel affords the court the opportunity to choose its own team to litigate the overall matter—to decide who will best handle the pretrial proceedings. Indeed, it has been observed that "[t]he universal goal in any MDL is to assemble the *best team."*[69] The court may be involved in *ex parte* discussions with the leadership team about supplementing or rearranging the team to improve its performance. In the common benefit fee process, the court will decide how much the plaintiffs represented by nonleadership counsel will be taxed to pay the fees and costs of the chosen group. Although none of these circumstances necessarily crosses ethical lines, they do create the troubling appearance of an MDL court having active involvement in managing plaintiffs' side of the litigation.

This appearance concern may be exacerbated where, in the words of the Draft Note, "tension [develops] between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel." The Draft Note observes that "nonleadership counsel [should] have suitable opportunities to express their views to the court." But will those opportunities occur on the public record or *ex parte*? For example, if leadership counsel insists on using a particular science expert on causation issues common to all plaintiffs

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their authority to perform representational duties has been shifted to leadership counsel and their awareness of what is occurring in the litigation is necessarily limited by the distance they are required to maintain.

[69] Judge Stephen R. Bough & Elizabeth Chamblee Burch, *Collected Wisdom on Selecting Leaders and Managing MDLs,* 1 Judicature 69 (2022).

but nonleadership counsel has received information showing that a different expert would be better equipped to rebut defendant's positions, how will that dispute be aired with the court? Presumably, the plaintiffs' side would prefer that the dispute be discussed *ex parte* to avoid giving defense counsel a window on plaintiff strategies. But how can a federal court possibly justify discussing and possibly expressing views on merits issues *ex parte*? Doing so could be exceedingly unfair to defendants and certainly create an appearance of impropriety.

Given all of the foregoing concerns and uncertainties about the meaning, authorization, and ramifications of the MDL leadership counsel concept, it would be imprudent to include subsection (c)(1) in the proposed Rule 16.1. It should be removed from the Preliminary Draft.[70]

III. TIPS FOR JUDICIAL FACILITATION OF SETTLEMENT DO NOT BELONG IN THE FRCP—GOOD LITIGATION MANAGEMENT IS THE KEY

The Preliminary Draft acknowledges that Rule 16 already prompts judges to consider actions to facilitate settlement,[71] but escalates settlement into a top priority in MDLs by making suggestions that transferee courts consider "measures to facilitate settlement,"[72] provide "judicial assistance [to] facilitate the settlement of some or all actions,"[73] facilitate the role of leadership counsel "in settlement activities,"[74] and refer matters to a magistrate judge or master "to play a part in settlement negotiations."[75] The words "settle" or "settlement" appear 12 times in the Preliminary Draft and Draft Note.[76] In particular, the Draft Note stresses the "important role for leadership counsel in some MDL proceedings … to facilitate possible settlement"[77] As the Draft Note puts it:

> It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.[78]

Many federal judges would disagree that a court should be "regularly apprised of developments regarding potential settlement" of matters before them and should "make every effort" to supervise lawyers (on one side of the case) as to their settlement efforts. Although the Draft

[70] If the Advisory Committee decides to pursue addressing the leadership counsel concept in Rule 16.1, the Rule should directly address the concerns noted above by, *inter alia,* stressing the need to define clearly the division of responsibilities between leadership and nonleadership counsel and requiring substantial involvement of nonleadership counsel in decision-making.

[71] *See* Preliminary Draft Rule 16.1(c)(9) and accompanying advisory committee's note.

[72] Preliminary Draft Rule 16.1(c)(9).

[73] Preliminary Draft Rule 16.1 (c)(9) advisory committee's note.

[74] Preliminary Draft Rule 16.1(c)(1)(C).

[75] Preliminary Draft Rule 16.1(c)(12) advisory committee's note.

[76] At lines 33, 62, 206, 207, 211, 213, 217, 320, 322, 324, 330, and 336.

[77] Preliminary Draft Rule 16.1(c)(1)(C) advisory committee's note.

[78] Preliminary Draft Rule 16.1(c)(1)(C) advisory committee's note.

TAB 7

No summary of testimony was submitted.

TAB 8

Rule 16.1 – Speaker Outline – Chris Campbell, DLA Piper

1. **Intro**
    a. Christopher G. Campbell
    b. Roadmap: (1) MDL Overview; (2) Issues with Draft Rules; and (3) Areas for improvement
2. **MDLs suffer from too little structure, predictability, and uniformity**
    a. An FRCP amendment providing firm positions on MDL management is needed.
    b. Current Draft conflicts with Rules, advisory notes, and existing law.
    c. 1926 Senate Judiciary Committee Report on the Rules Enabling Act stated the goals of FRCPs are to make process "uniform" aimed at "simplicity" and "speedier and more intelligent disposition of issues..."
        i. Effect of not having parties/lawyers know what procedures govern at the outset is that "*repeat players*" thrive while others face confusion and delay.
        ii. Likely consequences of proposed rule include increased filing/longer survival of unexamined claims and increased process "*ad hockery*."
3. **The Rule functions more as practice advice/opinions than true "rule"**
    a. The 16.1 Preliminary Draft deficiencies include, but are not limited to:
        i. *Promoting Claim Insufficiency* – improper MDL early case management thwarts ability to assess risks, impedes bellweather selection, and allows meritless claims to linger. For example, 16.1(c)(4) conflates information sharing and managing discovery – prompts the parties to discuss "how and when the parties will exchange information about the factual bases for their claims and defenses" without questioning standing/ability to state claim in the first place.
        ii. *Leadership Counsel Confusion* – the Preliminary Draft includes a prompt to consider "whether leadership counsel should be appointed."
            1. No definition of Leadership Counsel exists, so including this is confusing. *See, e.g.*, 2020 "Noll Study" on MDLs showed leadership appointment orders are insufficient, with only about half enumerating leader duties.
            2. Additionally, rule references "limits on activity of nonleadership counsel" which is inappropriate as it asks lawyers who are not selected as leadership to effectively stand down from their client obligations.
        iii. *Settlement Emphasis* – 16.1(c)(9) improperly promotes settlement as a top priority, noted 12 times in the rule, even suggests transferee courts to provide "measures to facilitate settlement."
        iv. *Conflicts with FRCP 7a* – 16.1(c)(5) rejects filing of pleadings absent specific Rule 7(a) authority, despite "consolidated pleadings" not being included in 7(a).
        v. *Direct Filing Orders* – 16.1(c)(10) prompts consideration of direct filing orders. This conflicts with Rule 3, contradicts the MDL statue (28 U.S.C. § 1497), and provokes questions related to personal jurisdiction, venue, and choice of law.
        vi. *Use of Masters* – Subsection 16.1(c)(12) suggests parties obtain party views on "whether matters should be referred to a magistrate judge or masters." This goes against rules that masters be the "exception and not the rule" only appointed in "limited circumstances." *See* Fed. R. Civ. P. 53. Issues with this include delaying resolution and lack of transparency in master selection/responsibility/cost.
4. **Questions?**

TAB 9

From: Shepherd, James (SHB)
To: RulesCommittee Secretary
Cc: Shepherd, James (SHB)
Subject: Outline of Proposed Remarks of Elmore James Shepherd at Civil Rules Hearing on October 16
Date: Wednesday, October 04, 2023 3:30:23 PM

I. Introduction
   a. My name and experience with MDLs
   b. MDL specific rules are necessary
   c. Preliminary draft of Rule 16.1 is a good start but it has flaws
II. What the Rule is Missing
   a. Need to give transferee courts a rule that allows them to vet legally insufficient cases
      i. A requirement that plaintiffs transferred to an MDL provide proof of use and injury within 30 days of transfer will help with legally insufficient cases
         1. Such a requirement is not burdensome
            a. It should already be in the file of the plaintiff's attorney who has a duty to due diligence before signing her/his name to the lawsuit
   b. Need to disincentivize Plaintiff attorneys from filing legally insufficient cases
      i. Tie % of legally insufficient cases to CBF
III. What the Rule Does Not Need
   a. Early Consideration to Facilitate Settlement
      i. Purpose of an MDL is to coordinate or consolidate pretrial proceedings
      ii. It is not to resolve the litigation via settlement
         1. Presupposes liability
         2. Hinders the purpose of the MDL

TAB 10

From: Christopher Guth
To: RulesCommittee Secretary
Subject: Outline of Proposed Testimony of Chris Guth at October 16 Rules Committee Hearing
Date: Thursday, October 05, 2023 6:00:55 PM

To the Secretary-

I am Senior Assistant General Counsel for the life sciences company Bayer and write in response to the request for a written submission of planned testimony at the October 16 hearing. Bayer will be soon submitting a formal written comment regarding proposed Rule 16.1, which will be consistent with the outline I provide in this email.

In my testimony I plan to address proposed Rule 16.1, and specifically 16.1(c)(4). My testimony will focus on the need to strengthen the current proposed language of 16.1(c)(4). Rather than simply prompting an early exchange of information, it should instead include language regarding (i) when each plaintiff should provide information on their claim to establish standing and facts necessary to state a claim; and (ii) the type of information to be provided, such as use of the product(s) involved in the MDL proceeding and the nature of their alleged injury. I plan to also address the language regarding plaintiff fact sheets in the draft Note to 16.1(c)(4). Specifically, I will address the fact that plaintiff fact sheets are a discovery mechanism, which have been co-opted by necessity as an inefficient method to obtain information regarding the claims. But even this use of plaintiff fact sheets occurs at advanced stages of the MDL proceeding and as a type of discovery vehicle insufficient to adequately address the issue of claim sufficiency in MDLs. I plan to address these issues through discussion of my experiences in several product liability MDLs where a Rule with language as described above would have (i) fostered more efficient MDL proceedings; (ii) more properly allocated the court's and parties' resources to substantive and dispositive issues in the litigation; and (iii) resulted in a superior process as demonstrated by my experience with plaintiff fact sheets.

Thank you for your consideration and for the opportunity to testify on this important issue.

Freundliche Grüße / Best regards,

Christopher M. Guth
Senior Assistant General Counsel

//////////////////////

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TAB 11

TO: Advisory Committee on Civil Rules

FROM: Fred M ("Tripp") Haston, III

RE: Outline of Anticipated Testimony Concerning Proposed FRCP 16.1

DATE: October 5, 2023

I. Organization & Speaker Information

A. International Association of Defense Counsel – Who & Why Here

B. Haston Personal MDL Experience & Perspective
1) 20 Years of Direct and Indirect Involvement in Multiple Major MDLS
2) Ever Expanding Dockets: From Withdrawal to Label Change to Literature Publication

II. Proposed Rule 16.1

A. Beneficial Aspects
1) Recognition of Need for Structure, Predictability & Uniformity
2) Focus on Intake/Initial Proceedings – Promise of More Efficient Outcomes

B. Substantial Room for Improvement
1) Broadly – Endorsement of *Lawyers for Civil Justice* 9/18/23 Comment
2) Special Emphasis
   a) Claim Sufficiency – Proposed FRCP 16.1(c)(4)
      i) Cause of Exploding Dockets? Ease of "Park & Ride" Filings
      ii) A Fair Filter: Early Scrutiny of Claims
      iii) *LCJ*'s Proposed FRCP 16.1(c)(4) Revision
   b) Proposed FRCP 16.1's Overemphasis on MDL as a Settlement Facility
      i) Exacerbation of Exploding Dockets, Protracted Litigation & Non-Meritorious Filings
      ii) Parallel Rules & Notes on Class Actions – Emphasis on Procedure & Not Settlement
      iii) Importance of Proposed FRCP 16.1(c)(3) to Emphasize Rules & Procedure-Based Resolution
         (1) Pleading Sufficiency
         (2) Cross-cutting Legal & Factual Issues
      iv) Proposed Revisions to Notes
   c) Proposed FRCP 16.1(c)(10)'s Inappropriate Seeding "Direct Filings"
      i) Direct Filings as Contrary to FRCP 3 & MDL Statutory Framework
      ii) Frustration of Proposed FRCP 16.1's Promise
      iii) Need for Removal or Greater Context

TAB 12

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October 5, 2023

VIA REGULATIONS.GOV PORTAL
RulesCommittee_Secretary@ao.uscourts.gov

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, DC 20544

Re: Comment to the Advisory Committee on Civil Rules Regarding Proposed New Rule 16.1

Dear Members of the Advisory Committee:

In connection with my anticipated testimony at the hearing on October 16, 2023, this letter will provide comments regarding the focus of my testimony as it relates to proposed new Rule 16.1, and in particular subsection (c)(4) of the proposed rule. More specifically, I will address in this letter and my testimony the serious constitutional issues that arise with respect to **Article III subject matter jurisdiction** over claims that become consolidated in many large multidistrict litigation ("MDL") proceedings. As discussed below, it seems that the location within the proposed rule where these problems should be addressed is subsection (c)(4), but the current formulation of that rule is wholly inadequate and should be substantially revised.

Every district court judge, MDL transferee judge or not, has a constitutional obligation to evaluate and ensure that the claims before the court meet the requirements of constitutional standing. *U.S. v. Hays*, 515 U.S. 737, 742 (1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines.") (cleaned up) (quotations and citation omitted).[1] In addition, the Supreme Court has made it clear that "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek …." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). There is no Article III exception for MDL proceedings.

[1] In *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016), the Supreme Court remarked that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)) (internal quotations omitted).

Unfortunately, in many MDL proceedings, particularly those with hundreds or thousands of plaintiffs, transferee judges are not provided with the essential information necessary to ensure that all plaintiffs have constitutional standing.[2] As a result, thousands of improper claims may become buried in a mass of plaintiffs over which the transferee court lacks subject matter jurisdiction, and the district court judge is stymied from fulfilling the court's obligation to ensure Article III jurisdiction.

As the Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Spokeo*, 578 U.S. at 338. "The plaintiff must have (1) suffered an ***injury in fact***, (2) that is fairly ***traceable to the challenged conduct of the defendant***, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)); *TransUnion*, 141 S. Ct. at 2203.[3]

It goes without saying that "[t]he plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Spokeo*, 578 U.S. at 338. And where "a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' ***each element***" of standing. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Again, standing must be established for "each claim . . . and for each claim of relief." *TransUnion*, 141 S. Ct. at 2208. If a plaintiff has not provided the essential facts to establish all three elements, the court lacks jurisdiction to hear the claims. Failure to root out such claims early in the proceeding violates Article III and impedes the resolution of mass MDL proceedings by allowing thousands of claimants to join the proceeding despite the absence of constitutional standing.

And it cannot be seriously argued that providing basic, essential facts to establish "injury in fact" and "traceability" to a particular defendant named in the proceeding is an undue burden. If the MDL proceeding involves a particular product, essential facts establishing that the product at issue was in fact used by a plaintiff, and the fact of injury, are required. In addition, traceability requires "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 561 (cleaned up).[4]

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[2] The requirement that a party have "[s]tanding to sue" is rooted in the constitutional "cases or controversies" limitation. *Spokeo*, 578 U.S. at 338.

