ADVISORY COMMITTEE ON CIVIL RULES

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

January 16, 2024

Testimony Outlines and Comments

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TAB 1

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January 2, 2024

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

Re: Proposed Amendments to Civil Rules 16 and 26 and Proposed New Rule 16.1

Dear Members of the Advisory Committee:

Thank you for the opportunity to comment on the Committee's proposed amendments to Federal Rules of Civil Procedure 16 and 26 regarding privilege logs and the Committee's proposed new Rule 16.1 regarding multi-district litigation.

I am a partner at Hausfeld, a global claimants' law firm with a focus on private enforcement of competition laws, with nearly 250 attorneys worldwide. Within the United States, Hausfeld's practice comprises predominantly large, complex, multi-defendant (and often multi-district) class actions, including antitrust, consumer, technology, privacy, data breach, and human rights class actions. My firm and its attorneys are frequently appointed to leadership positions in these class actions. We currently serve as lead or co-lead counsel in dozens of pending class actions, many of them MDLs.

Our clients are generally individuals or small to mid-sized businesses that are unable to seek redress for harms they suffered without recourse of the class action mechanism. Defendants in our matters are among the largest domestic and global concerns, including leading air carriers, financial institutions, food manufacturers, technology companies, health insurance providers, and industrial and consumer goods manufacturers, among others, usually represented by nationally recognized defense firms.

I currently serve as court appointed co-lead counsel in *In re Wawa Data Security Incident* (19-cv-6019, E.D. Pa.) involving consolidated data breach class actions for three classes and am a member of court-appointed leadership in two antitrust class action MDLs: *In re Generic Pharmaceutical Pricing Antitrust Litig.* (MDL No. 2724) (personal appointment to plaintiffs' steering committee) and *In re Domestic Air Travel Antitrust Litig.* (MDL NO. 2656) (HLLP as co-lead counsel). I also served as a lead case team member for *In re Fresh and Process Potatoes Antitrust Litig.* (MDL No. 2186) and *In re Processed Egg Products Antitrust Litig*. (MDL No. 2002) for which my firm was appointed lead and co-lead counsel, respectively.

I am an active member of the Sedona Conference's Working Group 1 on Electronic Document Retention and Production, often serving as a dialogue leader (including related to privilege logs)

and on WG1's various brainstorming and drafting committees. I am a member of the board of directors for the Complex Litigation eDiscovery Forum ("CLEF"), serve on the advisory council for the Electronic Discovery Reference Model, which has attempted to find at least some consensus on privilege log issues, and am a member of the 2024 ASU-Arkfeld eDiscovery Advisory Committee. I frequently speak and conduct trainings on discovery issues, including matters related to privilege logging and complex case management.

I. Proposed Amendments to Civil Rules 16 and 26

The proposed amendments require that any discovery plan under Rule 26(f) state the parties' views and proposals on "the timing and method for complying with Rule 26(b)(5)(A)." Correspondingly, the proposed amendments also encourage inclusion of a provision regarding the timing and methods for compliance with Rule 26(b)(5)(A) in the Rule 16(b) scheduling order.

A. The Committee's Appropriate and Balanced Approach to Privilege Logs Will Reduce Privilege Log Disputes and Reflects Current Best Practices.

The Committee's thoughtful approach to addressing privilege logs will advance case management, minimize avoidable disputes, and promote the efficient progress of litigation.

Public comments provided to the Advisory Committee in response to the 2021 invitation for comments reflected widespread concern among parties receiving privilege logs that producing parties vastly over-designate documents as privileged or work-product protected, imposing enormous burdens on receiving parties to assess the log, identify the improperly withheld documents, undertake challenges to them, engage in meet and confers to resolve them, and file motions to compel their production. They also affirmed the necessity of complete privilege logs to make those assessments and confirmed that whether alternative approaches to privilege logs, in whole or in part is case-dependent but that, in a typical case, document-by-document logs are critical. The Committee recognized that there was a "pervasive divide" between requesting and receiving parties and appropriately identified an approach for which there was common ground.

Requiring early Rule 26(f) meet and confers regarding the method for compliance with Rule 26(b)(5(A) will encourage early resolution of the required format, content, and timing of privilege logs. Early resolution will help minimize or eliminate later time-consuming disputes regarding whether the log provides sufficient information to assess a claim of privilege by establishing the presumptively compliant format and content agreed to by the parties or ordered by the court. With prior agreement on the format and content of privilege logs, the parties will be able to focus their attention on substantive matters related to the logged documents—whether the withheld documents are properly withheld—rather than whether the log itself is deficient.

The proposed rule amendments will also provide assurances to producing parties that the format and content of the logs they serve will be acceptable, reducing the need for "do-overs." As the Committee has recognized, it is also important that discussions on the manner of compliance

with Rule 26(b)(5)(A) occur prior to document review and production because the format and means of compliance may implicate how that review proceeds.

Importantly, the proposed amendments make clear that the discussions regarding log production timing and logging methods are focused on the *means of compliance* with Rule 26(b)(5)(A). Too often, proposals for privilege log "reform"—including some of those urged on the Advisory Committee—appear to seek endorsement of logging methods that *side-step compliance* by suggesting either *forgoing* disclosure or logging documents in a manner that makes it impossible for the recipient to assess the claims as to each document. The proposed amendment clarifies that the parties should focus discussions on a manner of logging that is compliant with Rule 26(b)(5)(A)'s requirement that the method of disclosure enable the recipient to evaluate the appropriateness of the claim of privilege.

This practice—early negotiation of the form and content of privilege logs at the 26(f) stage—is currently routine in most complex litigation in which I and others in my firm have been involved. These stipulations are ordinarily part of a negotiated protocol governing electronically stored information or included as part of a protective order and/or Rule 502(d) order.

Early in multi-defendant complex litigation, even prior to serving discovery, it is expected that the parties will negotiate the form, specific content, and timing for the production of privilege logs, as well as a process for how the parties will address challenges to withholding prior to any motion practice that may be required. For example, the parties negotiate: the precise fields that should be provided in the log (e.g., to/from/cc/bcc, date, document type, subject matter/description, type of claim, bates # for redacted documents, etc.); the time period covered by the log (if different from the discovery period) and any temporal exceptions to logging requirements; if a metadata-type log is agreed to, how to address documents for which metadata provides little to no information or inaccurate information and any manual information that must be supplemented; how hard copy versus electronic documents shall be logged; any technical issues that are expected; the physical format of the logs (e.g. sortable spreadsheets); when the logs must be produced; and how the parties will proceed if challenges to claims of privilege arise. These provisions set appropriate expectations and provide a roadmap for the parties' conduct going forward.

To address concerns that a party may not have sufficient information about the case, its documents, or its production at the time of the Rule 26(f) conference, such protocols generally build in an escape hatch permitting modification of the protocol by agreement of the parties or by order of the court for good cause shown or include placeholders for later negotiations over certain questions. This provides the flexibility parties may desire.

Although many have interpreted the language of Rule 26(f)(3)(D) to already require inclusion of logging methodology and timing of log production as part of a discovery plan, clarifying that the Rule requires the parties' to address their positions on the means of compliance with Rule 26(b)(5)(A) will encourage early resolution of privilege logging issues among parties that had not even contemplated the question of privilege logs or are reluctant to engage in those

discussions with the opposing side.

I thus encourage the Rules Committee to adopt the text of the amendments to Rules 16 and 26 as proposed.

B. The Draft Committee Notes Provide Helpful Guidance but Require Modification to Reflect Concerns of, and Burdens Faced by, Receiving Parties.

The draft Committee Notes provides helpful guidance for courts and litigants in applying the proposed amendments. Importantly, they highlight:

- that methods of compliance may be case-dependent and avoid endorsement of any particular "flexible" methodologies.

- the importance of rolling privilege logs, noting that failure to do so may pose serious problems. These problems include, among others, exacerbating over-withholding where producing parties do not have early guidance on what may or may not be withheld that would inform later privilege reviews, delaying case progress (as deadlines for discovery and dispositive motions may need to be delayed until resolution of motions to compel),[1] and prejudicing parties when they must move forward with depositions and dispositive briefing without the benefit of documents that have been withheld. These advantages outweigh any purported concerns about rolling privilege logs.[2]

- the value of early discussions regarding the nature of potentially privileged materials involved in the case, which can reduce substantive disputes about certain claims. For example, disclosure of the nature of third parties involved in attorney communications or case-related investigations can facilitate early resolution about the roles of such parties and whether they are more or less likely to waive privilege or at least focus a party's attention to such third parties' roles during discovery. At present, such disclosures occur only during motion practice when a party seeks to justify its privilege claims.

- that agreements among parties regarding what documents might be excluded from the logging requirement entirely "calls for careful drafting and application keyed to the specifics of the action." In some types of cases, such as those involving allegations of

[1] This occurred in the *Domestic Airlines* litigation where production of voluminous logs only after substantial completion of production and resulting motion practice required a one-year extension of the deadline for summary judgment motions. *See* ECF Nos. 430, 446*, In re Domestic Airline Travel Antitrust Litig.*, No. 15-cv-1404 (MDL No. 2656) (D.D.C.).

[2] Those opposing rolling privilege logs suggest that earlier logs may have errors that could hypothetically be detected after all documents have been produced. But any documents improperly withheld can be later produced and, so long as there is a Rule 502(d) order, any documents missed in earlier privilege reviews may be clawed back.

price fixing that my firm frequently prosecutes, relevant communications regarding the litigation that involve in-house or outside counsel after the litigation has been filed are more likely than not to be privileged, and agreements to exclude them from the logging obligation are common. But in other types of actions where the conduct may be ongoing or documents relating to the litigation may or may not be trial preparation materials, such exclusions are not appropriate. In a data breach action, for example, internal and external discussions and analyses about the cause and effect of the conduct generally first begins after litigation has commenced and often involves in-house and outside counsel wearing both "legal" and "business" hats. In such actions, disputes over the protected nature of the post-litigation documents are frequent and fierce. The Committee's caution is thus well-placed.

But there are also statements in the Notes that give pause and may merit reconsideration. While the proposed amendments reflect a balanced approach after the Advisory Committee's careful consideration of all viewpoints expressed during the 2021 informal comment period, the draft Committee Note may lend credibility to producing parties' concerns without affirming the importance of the rule in ensuring non-protected materials are not shielded by claims of privilege. The Notes thus appear to put the thumb on the scale in favor of so-called alternatives to identifying grounds for withholding documents without addressing the potential risks of alternative approaches in undermining the purpose of Rule 26(b)(5(A) as expressed during the prior comment period.

- *The Note does not address valid concerns regarding over-withholding and the value of document-by-document disclosures.*

  The draft Committee Note begins by stating that Rule 26(f)(3)(D) is amended to address concerns about the application of Rule 26(b)((5)(a) but identifies only one of those concerns—the purported cost of compliance from document-by-document privilege logs. But the Discovery Subcommittee's presentation of the proposed amendments (as set forth in the October 12, 2022 Agenda Book) discussed the views of receiving parties regarding over-withholding of non-protected documents and the importance of detailed logs in identifying erroneous claims. As discussed during that comment period, many such claims are quickly abandoned once informally challenged with many remaining claims rejected by courts. This suggests two things: (1) that at least one source of the purported burden of logging is significant over-designation of documents as protected; and (2) the necessity of appropriately detailed privilege logs to assess and challenge claims.

  The Committee's emphasis on *burdens* of compliance without addressing the benefit of the rule in *assuring* compliance tips the scale by implicitly suggesting the amendments are designed to address only one side of that equation. Accordingly, the Committee Notes should emphasize that the Rule's purpose and utility in ensuring non-protected documents are not improperly withheld by producing parties remain as important today as upon its initial adoption and requires balancing the burdens with the benefits of disclosure, recognizing that the purpose of the rule is to allow the receiving party to

assess the propriety of the claim.

- *The Note over-emphasizes "flexible" alternatives without providing cautionary comments regarding risks associated with alternatives courts have gained since the Rule's adoption.*

  The draft Note goes advises that, from its adoption, the Rule was intended to recognize the need for flexibility, but adds, disapprovingly, that it has not been so applied, sometimes imposing undue burdens. This disregards that at the time of the Rule's adoption, courts and litigants did not have the benefit of the thirty years of experience with different approaches to compliance and the epidemic of over-designation. That experience, as reflected in comments received during the initial comment period, reveals the limitations of certain "flexible" approaches as compared with traditional document-by-document logs. The draft Note also disregards that courts adopting traditional log approaches as a default have done so based on their own experiences with compliance. While the draft Note recognizes that the means of compliance may depend on the nature of the case, it does not sufficiently emphasize that compliance with the Rule must always be the guiding standard. Purported burdens of compliance should not be a justification for non-compliance.

- *The Note discusses "undue" burdens of compliance without providing guidance on what constitutes an undue burden.*

  The Note references purported "undue" burdens from traditional approaches but does not discuss when a burden is undue. Accordingly, the Note should acknowledge that a logging burden is "undue" only if it requires more information than necessary to assess the claim of privilege as the Rule requires. It should also make clear that when considering "flexible" approaches to compliance, courts and litigants should be careful to ensure that any such approach will provide sufficient information for courts and litigants to assess the correctness of the claims.

- *The Note inappropriately suggests that document-by-document listings with explanation of the ground for withholding is appropriate in only "some" cases.*

  The draft Note to Rule 26(f) posits that "[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." This could suggest that a document-by-document log is not generally necessary even though it is the standard approach in most cases and in most courts. In my experience, which is consistent with that of my partners and my colleagues at other plaintiff-focused firms, a document-by-document log that includes an explanation for the withholding is generally the *only* meaningful method for assessing whether individual documents withheld are actually privileged.

  While the parties may be able to carve out exceptions to that rule for specific, narrow

agreed subsets of documents in a given case, no commentor before this Committee to date has explained how a receiving party is able to assess the propriety of a claim without disclosure of document-by-document information. Our experience with alternative forms of logs is that they ordinarily result in greater, not fewer, disputes and more motion practice precisely because it is impossible to assess the propriety of the claims without seeking court intervention.

- *The Note's caveat with respect to document-by-document logs risks a presumption that such logs are inappropriate in large cases where, in practice, they are most necessary.*

  The statement that such logs are appropriate in only "some" cases, together with the 1993 Note that suggested detailed information about withheld documents may be unduly burdensome where voluminous documents are withheld, may suggest that such logs are appropriate when only a small number of documents are withheld. But it is large-withholding cases—where thousands or hundreds of thousands of documents are withheld—in which document-by-document information is most essential. Such cases pose the greatest risk that wide swaths of responsive documents will be withheld, making detailed disclosures critical.

  For example, in *In re Blue Cross Blue Shield Antitrust Litigation*, in which my firm was co-lead counsel, more than 450,000 of 700,000 documents withheld were de-designated after the plaintiffs were able to challenge withholding on a document-by-document basis, with some parties ultimately producing as much as 83% of initially withheld documents. In our *In re Domestic Air Travel* matter, of the 22,000 individually logged documents that Plaintiffs informally challenged, some 17,000 were voluntarily removed from the log following that challenge. Nearly 1,700 of those remaining were found to have been improperly withheld in whole or part after *in camera* review. Only through reviewing information about each document (e.g., whether an attorney was involved, whether the document involved business rather than legal advice, etc.) were plaintiffs able to identify which documents were improperly claimed as privilege by identifying inconsistencies between the descriptions and the documents.

- *The Note disregards that document-by-document logs are usually generated through automated processes, posing limited burden.*

  Most document-by-document logs are initially generated through automated processes in which document-by-document metadata (to/from/date/subject matter, etc.) for documents tagged as privileged on document review platforms is exported in table form. This is especially true for large document cases. The entries are not manually drafted but are instead based on metadata that is later normalized and "cleaned up" to produce the final log. While this table "clean up" necessarily imposes some burden, that burden is not undue given the ready availability of document-by-document information and the importance of compliance with the Rule.

And "true" metadata logs (those for which metadata is not "cleaned up" but simply presented as it is exported), while posing their own challenges for receiving parties, are a type low-burden document-by-document log that remain an option for every type of case if descriptions are added (or exported from descriptions populated during review), particularly in large-withholding cases.

To the extent that the Committee Note will continue to suggest that a document-by-document log is appropriate in only "some" cases, it should likewise point out the challenges that purported "more flexible" alternatives pose in assessing whether the claim of privilege is valid.

C. The Committee Should Reject Attempts to Shift Producing Parties' Burdens and Weaken Their Obligations Under Rule 26(b)(5)(A).

I have reviewed comments submitted to date to the Committee during this comment period. A number of these comments urge the Committee to go further and expressly endorse certain practices, either in the Rules themselves or in the Committee Notes. Many of these approaches are undefined and unworkable. To the extent they may make sense in a given case, it should be left to the parties to determine when and where they do, and if so, the conditions under which they should be applied.

A number of these proposals were made during or prior to the 2021 informal comment period and the Committee should reject them for the same reasons it opted in favor of the amendments now proposed. As the Discovery Subcommittee previously noted, there was a pervasive divide between requesting parties and receiving parties during the prior comment period. That pervasive divide applies equally to new proposals as well. I briefly address some of these proposals below.

- *Categorical Logs*: The shortcomings of "categorical logs" were widely discussed in CLEF's comments during the informal comment period[3] and I will not repeat them here. But it is worth reiterating the experience of my firm with one of the cases discussed in those comments—*In re Disposable Contact Lens Antitrust Litig.* (15-md-2626) (D. Fla). There, 60% of some 16,000 documents that were initially categorically logged were ultimately produced after we challenged the categories and the court ordered, among other things, an explanation as to whether each document in the categories were reviewed for privilege.

  This is not to say that in some cases for some narrow categories, logging multiple documents under a single category may be sufficient to assess the claim of privilege. In practice, however, there have been far too few cases in which categorical logs have been able to do so and far too many instances where they patently have not. Contrary to some

[3] *See* Complex Litigation eDiscovery Forum's Aug. 2, 2021 Comments at 15-20.

comments, they are particularly ill-suited to large-withholding cases where permitting them would incentivize even greater improper withholding.[4] Any endorsement of this approach would come at a heavy price to our civil justice system.

It is also important that so-called "categorical logs" not become a mechanism for failing to conduct a document-by-document privilege review at all—a fear that recent case law suggests is not without basis. *Maxis v. YPF,* No, 18-cv-50489, 2021 WL 3619900 (Bankr. D. Del. Aug. 16, 2021) involved a categorical log that lumped 5,692 documents into just three privileged categories. After the court found the categories not to be privileged, the withholding party asked to conduct a document-by-document review for privilege—a review it apparently had not conducted prior to claiming privilege over those documents. Our experience with *Contact Lens* also suggests categorical logs are a means of forgoing review given the number of withheld documents subsequently voluntarily produced after the court ordered an explanation regarding review and that more detailed information be provided.

- *Tiered Logs*: Some have suggested so-called "tiered" or "iterative" logging (as opposed to rolling logs), in which the producing party provides more detailed information for withheld documents that are supposedly "material" or "important" to the case and produces "broad categories" or "summaries" for other documents. These proposals should be rejected.

  First, they fail to explain how a producing party that does not bear the burden of proof in a case would subjectively determine what is "material" or "important" to the other side's case, much less why the producing party should be allowed to make that determination. Opening that door would lead only to gamesmanship. Second, by definition, all such documents are already responsive to discovery requests (otherwise they would not be on the log), and the receiving party has a right to their production if they are not protected. Endorsing such a proposal for "tiered" logs would allow producing parties to withhold discovery they subjectively deem to be less important with little obligation to defend that withholding. Third, such a proposal would only create more delay in the production of logs. At the same time privilege log opponents bemoan the burdens of having to review documents for actual privilege, a "tiered" approach would add yet another layer of subjectivity to that review: reviewers would not only have to make judgments about whether a document is privileged and why but also whether each document is "material"

[4] Now well-known are allegations in *In re: Google Play Store Antitrust Litigation* that Google used "fake privilege"—the practice of unnecessarily involving a lawyer in a communication to provide an aura of privilege—to shield documents from discovery. *See* Bonnie Eslinger, *Google In-House Attys Joked About 'Fake Privilege,' Jury Told*, Law360, Nov. 9, 2023.

Such practices would be nearly impossible to detect in categorical logs. A document-by-document log, however, would show that the lawyer was peripheral to the communication as well as a pattern of including lawyers on standard business communications.

and why.