[3] Unless otherwise indicated in this letter, all emphasis is added and internal quotations and citations are omitted.

[4] Article III "requires that a federal court act only to redress an injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

Stated another way, traceability requires the plaintiff to establish a "substantial likelihood" that the defendant caused his injury. *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 75 & n.20 (1978); *see also* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.5 (3d ed. 2022).

Before MDL transferee courts begin to assert jurisdiction over claimants and claims, the district judge should ensure that the court has sufficient information ***from each plaintiff*** to evaluate and ensure constitutional standing. Subsection 16.1(c)(4) should be revised to accomplish this result.

Section (c) of proposed Rule 16.1 addresses preparing a report for the initial conference before the transferee court. It begins, "the transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins." The rule continues by stating that "[t]he report must address any matter designated by the court, which ***may include*** any matter addressed in the list below…." The list does not include a requirement to ensure the court can satisfy its obligation to police subject matter jurisdiction.

Subsection (c)(4) should be revised to require, at a minimum, that the report ***shall*** address (not may address) the following:

(1) whether all named plaintiffs have satisfied their burden of providing the court with sufficient information to establish standing;

(2) if not, how and when sufficient information will be provided by each named plaintiff to establish Article III standing, including

(3) facts establishing the use of any products or services involved in the MDL proceeding, injury in fact (e.g., the nature and time frame of each plaintiff's alleged injury), and traceability to one or more named defendants; and

(4) if necessary, the mechanism to remove from the MDL proceeding claims that do not satisfy minimum standing requirements.[5]

Failure to cure this problem at inception will allow (if not encourage) the mass filings of improper and unjustifiable claims, making it impossible for defendants to assess the validity of

[5] I note that Lawyers for Civil Justice ("LCJ") has submitted a proposed revision of Rule 16.1(c)(4) that seeks to accomplish this result. I support LCJ's proposal. Also, the requirements of constitutional standing are *in addition* to well-established pleading requirements necessary to state a plausible claim for relief.

claims and to resolve legitimate claims, leading to prolonged, expansive, and inefficient proceedings.

The current version of subsection (c)(4) does not address, let alone cure, the problem of mass deficiencies in constitutional standing. This requirement does not involve an "exchange" of information between plaintiffs and defendants, nor does it involve "defenses." Those concepts should be removed from the rule. Constitutional standing is a requirement that plaintiffs must satisfy to invoke federal jurisdiction, and an MDL court should require sufficient information to satisfy this constitutional obligation.

I look forward to discussing these issues before the Committee. Thank you for your consideration.

Very truly yours,

MARKHAM R. LEVENTHAL

MRL:cp

134073048

TAB 13

Testimony of Amy Keller, DiCello Levitt LLP

October 16, 2023 Civil Rules Hearing

My name is Amy Keller, and I am the Managing Partner of DiCello Levitt LLP's Chicago office, and the Chair of its Privacy, Technology, and Cybersecurity Practice Group. For the past fifteen years, I have dedicated my practice to consumer protection issues and class action litigation. I am an elected member of the American Law Institute, and a Steering Committee member of the Sedona Conference's Working Group 11 on Data Security and Privacy Liability. I have the privilege of serving on the Board of Directors of the Public Justice Foundation, and the Board of Governors of the American Association for Justice. I have been appointed to more multi-district litigation leadership positions than any other woman in the country over the last five years—including nationwide class actions against Equifax and Marriott related to their 2017 and 2018 data breaches—and I have achieved nearly $2 billion in recoveries for class members through settlements in my cases.

Through my legal work over fifteen years of litigation, I have reviewed millions of privilege log entries. I have negotiated orders concerning, drafted and reviewed, and met and conferred and briefed legal issues concerning privilege logs. Based upon my experience, I recognize that all parties to civil litigation have had complaints about privilege logs. But many of those issues could be resolved with early discussions about the how, when, and in what format the logs should be produced, and *if* categorical logging is suitable for their particular case. No "one size fits all" solution is appropriate, which is why the courts, and parties, should work to resolve these issues collaboratively, rather than issue a rule which binds the parties to a particular protocol.

I enthusiastically support the proposed amendments to Rule 16 and 26 because they would require parties and the court to resolve any potential disputes related to the production of logs and the format of those logs, as well as any other potential issues that the parties may face. Resolving those issues at the outset of litigation will reduce the number of disputes the parties have during the discovery process, and eliminate unnecessary surprise, delay, or expense associated with deficient logs or inappropriately withheld documents.

1. My experience as co-lead counsel in a nationwide data breach case.

One of the main reasons why I enthusiastically support the proposed amendments is because of my experience in a data breach case where I currently serve as co-lead counsel: *In re Marriott International Customer Data Security Breach Litigation*, MDL No., 19-md-2870 (D. Md.). My experience in this case not only informs me that discussions regarding privilege logs should

happen *early*, but that any use of categorial logs should be negotiated with clear guardrails in place to avoid over-designation.

In *Marriott*, we negotiated a whole host of proposed orders at the outset of the litigation, including an order for the production of electronically-stored information. In that order, which was entered in July 2019, the parties agreed that "[a] party withholding documents based on one or more claims of privilege will produce a privilege log in accordance with a mutually agreed upon or Court-ordered timeframe." ECF No. 315, § 11. Unfortunately, leaving details for privilege logging until a later date led to significant disputes and *months* of meeting and conferring, where the defendants insisted on categorical logging.

We negotiated a limited categorical privilege log with defendants' counsel, under the condition that defendants agree to low-cost, common sense safeguards, including those recommended by the Facciola-Redgrave Framework.[1] We agreed to negotiate such a protocol with the defendants in that case despite the fact that categorical privilege logs can be prone to gamesmanship and over-designation,[2] a fact recognized by leading voices in the bar regarding privilege logs.[3] Unfortunately, defendants' response was consistent with that experienced by other firms with whom we have worked extensively, in that they refused to: (1) agree what categories would be used; (2) include an attestation by an attorney to provide reasonable context as to the role of the person making the privilege assertion, the applicability of the privilege, and how the review was conducted; (3) include specific data points for categorical logs; and (4)

[1] *See* Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2009). Judge John Facciola (ret.) serves as the Special Master in that data breach case.

[2] *See e.g., In re Aenergy, S.A.,* No. 19-MC-542 (VEC), 2020 WL 1659834, at *4-6 (S.D.N.Y. Apr. 3, 2020) (finding defendant's categorical privilege log descriptions were "vague and repetitive" and improperly failed to reveal sufficient information to enable other parties to assess privilege claims); *Certain Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 3:15-CV-01300-JMC, 2016 WL 6539344, at *3 (D.S.C. Nov. 3, 2016) (holding party's categorical privilege log was deficient because it did not allow opposing party or the court to test the applicability of privilege to each document sought to be withheld); *Franco-Gonzalez v. Holder*, No. CV 10-2211-DMG DTBX, 2013 WL 8116823, at *7 (C.D. Cal. May 3, 2013) (same); *Chevron Corp. v. Salazar*, No. 11 CIV. 3718 LAK JCF, 2011 WL 4388326, at *2 (S.D.N.Y. Sept. 20, 2011) (finding, after *in camera* review of withheld documents, that party's categorical privilege log "obscures rather than illuminates the nature of the materials withheld" and that some or all documents withheld were subject to disclosure).

[3] *See* Facciola-Redgrave Framework, at 20.

provide distinct data points for document-by-document logs. Instead, defendants continued to propose category descriptions that were facially overbroad and inconsistent with the Federal Rules of Civil Procedure, despite producing millions of documents and indicating that they were withholding substantial additional documents.[4]

What became clear during negotiation, and then (inevitably) motion practice, was that the defendants intended to litigate the sufficiency of their privilege logs, which only further prolonged the discovery disputes present. After months passed with no movement beyond the naked placeholders offered at the outset, one of defendants' counsel advised that the "parties' proposals are too far apart for repeated redlines" and only then did they present us with two lists of proposed categories.

We eventually sought advice from Special Master Facciola in that case, noting that we were frustrated with the way that the process was unfolding, and believed that months of delay with a looming discovery cut-off was preventing us from assessing *any* of defendants' privilege assertions. During a call with the Special Master, he told the parties that, if he had known that categorical logs would cause so many problems, he would not have suggested them. As a result, the parties negotiated a process that required defendants to produce document-by-document privilege logs, which allowed us to have sufficient information to mount several successful challenges to defendants' privilege assertions. Through this process, one of the defendants produced *thirteen thousand* relevant documents it had previously marked as "privileged." Had the parties used only categorical logs, these documents—many of which speak directly to defendants' liability—would have remained improperly shielded from discovery. Some of the "hottest" documents were included in that production—documents that Plaintiffs had been seeking in the case for years (including non-lawyer emails and timelines prepared by internal employees). As a result, additional interrogatories needed to be propounded, earlier responses updated, and additional depositions taken.

If Judge Facciola ordered Marriott to produce a line-by-line privilege log earlier in the litigation, Plaintiffs (and even Marriott) could have saved significant expense and duplication of efforts, because Marriott would have been required to more carefully review their documents to

[4] *See* Fed. R. Civ. P. 26(b)(5) (requiring a party withholding information based on privilege to "(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, *will enable other parties to assess the claim*.") (emphasis added).

determine if the documents were privileged or protected by an assertion of work product. Meeting and conferring to agree upon a privilege log format *before* the documents were produced would have avoided the unnecessary delay and expense.

My experience in *Marriott*, as well as other nationwide class actions, informs me that having discussions regarding document format and production, privilege logs, "clawback" provisions, deposition protocols, electronic filing and sealing, and other case management issues *from the outset* is important for the efficient litigation of complex cases. Accordingly, I support the proposed amendment to Rules 16 and 26, and thank the Committee for the opportunity to share my experiences with you.

TAB 14

TAB 14A

Lana Olson
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lolson@lightfootlaw.com

October 5, 2023

VIA EMAIL

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: October 16, 2023 Civil Rules Hearing

Dear Mr. Byron:

I appreciate the opportunity to appear before the Advisory Committee on Civil Rules at its upcoming hearing on October 16, 2023. As requested in the September 21, 2023 memorandum to confirmed hearing witnesses, I wanted to report that at the hearing I intend to support the proposed amendments to Fed. R. Civ. P. 16 and 26 related to privilege logs. The proposed amendments encourage parties to devise proportional and workable privilege logging procedures while facilitating timely judicial management where necessary to avoid later disputes, reducing the burdens on both the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, enable the parties or the court to assess the claim[s]. My views on this topic are generally reflected in the comments submitted by DRI and its Center for Law and Public Policy on October 3, 2023.

If you have any questions, please let me know.

Sincerely,

Lana A. Olson, DRI President

TAB 14B

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed Amendments to FRCP 16 and FRCP 26

October 3, 2023

The DRI Center for Law and Public Policy respectfully asks the Advisory Committee on Civil Rules to consider this submission in support of the amendment to Rules 16 and 26 proposed by the Advisory Committee on the Federal Rules of Civil Procedure. The proposed amendment to Rule 26(f)(3)(D) would require the parties to include in their discovery plan, submitted before the initial case management conference, their views and proposals on how claims of privilege and protection of trial-preparation materials, "including the timing and method for complying with Rule 26(b)(5)(A)," should be addressed during discovery. The proposed amendment to Rule 16 (b)(3)(iv) allows the parties to propose in their discovery plan the timing and method for complying with requirements of Rule 26(b)(5)(A) should claims of privilege or protection of trial-preparation arise. Both of these proposed amendments will aid the parties and the courts in managing the process of asserting and resolving claims of privilege.

WHO WE ARE

The Center for Law and Public Policy ("the Center") is part of DRI, Inc. ("DRI"), the leading organization of civil defense attorneys and in-house counsel. Founded by DRI in 2012, the Center is the national policy arm of DRI. It acts as a think tank and serves as the public face of

DRI. The Center's three primary committees—Amicus, Public Policy, and Legislation and Rules—are comprised of numerous task forces and working groups. These subgroups publish scholarly works on a variety of issues, and they undertake in-depth studies of a range of topics such as class actions, climate change litigation, data privacy, MSP, and changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Since its inception, the Center has been the voice of the civil defense bar on substantive issues of national importance.

I. BACKGROUND

The Standing Committee describes these proposed amendments as dealing with what they call the "privilege log" problem. Rule 26(b)(5)(A) and Rule 45(e)(2), as they currently stand, direct litigants and nonparties withholding documents from production based on claims of privilege or work product protection to identify those documents in a manner that "will enable other parties to assess the claim." The default method of doing so employed by most lawyers is for the withholding entity to prepare a privilege log of all withheld records on a "document-by-document basis." However, some categories of documents and communications are, by their authorship, exchange, or content, transparently privileged or protected, while others merit more information. The exponential proliferation of ESI since Rule 26(b)(5)(A) was enacted in 1993 further complicates this process. And despite the 1993 Committee Note to Rule 26(f) regarding flexibility with respect to privilege logging, the proposed Amendments include guidance about optional methods other than continued adherence to the inflexible, "each document must be logged" standards.

These document-by-document privilege logs are very labor-intensive, burdensome, and costly. The costs associated with creating these traditional privilege logs have become possibly the largest category of pretrial spending for litigants in document-intensive litigation. Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, make and then validate initial privilege calls, and then construct a privilege log describing each withheld document—with the lawyer's client paying the associated costs. These logs are often expensive to produce and inefficient in conveying useful information, and often lead to disputes that require court intervention.

II. PROPOSED AMENDMENTS

Rule 16. Pretrial Conferences; Scheduling; Management

(b) Scheduling and Management

(3) ***Contents of the Order.***

(B) *Permitted Contents.*

(iv) include *the timing and method for complying with Rule 26(b)(5)(A)* and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including *the timing and method for complying with Rule 26(b)(5)(A) and*—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

III. DRI CENTER RECOMMENDATIONS

The 2006 Committee Notes to Rule 26(f) recommended that parties address issues concerning privilege during the Rule 26(f) conference. However, this suggestion is often not followed in actual practice. The Proposed Amendments contemplate that the parties will take the initiative in addressing and reaching agreement with respect to the scope, structure, content, and timing of submission of privilege logs at the appropriate time in each matter.

This contemplated discussion should be initiated at the parties' required Rule 26(f) initial conference and agreement finalized at a reasonable time preceding the commencement of document productions. The precise procedures agreed to are best incorporated in the parties' Rule 26 report and then into a court order. If agreement, in full or part, is not achieved, each party could submit its plan or disputed parts to the court for guidance and, if necessary, resolution. The objective of the parties' conference is to agree on procedures for providing sufficient information to assess privilege claims relating to information that is likely to be probative of claims and defenses and that is not facially subject to protection. This could allow the parties to avoid many of the issues described above.