To the extent the parties wish to agree to a rolling production that prioritizes withheld documents by time-period, custodian, or some other *objective* metric, they are free to do so under the proposed amendments.

- *Amendments to Rule 26(b)(5)*: Other proposals urge the Committee to *require*, by amendment to Rule 26(b)(5)(A), that a case-by-case determination on the manner of compliance be made. Doing so would impose greater, not lesser, burdens on courts and parties to identify a logging methodology, prohibit courts from adopting standing rules for compliance as they are free to do now, and prevent judges from establishing their own standing policies and procedures on privilege logs as they do for so many other discovery procedures (such as default ESI orders) where the parties have not agreed to alternative approaches.

- *Proportionality*: Calls for incorporating proportionality in the Rule or its Committee Note are also misplaced. As an initial matter, the factors embedded in Rule 26(b)(1) make little sense in the context of Rule 26(b)(5)(A) since proportionality is a test for what documents are discoverable. The only question posed by Rule 26(b)(5)(A) is how much information must be disclosed about documents that have already been deemed proportional to the needs of the case but have been withheld. In reality, calls for a "proportionality" determination are merely calls for a determination of whether a log involves undue burden. And since compliance with the Rule is not optional, undue burden arises only where the nature of the log demanded is more than necessary to allow the receiving party to assess the claim.

- *Proposals for Certain Presumptions*: Other proposals—such as proposed presumptions related to logging emails, logging redacted documents, and relying on metadata logs—require significant technical understanding of challenges inherent to them (and changes to technology) that put resolution well beyond what the Rules can address. They involve complex questions of what information exists within a document database and can be produced, and what information might be manually supplemented. All three approaches risk withholding critical information from the receiving party that is necessary to assess the claims. For example, a presumption that only the last email in a thread need be logged means that a producing party may be permitted to withhold all information regarding all the subordinate emails until and unless there is a technological means of assuring each subordinate email appears elsewhere in the log.[5] A presumption that redacted documents need not be logged shifts the burden to the receiving party to identify all redacted documents in a production, review them for privilege, and infer what the redacted content contained and the reasons the producing party withheld it, when it is the producing party's obligation to describe what has been withheld. Finally, a presumption that

[5] To my knowledge, at present, there is no technology available that would allow this assessment.

> metadata logs are sufficient ignores that metadata are often inaccurate or missing and may provide little insight into the nature of the document or why it was withheld.[6]

For these reasons, the Committee's well-balanced proposed amendments are the better approach, providing the parties with flexibility and reducing the likelihood of privilege disputes.

II. Proposed New Rule 16.1

The MDL Subcommittee has recommended new Rule 16.1 to govern multi-district litigation proceedings. Many of my colleagues that practice in the mass tort area have submitted (or will be submitting) comments regarding the substance and appropriateness of the proposed new rule as applied to mass tort MDLs. I defer to their expertise on those issues. My comments are, by contrast, focused on application of the proposed new Rule for MDL proceedings that do not involve mass torts.

Of principle concern is the proposed new rule's application to *all* multidistrict litigation when the deliberative history of the MDL subcommittee's work and the draft Advisory Committee Note, make clear the rule is targeted principally to mass tort MDLs. Indeed, in that history and the draft Note, the Committee appears to use "MDLs" as shorthand for mass torts and the draft Committee Note itself contrasts "MDLs" with class actions.[7]

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[6] This is particularly true for attachments, stand-alone documents, and every email in a thread other than the top-most email. The information can be incorrect, uninformative, or, as in the last example, completely missing. The "author" metadata field for *this document*, for example, is "user."

[7] As one example, the Note for 16.1(c)(1) states that "MDL proceedings do not have the same commonality requirements as class actions" such that "leadership may be made up of "attorneys who represent parties asserting a range of claims." But in a class action MDL, of course, all claims of class members must be common and class counsel should not have conflicts with the class. As another, a now removed Note contrasted disfavored discovery of absentee class members in class actions with discovery of individual plaintiffs in MDLs.

During the March 29, 2022 MDL Subcommittee meeting it was noted that "Rule 23 was amended to help judges and to enable lawyers to help judges. The prospect here is that something similarly useful can be done for MDLs." Mar. 29, 2022 Draft Minutes (May 2022 draft), Civil Rules Advisory Committee at 20.

During the January 2021 Standing Committee meeting, there was discussion comparing "MDLs and class actions" noting that courts approve class actions settlements, which "is not the case for MDLs." Jan. 2021 Standing Committee Meeting Minutes at 23.

Indeed, the initial proposals for a rule were "mainly focused on 'mass tort' proceedings" and the initial discussion addressed issues uniquely related to mass torts, such as the claimed unavailability in mass torts of traditional mechanisms like prompt discovery and summary judgment (which are available in class action MDLs) to address unsupportable claims. *See* Dec. 14, 2018 Advisory Committee on Civil Rules, Report to Standing Committee at 5-17. That report also discussed the lack of analog in MDLs for Rule 23(g)(4) in class actions and the role of Rule 23(h) court approval of fee awards contrasted with mass torts where there are complicated questions of assessments on individual settlements to fund fee awards.

In fact, most MDLs are not mass-torts. By my count, of the approximately 170 pending MDLs as of December 2023, about 100 are class actions or actions involving a handful of related cases with a relatively small number of parties initially filed in different jurisdictions.[8] These cases stand in stark contrast to mass tort MDLs in which hundreds or thousands of individual cases with claims too individualized to be amenable to class treatment are consolidated and coordinated for pre-trial proceedings, with each retaining its individual identity and its own counsel and proceeding individually.

Class action MDLs, by contrast, involve the following or some combination thereof: (1) multiple class actions on behalf of the *same* class filed in various jurisdictions that, following transfer to an MDL court, proceed as a single action; (2) multiple class actions brought on behalf of a small number of different classes (such as, in the case of price fixing class actions, direct purchasers and indirect purchasers of the price-fixed product) that, following transfer, proceed as just two separate class actions with coordinated discovery; (3) actions that include class claims plus a small number of "opt-out" actions—usually larger businesses that fall within the class definition but that elect to prosecute their claims individually—all proceeding in parallel after transfer as a small number of discrete actions; and (4) actions that involve one or more of the foregoing class actions/opt-outs along with claims by public entities, such as states pursuing damages as *parens patria*e. Of these 100 non-mass tort MDLs, nearly 40 are antitrust class actions. Other class action MDLs include employment, privacy, data breach, securities, fraud, non-personal injury defective products, among others. Their commonality, however, is that they involve only single class action or small number of related actions following consolidation.

These non-mass tort MDLs do not implicate the same case-management issues that are commonly associated with mass torts and that have been the subject of the Subcommittee's deliberations. Further, they already proceed under other Rules of Civil Procedure, such as Rule 23, and statutory requirements such as the Class Action Fairness Act and the Private Securities Litigation Reform Act ("PSLRA"). Ordinarily, the case progression and management are no different than any other class action (or any other action for that matter): complaint, answer or motion to dismiss, discovery, class certification, summary judgment, and trial. In short, a class action MDL proceeds as any other class action would in a district court; if there are multiple classes, then there are simply a handful of cases that move in tandem with coordinated discovery among them to avoid duplication and inefficiencies.

Application of proposed new Rule 16.1 has the potential to disrupt and delay class action MDLs and sow unnecessary confusion as to the which rules apply to them. And in some cases, proposed Rule 16.1, may create conflicts with existing Rules and statutes. A few examples of where this

[8] This latter category involves commercial actions, such as intellectual property claims, often brought by a single corporate plaintiff against different infringers in various jurisdictions where the infringer is located. For example, a pending patent MDL involves claims by a patent holder against franchisees located in different jurisdictions.

may occur follow.

- *Rule 16.1(a).* Rule 16.1(a) directs that the court should schedule an initial management conference to develop a management plan for MDL pre-trial activities. In most class action MDLs, however, the first step is generally appointment of leadership counsel authorized to direct the class action on behalf of the class, followed by the filing of a consolidated class action complaint by interim class counsel. In some cases, initial case management conference is not held until after leadership is appointed and a single set of counsel is approved to represent the class and sometimes not until after the consolidated amended complaint is filed. In any event, a case schedule and discovery plan are ordinarily not negotiated or set until after appointment of interim class counsel. Setting an early conference to discuss discovery, fee awards, issues among counsel not authorized to speak on behalf of the class may be unnecessary and time-consuming.

- *Rule 16.1(b).* Rule 16.1(b) asks courts to consider designating interim coordinating counsel prior to the initial case management conference and suggests in the draft Note that performance of such coordinating counsel may bear on appointment of leadership. In class actions, such coordinating counsel is unnecessary because, as discussed below, many of the management issues raised in mass torts are not implicated by class action MDLs. And the Note's suggestion that performance of coordinating counsel may bear on leadership appointment may conflict with the requirements of Rule 23(g)(1) for appointment of class counsel and requirements of PSLRA for appointment of the lead plaintiff (and therefore its counsel of choice). [9]

- *Rule 16.1(c)(1).* Rule 16.1(c)(1) and the accompanying Note suggest that appointment of leadership counsel is not always necessary in an MDL (since it directs consideration of *whether* leadership counsel should be appointed). But in class action MDLs (or any class action where multiple complaints are filed on behalf of the same class), appointment of interim class counsel *is* necessary. Appointment of interim class counsel and a consolidated class action complaint that supersedes prior class action complaints for all purposes is essential in a class action MDL because the same class action cannot be prosecuted at once by dozens of counsel seeking to represent the same class but with different class representatives. Although interim appointment is optional under Rule 23(g)(3), I am unaware of any class action MDL where interim class counsel has not been appointed. Smaller mass torts may not necessitate leadership appointment, but class action MDLs do.

  Rule 16.1(c)(1)'s Note goes on to explain that leadership counsel play a facilitating role in claim resolution but that settlement decisions are made by individual parties. But in class actions (MDLs and otherwise), *only* court-appointed class counsel is authorized to settle

[9] 15 U.S. Code § 78u–4.

on behalf of the class.[10] And under Rule 23(e), the court itself must approve class settlements (unlike settlement of individual cases in a mass tort); the Note's reference to individual parties settling their own claims is inconsistent with Rule 23(e).[11]

Also problematic is the Note's guidance that there may be tension between the approach leadership counsel takes to pretrial matters and the preferences of individual parties and how to address it. This is clearly targeted to mass tort MDLs where parties' individual complaints are prosecuted individually, with leadership merely guiding the overall case. By contrast, in a class action, only court-appointed interim or litigation class counsel are authorized to direct pre-trial matters on behalf of the named class representatives and the absentee class. There is no "tension" between individual parties because the consolidated complaint supersedes the individual complaints. The Note thus threatens to create confusion in a class action MDL regarding the role of would-be class representatives and their counsel who were not selected to be named in the consolidated complaint and their own counsel and court appointed class counsel.

Similarly, the Note raises the question as to whether and when leadership counsel should be compensated. In mass torts, this generally refers to the common-benefit fund fees paid from individual settlements (a "hold back fee") to compensate leadership counsel for their work (in addition to compensation they may receive from their individual client settlements). By contrast, in class action MDLs, the compensation of court-appointed class counsel occurs *only* if there is a class-wide settlement overseen by the court or judgment at trial, after which class counsel move the court for fees and costs, generally as a percentage of the class settlement amount (or according to any applicable fee shifting statute). Fee awards for class actions are governed by Rule 23(h) and criteria set by well-established case law for class actions. Suggestions that, at the outset of a class action MDL, the court should make decisions regarding class counsel's compensation merely because it is an MDL seems unnecessary at best and runs the risk of sowing confusion regarding appropriate procedures and criteria compensation in class action MDLs.

- *Rule 16.1(c)(3).* Rule 16.1(c)(3)'s directive that the report should address identification of principal legal and factual issues to be presented appears targeted exclusively to mass tort MDLs. In mass torts, where there may be a wide range of differing claims across the hundreds or thousands of individual plaintiffs, organization of the range of principal claims across parties may facilitate case management. In class action MDLs, however, the principal legal and factual issues *as to everyone* in the class are laid out in a single

[10] Of course, class members may opt out of the class and choose to resolve their claims individually, but this is different than the settlement process in mass torts.

[11] The draft Note for Rule 16.1(c)(9) discusses means of promoting settlement and includes among them "selection of bellwether trials." Bellwethers are applicable only in mass torts. In class action MDLs, bellwether trials are inapplicable as ordinarily there are only a few class actions at issue (and often only one) that proceed to a few class-wide trials. To suggest the applicability of a bellwether in a class action MDL would significantly confuse and prolong the litigation.

consolidated complaint; there is no need for a process to identify them for case management purposes. And although in class actions, there are sometimes pure legal issues that can be resolved early, that is true in any litigation. Ordinarily class actions proceed as any action would where the legal and factual issues are addressed through dispositive motions. The Rule thus threatens confusion in a class action MDL as to how or whether the new Rule applies, and if it does, what other type of procedure other than ordinary litigation tools (interrogatories, motion practice, etc.) should be employed to identify the legal and factual issues.

- *Rule 16.1(c)(4).* Rule 16.1(c)(4) directs the report to address "how and when the parties will exchange factual bases for their claims and defenses." The Note makes clear by its reference to "fact sheets" and "censuses," that like Rule 16.1(c)(3), it is targeted and applicable only to mass torts MDLs. And while in mass tort MDLs, preparing "fact sheets" for individual plaintiffs or conducting a "census" may play a role in case organization, there is no analog in class actions. There are generally only a handful of class representatives on the consolidated complaint and their claims are the same. A directive that courts should consider such provisions may result in unnecessary confusion in otherwise relatively straightforward actions regarding what, precisely, the court should be identifying and opens the door to absent class member discovery that is already disfavored in class actions. Although the draft Note suggests that "[w]hether early exchanges should occur may depend on a number of factors, including the types of cases before the court," the Note does not provide guidance that such approaches are generally applicable only to mass torts.

- *Rule 16.1(c)(5).* Rule 16.1(c)(5) also risks confusion when it directs the report to address *whether* "consolidated pleadings should be prepared to account for multiple actions in the MDL proceedings." While I understand from the draft Committee Note that this likely refers to a "master" or "administrative" complaint common in mass torts that is filed solely for administrative purposes, a consolidated pleading has an entirely different meaning in class actions.

  An administrative or "master" complaint in mass torts does not supplant individual actions but serves merely as a summary of the claims. But in a class action MDL, the consolidated pleading does and must supplant prior complaints on behalf of the same class.[12] The Rules'

[12] This is the distinction made in note 3 of *Gelboim v. Bank of America*, 574 U.S. 405 (2015). To the extent the Committee's reference to *Gelboim* is intended to clarify when administrative complaints are appropriate (in mass torts) and when consolidated complaints that merge claims are necessary (for class claims applicable to a single class), the Note should provide further guidance. As written, the Note cryptically suggests there are "significant implications" for using master complaints but does not explain what they are. The implication is only that an administrative/master complaint does not displace individual claims whereas a consolidated pleading for a single class does supersede all previously filed claims on behalf of that same class. Courts should thus clarify when use of a master complaint is purely for administrative purposes and that a consolidated class action complaint supersedes all prior complaints.

> suggestion that a consolidated complaint might be optional in a class action MDL is worrisome. An action on behalf of a particular class cannot proceed with multiple counsel prosecuting the same class action on behalf of different putative class representatives. The consolidated class action complaint thus supersedes all previously filed complaints for the same class that were transferred to the MDL court and merges them as a single action, serving as the sole pleading for that class. Where there are multiple classes in a class action MDL, there will be a single consolidated class action complaint for *each class action* and those two or three class actions remain distinct actions from one another throughout the proceeding; there is generally no consolidated complaint for all classes even for administrative purposes.
>
> The lack of clarity regarding the distinction between consolidated pleadings for mass tort MDLs and class action MDLs risks confusing the now relatively straightforward class action MDL process for consolidated pleadings.

The MDL Subcommittee acknowledged the concern that a general MDL rule could create difficulties for non-mass tort MDLs during its March 29, 2022 meeting, noting that many MDLs "include a number of cases, parties, and attorneys that can be managed without any separate MDL rule and indeed might be impeded by a need to work through a separate rule." The Subcommittee determined, however, that this would be resolved by creating a "flexible rule that is to be invoked only in the MDL judge's discretion." The draft Committee Note addresses this by advising that "[n]ot all MDL proceedings present the type of management challenges this rule addresses."

But problematically, neither the Note nor the proposed new rule itself provides any guidance on what types of MDLs "present the type of management challenges" the rule addresses and which do not, requiring the court and the parties to work through each aspect of the lengthy rule to determine which provisions a report "should" address and which are inapplicable and why. It will likely result in disputes over the applicability of a provision, how it should be applied, and unearth new areas for dispute. And it will be particularly problematic for new MDL judges who have managed neither type of MDL and lack familiarity with the different procedures associated with each.

The bench and the bar would be better served by a revised Rule that is expressly limited to the types of MDLs that animated the proposed rule—mass torts—[13]or that clarifies in both the Rule and the Note when a particular provision is not applicable to class action and other simple MDLs. To properly craft such a Rule, greater input from the class action bar may be helpful.

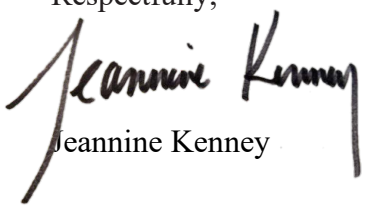
The Committee Note also recognizes that the Rule may provide guidance to "multiparty litigation that did not result from a Judicial Panel transfer order [that] may present similar management challenges." From this I understand the Committee to be referring to non-MDL mass torts pending in a single court (for example, after removal of a mass action under CAFA

[13] I defer to my colleagues that practice mass torts as to whether and how that should be accomplished.

and/ or consolidation under Rule 42). To the extent the Rule is intended to provide guidance for all types of mass tort actions regardless of how they came to be consolidated, it may be more appropriate to devise a rule targeted to those types of actions rather than the means by which they were consolidated.

Thank you for the Committee's consideration.

Respectfully,



Jeannine Kenney

TAB 2

Testimony of Lori E. Andrus, Andrus Anderson LLP Regarding Privilege Logs
Presented at the January 16, 2024 Civil Rules Hearing

Thank you for the opportunity to comment on proposed amendments 26(f) and 16(b). My name is Lori Andrus and I am President-Elect of the American Association for Justice. I have been a plaintiffs' lawyer since graduating law school in 1999. I am a founding partner of Andrus Anderson LLP, a two-woman plaintiffs-side law firm based in San Francisco. Before that, I was a partner at Lieff, Cabraser, Heimann & Bernstein, LLP. My firm handles a broad range of complex cases. We litigate class actions of all descriptions (including employment, consumer, and product defect class actions) and also represent plaintiffs in mass torts. I have been appointed to leadership in multiple MDLs and have served as Class Counsel in many cases. The Advisory Committee on Civil Rules has spent considerable time reviewing privilege log issues and has come up with a rule that I support and that works well for cases regardless of the type or size of the litigation. This balance is extremely important to me personally and for plaintiffs, who always have less information than defendants generally and must obtain critical documents through discovery.

I routinely find myself facing off against some of the best lawyers in the country, representing some of the largest companies in the world. My opponents have seemingly endless resources, and they uniformly, aggressively oppose every attempt of plaintiffs to uncover wrongdoing. Part of the standard defense strategy is to put as little information as possible on a privilege log, while withholding as many documents as possible.

To combat over-designation, I insist on early dialogue regarding the format and timing of the log. I negotiate for a rolling production (typically 30 days after any document production). Without early agreement on the details and timing of a log, what gets produced is inevitably insufficient for the court to evaluate the privilege assertions, and is unhelpfully at the end of discovery.

In the comment that I submitted in July 2021 in response to the Invitation to Comment on Privilege Log Practice, I explained my experience regarding over-designation in the mass tort *In re Avandia Marketing Sales Practices and Products Liability Litigation*, MDL No. 1871 in the Eastern District of Pennsylvania. I will not repeat the details of that ordeal except to say that after multiple rounds of challenges, the defendant was eventually ordered to completely re-do its privilege review, produce improperly withheld documents, and revise its privilege log accordingly. Thousands of documents that had been hidden came to light.