Some categories of documents and ESI are facially privileged or protected and can be agreed by the parties to be excluded from logging. For example, absent extraordinary circumstances, communications between counsel and client regarding the litigation after the date the complaint is served can be excluded as clearly privileged or protected. The Proposed Amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example communications exclusively between in-house counsel and outside counsel to an organization, might be so clearly privileged that a simplified log merely identifying counsel as the exclusive communicants is needed. Express exclusions, as allowed by the Proposed Amendments and encouraged by the Committee Notes, both reduces the burdens of reviews and logging and possible disputes regarding the scope of logging that arise when a party unilaterally excludes documents and ESI otherwise deemed relevant.

Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important to a case, so it is that not all documents withheld on the basis of privilege have the same value in the litigation. Whereas sampling and other procedures are employed to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, so can iterative, proportional logging determine which privilege claims should be subject to greater scrutiny in the circumstances of the case. For example, certain claimed privileged documents or ESI may pertain to a mixture of privileged and business information that is probative and requires additional information to assess the claim. Providing initial logs with limited information, for example logs based on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information is needed to assess the privilege claims. Similarly, well-structured categorical logging can include procedures for the receiving party to sample documents or ESI and receive document-by-document log entries for those documents to ascertain the sufficiency of the privilege claims for the category.

The 1993 Committee Notes to Rule 26(b)(5) recognize that detailed, document-by-document privilege logs are appropriate when only a few items are being logged but contemplate identification by category in other circumstances. Thus, even 25 years ago, as the current issues created by the volume of ESI were just beginning to emerge, the Committee recognized the benefit of categorical logs in the face of voluminous productions and claims of privilege. The recent Proposed Amendments allow the parties, and the court, to discuss the timing and method of complying with Rule 26(b)(5)(A). The Committee Note to the Proposed Amendment to Rule 26 reinforces this position, recognizing that "[i]n some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many of the withheld documents."

The DRI Center for Law and Public Policy believes that the Proposed Amendments are, overall, a step in the right direction to help litigants and the courts modernize guidance for handling privilege logs by strengthening the timing and manner of expected compliance with Rule 26(b)(5)(A). These Amendments, as guided by the Committee Notes, would enhance efficiency and expedite litigation by enabling parties to work collaboratively and creatively to avoid needless costs and disputes, saving judicial resources. The Proposed Amendments would also permit the parties to use new and emergent technologies, including technology applications that automatically identify privileged documents and ESI, and extract information for automated logging. Finally, the Proposed Amendments would bring uniformity to the best practices that have developed in many federal courts pursuant to local rules and pilot programs.

Some critics of the Proposed Amendments assert that categorical and iterative logging may provide incentive or ability to cheat the system by hiding important relevant documents and ESI behind invalid claims of privilege or protection. Such criticisms assume that lawyers admitted to practice in federal court would immediately set aside their oaths and violate the rules of ethics in every jurisdiction. This criticism also ignores that the amendments proposed here contemplate meet-and-confers at the appropriate juncture, providing the opportunity for timely judicial involvement if necessary. And, of course, such criticism ignores the obvious—if a lawyer is going to cheat, he or she will do so under either a document-by-document log or a categorical log.

V. CONCLUSION

The general practice under Rules 26(b)(5)(A) and 45(e)(2) has been for the parties to prepare document-by-document privilege logs notwithstanding the 1993 Committee Note suggesting that other procedures might be employed. The status quo puts substantial burdens on the parties, nonparties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. The Proposed Amendments encourage the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoid later disputes. Doing so would reduce both the burdens on the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, "enable other parties [and the court] to assess the claim[s]." Thus, the DRI Center for Law and Public Policy urges the Committee to adopt the proposed Amendments.

Respectfully submitted,

/s/ *Lawrence S. Ebner*
Lawrence S. Ebner, Chair
DRI Center for Law and Public Policy

/s/ James L. McCrystal, Jr.
James L. McCrystal, Jr., Chair
Center Legislation and Rules Committee

/s/ Robert L. Massie
Robert L. Massie, Chair
Center Federal Rules Task Force

TAB 15

TAB 15A

Amy Bice Larson*
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T/F: 281-930-6851

October 5, 2023

Via Email
RulesCommittee_Secretary@ao.uscourts.gov
H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

RE: ***October 16, 2023, Civil Rules Hearing***

Dear Mr. Byron:

In my appearance before the Advisory Committee on Civil Rules on October 16, 2023, I plan to address the proposed amendments to Federal Rules of Civil Procedure 16(b) and 26(f) as they relate to privilege logs. Comments submitted by Lawyers for Civil Justice on October 4, 2023, and by The DRI Center for Law and Public on October 3, 2023, generally align with my views and experience. Therefore, I do not plan to offer a separate written submission. I do, however, plan to offer the Committee practical examples of the tremendous costs and inefficiencies in the current document-by-document privilege log practice. I will also share comments on how the proposed amendments may play out in day-to-day discovery and litigation practice, especially in product liability cases.

I appreciate the opportunity to appear before the Committee and look forward to sharing my comments and answering any questions.

Very truly yours,

Amy Bice Larson

TAB 15B

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

October 4, 2023

THE DIRECT APPROACH: WHY FIXING THE RULE 26(b)(5)(A) PROBLEM REQUIRES AN AMENDMENT TO RULE 26(b)(5)(A)

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on the proposed amendments to rules 16(b) and 26(f) of the Federal Rules of Civil Procedure ("FRCP").[2]

INTRODUCTION

The proposed amendments recognize the significant problems and inefficiencies in today's complex federal court litigation involving the appropriate withholding of records on the basis of privilege – particularly the widely divergent standards and expectations across the nation. The fact that these problems exist despite the clear statement in the Committee Notes to the 1993 amendment to Rule 26(b)(5)(A) that document-by-document logs are not required in every case[3] suggests that the solution is not to issue guidance in Rules 16(b) and 26(f)(3)(D) and in the Committee Notes to those rules (the "Committee's Proposal"), particularly when the proposed comments will be inserted in notes unrelated to the rule that sets out the expectations when parties withhold documents from production on the basis of privilege, Rule 26(b)(5)(A). The fact that there are thirteen references to Rule 26(b)(5)(A) in the Committee's Proposal demonstrate that the Committee's intent is to address a Rule 26(b)(5)(A) problem. Because the

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

[3] It should be noted that the multiple amendments to Rule 26 since 1937 have caused the committee notes to become voluminous, making it difficult for courts and parties to find the relevant notes.

indirect approach will not serve the need, the Committee should modify its proposal to include an appropriate amendment to Rule 26(b)(5)(A).

The 1993 Committee Note correctly observes that detailed privilege logs "may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."[4] However, Rule 26(b)(5)(A) fails to help distinguish between appropriate and unduly burdensome logging, likely because the 1993 Committee Note has gotten lost in the voluminous notes to the 13 amendments to Rule 26 since 1937.[5] Many courts and parties continue to misconstrue Rule 26(b)(5)(A) to require document-by-document privilege logs in all cases—including in cases involving massive amounts of data, and even for categories of documents that are highly unlikely to contain discoverable information, such as communications with counsel after the filing of a complaint.[6] This misinterpretation of Rule 26(b)(5)(A) is causing significant inefficiency and injustice by imposing unsupportable and unjustifiable burdens and by hindering courts and parties from making use of more efficient alternative methods to comply with the rule. It is also suborning the unfortunate tactic of imposing asymmetric litigation burdens on litigants to force the compromise of claims and defenses in response to economic pressure rather than the merits.

To address the Rule 26(b)(5)(A) problem, the Committee is proposing to amend two other rules, Rule 26(f) and Rule 16(b), to require parties to discuss, and prompt judges to order, the timing and method for compliance with Rule 26(b)(5)(A). Although this proposal is well-intended, and might help in some cases correct the misinterpretation that leads many courts to find a presumptive requirement for document-by-document privilege logs, its utility will be limited. As Judge Facciola and Jonathan Redgrave accurately observed to the Committee:

> [T]he omission of any proposed amendments to Fed. R. Civ. P. 26(b)(5)(A)(ii) itself in the rules package unfortunately fails to address directly the progeny of cases that misapply this rule and axiomatically insist that the rule requires that a party must log each privileged document individually, including courts holding that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances.[7]

Meetings and conferences will not fix Rule 26(b)(5)(A), nor will they adequately address the problem of ever-increasing burdens of the privilege process as the volume of records and costs of discovery continue to increase. Only an amendment to Rule 26(b)(5)(A) can sufficiently clarify that the rule does not require document-by-document privilege logs but rather allows producing

[4] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment ("The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.")

[5] To find committee notes to a specific section of the rule, practitioners and courts need to know the year that section was amended. Importantly, the Committee's Proposal does not include a cross-reference in Rule 26(b)(5)(A) referring to the amendments and committee notes to Rules 16(b) and 26(f)(3)(D).

[6] *In re Imperial Corp. of America*, 174 F.R.D. 475, 478 (S.D. Cal 1997).

[7] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023), https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

parties to create categorical privilege logs or to agree on other alternatives. At very least, an amendment to Rule 26(b)(5)(A) should provide a reference to the proposed Rule 16(b) and Rule 26(f) amendments and should be accompanied by a note explaining what compliance with the rule means.

This Comment sets forth the Rule 26(b)(5)(A) problem, explains why a modification to the Committee's Proposal to add a direct amendment to Rule 26(b)(5)(A) is necessary, urges a change from "rolling" logs to "tiered" logs in the proposed Committee Notes to the proposed Rule 16(b) and 26(f) amendments, and suggests that the Committee should follow through with this rulemaking by next taking up a Rule 45 amendment to address the needs of non-parties. Modifying the Committee's Proposal as suggested here will achieve the Committee's purpose of informing and enabling parties to customize appropriate logging procedures that are effective, efficient, and proportional to the needs of each case.

I. PRIVILEGE LOGS ARE TOO EXPENSIVE, OFTEN MORE BURDENSOME THAN HELPFUL, AND FREQUENTLY INDUCE HARMFUL GAMESMANSHIP

A. Costs and Burdens

Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation.[8] The Sedona Conference recognizes that "[i]n complex litigation, preparation of [privilege] logs can consume hundreds of thousands of dollars or more."[9] The costs and complexity of privilege logs are increasing exponentially as the volume of data and communications increase at incredibly high rates. It is estimated that human beings produce 2.5 quintillion bytes of data every day. Ninety percent of the world's total data was produced in the past two years. Document and communication demands are consequently straining the current rules, which were designed for a world of paper.

The burdens of overlogging are not limited to producing parties. Because document-by-document logs treat each item as if it had equal importance, such logs force receiving parties and courts to focus often misplaced attention on items that may have no material relationship with the claims and defenses. Receiving parties often review thousands of entries, assess those entries, and fashion responses, irrespective of importance. Courts often must resolve disputes over the sufficiency of such log entries that frequently require *in camera* reviews and proceedings.

As the volume of material potentially subject to discovery has escalated, so too has the number of documents withheld for privilege. As the Committee explained to the Standing Committee, the burdens of producing document-by-document privilege logs have escalated as digital

[8] *See* New York State Bar Association, *Report of the Special Committee On Discovery And Case Management In Federal Litigation*, at 73 (June 23, 2012) ("Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.").

[9] The Sedona Conference, *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103 (2016).

communications have supplanted other means of communication.[10] As a result, the burdens and expenses of asserting privilege claims has grown dramatically. A court in the Southern District of New York has noted that "the advent of electronic discovery and the proliferation of e-mails and e-mail chains" has made "traditional document-by-document privilege logs . . . extremely expensive to prepare, and not really informative to opposing counsel and the Court."[11] While artificial intelligence and other technological advancements have increased the capability and efficiency of finding *potentially* privileged documents, litigants cannot use these tools alone to assert their privilege claims under the current rules. Instead, creating privilege logs remains a manual, burdensome, and exceptionally expensive process in litigation.

B. Limited Value

Document-by-document privilege logs are frequently of little value to the requesting party and the court in analyzing or evaluating the privilege claims, despite the time, effort and money spent preparing them.[12] The Sedona Conference explains: "Privilege logs rarely 'enable other parties to assess the claim' as contemplated by Rule 26(b)(5) [n]or do the logs 'reduce the need for *in camera* examination of the documents.'"[13] A major reason for the problem is that document-by-document logging is based on the flawed premise that each document (or redacted portion) should be treated with equal detail, rather than focusing more attention on the documents that are more important to the case and less attention to unimportant items. Preparing a privilege log requires careful and time-consuming analysis of descriptions sufficient to convey the basis for withholding the document without unintentionally conveying the substance of the communication and thus waiving privilege—an effort that should be tailored rather than applied as a blanket default to the universe of documents.

C. Gamesmanship

Although disagreements regarding the sufficiency of privilege logs can cause extensive skirmishes between the parties, rarely do such fights impact the ultimate outcome of the case. Too often, challenges to privilege logs are used as a tool by overly aggressive requesting parties to impose added expenses on producing parties, to obtain desired concessions with respect to other discovery disputes, or to delay litigation. Such actions place additional barriers to the

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[10] Memo from Hon. Robin L. Rosenberg, Chair, Advisory Committee on Civil Rules, to John D. Bates, Chair, Committee on Rules of Practice and Procedure (Dec. 9, 2022), Agenda Book, Committee on Rules of Practice and Procedure (Jan. 4, 2023), at 205, https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_agenda_book_final_0.pdf.

[11] *Auto Club of N.Y., Inc. v. Port Auth. of N.Y. and N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013).

[12] *See* The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 81 (2018) ("[o]ften, the privilege log is of marginal utility."); *see also id* at 159, Comment 10.h ("[T]he precise type and amount of information required to meet the general standards set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information to the requesting party to assess the claimed privilege.").

[13] The Sedona Conference, *Commentary on Protection of Privileged ESI, supra* at 104 n.7. *See also id* at 155 ("[T]he deluge of information and rapid response time required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs 'raise[] the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.'").

efficiency of our civil justice system and inevitably force parties to compromise rights that otherwise could be vindicated on the merits. Rarely do privilege log disputes result in the production of documents or data that are dispositive of a case or claim.

D. Lack of Uniformity

There is a troublesome lack of uniformity across federal courts in the caselaw interpreting Rule 26(b)(5)(A). Many district courts across the country have attempted to address the Rule 26(b)(5)(A) problem by promulgating local rules and standing orders that provide for limits on logging requirements and endorse alternative methods of privilege logging—a clear indication that the absence of a national standard is causing problems.[14] Local rules developed in response to the burden of document-by-document privilege logs have also been varied and inconsistent. For example, the District of Colorado urges counsel to engage in good faith to identify types of documents that do not need to be logged document-by-document,[15] while district courts in New York have local rules that presumptively find categorical groupings of documents for privilege logs to be proper.[16] Still other courts hold that Rule 26(b)(5)(A) rigidly requires a separate log for each email in a chain of emails, regardless of the circumstances.[17] There is also a lack of uniformity with respect to which kinds of documents may be categorically excluded from privilege logs, such as duplicative emails in lengthy email chains or communications between counsel and clients after the commencement of litigation.[18]

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[14] Even in jurisdictions where courts have not undertaken larger-scale efforts to address the problem of logging privileged documents in the digital age, a growing number of courts have recognized the appropriateness of categorical privilege logs based on the burden imposed by individual logs and lack of benefit they provide. *See, e.g., Asghari-Kamrani v. U.S. Auto. Ass'n,* No. 2:15-cv-478, 2016 WL 8243171, at *1– 4 (E.D. Va. Oct. 21, 2016) (finding party's categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be "unduly burdensome for no meritorious purpose*")*; *Manufacturers Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4-5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a "document-by-document listing…. would be unduly burdensome" and provide "no material benefit to Precision in assessing whether a privilege …. claim is well grounded."); *First Horizon National Corp*. v. Certain Underwriters at Lloyd's, 2013 WL 11090763, at*7 (W.D. Tenn. Feb. 27, 2013) (permitting categorical privilege log and noting that "several courts have employed such a categorical approach to balance competing concerns of, on the one hand, the burden on the withholding party to perform a detailed indexing of a large amount of documents and, on the other hand, the need for the requesting party, and even more importantly, the court, to be able to adequately assess the applicability of the privilege being asserted.")

[15] Guidelines Addressing the Discovery of Electronically Stored Information cmt. 5.1 (D. Colo. 2014)

[16] S.D.N.Y. Civ. R. 26.2(c); W.D.N.Y. Civ. R. 26(d)(4).

[17] *See, e.g.*, *M & C Corp. v. Erwin Behr GmbH & Co.*, No. 91-CV-74110-DT, 2008 WL 3066143, at *2 (E.D. Mich. Aug. 4, 2008) ("As an initial matter the Court notes that the parties have approached the question of the applicability of the work product doctrine to the disputed material in general terms rather than on a more detailed, document by document, level. Kemp Klein did not serve a privilege log listing each document withheld and describing each document as required by Fed. R. Civ. P. 45(d)(2). Therefore, this Court cannot and will not decide whether any specific documents or categories of documents are protected by the work product doctrine.").

[18] *Compare Brown v. West Corp*., 287 F.R.D. 494, 499 (D. Neb. 2012) ("This Court has joined other district courts in assuming privilege for attorney-client communications that transpire after the initiation of litigation in situations where the plaintiff is requesting extensive discovery."), *with Shufeldt v. Baker, Donelson, Bearman, Caldwell and Berkowitz, P.C.*, No. 3:17-cv-01078, 2020 WL 1532323, at *6 (M.D. Tenn. 2020) ("[T]here is no apparent reason to limit the scope of the log to materials generated before the filing of the [action]").

While a categorical privilege log can be a reasonable alternative to a document-by-document privilege log in many cases, it is certainly not the only alternative. The spirit of Rule 26(b)(5)(A) calls for effective and proportional alternatives, as contemplated in the 1993 Committee Note, and for parties to select the privilege log form that best suits the case. Establishing clear guidance on the elements of a sufficient privilege log will ensure consistency across courts and relieve parties of the default document-by-document privilege log burden.

II. THE COMMITTEE'S PROPOSAL SHOULD BE MODIFIED TO INCLUDE AN AMENDMENT TO RULE 26(b)(5)(A) WITH A COMMITTEE NOTE DESCRIBING A SUFFICIENT LOG

The Committee's Proposal will best achieve its purpose if an amendment to Rule 26(b)(5)(A)(ii) provides a reference to the new amendments. As suggested by Facciola and Redgrave,[19] adding this single sentence would put the focus where it belongs—the rule that is the source of the misunderstanding:

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

Adding this provision will help ensure that courts and parties turning to Rule 26(b)(5)(A) for guidance will learn that the FRCP require parties to take the initiative in addressing and reaching agreement on the scope, structure, content, and timing of privilege logs at the appropriate time in each case. A Committee Note accompanying this amendment should clarify that Rule 26(b)(5)(A) does not specify the method of compliance and should describe the elements of a sufficient privilege log. The Committee Note should also clarify that, absent unusual circumstances, there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation. These three categories are clearly within the privilege and almost never will be admissible in the substantive case. Providing clarity on this topic is much-needed (as noted in LCJ's original submission[20]) and would reduce satellite litigation over whether documents in these categories must be logged. The Committee Note should also suggest that prioritizing logging by tier can help parties focus on the documents that are most likely to matter to the litigation. An effective Committee Note could look like this:

> Rule 23(b)(5)(A) is amended together with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to direct the parties to select a privilege log form and process that is effective and proportional to the needs of the case. The form should allow the parties to assess

[19] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023) , https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

[20] Lawyers for Civil Justice, *Privilege And Burden: The Need To Amend Rules 26(B)(5)(A) And 45(E)(2) To Replace "Document-By-Document" Privilege Logs With More Effective And Proportional Alternatives* (August 4, 2020), https://www.uscourts.gov/sites/default/files/20-cv-r_suggestion_from_lawyers_for_civil_justice_-_rules_26_and_45_privilege_logs_0.pdf (hereinafter, "LCJ Suggestion").

privilege claims and make the proper assertion as to whether privilege applies. The process should be efficient; the parties' selection should reflect the volume of documents, the burdens and expenses of producing the log, and the value of the log to the litigation. The privilege log form and process should not require judicial attention or intervention in the ordinary course.

The privilege log form will vary with the needs of the case. Elements of a sufficient privilege log form may: (1) include sampling to determine whether privilege claims are legally and factually sound; (2) utilize broad categories or summaries for secondary, nonmaterial documents; (3) provide more detailed information for subsets of important or primary, material documents; or (4) establish logging protocols for particular types of linked/serial communications such as emails or text messaging.

The process of compiling a privilege log should also reflect the needs of the case. Prioritizing the logging of documents that are more likely to be significant to the claims and defenses could help focus attention on the key issues, just as with a tiered approach to document production.

Certain categories of documents are presumed not to need logging absent unusual circumstances, including trial-preparation documents created after the commencement of litigation and communications between counsel, client regarding the litigation after service of the complaint, and communications exclusively between a party's in-house counsel and outside counsel during litigation.

Parties may select a privilege log form and process that incorporates technology and the creativity of parties and counsel, so long as the privilege log form and process are clear, efficient, and proportional to the needs of the case.

III. THE PROPOSED COMMITTEE NOTES TO THE RULE 16(b) AND 26(f) AMENDMENTS SHOULD SUGGEST TIERED LOGGING RATHER THAN ROLLING PRODUCTION

The Committee's Proposal includes a proposed note to the Rule 26(f)(3)(D) amendment stating: "Often it will be valuable to provide for 'rolling' production of materials and an appropriate description of the nature of the withheld material." Similarly, the proposed Note to the Rule 16(b) amendment says: "It may be desirable for the Rule 16(b) order to provide for 'rolling' production that may identify possible disputes about whether certain withheld materials are indeed protected." This language should be changed to substitute the word "tiered" for "rolling" because tiering is an effective management technique but rolling is frequently a counterproductive concept that often exacerbates the problems of ineffective and inefficient logging practices.

A "tiered" process allows coordination between privilege logging and the production of documents.[21] It prioritizes the production and logging of documents that are most likely to

[21] Comment by Robert D. Keeling to the Advisory Committee on Civil Rules (Sept. 8, 2023) at 9, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0003.

contain information that is material to the issues in the case. Organizing the process in this manner means that any potential disputes related to the most important documents are resolved as early as possible in the discovery process. By focusing on sources that are more likely to be material, tiering can provide more detailed logs for important withheld documents while relieving the burdens of focusing undue attention on the less significant tiers.

In contrast, rolling logs often cause substantial delay in the completion of document productions because providing privilege logs at or near the same time as corresponding document productions adds significantly to the burden while decreasing the quality and accuracy of the privilege log.[22] Devoting resources and attention to composing privilege log entries takes away resources from the document production. "More often than not, rolling logs create needless 'fire drills' where not enough time (or resources) exists to provide quality productions simultaneously with quality log entries."[23] Because document productions are typically of more immediate interest to the requesting party, when a choice must be made, the privilege log is often the second priority, which leads to disputes and motion practice. Moreover, logs that are produced on a rolling basis often must be corrected and reproduced later in the process based on information from subsequent document review. "For example, the question of whether an individual copied on a communication is a third-party recipient who breaks privilege may not be clear from review of a single document, but subsequent review of additional documents may assist lawyers in making the correct privilege determination in the first instance."[24] Correcting and redoing previously produced logs, and making supplemental productions of documents in the previous log population, is inefficient. It is better for parties and the courts if privilege logs are compiled after the majority of documents in a particular tier have been reviewed.

IV. A RULE 45 AMENDMENT IS NEEDED BECAUSE THE COMMITTEE'S PROPOSAL DOES NOT ADDRESS THE PROBLEMS OF NON-PARTY PRIVILEGE LOGS

Non-parties facing the prospect of producing a privilege log pursuant to Rule 45 have an equal, or perhaps even greater, need for guidance about requirements than parties. Although Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it expressly with respect to privilege logging. Because non-parties do not typically participate in Rule 26(f) or Rule 16 conferences, the Committee's Proposal does not address their needs and problems. If the Committee does not want to address Rule 45 in the current rulemaking, it should nevertheless take up the topic for a future proposal because an amendment to Rule 45 is the most effective way to provide non-parties the appropriate guidance and protection.

CONCLUSION

The Committee's 1993 insight has been misunderstood or ignored, and now Rule 26(b)(5)(A) and its case law progeny have institutionalized a *de facto* default to "document-by-document" overlogging. This Rule 26(b)(5)(A) problem imposes significant burdens on parties, non-parties, and courts that are not worth the price, and it also induces gamesmanship. Although the

[22] *Id*. at 7-9.
[23] *Id*. at 8.
[24] *Id*.

Committee's Proposal could help, the indirect approach of amending Rules 26(f) and 16(b) will not be as effective without direct guidance in Rule 26(b)(5)(A) to focus on finding an efficient process that best meets the needs of the case. An amendment to Rule 26(b)(5)(A) referring to the new Rule 26(f) and 16(b) provisions, together with a Committee Note as described above, will inform and enable courts, parties, and non-parties to customize logging forms and procedures to ensure effective and efficient logging.

TAB 15C

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed Amendments to FRCP 16 and FRCP 26

October 3, 2023

The DRI Center for Law and Public Policy respectfully asks the Advisory Committee on Civil Rules to consider this submission in support of the amendment to Rules 16 and 26 proposed by the Advisory Committee on the Federal Rules of Civil Procedure. The proposed amendment to Rule 26(f)(3)(D) would require the parties to include in their discovery plan, submitted before the initial case management conference, their views and proposals on how claims of privilege and protection of trial-preparation materials, "including the timing and method for complying with Rule 26(b)(5)(A)," should be addressed during discovery. The proposed amendment to Rule 16 (b)(3)(iv) allows the parties to propose in their discovery plan the timing and method for complying with requirements of Rule 26(b)(5)(A) should claims of privilege or protection of trial-preparation arise. Both of these proposed amendments will aid the parties and the courts in managing the process of asserting and resolving claims of privilege.

WHO WE ARE

The Center for Law and Public Policy ("the Center") is part of DRI, Inc. ("DRI"), the leading organization of civil defense attorneys and in-house counsel. Founded by DRI in 2012, the Center is the national policy arm of DRI. It acts as a think tank and serves as the public face of

DRI. The Center's three primary committees—Amicus, Public Policy, and Legislation and Rules—are comprised of numerous task forces and working groups. These subgroups publish scholarly works on a variety of issues, and they undertake in-depth studies of a range of topics such as class actions, climate change litigation, data privacy, MSP, and changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Since its inception, the Center has been the voice of the civil defense bar on substantive issues of national importance.

I. BACKGROUND

The Standing Committee describes these proposed amendments as dealing with what they call the "privilege log" problem. Rule 26(b)(5)(A) and Rule 45(e)(2), as they currently stand, direct litigants and nonparties withholding documents from production based on claims of privilege or work product protection to identify those documents in a manner that "will enable other parties to assess the claim." The default method of doing so employed by most lawyers is for the withholding entity to prepare a privilege log of all withheld records on a "document-by-document basis." However, some categories of documents and communications are, by their authorship, exchange, or content, transparently privileged or protected, while others merit more information. The exponential proliferation of ESI since Rule 26(b)(5)(A) was enacted in 1993 further complicates this process. And despite the 1993 Committee Note to Rule 26(f) regarding flexibility with respect to privilege logging, the proposed Amendments include guidance about optional methods other than continued adherence to the inflexible, "each document must be logged" standards.

These document-by-document privilege logs are very labor-intensive, burdensome, and costly. The costs associated with creating these traditional privilege logs have become possibly the largest category of pretrial spending for litigants in document-intensive litigation. Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, make and then validate initial privilege calls, and then construct a privilege log describing each withheld document—with the lawyer's client paying the associated costs. These logs are often expensive to produce and inefficient in conveying useful information, and often lead to disputes that require court intervention.

II. PROPOSED AMENDMENTS

Rule 16. Pretrial Conferences; Scheduling; Management

(b) Scheduling and Management

(3) ***Contents of the Order.***

(B) *Permitted Contents.*

(iv) include *the timing and method for complying with Rule 26(b)(5)(A)* and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including *the timing and method for complying with Rule 26(b)(5)(A) and*—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

III. DRI CENTER RECOMMENDATIONS

The 2006 Committee Notes to Rule 26(f) recommended that parties address issues concerning privilege during the Rule 26(f) conference. However, this suggestion is often not followed in actual practice. The Proposed Amendments contemplate that the parties will take the initiative in addressing and reaching agreement with respect to the scope, structure, content, and timing of submission of privilege logs at the appropriate time in each matter.

This contemplated discussion should be initiated at the parties' required Rule 26(f) initial conference and agreement finalized at a reasonable time preceding the commencement of document productions. The precise procedures agreed to are best incorporated in the parties' Rule 26 report and then into a court order. If agreement, in full or part, is not achieved, each party could submit its plan or disputed parts to the court for guidance and, if necessary, resolution. The objective of the parties' conference is to agree on procedures for providing sufficient information to assess privilege claims relating to information that is likely to be probative of claims and defenses and that is not facially subject to protection. This could allow the parties to avoid many of the issues described above.

Some categories of documents and ESI are facially privileged or protected and can be agreed by the parties to be excluded from logging. For example, absent extraordinary circumstances, communications between counsel and client regarding the litigation after the date the complaint is served can be excluded as clearly privileged or protected. The Proposed Amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example communications exclusively between in-house counsel and outside counsel to an organization, might be so clearly privileged that a simplified log merely identifying counsel as the exclusive communicants is needed. Express exclusions, as allowed by the Proposed Amendments and encouraged by the Committee Notes, both reduces the burdens of reviews and logging and possible disputes regarding the scope of logging that arise when a party unilaterally excludes documents and ESI otherwise deemed relevant.

Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important to a case, so it is that not all documents withheld on the basis of privilege have the same value in the litigation. Whereas sampling and other procedures are employed to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, so can iterative, proportional logging determine which privilege claims should be subject to greater scrutiny in the circumstances of the case. For example, certain claimed privileged documents or ESI may pertain to a mixture of privileged and business information that is probative and requires additional information to assess the claim. Providing initial logs with limited information, for example logs based on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information is needed to assess the privilege claims. Similarly, well-structured categorical logging can include procedures for the receiving party to sample documents or ESI and receive document-by-document log entries for those documents to ascertain the sufficiency of the privilege claims for the category.

The 1993 Committee Notes to Rule 26(b)(5) recognize that detailed, document-by-document privilege logs are appropriate when only a few items are being logged but contemplate identification by category in other circumstances. Thus, even 25 years ago, as the current issues created by the volume of ESI were just beginning to emerge, the Committee recognized the benefit of categorical logs in the face of voluminous productions and claims of privilege. The recent Proposed Amendments allow the parties, and the court, to discuss the timing and method of complying with Rule 26(b)(5)(A). The Committee Note to the Proposed Amendment to Rule 26 reinforces this position, recognizing that "[i]n some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many of the withheld documents."

The DRI Center for Law and Public Policy believes that the Proposed Amendments are, overall, a step in the right direction to help litigants and the courts modernize guidance for handling privilege logs by strengthening the timing and manner of expected compliance with Rule 26(b)(5)(A). These Amendments, as guided by the Committee Notes, would enhance efficiency and expedite litigation by enabling parties to work collaboratively and creatively to avoid needless costs and disputes, saving judicial resources. The Proposed Amendments would also permit the parties to use new and emergent technologies, including technology applications that automatically identify privileged documents and ESI, and extract information for automated logging. Finally, the Proposed Amendments would bring uniformity to the best practices that have developed in many federal courts pursuant to local rules and pilot programs.

Some critics of the Proposed Amendments assert that categorical and iterative logging may provide incentive or ability to cheat the system by hiding important relevant documents and ESI behind invalid claims of privilege or protection. Such criticisms assume that lawyers admitted to practice in federal court would immediately set aside their oaths and violate the rules of ethics in every jurisdiction. This criticism also ignores that the amendments proposed here contemplate meet-and-confers at the appropriate juncture, providing the opportunity for timely judicial involvement if necessary. And, of course, such criticism ignores the obvious—if a lawyer is going to cheat, he or she will do so under either a document-by-document log or a categorical log.

V. CONCLUSION

The general practice under Rules 26(b)(5)(A) and 45(e)(2) has been for the parties to prepare document-by-document privilege logs notwithstanding the 1993 Committee Note suggesting that other procedures might be employed. The status quo puts substantial burdens on the parties, nonparties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. The Proposed Amendments encourage the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoid later disputes. Doing so would reduce both the burdens on the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, "enable other parties [and the court] to assess the claim[s]." Thus, the DRI Center for Law and Public Policy urges the Committee to adopt the proposed Amendments.

Respectfully submitted,

/s/ *Lawrence S. Ebner*
Lawrence S. Ebner, Chair
DRI Center for Law and Public Policy

/s/ James L. McCrystal, Jr.
James L. McCrystal, Jr., Chair
Center Legislation and Rules Committee

/s/ Robert L. Massie
Robert L. Massie, Chair
Center Federal Rules Task Force

TAB 16

TAB 16A

Beveridge & Diamond

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October 5, 2023

H. Thomas Byron III
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Room 7-300
Washington, DC 20544

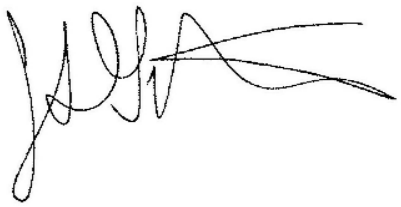
Re: October 16, 2023, Civil Rules Hearing

Dear Mr. Byron:

I appreciate the opportunity to appear before the Advisory Committee on Civil Rules at its upcoming hearing on October 16, 2023. As requested in the September 21, 2023, memorandum to confirmed hearing witnesses, I wanted to report that at the hearing I intend to support a proposed Fed. R. Civ. P. 16.1. My views on this topic will be generally reflected in the comment to be submitted by DRI and its Center for Law and Public Policy in advance of the hearing, which will advocate that a proposed rule should be crafted to address the issue of meritless claims, including how an actual rule would benefit MDL judges.

If you have any questions, please let me know.

Very truly yours,



John S Guttmann
Principal

TAB 16B

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed FRCP 16.1

October 11, 2023

SEPARATING THE WHEAT FROM THE CHAFF: THE NEED FOR A RULES-BASED SOLUTION TO ADDRESS UNSUPPORTABLE CLAIMS IN CONTEXT OF MDL PROCEEDINGS

The DRI Center for Law and Public Policy (the "Center" or "DRI") is the public policy "think tank" and advocacy voice of DRI, Inc., an international community of approximately 16,000 attorneys who represent businesses in civil litigation. The Center participates as an amicus curiae in the U.S. Supreme Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system. Given the prominence of MDL litigation in federal courts to its members, their clients, and the outsized role the MDL process plays in the current civil justice system, the Center established a working group to examine proposed Rule 16.1 and, where appropriate, to offer comments and

suggestions. The Center submits this comment specifically directed to one aspect of proposed Rule 16.1 and to suggest that Rule 16.1(c)(4) and its accompanying note be revised to more specifically address a recurring issue in MDL proceedings—"unsupportable claims"—and to call for a rules-based solution to the problems they create for all relevant stakeholders in the MDL process.

DRI'S PERSPECTIVE ON THE NEED FOR A RULES-BASED SOLUTION

The fifty years since 28 U.S.C. § 1407, the statute creating the MDL transfer process, was first enacted in 1968 have seen an exponential growth in the number of matters pending on MDL dockets in district courts around the country. As the JPML reported in its summary for fiscal year 2020, 953,641 civil actions were centralized for pretrial proceedings from the creation of the JPML from 1968 to September 30, 2020. United States Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407, Fiscal Year 2020* at 3. More than a third of that number, 327,024, were pending at the end of FY 2020 alone. By September 15, 2023, less than three years later, that number had ballooned again, to 408,636 cases pending in various MDLs. United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending* (September 15, 2023).

As discussed in some detail in the MDL subcommittee's report, an unreasonably high number of those claims—particularly in product liability actions making up the largest percentage of cases and consolidated proceedings—are "unsupportable[1]" as that term is defined

[1] DRI uses the phrase "unsupportable claim" in same sense it was defined by the MDL subcommittee in its reporting: a claim where the plaintiff did not use the product involved,

below. The MDL Subcommittee decision to offer only nonbinding guidance contained in proposed Rule 16.1(c)(4) and the Committee Notes to Rule 16.1 is disappointing because the situation will only improve with a clear, rules-based approach.[2]

DRI supports revising the proposed language with a clear rules-based approach to address the problem presented by unsupportable claims. This approach is needed, is workable, and will be beneficial to the MDL judges, the parties, and the judicial system as a whole. Unsupportable claims are relatively easy to weed out in mine-run litigation where there is little if any incentive, for example, to file a claim against a pharmaceutical manufacturer where the claimant did not actually use the drug or where the plaintiff did not develop the condition the drug allegedly causes or where the statute of limitations had plainly run. All of that information is uniquely in the hands of the party filing the claim. Without that foundation, there would be little reason to file suit. And even where an unsupportable claim is improperly filed in an individually litigated case, those deficiencies are usually exposed efficiently and can be addressed by the court in the usual course of business.

DRI submits, however, that the problem of unsupportable claims creates asymmetrical issues of scaling when applied across hundreds or thousands or tens of thousands of cases pending in an MDL. As discussed below, this unsupportable claim problem is real and adversely impacts the judicial system in a way that a rules-based solution can uniquely remedy. Accordingly, DRI suggests that proposed Rule 16.1 be amended to **require** specifically that the report called for by proposed Rule 16.1(c) include a **mandatory** proposal for addressing the

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where the plaintiff did not suffer the adverse consequence at issue, or where the claim is time-barred under applicable law.

[2] DRI notes that the Lawyers for Civil Justice submitted a comment on proposed Rule 16.1 on September 18, 2023, which suggests proposed revisions to both Rule 16.1(c)(4) and adding appropriate notes to that portion of the rule. DRI endorses the LCJ's proposed revisions and additions.

supportability of claims pending or transferred into the MDL.[3] DRI also suggests that the notes to Rule 16.1(c)(4) outline the reasons for its adoption. DRI believes these changes will discourage if not eliminate the filing of unsupportable claims to the benefit of all. And even when such claims are filed, failure to supply the required information makes their dismissal almost a ministerial task rather than the far more resource-intensive motion practice required under the existing rules.

THE EXISTENCE OF UNSUPPORTABLE CLAIMS IS REAL AND HAS EXISTED FOR SOME TIME

DRI purposefully uses the phrasing "unsupportable claims' because it mirrors the language in the MDL Subcommittee's 2018 report to the Advisory Committee:

> There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations—perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices—a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit. The reported proportion of claims falling into this category varies; the figure most often used is 20 to 30%, but in some litigations it may be as high as 40% or 50%.

MDL Subcommittee Report, Advisory Committee on Civil Rules Agenda Book at 143 (November 1, 2018).[4]

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[3] The current version of Rule 16.1(c)(4) simply refers to the "exchange of information" about the factual bases for the parties claims and defenses. But the exchange of information is really a discovery issue, more properly addressed under the initial disclosure requirements of Rule 26(a)(1) and proposed Rule 16.1(c)(6). On the other hand, the supportability of each claim is foundational issue—the very keys to the federal courthouse, if you will—which precedes any need for discovery.

[4] This is in contrast to claims that cannot survive summary judgment because for example, the plaintiffs ultimately cannot establish general or specific causation. *See, e.g.*, *In re*

Twenty-one years before that report, the Federal Judicial Center published a report, *Mass Torts Problems & Proposals, A Report to the Mass Torts Working Group* (Fed. Judicial Center January 1999), which observed that, "[t]he consequences of aggregation can be to create a mass tort. To capsulize a now-familiar metaphor, Professor McGovern has coined the mantra: 'If you build a superhighway, there will be a traffic jam.'" *Mass Torts Problems & Proposals* at 23. In discussing asbestos litigation specifically, the report offered an observation that Professor Siliciano had attributed "the asbestos problems to a failure to apply the ground rules of the tort system, allowing unmeritorious claims to clog the new superhighway." *Id.* These have proved to be more than academic and not limited to asbestos claims.

More recently, in 2016, Judge Land stated that his experience as a transferee judge in two MDLs led him to the belief that

> the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action. Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action.

In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016). Based on his experience, Judge Land added:

Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig., 227 F. Supp. 3d 452, 466 (D.S.C. 2017), *aff'd sub nom. In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624 (4th Cir. 2018) ("Plaintiffs at issue here were prescribed and ingested Lipitor is dosages of less than 80 mg prior to their diabetes diagnosis, they have no admissible expert testimony regarding general causation."). In that case, the plaintiffs covered by the motion had ingested the product at issue and had been subsequently diagnosed with the disease at issue; they were simply unable to provide sufficient expert testimony at the summary judgment/Rule 702 stage to establish a genuine issue of fact on causation. Under DRI's definition, those claims were "supportable" even if not ultimately successful.

> This phenomenon produces the perverse result that an MDL, which was established in part to manage cases more efficiently to achieve judicial economy, becomes populated with many non-meritorious cases that must nevertheless be managed by the transferee judge—cases that likely never would have entered the federal court system without the MDL.

Id. Judge Land, noting his struggle to address that problem, suggested the "robust use of Rule 11" might help. But Rule 11 comes with its own issues and requires heavy involvement from the transferee judge.[5]

Even the American Association of Justice's MDL Working Group's suggestions to the MDL subcommittee in 2018 candidly acknowledged that cases are "sometimes filed prematurely" because, it said, "plaintiffs need additional time to obtain medical records or other documentation to confirm plaintiffs' use of the product, diagnosis, date of injury, etc." *Memorandum to Judge Robert Dow and Members of the MDL Subcommittee*, AAJ's MDL Working Group at 1 (May 25, 2018). But even were that the situation in sporadic individual cases, it would not explain the 20–40 percent estimate of unsupportable claims noted by the MDL Working Group in its report. More importantly, the current MDL process all but assures that those "prematurely filed" cases will be in the MDL regardless of whether their claims are supportable or unsupportable.

THE PROBLEM OF UNSUPPORTABLE CLAIMS IS NOT A DISCOVERY ISSUE

[5] As Judge Robreno pointed out ten years ago, "aggregation promotes the filing of cases of uncertain merit. The incentive becomes the number of cases that can be filed, *not* the relative merit of the individual case. Additionally, while the court searches for global solutions, the individual cases are not attended to by either the court or the individual lawyers." Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (Mdl-875): Black Hole or New Paradigm?* 23 Widener L.J. 97, 187 (2013).

The Supreme Court has repeatedly held that Article III standing is constitutional minimum for proceeding in federal court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (calling standing an "irreducible constitutional minimum"). As the United States Court of Appeals for the First Circuit has stated, "Standing is a threshold question in every case." *Summers v. Fin. Freedom Acquisition LLC*, 807 F.3d 351, 355 (1st Cir. 2015) (*citing* W*arth v. Seldin*, 422 U.S. 490 (1975)). It added, "[a] plaintiff suing in federal court normally must shoulder the burden of establishing standing. *Id.* Moreover, when "standing is challenged as a factual matter…, the plaintiff must come forward with 'competent proof,' showing by a preponderance of the evidence that standing exists." *EMD Crop Bioscience Inc. v. Becker Underwood, Inc.*, 750 F. Supp. 2d 1004, 1011 (W.D. Wis. 2010).

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), the Court concluded that to have Article III standing, a plaintiff must show (1) he or she suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision. Unsupportable claims fail the Article III standing requirement because:

1) The plaintiff did not suffer an injury in fact; and/or
2) The plaintiff's injury is not fairly traceable to the defendant's conduct; and/or
3) The claim is not likely to be redressed by a favorable decision because it was time-barred when suit was filed.

Using Rule 16.1 to require the MDL courts to establish a procedure for establishing these three minimal components of the "irreducible constitutional minimum" of standing—a "threshold question" in every case—is not a discovery issue but is foundational to whether the case belongs in federal court (and therefore in the MDL) in the first place.