Privilege logs are not merely an administrative exercise, nor are they a valid basis to complain about the rising costs of discovery or a tool for addressing proportionality.[1] They are an

[1] The Rules regarding privilege should not require any "proportionality" analysis for two reasons. First, protecting valid claims of privilege is important enough that the party invoking privilege should be prepared to expend the time and expense necessary to justify withholding information. Regardless of the size of the case, a party withholding documents on privilege grounds should have to explain the reasons for doing so. Second, when the privilege is applied too broadly (inadvertently

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exceptionally potent tool for burying evidence. To avoid abuses, robust policing of privilege logs is necessary. Without detailed logs, the court is asked by defendants to "take our word for it," with no accountability.

Moreover, so-called "categorical" logs fail to provide courts sufficient information to support privilege assertions. In some cases, I have agreed that certain limited categories of communications do not need to be logged at all, such as communications between in-house counsel and litigation counsel after the case has been filed. But I have never seen a case where categories of documents (like "memos," or "agendas") could be grouped together while, at the same time, providing "sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure." *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d. Cir. 1996). Categorical logs "obscure[] rather than illuminate the nature of the materials withheld." *Chevron Corp. v. Salazar*, No. 11 Civ. 3718(LAK(JCP), 2011 WL 4388326, * 1 (S.D.N.Y. Sept. 20, 2011).

Early engagement by the court on the issues of privilege logs will deter mischief, prevent misunderstandings, and curtail over-designation. Early engagement will also make the process of challenging privilege logs more efficient, thus saving time and money for all parties. Preserving flexibility for the parties to design an appropriate privilege log protocol for each particular case is important. One size does not fit all. This is particularly true for cases removed to federal court under diversity jurisdiction that may involve only a few dozen documents. A trucking case, for example, will likely involve many fewer documents than an antitrust matter. Less complex cases that wind up in federal court should not be bound by inflexible rules.

For all these reasons, **I support the proposed changes to Federal Rules of Civil Procedure 26(f)(3)(D) and 16(b)(3)(B)**. However, I urge the Committee to make the following important adjustments to increase the clarity and efficacy of the proposed amendments:

First, I have never found that over-designation is the result of a "failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case." I recommend striking that entire sentence from the Committee Note (last paragraph).

I would also strike this sentence found in the first paragraph of the Committee Note: "Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log." Technological advances have made privilege logs much cheaper to generate in the last few years, and those costs will continue to plummet, so the sentence isn't necessarily accurate today and likely won't be accurate in the future, either.

Finally, I support the suggestion of Doug McNamara, who testified at the October 16, 2023 Rules Committee Hearing, that specific language be added to the Committee Note explaining what should be in a privilege log, and citing to Judge Grimm's article *Discovery Problems and Their Solutions*, and citing *Hill v. McHenry*, No. CIV. A. 99-2026-CM, 2002 WL 598331, at *2-3 (D. Kan. Apr. 10, 2002).

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or otherwise), using "proportionality" as an excuse just doubles down on plaintiffs' inability to uncover relevant, discoverable information.

Thank you for the opportunity to address this important topic. I would be happy to answer any questions.

Sincerely,

Lori E. Andrus

TAB 3

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January 2, 2024

Mark P. Chalos
Partner
mchalos@lchb.com

BY EMAIL

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

RE: Proposed Amendments to Rule 16.1

Dear Committee:

Thank you for opportunity to address the Committee.

Throughout my 25-year career, I have been involved in the leadership of numerous MDLs, ranging from deaths and personal injuries from contaminated epidural steroid injections (MDL No. 2419) to consumer class actions arising from moldy front-loading clothes washers (MDL No. 2001). Right now, for example, I am in the leadership of MDLs ranging from defective residential solar power systems (MDL No. 3078) to defective knee, hip, and ankle joints (MDL No. 3044) to falsely marketed child booster seats (MDL No. 2938). In addition to serving as Managing Partner of the Nashville Office of Lieff, Cabraser, Heimann & Bernstein, I am Immediate Past President of the Tennessee Trial Lawyers Association. I also serve on the adjunct faculty of Vanderbilt Law School, teaching The Practice of Aggregate Litigation[1].

I. Flexibility

No two MDL are exactly alike. The needs of each MDL are different; the timing and rhythms are different; the organization of the litigation and case management plans are different; and the paths to concluding the litigation are different.

Two guiding constants remain, however: justice and efficiency. They are enshrined in the text of 28 U.S.C. sec. 1407 ("transfers for such proceedings will … promote the just and efficient conduct of such actions.") and Rule 1 ("[the rules] should be construed, administered, and

[1] I submit these comments in my individual capacity and on behalf of the Tennessee Trial Lawyers Association. These comments do not necessarily reflect the views of my law firm, law partners, clients, or Vanderbilt Law School.

employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action….").

Achieving these twin goals requires, among other attributes, flexibility and, at times, creativity. And to be trans-substantive, as the civil rules ought to be – particularly a rule focused on MDLs - the rule must permit courts to be flexible. By not being phrased as an imperative, the proposed amendments contemplate and allow for such flexibility and creativity.

It might serve this undertaking, however, to make explicit at the outset that the Rule was crafted with this reality in view and it is not intended to suggest that there is a mandatory or a preferred framework for managing MDLs efficiently.

Toward that end, here are two suggestions for the Committee Note:

Suggestion 1: In the last sentence of the first paragraph of the Draft Committee Note, add the word "flexible" before "framework". So, that sentence would read: "There previously was no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a flexible framework for the initial management of MDL proceedings."

In addition, because MDLs vary significantly, some or all the provisions of Rule 16.1 may not apply in a particular MDL. Making this explicit in an overview would potentially relieve courts and parties from an unfounded notion that they should strive to deliberate and negotiate over each provision in the rule. While this is made somewhat clear in some of the Note's discussions of specific provisions, an overview statement would provide clear guidance.
Suggestion 2: Add after the first sentence of the second paragraph of the Draft Committee Note: "Because MDLs vary significantly, some or all of the provisions of Rule 16.1 may not apply in a particular MDL."

II. Designating Coordinating Counsel

Respectfully, including a specific provision addressing the early designation of coordinating counsel carries substantial and unnecessary risks, without commensurate benefits. First, as presently drafted, the Rule says that the court may designate coordinating counsel but does not explicitly give the court space to implement a process to consider applicants for coordinating in advance of such designation. Without a selection process whereby the court would receive balanced input from a variety of sources, courts potentially will be inclined to base this designation only or mostly on the Court's experience with the lawyer and/or the lawyer's reputation. Moreover, the Draft Committee Note presently specifies that "experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position…." While the Note makes clear that the coordinating counsel role should not focus on being a showcase of the lawyer's organization and leadership skills, it seems likely that, at least in some instances, coordinating counsel will have an opportunity that other, equally or more competent counsel would not necessarily have to demonstrate her abilities. Taken together, the lack of process to receive full information prior to the Rule 16.1(b)

designation and the potential advantage afforded coordinating counsel in the leadership selection process contemplated by Rule 16.1(c)(1) present a risk of exacerbating the "repeat player" concern that has arisen in MDL leadership selection.

Second, early designation of coordinating counsel is unnecessary. Parties – particularly on the plaintiffs' side – sometimes have divergent views of how litigation should proceed. Experience shows that they will either work out their differences and arrive at a consensus, or they will present their divergent views to the court in due course. And if the divergence is significant and irresolvable, it might require the Court to sort out the litigation leadership before formalizing an initial case management vision. But, importantly, that process would play out without the court imbuing any one counsel with its imprimatur at the outset of the litigation at which point the court has little of the relevant information.

In short, including a notion of appointing coordinating counsel in the text of the rule potentially exacerbates the "repeat player" concern and is unnecessary.

Suggestion 3: eliminate paragraph 16.1(b) and perhaps instead include the concept in the Committee Note.

* * *

III. Interplay Among Rule 16, Rule 16.1, and Rule 26(f)

The interplay among Rules 16, 16.1, and 26(f) is not entirely clear from the text of the proposed rule or from the Draft Committee Note. In specific, it is not clear whether the conference contemplated by Rule 16.1(c) satisfies the provision of Rule 26(f)(1) that states, "the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." This is particularly significant given Rule 26(e)(1)'s mandate that, "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Moreover, Rule 26(a)(1)(C) keys the deadline for mandatory initial disclosures under Rule 26(a)(1)(A) to the Rule 26(f) conference: "A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order…."

Suggestion 4: Add in the Committee Note a sentence in the section addressing Rule 16.1(c), "The court should state in its order whether the Rule 16.1(c) conference of the parties supplants the conference contemplated by Rule 26(f), including for purposes of Rule 26(a)(1)(C) and 26(e)."

* * *

Thank you, again, for the opportunity to address the Committee.

Sincerely,

Mark P. Chalos

TAB 4

AMERICAN ASSOCIATION FOR JUSTICE
The Association for Trial Lawyers

Statement of Tobi L. Millrood

Past President, American Association for Justice

Before the Advisory Committee on Civil Rules

January 16, 2024

Thank you for providing an opportunity to comment on proposed Rule 16.1 on multidistrict litigation (MDL) and privilege logs. Both issues are extremely important to the American Association for Justice (AAJ) and its members. My name is Tobi Millrood, I'm a past president of AAJ, and chair of the mass torts practice at Kline & Specter in Philadelphia, Pennsylvania.

I have served in leadership of numerous complex product liability litigations in both federal and state courts. Most recently, I was Co-Lead Counsel of the Zimmer NexGen Knee Product Liability litigation, MDL 2272, before Hon. Rebecca Pallmeyer and Co-Lead Counsel of the Zofran (Ondansetron) Products Liability Litigation, MDL 2657, before Hon. F. Dennis Saylor. I have served on multiple MDL Plaintiffs' Steering Committees and Executive Committees and have served on and/or chaired numerous committees including Discovery, Science, Law & Briefing, and Settlement Committees. In these capacities, I have worked with presiding MDL judges and opposing counsel to arrive at numerous case management orders to help facilitate the efficient management of MDL litigation. I have also served as Lead Counsel in numerous coordinated proceedings in state courts as well, also employing pre-trial case management efforts for the efficient handling of complex litigation. I have been involved in the informal MDL rule discussions since it was first considered by the Advisory Committee on Civil Rules, and my comments today will focus on proposed Rule 16.1.

The AAJ will file public comments on both MDLs and privilege logs, and the President-Elect of AAJ, Lori Andrus, will speak to the privilege log rule at today's hearing. AAJ would like to thank the Advisory Committee on Civil Rules for its continued and careful consideration of the plaintiffs' perspective. AAJ supports the view that an early conference and report can facilitate efficiency in MDLs, and we offer several suggestions for improving the text of the rule.

I. Preliminary Considerations

One of the stated purposes of the proposed rule is to provide direction for judges and attorneys handling their first MDL. A rule must provide clarity and not inject unintended ambiguity or uncertainty into complex litigation, while applying to the full spectrum of possible MDL litigation categories. The recommended additions from Lawyers for Civil Justice (LCJ), the Defense Research Institute (DRI), and other defense-side interests are purely focused on product liability MDLs and ignore the vast array of complex litigation before transferee judges. For example, it would be a mistake to establish "claims sufficiency" as a topic for the preliminary conference because it assumes a product liability theory for establishing claims that is too limited

in scope.[1] A final rule must work for *all* MDLs, including mass actions, class actions, antitrust, securities fraud, marketing and sales practices, employment practices, intellectual property, and other MDLs not related to product liability claims.

The discretionary nature of the rule does not ameliorate this problem. If enacted, Rule 16.1(c) provides that the parties "must" address any matter designated by the court, followed by a long list of possible topics in (c)(1) through (12), plus any other matter designated by the court. For judges without experience in MDLs, the list of topics will often become a *de facto* checklist of matters that must be considered by the parties. It can be expected that whatever checklist exists in a rule, experience foretells that defendants in an MDL will urge the transferee judge to address all listed topics. Therefore, only topics of general application that should be discussed and reported on early should be listed in the rule.

II. Two Important Changes to the Proposed Rule Text

A. Appointment of Coordinating Counsel May Not Be Beneficial

AAJ has deep reservations about a rule that requires the early appointment of "coordinating counsel." Concerns about early organization can be addressed without a rule-mandated appointment that may very well lead to unintended consequences. As an initial and practical matter, there is no requirement in the text of the rule that the coordinating counsel even have a stake in the plaintiffs' side of the litigation and nothing in the Committee Note defines the qualifications of this position. While there is no requirement that coordinating counsel be appointed, once it appears in the rule, it is likely to become routine practice (similar to a *de facto* designation that all or most topics be included in the report).

Second, AAJ has logistical concerns about the coordinating counsel role, as there is no direction provided about what to do if there are competing slates jockeying for this appointment (which is likely to occur once a formal rule-based title could be seen as the logical steppingstone to permanent leadership). While in some instances it could be intuitive who should be appointed as "coordinating counsel," in many other MDL instances, the creation of the coordinating counsel position could simply lead to a secondary fight over appointment of leadership. Finally, it may be premature to have a coordinating counsel confer and report on several of the topics proposed by proposed Rule 16.1(c). It is permanent leadership who ultimately needs to decide:

(6) a proposed plan for discovery and how to handle it efficiently;

(7) any likely pretrial motions and a plan for addressing them;

[1] LCJ suggests and others have echoed adding language to 16.1(c)(4) that substitute the neutral "how and when parties will exchange information" found in the draft text for "how and when sufficient 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." This proposed language biased against plaintiffs and would insert a product liability theory framework into a conceptually broader MDL rule.

(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.

It may also be premature—or simply not aid the litigation—to have coordinating counsel recommend leadership under (c)(1). Depending on who is appointed coordinating counsel, recommendations for leadership could serve some interests while other aspects of the litigation could simply be ignored. It may serve both the interests of the court and the plaintiffs to appoint interim leadership or to allow the plaintiffs to self-select leaders until the court officially appoints leadership.

Ultimately, this Committee can achieve the same objectives of early organization, without the formally appointed title. A Committee Note could urge the MDL judge to use the preliminary conference as an opportunity to invite those counsel who have vested interest, resources and are engaged in the litigation to assist the Court with some of the preliminary matters that need to be addressed before the more substantive matters reserved for the formal appointment of lead counsel. This would still allow the MDL court to address preliminary matters without the distracting sideshow that can result from the desire to obtain a title of "coordinating counsel."

B. Several of the Topics for the Meet and Confer are Premature or Untimely

Although AAJ agrees with the Committee that early attention to some of the matters identified in proposed section (c) "may be of great value," consideration of several listed topics during an initial conference is untimely and imprudent. Again, a long menu of topics—some of which have no bearing on the preliminary organization of an MDL—may have unintended consequences, or worse, empower MDL courts beyond their charge of managing pre-trial discovery. The rule cannot be a substitute for training new judges or for Manual on Complex Litigation, which is still a beacon for MDL courts. Moreover, once a formal rule lists multiple topics, a fulsome discussion of *all* those multiple topics will become the default even if the parties need to focus on the basic structure of the MDL early in the litigation.

As a starting point, settlement discussions (likely to be unrelated to the charge of managing pretrial discovery) and the appointment of special masters are very premature topics, and a judge's insistence on a report that contains all topics borders on a waste of resources for parties to spend time on issues that cannot reasonably be discussed. In MDLs where leadership or interim leadership has been appointed, topics relating to discovery and pretrial orders might be able to be discussed initially. However, where leadership has not been appointed and an appointment is likely to be made later or is recommended in the report itself, then many topics should be deferred until an appointment is made. The proposed rule provides no such direction about the timing of topics and leadership, and thus there is a mismatch between these parts of the proposed rule.

C. Solving the Problem

AAJ recommends amending the proposed rule to remove the coordinating counsel position and provide a shorter list of options that could be more easily agreed to and reported on by the parties early in the litigation. This option would provide a roadmap to establish the MDL without

wading into issues that need to be resolved by leadership or that need additional time and information to develop a plan for the litigation.[2]

Another option that the Advisory Committee could consider is removing "coordinating counsel" and replacing it with an option to appoint leadership, signaling that the appointment of leadership can be made first. With this change, some topics listed under 16.1(c)(1) regarding the appointment of leadership would be moved to 16.1(b) and would no longer be listed as separate topics. AAJ would still recommend removing certain topics as premature, including topics under (c)(9) regarding measures to facilitate settlement and (c)(12) regarding referring matters to a special master, but with leadership in place, the court can have more confidence about the meet and confer process establishing some parameters and direction to the litigation.

III. Conclusion

AAJ thanks the Advisory Committee for their extremely thorough and diligent consideration of MDLs and proposed Rule 16.1. An initial management conference can help the parties and court plan for the litigation. Thus, AAJ recommends removing the undefined coordinating counsel position from the proposed text and shortening the list of topics to those which can truly be discussed during an early management conference. I would be happy to answer your questions.

[2] Inasmuch as AAJ and LCJ are most often found in opposing positions, the fact that AAJ agrees with LCJ that topics 16.1(C)(9) (whether the court should consider measures to facilitate settlement) and 16.1(c)(12) (whether matters should be referred to a magistrate judge or master) should be removed from the list, is a strong indicator that these topics should be excised from the proposed rule.

TAB 5

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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

VIA EMAIL ONLY TO: RulesCommittee_Secretary@ao.uscourts.gov

January 3, 2023

RE: Proposed New Rule 16.1 on MDL Proceedings

Dear Members of the Advisory Committee:

Thank you for the opportunity to address the Committee.

My name is Alyson Oliver, and I am the founding and managing partner of Oliver Law Group PC. I have been practicing for twenty-six years, with the last fifteen years or so being in the context of mass torts and other consolidated proceedings. I have been court-appointed to plaintiff's leadership positions in both state and federal court in mass tort and class actions including Zimmer NexGen Knee, Transvaginal Mesh, Valsartan, and most recently in the Philips C-Pap MDL currently pending before the Hon. Joy Conti-Flowers in Pittsburgh, Pennsylvania in the role of Time and Expense Committee. I write to provide my perspective to the Advisory Committee from my perspective as a practitioner in these proceedings.

It is necessary to emphasize that each MDL is different. An MDL involving a medical product will have different needs. While some comments focus on a lack of specificity, particularly related to the qualifications of the proposed addition

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regarding coordinating counsel; if coordinating counsel ultimately is part of Rule 16.1 it should remain as flexible as possible to allow the court to utilize this role in a meaningful way given the vagaries of the particular MDL at issue. That said, I believe the inclusion of a provision for appointment of coordinating counsel is not necessary and should be eliminated in whole, because it will substantially increase costs of the litigation, without providing sufficient benefit.

Without a vetting process to determine who best meets the needs of the MDL and the court for the purposes of coordinating the initial report for the initial case management hearing; the court will be left with no input from lawyers who have stake in the litigation and no input from lawyers who are experienced in the particular complex litigation. The resulting work product will then likely involve a significant learning curve for the appointee, both in regard to the litigation itself and in regard to the lawyers involved. This learning curve is not free; the appointee will rightfully seek compensation for their work. Whereas counsel involved in the litigation itself, who is experienced in the type of MDL, the issues therein, and the counsel involved would also deserve compensation if appointed in this role, the lift for the appointee with these qualifications will be dramatically less than an appointee trying to learn the case and the attorneys from scratch. Where each MDL Plaintiff at the end of the case will be paying for attorney fees through the common benefit fund to all attorneys billing time for common benefit, employing an attorney 'green' in the litigation will directly harm the Plaintiffs, and is therefore neither efficient or just. This is in direct contravention of 28 U.S.C. sec. 1407 ("transfers for such proceedings will…promote the just and efficient conduct of such actions.") and Rule 1 ("[the rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action..")

Appreciating this, the natural train of thought becomes that an MDL court could benefit from guidance as to how to vet a coordinating counsel from the many attorneys on the courts docket with related actions transferred into the MDL so as to avoid the imposition of unnecessary costs to the Plaintiffs as discussed above. But this logical next step would actually slow the proceedings down, again in contravention of the guiding principles of efficiency and just resolution. To convene a vetting process for a coordinating counsel, and yet another vetting process for

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leadership counsel at some time thereafter is unnecessary duplication. This duplication imposes unnecessary costs to Plaintiffs and is inherently inefficient. For these reasons, I support the elimination of paragraph 16.1(b).

Sincerely,

Alyson Oliver

Alyson Oliver

TAB 6

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January 9, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
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BY PDF EMAIL (RulesCommittee_Secretary@ao.uscourts.gov)

RE: Proposed Rule 16.1 – Multidistrict Litigation

Dear Committee Members,

I serve as co-lead counsel on MDL 3026, the Preterm Infant Formula-Necrotizing Enterocolitis product liability litigation, presided over by Chief Judge Rebecca Pallmeyer, in the Northern District of Illinois. I write today to offer comments on Proposed Rule 16.1 (Multidistrict Litigation). My professional experience includes twenty-six years as a trial lawyer. I have worked as a JAG Officer, Special Assistant United States Attorney (Prosecutor), criminal defense attorney, civil defense attorney, and, for the last eighteen years, a plaintiff's attorney.