UNSUPPORTABLE CLAIMS ARE PROBLEMATIC TO THE MDL COURT, THE PARTIES, AND THE JUDICIAL SYSTEM

Judge Land already pointed out the burden that unsupportable claims placed on the MDL process based on his experience. But the problem runs deeper than that for all relevant stakeholders. Once the JPML establishes an MDL, Rule 7.1(a) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation requires "[a]ny party or counsel in actions previously transferred under Section 1407 shall promptly notify the Clerk of the Panel of any potential tag-along actions in which that party is also named or in which that counsel appears."[6] This means, in the first instance, that the JPML itself must take action to transfer (or decline to transfer) unsupportable claims filed, in any district except the one where the transferee court sits, since all potential tag-alongs must be reported to it.[7]

Once such claims are transferred into the MDL proceeding, the existing parties and the transferee court (and its staff) now have to deal with them. A large volume of unsupportable claims misleads the transferee court on the scope of the MDL they will be overseeing and prevents all proper parties from assessing the scope of the work ahead. Moreover, given the unfortunate reality that many MDL judges feel pressure to lead the parties towards a global resolution (a reality that DRI believes is inconsistent with the intent of §1407 and violative of the Rules Enabling Act and due process), the presence of so many unsupportable claims places a

[6] Rule 1.1(h) defines a "tag-along" action was "a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407."

[7] This is not to say that DRI endorses the concepts of "direct filing" orders allowing plaintiffs to bring actions directly into the MDL and skip the transfer process of 28 U.S.C. § 1407. These orders raise significant questions regarding the scope of MDL proceedings, jurisdiction (both subject matter and personal), waiver, choice-of-law, and a host of other problems. For purposes of this comment, however, DRI simply notes that any unsupportable claim subject to a § 1407 transfer will take up JPML resources in the first instance.

barrier to such global resolutions, impacting all parties' ability to assess properly the magnitude of exposure and determining who the actual stakeholders are.

EXISTING RULES ARE INADEQUATE TO ADDRESS THE PROBLEM OF UNSUPPORTABLE CLAIMS

Despite long-standing evidence that creating an MDL can result in a mass tort proceeding with large amounts of unsupportable claims, the JPML has expressed the belief that it is a problem that can be readily handled by the transferee judge. In rejecting a challenge by certain defendants to the expansion of an MDL to include additional types of claims, the JPML reasoned:

> [T]he transferee court handling several cases in an MDL likely is in a better position—and certainly is in no worse position than courts in multiple districts handling individual cases—to properly address meritless claims. There are many tools a transferee court may use to accomplish this task. And importantly, if defendants believe plaintiffs' counsel are filing frivolous claims, it is incumbent upon defense counsel to bring that concern to the attention of the transferee court, and to propose a process to identify and resolve such claims.

In re Valsartan Prod. Liab. Litig., 433 F. Supp. 3d 1349, 1352 (U.S. Jud. Pan. Mult. Lit. 2019). From DRI's perspective, there are at least two issues with this approach.

First, the wide-spread knowledge cited by the MDL committee that "a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims," is itself evidence that the existing rules are not adequately addressing the problem.[8] There is no good reason for the transferee court, the defendant(s), or the plaintiffs who do have supportable

[8] *See, e.g.*, Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 350 (2014) ("While mass torts have notoriously generated false claims by individuals far removed from the tort, the structure of the modern MDL does not provide as strong a check upon these claims as exists in single-plaintiff litigation.")

claims to have to shoulder through claims that frankly would not have been filed except for the pendency of an MDL consolidation only to find out at some late settlement stage that many of the claims asserted in the MDL are unsupportable.[9]

Second, there is no reason to believe the transferee court would in reality be in the same sort of position as a judge in one-off case to determine whether sufficient facts exist to support Article III standing.[10] The existing pleading rules—requiring the plausible allegation of facts sufficient to state a claim—fit poorly in the context of an MDL with hundreds or thousands of aggregated claims. Take the "prematurely filed" example cited by the AAJ, where suit is filed even though "plaintiffs need additional time to obtain medical records or other documentation to confirm plaintiffs' use of the product, diagnosis, date of injury, etc." If the complaint in a prematurely filed case flatly stated that the plaintiff "may or may not" have used the defendant's product or that the plaintiff "may or may not" have been diagnosed with the condition at issue, the procedure in a mine-run case would allow the defendant to file an appropriate motion that the district court could address—if necessary—in the normal course of handling their caseload. Multiply that by hundreds of similarly pleaded complaints and similar motions and the transferee court is now overwhelmed with motions.[11] The wheels of justice grind to a halt despite Rule 1's

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[9] As Judge Robreno stated, "Regardless of the amount of judicial effort and resources, unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process." *Black Hole or New Paradigm? supra,* 23 Widener L.J. at 186.

[10] The JPML in the *Valsartin* decision suggested that the transferee courts are only handling "several" cases. But as the statistical analysis from that Panel shows, as of September 15, 2023, 58 of the pending 173 MDLs had at least 50 pending cases and another 27 historically had more than 50 cases, meaning that MDL judges are coordinating much more than just "several" cases in MDLs they handle.

[11] As of September 15, 2023, 23 of the 25 largest MDL proceedings (containing almost 400,000 of the pending MDL cases) were classified by the JPML as "Product Liability" cases. The other two, *In Re: National Collegiate Athletic Association Student-Athlete*

goal that the rules were intended to "secure the just, speedy, and inexpensive determination of every action and proceeding."[12]

Beyond the practical reality that no transferee court should be forced or even reasonably be expected to devote the resources necessary to rule on multiple motions addressing the threshold issue of a given claimant's Article III standing (or for putting the MDL defendant to the waste of resources necessary to bring such motions), there is the larger question of expectations. If all parties, including plaintiffs considering filing a claim that will end up in an MDL, know that the rules will require the prompt provision of information sufficient to establish Article III standing as discussed above, claims that cannot meet that threshold will not be filed in the first place.

DRI BELIEVES THE TIME HAS COME TO PUT A RULE IN PLACE TO REMEDY THE PROBLEM

As noted, the courts and parties have had 50 years of experience with the MDL process and its explosive growth as a percentage of the federal docket. DRI believes the time has come to put a rule in place to address the unique and recurring problem of unsupportable claims in MDL proceedings. That solution, in DRI's view, goes beyond the language of the current draft of Rule 16.1 to include mandatory provision at the outset of the information necessary to establish each MDL plaintiff's Article III standing: an injury-in-fact fairly traceable to the

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Concussion Injury Litigation, MDL-2492, and *In Re: National Prescription Opiate Litigation*, MDL-2804, were classified as "Miscellaneous" cases by the JPML reporting and accounted for another 3,500 or so cases.

[12] And that is just where the Complaints candidly acknowledged their current lack of knowledge about "Plaintiffs' use of the product, diagnosis, date of injury, etc." When those facts are blurred or elided over, the task becomes even more overwhelming to the point that the process of eliminating unsupportable claims under the current rules simply does not happen to the detriment of every stakeholder.

defendant's conduct that would likely be remedied by a favorable resolution. That means in the vast majority of the MDL proceedings, facts establishing the use of the involved product, the nature of the claimed injury, and the date of that alleged injury.

In addition, DRI believes that the Committee Note to proposed Rule 16.1(c)(4) ought to outline in some detail the problem with unsupportable claims, explain why it is needed, and unequivocally state that the required information is not a discovery issue. It need not cast aspersions on parties. Rather, it can simply state as a fact that Article III standing requirements are a threshold issue as to whether a given plaintiff has sufficient information to support moving forward in federal court. It can further point out that rather than requiring extensive and resource-intensive motion practice, the Rule is intended to require the early submission of the minimal amount of information necessary to move to the discovery process.

A RULES-BASED SOLUTION WOULD AID THE TRANSFEREE COURT AND THE PARTIES IN A NUMBER OF WAYS

As discussed above, the current approach benefits none of the relevant stakeholders (defined as the judicial system, the transferee judge, those plaintiffs with supportable claims, and the defendants).[13] A rules-based solution would benefit all of them. DRI believes that it would benefit the JPML and transferee courts because a rules-based requirement to provide threshold information promptly will discourage if not outright eliminate the filing of unsupportable claims.[14] This means the transferee court will have a far more accurate picture of the scope of

[13] In DRI's view, parties with unsupportable claims (as defined above) simply have no relevant interest in the process. They do not have a claim and have no right to burden the judicial system and the other stakeholders with their involvement.

[14] And even where such claims are filed, the parties and the transferee court will have a far simpler task (if even necessary) of determining whether the information submitted

the MDL they are overseeing. This will inform decisions across-the-board on discovery, the nature of the claims, what sort of bellwether trials may or may not be useful, and even how to structure case management orders and conferences.

The elimination of unsupportable claims benefits the other stakeholders as well. As discussed, the defendants will have a far more accurate picture of their exposure and the true nature of the claims being asserted against them. And for plaintiffs who have supportable claims, it encourages the entire process to move forward towards a "just, speedy, and inexpensive" determination of their claims.

Respectfully submitted,

/s/ *Lawrence S. Ebner*
Lawrence S. Ebner, Chair
DRI Center for Law and Public Policy

/s/ James L. McCrystal, Jr.
James L. McCrystal, Jr., Chair
Center Legislation and Rules Committee

/s/ Toyja E. Kelley
Toyja E. Kelley, Chair
Center MDL Working Group

/s/ Jeffrey A. Holmstrand
Jeffrey A. Holmstrand, Member
Center MDL Working Group

establishes a supportable claim. No submission is little different than not filing suit in the first place and whether the information submitted meets the requirements to show the claim is supportable is a far more binary determination than most.

TAB 17

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October 5, 2023

The Honorable Robin L. Rosenberg
Chair, Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Written Testimony on Proposed Rule 16.1(c)(5)

Dear Judge Rosenberg and Members of the Civil Rules Advisory Committee:

I am a partner at Covington & Burling LLP, where I represent clients in complex product liability and mass tort litigation, often in federal MDLs and analogous centralized proceedings in state courts. I appreciate the chance to speak briefly about proposed Rule 16.1(c)(5), which identifies "consolidated pleadings" as a matter to potentially be addressed in the initial MDL management conference report.

Large MDLs often substitute individualized complaints with a "master complaint" containing allegations common to all plaintiffs and a "short-form complaint" containing allegations specific to each plaintiff. This process undoubtedly introduces efficiencies, as plaintiffs are absolved of the need to draft individualized complaints, and defendants are correspondingly absolved of the need to serve individualized answers.[1] But there is no "MDL exception" to the Federal Rules of Civil Procedure.[2] As the Sixth Circuit colorfully put it, "MDLs

[1] *See, e.g.*, *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 860 F. App'x 886, 888 (5th Cir. 2021) ("To streamline this multidistrict litigation, the district court directed the plaintiffs to file a master complaint collectively and to file short-form complaints individually."); *Nelson v. C.R. Bard, Inc.*, 553 F. Supp. 3d 343, 349 (S.D. Miss. 2021) (noting that court "ordered the use of Short Form Complaints as a manner of efficiently managing thousands of cases for pre-trial proceedings"); *Perez v. Am. Med. Sys. Inc.*, 461 F. Supp. 3d 488, 494 (W.D. Tex. 2020) (short-form complaint process "was created in order to streamline pleadings in the MDL"); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 264900, at *2 (N.D. Ohio Jan. 18, 2019) ("The goal of the Short-Form Complaint is to streamline the amendment process, reduce the burden on the parties and the Court, and increase judicial efficiency.").

[2] *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.").

are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[3] And the Federal Rules do not condone sacrificing fairness for efficiency. Indeed, Rule 1 lists justice first in its list of goals.[4]

A complaint is not a mere box-checking exercise. Complaints serve two critical purposes: (1) providing defendants "fair notice of what the . . . claim is and the grounds upon which it rests"[5]; and (2) permitting defendants an opportunity, before costly and burdensome discovery, to challenge the legal sufficiency of the claims.[6] Unfortunately, some courts have implemented master and short-form complaints in a manner fundamentally at odds with both of these protections.

If Rule 16.1 ultimately recommends consideration of "[w]hether consolidated pleadings should be prepared," the Advisory Committee Notes should explain that the master and short-form complaints, taken together, must satisfy Rule 8 and, where applicable, Rule 9(b), and that Defendants must be afforded an opportunity to seek dismissal of the master complaint under Rule 12.

I. The Use of Consolidated Pleadings Should Not Relax the Pleading Requirements that Govern All Civil Actions in Federal Court.

Rule 8 — and where it applies, Rule 9(b) — applies to "all civil actions and proceedings in the United States district courts" by virtue of Rule 1.[7] Because the master complaint necessarily

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[3] *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020); *see also, e.g.*, *In re Paraquat Prods. Liab. Litig.*, 2021 WL 9793339, at *1 (S.D. Ill. Nov. 10, 2021) ("[A]n MDL court must adhere to the Federal Rules of Civil Procedure."); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2017 WL 1458193, at *5 (D. Mass. Apr. 24, 2017) ("The creation of an MDL proceeding does not suspend the requirements of the Federal Rules of Civil Procedure, nor does it change or lower the[m].").

[4] *See* Fed. R. Civ. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[5] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

[6] *Id.* at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management' . . . . [I]t is self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries'; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").

[7] Fed. R. Civ. P. 1.

lacks allegations about any particular plaintiff, the short-form complaint must contain sufficient *individualized* facts that, taken together with the general allegations in the master complaint, provide Defendants fair notice under Rule 8.[8] Several years ago, in the Zostavax MDL, the court dismissed 173 complaints because they were "full of boilerplate language unrelated to the individual case."[9] But *Zostavax* is the exception, not the rule. As the MDL Subcommittee has recognized, "MDL courts using master complaints may initially require nothing more of claimants than the pleading equivalent of 'count me in,' deferring individualized details until later."[10] The Subcommittee noted that "[o]ne could argue that such pleadings do not comply with Rule 8(a)(2), which requires a 'showing that the pleader is entitled to relief.'"[11]

I agree that "count-me-in" short-form complaints do not comply with Rule 8. Outside the setting of an MDL, if a plaintiff were to file a complaint alleging that use of a medicine caused them harm, without facts regarding the plaintiff's usage of the medicine (including timing of use), how the medicine is alleged to be defective, or the nature and timing of the injury alleged, there can be little doubt that the complaint would be dismissed.[12] Yet in an MDL, such

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[8] *See, e.g.*, *In re Flint Water Cases*, 2019 WL 3530874, at *40 n.31 (E.D. Mich. Aug. 2, 2019) ("Combined, the amended master and short-form complaints contain enough factual matter to put Veolia on adequate notice . . . .").

[9] *In re Zostavax (Zostar Vaccine Live) Prods. Liab. Litig.*, 2019 WL 2137427, at *1 (E.D. Pa. May 2, 2019).

[10] Advisory Comm. on Civil Rules, *MDL Subcommittee Report* 148 (Nov. 1, 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf; *see also* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835, 1853–54 (2022) ("MDLs use master complaints with generic allegations and short-form complaints that often mean shoehorning plaintiffs' story into a six-page check-the-box form."); Lauren E. Godshall, *Direct Filing in Multidistrict Litigation: Limiting Venue Options and Choice of Law for Plaintiffs*, 29 Geo. Mason L. Rev. 3, 14 (2021) ("*Zostavax* is unusual in this regard, and many MDLs are allowing the filing of standardized short form complaints.").