In 2019, my firm filed the first case of its kind against the formula industry, alleging that infant formula causes a horrific intestinal disease, necrotizing enterocolitis, in premature infants. For two years, we led the charge in this litigation. We developed the pleadings, retained the experts, and survived motions to dismiss. We retained hundreds of clients and developed a small network of plaintiff's attorneys who litigated these claims with us in federal court. Ultimately, our foundational work led Abbott Laboratories to file with the Judicial Panel on Multidistrict Litigation ("JPML") seeking consolidation. Following JPML, things rapidly changed. A national interest arose in the litigation, and large, powerful firms entered the fray.

This experience provided our firm with insight into the process of MDL development and an inside view of the formation of leadership teams. My comments come from the perspective of a small law firm, made up of trial lawyers, who entered the MDL world through an individual case.

1. Selection of Leadership Counsel**.**

Leadership appointments in MDLs have, in many instances, become a revolving door. The same law firms and their appointees make repeat appearances on leadership teams. There is a logic to this. Repeat players have experience in the management of MDLs, which surely benefits the tort. Their history provides a court with some comfort that comes with dealing with lawyers who have been there before. Familiar faces give the court reassurance that the lawyers managing their MDL have the

experience, financial, and structural resources to advance the litigation. These are all legitimate considerations for appointment to leadership.

However, an over-emphasis on prior MDL experience often results in appointments that fail to be representative of the plaintiffs, fail to include true subject matter experts in the litigation, and fail to ensure diversity of experience and background. Often, highly competent trial lawyers with valuable litigation experience are excluded from top leadership roles.

Although leadership appointments are addressed within the proposed rule, this topic is worthy of additional emphasis. Transferee judges should bear in mind the goals of diversity of experience and background while filling leadership positions, but too often the very lawyers who began and developed the litigation, who arguably have the greatest vested interest in the outcome and the deepest understanding of the nuances of the litigation, are not considered.

My firm is one of the rare exceptions; I know of only one other firm that initiated a litigation and was also elevated to a co-lead position in an MDL. Despite my firm's extensive knowledge of the tort, my lack of prior MDL experience was considered a hurdle to my appointment as a co-lead. This occurred even though my firm was, in some part, responsible for every case filed prior to JPML. After the motion for consolidation was filed, the litigation exploded, and firms with more MDL experience and resources joined the effort. Ultimately, it was my firm's knowledge and experience with the tort, in combination with Chief Judge Pallmeyer's commitment to diversity, which secured my position as co-lead counsel in the MDL.

It is my opinion that there is an exaggerated emphasis on "MDL experience" as a criterion for leadership. Experience comes in many forms. While it is undeniable that MDL experience is an important factor, it should not be the sole or even most important criterion. Often, the more a lawyer becomes entrenched in the world of MDL leadership and management, the more there is a necessary decline in that lawyer's trial practice of individual cases. More problematic, an over-emphasis on "MDL experience" may have the unintended consequence of creating homogenous leaders, absent of meaningful diversity of experience and background.

As pointed out by Diandra Debrosse Zimmerman, black and brown babies bore the brunt of the harm in the infant formula litigation. Disproportionately, persons of color are impacted by the harmful effects of this product. This disproportionate harm called for a leadership team that aptly represented the people it was formed to serve.

Seeming to agree, Judge Pallmeyer entered a case management order directing counsel "to be sensitive to the need for diversity with respect to relevant considerations, including (but not limited to) geography, gender, size of practice, litigation experience, and experience with MDLs." When Judge Pallmeyer ultimately appointed five co-leads, she indicated that "the court seeks lawyers who are capable and experienced, and who will responsibly and fairly represent all plaintiffs, keeping in mind the benefits of diversity of experience, skills, and backgrounds." (CMO # 2). With regard to my own appointment, Judge Pallmeyer noted that "the newly added Mr. Rojas (who brings diversity of experience and background) litigated several of the early lawsuits concerning necrotizing enterocolitis ("NEC") and baby formula (the focus of this MDL) and currently has thirteen active federal cases." Judge Pallmeyer was keenly sensitive to the importance of diversity of both background and experience, despite being well aware of my lack of prior MDL experience. Notably, she also focused

on the role played leading up to the formation of the MDL. In my opinion, this is a commendable and appropriate step in the right direction.

Our fine cadre of federal judges undoubtedly know the importance of diversity and social equity. An emphasis in the Committee Note or the Rule will further empower and encourage judges to make appointments that specifically consider diversity of both background and experience.

Making room for representatives of law firms who have been involved from the outset in such litigations, who have made the commitment and litigated in the trenches so that the leadership teams appointed truly embrace the soul of the litigation, should be an important consideration. Such firms often have the deepest understanding of the science, the law, and the established relationships with experts. In many instances, pairing them with firms that have MDL experience will be of practical benefit. But this simply has not happened with sufficient regularity.

Selection should specifically consider: (1) Role in advancing the litigation to date; (2) Expertise/experience relevant to the subject matter of the litigation (e.g., product liability, pharmaceutical, environmental, etc.); (3) Diversity of experience; (4) Diversity of background; (5) Representative racial and ethnic diversity; (6) MDL experience; and (7) Availability of time commitment for the litigation.

Current Proposed Rule:

(1) Whether leadership counsel should be appointed, and if so:

(a) The procedure for selecting them and whether appointment should be reviewed periodically during the MDL proceedings:

Suggested Edit (suggested edit in red):

(1) Whether leadership counsel should be appointed, and if so:

(a) The procedure for selecting them and whether appointment should be reviewed periodically during the MDL proceedings. **In considering the appointment of leadership counsel, the transferee court should evaluate potential candidates based on their role in advancing the litigation to date, experience and expertise relevant to the subject matter of the litigation, diversity of experience, diversity of background, geographical distribution, nature of claims, and other relevant factors. The court's responsibility is to ensure diverse and capable representation, without unduly emphasizing prior MDL experience.**

2. Selection of Coordinating Counsel.

Turning to the issue of Coordinating Counsel, the rule does not provide explicit criteria or guidance on who should be selected as Coordinating Counsel. The rule does not clarify if serving as Coordinating Counsel would preclude someone from subsequently taking on a leadership role. Since, however, the selection of Coordinating Counsel is purely discretionary and meant to assist the court as well as the parties, it would seem that, except in an extraordinary instance, the transition from Coordinating Counsel to leadership counsel should be discouraged, absent evidence that Coordinating

Counsel satisfies the requirements of leadership as outlined in my proposed changes to 16.1. There being no automatic assumption that the Coordinating Counsel role will transition into a leadership position best assures the proper focus and scope of Coordinating Counsel's efforts. It also enables the court to appoint whomever it deems most capable of driving efficiencies without having to consider the full range of considerations for making leadership appointments.

As discussed above, leadership appointments in the MDL context have become a revolving door with the same firms and their appointees making repeat appearances. To the extent that Transferee Judges deem it appropriate to appoint Coordinating Counsel, one of the tasks assigned should be an effort to identify and assure broader participation on leadership teams amongst the ranks of lawyers who were instrumental in developing the litigation in the first instance (firms that may otherwise be overlooked or outmaneuvered and, in a functional sense, be sidelined from continuing to represent the pool of clients they represent). The selection of such firms often engenders geographic and other manners of diversity, which may be accorded a premium weighting during the selection process. Coordinating Counsel and the Transferee Judge may actively support the broadening out of leadership committees, which, in the end, better represent the interests of the entire client pool and serve to educate and empower committed trial lawyers who care deeply about the litigation's outcome as well as its processes.

I suggest that Rule 16.1(b)(1)(A) be edited as follows:

Current Proposed Rule:

> (b) Designation of Coordinating Counsel for The Conference. The transferee court may designate coordinating counsel to:
>
> (1) assist the court with the conference

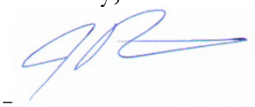
Suggested Edit (Suggested edit in red):

> (b) Designation of Coordinating Counsel for The Conference. The transferee court may designate coordinating counsel to:
>
> (1) assist the court with the conference. **Designation as Coordinating Counsel does not presuppose a subsequent leadership role in the MDL proceedings**.
>
> **Committee Note:**
>
> Remove the following sentence: "If the court has appointed Coordinating Counsel under Rule 16.1(b), experience with Coordinating Counsel's performance in that role may support consideration of Coordinating Counsel for a leadership position, but appointment under Rule 16(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a)."
>
> Replace with: "**While there is no requirement that the court designate Coordinating Counsel, the court should consider whether such a designation**

could facilitate the organization and management of the action at the initial MDL management conference.

I thank the Committee for the opportunity to comment.

Sincerely,



Jose M. Rojas, Esq.

TAB 7

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&
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Statement of James J. Bilsborrow
Partner and Co-Chair, Environmental and Toxic Tort Department
Weitz & Luxenberg, PC

Before the Advisory Committee on Civil Rules

January 16, 2023

Thank you for providing an opportunity for public comment on proposed Federal Rule of Civil Procedure 16.1. My name is James Bilsborrow and I am a partner at the law firm of Weitz & Luxenberg and the co-chair of the firm's environmental and toxic tort practice. In that role, I oversee and participate in litigation involving mass torts and environmental harms. For example, I was appointed to the Plaintiffs' Executive Committee in the Dicamba Herbicides MDL, a case centralized in the Eastern District of Missouri in which farmers brought product liability claims against pesticide manufacturers over defective dicamba herbicide products. Though not multidistrict litigation, I have also been appointed to the Plaintiffs' Executive Committee in the recent train derailment and chemical contamination case in East Palestine, Ohio, and as class counsel in multiple cases representing communities impacted by PFAS contamination. My law partners and colleagues have also been appointed to leadership positions in the Roundup herbicides MDL, the BP oil spill litigation, and the aqueous film-forming foam MDL, to name just a few. In these and other multidistrict litigations, my firm has represented municipalities, water providers, businesses, and individuals injured both physically and economically by toxic chemicals and hazardous pollution.