[11] Advisory Comm. on Civil Rules, *MDL Subcommittee Report*, *supra*, at 148.

[12] *See, e.g.*, *In re Prempro Prod. Liab. Litig.*, 2008 WL 3200772, at *1 (E.D. Ark. Aug. 5, 2008) ("The current Complaint is an excellent example of the generic, omnidirectional complaints of which I have repeatedly expressed disfavor. At 77 pages, it is long on the history of [hormone replacement therapy], but short on the application of that history to the specific plaintiff. In fact, the complaint lacks any specificity regarding Plaintiffs' use of hormone therapy and fails to directly link any Plaintiff with any of the defendants, other than broad boilerplate language. As an example, the complaint states that '[b]ecause of her use of HRT drugs, [Plaintiff] was diagnosed with breast cancer.' Simply claiming that you took hormone therapy and suing every hormone therapy manufacturer is not enough." (alterations in original)).

short-form complaints are routine.[13]

The problem is compounded in MDLs involving multiple defendants or multiple injuries, which seem to be becoming more common. For instance, in the *Johnson & Johnson Talcum Powder MDL*, the master complaint alleged that "Plaintiffs were diagnosed with various forms of cancer of the female reproductive system,"[14] yet the short-form complaint simply required a plaintiff to allege that she experienced "a talcum powder product(s) injury" — without any specification of *what* that injury was.[15] This basic Rule 8(a)(2) information was reserved for a plaintiff profile form that was not ordered until 3.5 years into the litigation and, even then, initially for only a subset of plaintiffs.[16]

The concern is also heightened where MDLs involve claims involving fraud or mistake, which Rule 9(b) requires to be pled with particularity.[17] Complying with Rule 9(b) necessarily requires individualized facts: what alleged misstatements the plaintiff heard, when the plaintiff heard them, and how the plaintiff relied on them.[18] Yet some courts have permitted plaintiffs to plead fraud claims via short-form complaint by checking a box to "opt-in" to the fraud allegations in the master complaint without supplementing the master complaint with

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[13] *See, e.g.*, Pretrial Order No. 79, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-02327 (S.D. W. Va. Nov. 14, 2013), ECF No. 932.

[14] Pls.' Master Long-Form Compl., *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 3:16-md-02738 (D.N.J. Jan. 5, 2017), ECF No. 82.

[15] Case Management Order No. 2, *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 3:16-md-02738 (D.N.J. Feb. 7, 2017), ECF No. 102.

[16] Order, *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 3:16-md-02738 (D.N.J. May 26, 2020), ECF No. 13428 (directing completion of profile form for 1,000 randomly-selected cases); *see also* Pl.'s Profile Form Order (Apr. 20, 2021), ECF No. 19911 (directing all plaintiffs to complete profile form within 330 days).

[17] *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

[18] *Compare In re Trasylol Prods. Liab. Litig.*, 2008 WL 5190987 (Aug. 15, 2008) ("MDL plaintiffs, like all other federal plaintiffs, must plead with particularity 'the circumstances constituting fraud'"; one purpose of a SFC is to "present[] adequate particulars for any fraud claim"); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2017 WL 1458193, at *6 (D. Mass. Apr. 24, 2017) ("[A]ny particularized allegation of fraud applicable only as to an individual — for example, a claim that a specific sales representative made a misrepresentation to a specific physician, who then prescribed the product to the plaintiff mother — should normally be set forth in the individual short-form complaint.").

individualized allegations.[19]

Rule 7 identifies the "only" pleadings that are "allowed," and "consolidated pleadings" are absent from the list. If Rule 16.1 is intended for the first time to expressly authorize this often-used pleading form, the Advisory Committee Notes should provide much-needed guidance that master and short-form complaints must collectively meet the pleading requirements attendant to Rule 7(a)(1) complaints.

II. Consolidated Pleadings Should Not Prevent Defendants from Moving to Dismiss Master Complaints that Fail to State a Claim.

The Federal Rules of Civil Procedure require more than simply notice to the defendant of the claims they face; they require that the defendant be permitted an early opportunity to challenge the legal sufficiency of those claims.[20] Yet without guidance in the Federal Rules, courts have taken varying approaches to motions to dismiss consolidated pleadings.[21] Some courts have interpreted master complaints as administrative devices and thereby barred defendants from filing motions to dismiss them. For instance, in the ongoing *Acetaminophen ASD-ADHD MDL*, the court directed that "motions to dismiss should be brought against particular complaints and not against the master complaint."[22] Others have permitted motions to dismiss, but "assess[ed] the sufficiency of plaintiffs' claims with substantial leniency."[23] Finally, some courts have held that "the Master Complaint is not immune from a motion to dismiss under Rule 12(b)(6)."[24]

In light of Rule 1 and the purposes of MDL proceedings — to "promote the just and efficient conduct" of civil actions pending in different districts[25] — the third approach is the

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[19] *See, e.g.*, Short-Form Compl., *In re Juul Labs, Inc., Marketing, Sales Practices, and Prods. Liabl. Litig.*, No. 3:19-md-02913 (N.D. Cal. Mar. 27, 2020), ECF No. 405.

[20] *See* Fed. R. Civ. P. 12(b)(6) ("[A] party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted . . . .").

[21] *See In re Digitek Prods. Liab. Litig.*, 2009 WL 2433468, at *8 (S.D.W. Va. Aug. 3, 2009) ("[I]t is uncertain how a master complaint should be treated when it is challenged via Rule 12(b)(6) . . . .").

[22] *In re Acetaminophen ASD-ADHD Prods. Liab. Litig.*, 2023 WL 3026412, at *2 n.2 (S.D.N.Y. Apr. 20, 2023).

[23] *In re Trasylol Prods. Liab. Litig.*, 2009 WL 577726, at *8 (S.D. Fla. Mar. 5, 2009); *see also In re Allergan Biocell Textured Breast Implant Prods. Liab. Litig.*, 537 F. Supp. 3d 679, 720 (D.N.J. 2021) ("The Court Will Review the [Master Long-Form Personal Injury Complaint] with Leniency.").

[24] *In re Atrium Med. Corp.*, 2018 WL 11397878, at *5 (D.N.H. Jan. 8, 2018).

[25] 28 U.S.C. § 1407(a).

correct one. Nothing in the Federal Rules supports putting the court's thumb on the scale against dismissal, simply because lawyers have recruited hundreds or thousands of plaintiffs to bring the same claims. The MDL Subcommittee has commented extensively on the "Field of Dreams" problem — that the creation of an MDL itself generates claims.[26] And requiring defendants to file identical motions to dismiss hundreds or thousands of individual cases is neither just nor efficient. Where a motion to dismiss "raises issues common to all plaintiffs" that do not "require case-specific rulings to determine the sufficiency of each individual plaintiff's factual allegations," Defendants should be allowed to file a motion to dismiss the master complaint.[27] Where a motion to dismiss involves case-specific facts, it should be filed against the short-form complaint.

If the Federal Rules are going to encourage consideration of "consolidated pleadings," the Advisory Committee Notes should clarify that those consolidated pleadings are not immune from challenge under Rule 12(b)(6) or subject to a standard of review that is different from any other complaint filed in federal court.

Sincerely,

Gregory L. Halperin

[26] *See, e.g.*, Advisory Comm. on Civil Rules, *MDL Subcommittee Report*, *supra*, at 143.

[27] *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, 2012 WL 3582708, at *3–4 (N.D. Ill. Aug. 16, 2012) ("Where defendants bring a motion to dismiss that raises issues common to all plaintiffs, however, the administrative nature of a Master Complaint does not necessarily preclude 12(b)(6) motion practice.").

TAB 18

From: hratliff_shb.com
To: RulesCommittee Secretary
Subject: Outline of Proposed Remarks by Harley V. Ratliff at Civil Rules Hearing on October 16
Date: Thursday, October 05, 2023 2:46:36 PM

Greetings. I'm writing with regard to the upcoming testimony scheduled for Oct. 16 on proposed rule changes.

Below is a short written summary of my anticipated testimony:

My name is Harley Ratliff. I'm a partner at the law firm of Shook, Hardy & Bacon. Most of my 20-year career has been spent litigating within the world of MDLs. For the past eight years, I have served as national counsel for the lead defendant in two major products liability MDLs, and also as lead counsel for a global retailer in another products liability MDL. I have seen the MDL process play out first hand and, without question, the current system is broken. The cost of this is borne by our federal judiciary tasked with managing unmanageable dockets; defendants that must spend millions of dollars litigating thousands of largely un-vetted lawsuit; and individual plaintiffs who might have potentially meritorious claims but that are devalued by the thousands of claimants who plainly do not. At the end of the day, the only winners now are the lawyers.

Proposed Rule 16.1 is certainly a start. And, that steps are being taken to tackle some of these problems is encouraging. That said, in my experience much of what is being proposed with 16.1 routinely takes place in MDLs already – *i.e.*, initial case management conferences, designation of coordinating or liaison counsel, discovery plans, appointment of leadership, preparation of consolidated proceedings, etc. Although these concepts might be helpful for entirely uninitiated MDL judges, they do not address the underlying problems at the core of our current system.

To move the ball forward, there needs to be a serious approach to addressing the viability of these lawsuits on the front end – not after years of expensive and potentially unnecessary litigation. What does this mean?

It means that plaintiffs in MDLs should be held to the same basic standards that they would in an individual lawsuit. For example, does the plaintiff actually have proof that they used the product in question (proof of use)? Does the plaintiff have proof that they used Defendant's products vs. some other, similar, product (product identification)? Have they been diagnosed with or, at the very least, have some basic medical corroboration that they have the injury they allege (proof of injury)? To illustrate, outside of an MDL no plaintiff would file an individual lawsuit alleging a product caused them cancer if, in fact, they had never been treated for or diagnosed with cancer before the lawsuit was filed. Yet this scenario is all too common in MDLs.

As it stands, these threshold issues are almost always addressed (if at all) after a "global" resolution has been reached or through the pain-staking and expensive process of litigation. Without any

barrier to entry beyond a filing fee, the MDL system will remain a place where thousands (if not tens or hundreds of thousands) of un-vetted claims are parked in our federal court system. Addressing these issues first, rather than last, will streamline proceedings, unburden federal courts, and allow the parties to litigate the merits of lawsuits that potentially have value. Otherwise we will continue to have a system where MDLs are treated by many filing attorneys as little more than part of their diversified investment portfolio. File hundreds of cases, let them sit in the MDL, and hope for a return at a later time.

Likewise, MDLs should not be viewed as simply a mechanism for transferring money from the defendant to the attorneys who have filed suit. In my experience, MDL judges may often view liability as a foregone conclusion and the only (or easiest) solution to the problem is early resolution. At one initial management conference, an MDL judge told the attorneys that he viewed them as "partners working toward the efficient administration and resolution of the MDL." This was before a single document was produced, deposition taken, or motion filed. MDLs were created for the purpose of coordinated or consolidated pre-trial proceedings. Too often, they are seen purely as an instrument for resolution. And, while resolution might be a worthy goal if the parties desire it, other considerations should be paramount, such as ensuring that claimants have legally sufficient claims and all parties are treated fairly. And, if remand occurs after an efficient pre-trial process and winnowing of claims, then the process should not be viewed as a failure of the presiding judge or the MDL generally.

To fix the current situation, we must go beyond proposed Rule 16.1 and begin to address the real problems with our MDL system.

TAB 19

No summary of testimony was submitted.

TAB 20

OUTLINE OF
TESTIMONY OF SHERMAN JOYCE
PRESIDENT, AMERICAN TORT REFORM ASSOCIATION
REGARDING PROPOSED NEW RULE 16.1
ADVISORY COMMITTEE ON CIVIL RULES
PUBLIC HEARING
OCTOBER 16, 2023

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms. Our mission is to establish and advance a predictable, fair, and efficient civil justice system.

ATRA commends the Committee for recognizing the critical need for rules governing multidistrict litigation (MDL), which has transformed the federal courts and has been misused for the mass filing of questionable and unsupportable claims. This litigation has overwhelmed both defendants and the federal courts.

Respectfully, the preliminary draft of Rule 16.1 is insufficient. It does not acknowledge these significant problems; nor does it provide needed, effective procedural safeguards for MDLs. ATRA urges the Committee to further develop the proposed rule with the goal of restoring balance to the MDL system.

Since Congress adopted the MDL statute in 1968, the mass tort litigation environment has significantly changed. An industry has developed around such litigation. Hundreds of millions of dollars are spent on generating claims for a single mass tort. Third party litigation funding supports these advertising campaigns and the filing of speculative litigation. With minimal screening, claims are filed en masse. Federal MDL dockets can go from zero to tens of thousands of questionable claims in only a few months.

The percentage of cases in federal MDLs has doubled over the past decade and more than tripled over the past two decades. In 2020, for the first time in history, MDL dockets, primarily product liability mass tort cases, made up more than half of the federal civil caseload. That percentage reached an astounding 73% as of the conclusion of the 2022 fiscal year.

The MDL system is not functioning properly. There is widespread agreement that a significant number of claims in product liability MDLs are not viable -- as high as 40% to 50%. Cases that otherwise would not be filed if they had to stand on their own merit are filed in MDLs because plaintiffs' attorneys believe that, given the sheer volume of cases, defendants and courts will not scrutinize clear deficiencies in their claims when they are swept into a global settlement.

A rule governing MDLs is long overdue, but the preliminary draft of the proposed new Rule 16.1 (which largely offers a non-binding checklist for an initial management conference) is insufficient.

A proposed rule should:

- Recognize and respond to the extraordinary surge of mass tort litigation in the federal courts and the widely acknowledged problems that result.

- Include safeguards that require cases to be carefully screened when they are filed and that provide a mechanism for courts to dismiss speculative or otherwise nonviable claims at an early stage, as they would if litigated individually.

- Encourage courts to rule on dispositive legal issues as soon as practicable in the case, such as on novel theories of liability, general causation, preemption, or statutes of limitations that can affect all or many claims.

In addition, disclosure of third party litigation funding, which is intertwined with the growth of MDLs, should be adopted as part of an MDL rule or separately.

TAB 21

Johnson&Johnson

October 5, 2023

Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed New Rule 16.1

Dear Members of the Advisory Committee:

My name is Deirdre Kole, and I am Assistant General Counsel, Litigation at Johnson & Johnson. In that role, I am responsible for the management of product liability litigation involving certain medications, biologics and medical devices. Prior to joining Johnson & Johnson, I was a partner at the law firm Drinker Biddle & Reath, where my practice focused on representing pharmaceutical companies and medical device manufacturers in product liability litigation, including mass torts.

I applaud the Committee's efforts to bring much needed change to the governance of Multi-District Litigation ("MDL"). Undoubtedly, there is great need for an amendment to the Federal Rules of Civil Procedure ("FRCP") providing clarity about MDL management. The federal judiciary is struggling under the current rules to manage ever-growing MDLs, which accounted for nearly 73% of all pending federal civil cases in 2022[1], to proper outcomes. Concerns surrounding the integrity of the civil justice system in the MDL context is a significant challenge facing Johnson & Johnson's family of companies, which manufacture a myriad of prescription products, including life-saving and life-enhancing medicines and medical devices. These issues also affect the U.S. economy on a macroeconomic level as manufacturers facing mass tort lawsuits struggle to address, manage and resolve staggering numbers of claims—many of which lack even the most basic factual support.

Herein lies the problem: as tens of thousands of claims that lack the basic factual and legal bases required by the FRCP besiege the federal judiciary, courts and defendants in mass tort MDLs are deprived of critical information necessary to understand the scope and reach of the litigation. The mere stockpiling of claims on federal dockets does not mean that claims have merit or that individual plaintiffs have legitimate bases to pursue such claims; rather, the barrage of filed complaints underscores that the FRCP safeguards that usually prevent the initiation of baseless lawsuits are not utilized, or simply do not function, in the MDL context.

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[1] *See* Rules 4 MDLs, https://www.rules4mdls.com/73-percent-of-federal-civil-cases-are-in-mdls (last accessed Oct. 4, 2023) (392,374 cases out of 536,651 federal civil cases resided in MDLs at the end of fiscal year 2022).

The Preliminary Draft of Rule 16.1 does not solve for this problem. Any Rule to address the management of MDLs must provide clear instructions for the early vetting of cases to ensure that claims in an MDL have, at minimum, a facial factual basis—*i.e.*, the plaintiff actually used the product at issue and medical records show they experienced the injury they allege. Requiring this information is not burdensome; it is part of the normal intake process for any plaintiffs' lawyer in an individual case and would promote justice and efficiency for all parties and the judiciary.

Traditional Safeguards Against Frivolous Claims Do Not Function in the Mass Tort MDL Context

Traditionally, in tort litigation, an individual who experienced harm would seek out a lawyer to vindicate his or her rights in an effort to recover from someone who wrongfully caused that harm. Before filing a lawsuit, the lawyer—particularly one working on a contingency fee basis as is standard in the tort context—would conduct an initial assessment of the case to ensure the individual has a colorable claim. That is how civil justice is supposed to work and should work. That is also what is required by FRCP 11, which states that by filing a pleading, an attorney certifies that "the factual contentions have evidentiary support or, if specially so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]"[2]

The MDL process does not function in the same way as traditional tort litigation—a fact that came up in a recent congressional hearing on the impact of third-party litigation funding on mass torts and the MDL process.[3] In an exchange with Congressman Jamin Raskin, an accomplished legal scholar, my colleague Aviva Wein, who leads Johnson & Johnson's Litigation Policy and Risk Management Group, discussed this point.

> Ms. Wein explained: "We have no access to information regarding the thousands of claims brought against us because plaintiffs aren't required to actually produce evidence of product usage or injury alleged from the product. We're essentially hamstrung from using Rule 11 to bring sanctions on those individual cases. We're also hamstrung in many cases from filing 12(b)(6) motions because that motion practice is usually suspended in the MDL process."[4]
>
> Congressman Raskin responded that this "might be something interesting to look at. . . . To my understanding anybody who brings vexatious, frivolous or meritless litigation can be sanctioned by the courts."[5]

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[2] FED. R. CIV. P. 11(b)(3).
[3] Unsuitable Litigation: Oversight of Third-Party Litigation Funding, Sept. 13, 2023.
[4] *Id.*
[5] *Id.*

In reality, many claims become part of MDLs even when they have no basis to be filed in the first place. As you well know, the Advisory Committee issued a report estimating that 20%-30% of all claims in MDLs are "unsupportable . . . either because the claimant did not use the product involved, . . . the claimant had not suffered the adverse consequence in the suit," or had some other deficiency, including where the statute of limitations has undisputedly expired.[6] In some litigations, the report continued, unsupported claims "may be as high as 40% or 50%."[7]

This result is the by-product of how the mass tort MDL process operates in practice. Today, aggrieved plaintiffs do not seek out lawyers to achieve justice. Lawyers develop a tort theory, recruit investors, and use their money to advertise for plaintiffs and, in many situations, hire marketing firms to generate leads. Lawsuit ads are then blasted on television, the internet, and billboards instructing consumers to call, click, fill out forms, and their claims will quickly be filed. Many claims are collected by lead generators and sold to law firms who file them—with little to no vetting. The lawyers have likely never met or even spoken to their clients. In fact, a recently released survey of plaintiffs in mass tort MDL proceedings revealed that, "[l]ess than fifty percent could identify their attorney's name, fifty-nine percent disagreed that their attorneys kept them updated on their case's status, and only 16.6 percent ever even spoke with their lawyer on the phone."[8] The result is a mass of claims, many of which are completely nonviable for basic factual shortcomings.

Once plaintiffs' lawyers amass a sufficient number of claims, they petition the United States Judicial Panel on Multidistrict Litigation ("JMPL") to establish an MDL. After the JPML establishes an MDL, lawsuits premised upon the subject matter designated to the MDL are filed directly into the MDL proceeding or transferred into the MDL proceeding, often without any vetting of underlying evidence to ensure the claims are colorable and not frivolous. Most of these individual lawsuits sit stagnant while the MDL court and parties address pre-trial issues.

Thus, unlike in individual cases, where motions to dismiss can be filed prior to a defendant's answer to challenge the sufficiency of the claims asserted, plaintiffs who are part of an MDL do not have to substantiate the basics of their claims. Accordingly, Plaintiffs' lawyers can aggregate large numbers of claimants in an effort to pressure the courts and defendants toward settlement as the only realistic option to end what appears to be voluminous litigation. Indeed, even this draft rule directs MDL judges to contemplate settlement at the outset of the litigation—before addressing the merits, including whether or not the claims are valid, the scientific evidence supports the litigation or the federal regulatory

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[6] Agenda Book, Advisory Committee on Civil Rules, Nov. 1, 2018, at 142.
[7] *Id.*
[8] Elizabeth Chamblee Burch, *MDL for the People*, 108 Iowa L. Rev. 1016, 1018 (2023).

process preempts state law claims. The thousands of claims inundating their dockets create "incentives for judges to treat settlement as the ultimate goal."[9]

Judge Land of the Middle District of Georgia explained these dynamics in a 2016 order in a mesh MDL. He observed that MDLs create "incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit" because the lawyers "seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized."[10] This is why "many cases are filed . . . with so little pre-filing preparation that counsel apparently has no idea whether or how she will prove" the case.[11]

The dynamics Judge Land described played out in the MDL involving Ethicon Pelvic Mesh devices.[12] In that MDL, 46,511 cases were filed against Ethicon. Out of these cases, 24,695 cases—more than half—were dismissed for basic factual shortcomings or inability to establish a cognizable injury.

Similarly, when a a random sample of claimants in the 3M Combat Arms earplug litigation were ordered to produce evidence to substantiate their claims ("Wave 1 plaintiffs"), the vast majority could not.[13] Of 500 Wave 1 plaintiffs in that MDL, 126 (25.2%) reportedly produced no evidence and dropped out of the case, and nearly three quarters of the Wave 1 plaintiffs had no record of ever using the product at issue.[14] Those cases should not have been filed.

Rule 16.1 Should Provide For Early Vetting of Claims.

Any new rule focused specifically on MDLs should have a Rule 11 analogue for MDLs. Lawyers should be sanctioned for filing baseless claims—not incentivized to do so. Just as in individual claims, Plaintiffs should have to provide evidence supporting basic facts. The new Rule 16.1 should include the following safeguards:

- Within 30 days of a case being filed in an MDL or transferred to an MDL, plaintiff must produce evidence (*e.g.*, medical records) identifying the product he or she used and documenting his or her injury. If plaintiff fails to produce such evidence, the MDL court shall (1) dismiss the case with prejudice; (2) impose sanctions on the party or plaintiff's attorney for filing a case that lacks evidentiary support; and (3) allow the defendant to recover its costs and attorney's fees incurred in defending that claim.

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[9] Andrew S. Polis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1669 (2011).
[10] *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08–MD–2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).
[11] *Id.*
[12] *In re Ethicon, Inc., Pelvic Repair System Prods. Liab. Litig.*, MDL No. 2:12-MD-02327 (S.D.W. Va.).
[13] *In re Aearo Tech. LLC*, Informational Brief of Aearo Techs. LLC, 38, No. 22-02890-JJG-25-28, Dkt. No. 12 (Bankr. S.D. Ind. filed July 26, 2022).
[14] *Id.* at 35, 38.

- The language could mirror Rule 11, requiring "the factual contentions [in MDL claims] have evidentiary support or, if specially so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]"[15]

- Further, the court should impose the same sanctions authorized under Rule 11 on attorneys or parties who violate the rule: "nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

The goal is not to impose the sanctions, but to require plaintiffs' lawyers to do basic due diligence before asserting claims on behalf of a new client—just as they would if they were going to pursue that person's claim individually. This basic due diligence is not burdensome. It is the same information plaintiffs would have to provide any lawyer during any initial case assessment before an attorney operating under a contingency fee would agree to represent them and file a lawsuit.

These measures would go far toward combatting facially meritless claims that, when amassed in the thousands, substantially interfere with the ability of judges to effectively administer MDLs and help ensure MDLs reach their rightful outcomes. Only after these extraneous cases are removed and the core issues in the litigation are decided can the parties evaluate the merits of the litigation and determine whether, and if so under what terms, to settle the cases. We hope this Committee will welcome the opportunity to adopt these simple, common-sense measures and return the federal judiciary to a place where plaintiffs and defendants can achieve justice.[16]

Sincerely,

Deirdre R. Kole

Deirdre R. Kole
Assistant General Counsel, Litigation
Johnson & Johnson

[15] *See* Fed. R. Civ. P. 11(b)(3).
[16] I also join the Comment submitted on September 18, 2023 by the Lawyers for Civil Justice.

TAB 22

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October 6, 2023

Mr. H. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed New Rule 16.1 on MDL Proceedings

Dear Mr. Byron:

My firm and I have represented plaintiffs and served as Co-Lead Counsel, members of Plaintiffs' Executive Committees, and members of Plaintiffs' Steering Committees in numerous multidistrict litigations (MDL). Currently, I serve as Co-Lead Counsel in the *In re: Johnson & Johnson Talcum Powder Prods. Mkting, Sales Practices, and Prods. Liab. Litig.,* MDL No. 2738. An MDL is a powerful and effective tool, particularly in the setting of mass tort product liability litigation, to create efficiencies and to facilitate the ability of plaintiffs to seek redress for their injuries.

We support efforts to improve the MDL process. Further, we thank the Committee for its considerable time and efforts to create a rule intended to assist judges as they preside over the early stages of an MDL.

Areas of Agreement

There are aspects of the proposed new rule with which we agree. As outlined in proposed Rule 16.1(a), we agree that the transferee court should be encouraged to schedule an initial management conference soon after the creation of an MDL. This has been a helpful first step in developing a preliminary case management plan for every MDL in which my firm has been involved.

In relation to proposed Rule 16.1(c), we believe it could be very helpful for the court to order the parties to meet and confer and provide the court with a report on the following topics:

- (1) whether leadership counsel should be appointed, leadership structure, and the appropriate procedure and timeline for appointing leadership;

- (2) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

- (3) identifying the principal factual basis of the case and legal issues to be presented in the MDL proceedings, to the degree known and without prejudice to leadership after their appointment;[1]

- (10) how to manage the filing of new actions in the MDL proceedings; and

- (11) whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them.

This shortened list of topics focuses the court on the preliminary matters that need to be addressed at the beginning of the case. These topics allow the court to be informed of the general facts and law at issue in the litigation and to be apprised of the status of other cases, but they do not require substantive decision-making that will affect the direction of the MDL prior to the appointment of leadership.

Areas of Disagreement and Concern

Many of the provisions listed in proposed Rule 16.1(c) are premature to discuss at an initial conference. Why? Leadership is not in place at the time of the initial conference. To expect a "coordinating counsel" to provide adequate information on the remaining topics is unworkable. First, there are no qualifications provided for the coordinating counsel. And while there is no requirement that such a counsel be appointed, if one is appointed, there is no requirement that the counsel have a stake in the litigation. In some cases, there may be competing theories of the case and different slates of attorneys vying for leadership. In these instances, the court must make a leadership appointment before other substantive recommendations regarding the litigation can be provided to the court.

Second, although the defense bar has its views about leadership, the appointment of leadership is an issue that affects almost exclusively the plaintiffs' side. At the time of the initial conference, a defendant will have selected counsel and developed its initial theory of the case and a strategic plan for first steps in the litigation. This is not true for counsel representing plaintiffs. Thus, it is extremely important to lawyers who represent clients injured by talc or other defective products to have leadership appointed quickly. The use of a coordinating counsel inserts a two-step process into the selection of leadership without establishing any criteria or vetting process for the coordinating counsel that the Committee Note provides for leadership appointment. After the initial conference, the court would then have to undertake a second process of appointing more permanent leadership. We believe this process would be inefficient, and it is unnecessary. Should the court order that the parties meet and confer and produce a report to the court prior to the initial status conference, the parties in most cases are capable of preparing such a report without an official appointment, provided the topics of the report are limited as set forth above.

[1] We suggest that the language in red be added to this provision of the proposed rule.

The following topics listed under proposed Rule 16.1(c) are premature to discuss prior to the appointment of leadership counsel:

- (4) how and when the parties will exchange information about the factual bases for their claims and defenses;
- (5) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;
- (6) a proposed plan for discovery, including methods to handle it efficiently;
- (7) any likely pretrial motions and a plan for addressing them;
- (8) a schedule for additional management conferences with the court;
- (9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I); and
- (12) whether matters should be referred to a magistrate judge or a master.

These provisions have a couple of things in common. Many of them, such as a plan for exchanging information, a discovery plan, pretrial motions, along with settlement issues, require substantive decision-making about the case itself, which may not be possible in any MDL that requires a leadership appointment. The remaining issues require the litigation to be further along than an initial conference (and some provisions like the appointment of a special master and settlement easily fall into both categories). The proposed Rule 16.1(c) provisions, while meant to be a prompt for newly appointed transferee court judges, can easily become an ill-informed box-checking exercise. It is conceivable to have a case in which a judge appoints a coordinating counsel without knowledge of the case or a stake in the litigation to prepare a report that includes most of the proposed Rule 16.1(c) topics. Would such a report be accurate, let alone useful to the court?

Our recommendation is for the Committee to promulgate a more limited rule where the initial management conference focuses on items that need to be done first.

Thank you for the opportunity to address the Committee on October 16, 2023. I look forward to sharing my comments in greater detail and to answering any questions that members of the Committee might have.

Respectfully submitted,

/s/ P. Leigh O'Dell

P. Leigh O'Dell