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I know the Committee is aware that MDLs are not one-size-fits-all and many of the environmental and toxic tort cases I litigate involve diverse claims pursued by a range of people and entities. For this reason, I am encouraged that proposed Rule 16.1 embraces a flexible approach to the initial MDL case management conference. Not all MDLs involve pharmaceutical injuries. In many large, complex MDLs it is not possible at the initial case management conference to implement a census or procedure to ensure that every plaintiff took the "right drug" or has the "right diagnosis." In the BP oil spill MDL, for example, the spill caused economic losses to businesses, depleted the tourism revenue of beach communities, closed fishing waters relied on by commercial fishermen, soiled waterfront properties, damaged states' natural resources, and caused physical injuries to clean-up workers exposed to oil on water and land. Similarly, in the current MDL concerning aqueous film-forming foam, plaintiffs include water providers and municipalities dealing with drinking water remediation costs, state governments seeking to clean and remediate natural resources, firefighters who trained with and were unwittingly exposed to the toxic foam, and individuals who consumed contaminated water and developed an array of human health conditions for which the science is evolving. A federal rule guiding the organization and orderly litigation over such diverse claims must necessarily be flexible to allow the transferee judge to adapt to the circumstances presented and manage the litigation with input, drawing from the experience of lawyers that are likely to be involved in such cases. For this reason, I encourage the Committee to maintain the flexibility of the proposed Rule.

The Role of Coordinating Counsel is Likely to Have Negative Effects

Although the proposed Rule does not require it, I remain concerned that proposed Rule 16.1(b) encourages the transferee court to designate a coordinating counsel prior to the initial case management conference. The Rule provides no parameters for this appointment and, given the early stage of the litigation, this means that the appointment will likely go to an attorney familiar to the transferee court rather than counsel most familiar with and best positioned to successfully litigate

the matter. Under the current proposed Rule, coordinating counsel need not represent any client interests at all and may have had no involvement in the litigation prior to centralization in their home jurisdiction. How could such counsel effectively prepare the report envisioned by Rule 16.1(c)? Other counsel will appropriately view coordinating counsel as de facto lead, which may lead to unhelpful alliances that may or may not be beneficial to the litigation's success.

In most MDLs, the transferee court encourages plaintiffs' counsel to informally coordinate amongst themselves to address a set of issues identified in an initial order. This informal coordination is especially important in MDLs consisting of diverse claims or counsel representing diverse client interests because it allows for the various stakeholders to be heard, either as part of a coordinated group or on their own if certain counsel is not in agreement with the coordinated submission. For example, in the dicamba herbicides MDL, the transferee court issued an initial order following centralization that identified certain issues (many reflected in proposed Rule 16.1(c)) to be addressed by plaintiffs' counsel at the initial conference. The majority of plaintiffs' counsel focused on tort claims pursued by farmers and submitted a coordinated report addressing issues pertinent to those claims; a smaller group of plaintiffs' counsel submitted a separate report encouraging the court to appoint counsel pursuing antitrust claims and recognizing a separate litigation track for those claims. The transferee court ultimately appointed members of both groups to leadership and created a separate litigation track for antitrust claims, as recommended by the smaller group of attorneys. Had the court simply appointed coordinating counsel, this minority proposal may not have made it into the Rule 16.1(c) report, depriving the court of the options with which it was presented.

There is little harm in permitting interested counsel to present multiple Rule 16.1(c) reports for the court's consideration at the initial conference or, if plaintiffs' counsel are well-coordinated, from allowing that coordinated group to address the Rule 16.1(c) issues identified by the court. The court may then devote the initial case management conference to selection of lead counsel, followed

by a conference to address the overall organization of the litigation. Proposed Rule 16.1(b)'s preference for appointment of coordinating counsel, however, will likely curtail presentation of diverse plaintiff viewpoints at the initial case management conference. Accordingly, and for the reasons set forth above, I recommend that the proposed Rule be modified to eliminate its preference for appointment of coordinating counsel. The Committee note could still suggest this as an option for the transferee court's consideration, but it should not be recommended by the Rule, especially where it is likely to add little efficiency and deprive the court of diverse organizational viewpoints.

Court-Appointed Leadership Should Make Substantive Case Decisions, Not Coordinating Counsel

Even if the Committee maintains Rule 16.1(b)'s preference for appointment of coordinating counsel, the Rule should ensure that substantive decisions that will affect the course of the litigation will not be made until the appointment of lead counsel and a plaintiffs' steering committee. Proposed Rule 16.1 encourages the transferee court to require a Rule 16.1(c) report prior to appointment of leadership, overseen by a coordinating counsel who may or may not be well-versed in the subject matter of the litigation. As a result, substantive negotiations regarding the conduct of the MDL, discovery procedures, plaintiff or defense fact sheets, and even early orders such as ESI protocols should be reserved for counsel appointed to lead the case, as those attorneys will be best suited and most knowledgeable about the individuals or entities who allege harm and the subject matter of the litigation.

Coordinating Counsel Should Not Be Permitted to Make Decisions Regarding "Unsupported" Claims or a Plaintiff Census

The Committee has received comments from defense counsel and interest groups aligned with defendants encouraging a modification to the Rule to require the Rule 16.1(c) report to address "unsupported claims," or to propose procedures for a plaintiff census. The Committee should reject such proposals. As I've addressed in my remarks, even in a case where such procedures are warranted, coordinating counsel is not likely to be best positioned to negotiate such procedures. It

is possible that coordinating counsel will not represent any clients at all, or will represent a narrow subset of client interests. Further, in cases that do not involve pharmaceutical injuries, such as those I litigate, any early census or procedures required to screen "unsupportable" claims are likely to vary significantly based on the claims and entities involved, and this will necessarily require input from the entire court-appointed leadership committee that represent the range of clients and claims involved in the case. This is not a job for coordinating counsel and it is not a role that should be encompassed by an initial, organizational Rule 16.1(c) report. Instead, the transferee court should deal with these case-specific scenarios as transferee courts have done throughout the life of MDLs: by applying its discretion to manage complex litigation with input from the experienced attorneys appointed to leadership roles or retained by defense counsel.

In sum, I encourage the Committee to retain the flexibility set forth in proposed Rule 16.1, which will allow transferee courts to address the diverse claims and claimants routinely present in large, complex MDLs. That said, Rule 16.1(b)'s preference for appointment of coordinating counsel is likely to lead to negative outcomes, the appointment of counsel who are familiar to the transferee court rather than best-suited to organize the case, and to a restriction on the organizational proposals presented to the court at the outset of proceedings. The Committee should eliminate the Rule's preference for coordinating counsel and instead identify this as one possible option in the Committee note. If the Rule retains its preference for appointment of coordinating counsel, Rule 16.1 should not permit coordinating counsel to make substantive decisions that will affect the litigation, such as negotiating proposals to conduct a plaintiff census or to deal with "unsupported" claims. Those negotiations, if they are necessary at all, should be conducted by court-appointed leadership best suited to litigate the MDL.

Thank you and I appreciate the Committee's time and attention.

TAB 8

DICELLO LEVITT

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January 2, 2024

BY .PDF EMAIL (RulesCommittee_Secretary@ao.uscourts.gov)

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

Re: *Hearing on Proposed Amendments to Civil Rule 16.1*

Dear Committee Members:

My name is Diandra "Fu" Debrosse, and I am the Co-Chair of DiCello Levitt's Mass Tort Practice Group and the Managing Partner of the firm's Birmingham office. In addition to co-leading DiCello Levitt's Mass Tort practice, I Co-Chair the firm's National Civil Rights Practice Groups and I am also a member of firm's the Public Entity, Catastrophic Personal Injury, Environmental and Trial Practice Groups. I believe in a just system that allows those who have been injured—and the families of those who have been wrongfully killed—to seek justice.

As a life-long plaintiffs' side attorney, I have been honored to represent thousands of people who have been injured by wrongful products and practices. To date, I hold and have held leadership positions in numerous multidistrict litigations ("MDL" or "MDLs") across the United States, protecting and pursuing the rights of tens of thousands of victims of wrongful corporate conduct. I am Co-Lead Counsel in *In re: Abbott Laboratories, et al., Preterm Infant Nutrition Products Liability Litigation*, MDL No. 3026, and am also Co-Lead Counsel in *In re: Hair Relaxer Marketing, Sales Practices, and Products Liability Litigation*, MDL 3060. I also serve on the Plaintiffs' Executive Committee ("PEC") in *In re: Paraquat Products Liability Litigation*, MDL No. 3004, and on the Plaintiff Sterring Committee ("PSC") in *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, MDL No. 3047. In addition, I lead the firm in representing more than

sixty cities and counties in *In re: National Prescription Opiate Litigation*, MDL No. 2804 and in *In re: McKinsey & Company, Inc., National Prescription Opiate Consultant Litigation*, MDL No. 2996, as well as other significant litigations involving public entities across the United States. I previously held leadership positions on the Plaintiffs' Steering Committees in *In re: Smith & Nephew Birmingham Hip Resurfacing Hip Implant Liability Litigation*, MDL No. 2775, and in *In re: Higher One Account Marketing and Sales Practices Litigation*, MDL No. 2407. I also speak and teach on MDL practice at law schools and conferences across the United States, including co-founding an organization and conference which seeks to promote diversity in the leadership of MDLs called *Shades of Mass*.

I write in opposition to proposed Federal Rule of Civil Procedure ("Rule" or "Rules") 16.1. Specifically, subsection 16.1(c)(4) is intended to—and would—wrongfully limit the rights of millions of injured people and restrict their rightful access to the courthouse.

Proposed Rule 16.1(c)(4) seeks *early* disclosure of product use information. The proposed rule is fraught with issues and is based upon a grossly false premise—namely, that scores of injured people are filing baseless claims against miscellaneous defendants. But this point of view is mistaken, and—while trying to be helpful to corporate clients—is often parroted by attorneys who are not "in the trenches" of these cases, but are providing commentary based upon the opinions of other counsel. I hope that, by providing my first-hand experience in litigating these cases, I may be of some assistance to the Committee.

First, millions of people are harmed by products that are defectively manufactured or designed each year. When these people and/or their families step forward to assert their legitimate claims—of death, of being maimed, or of developing cancer, among other horrors—they and their lawyers face a rigorous gauntlet of high-powered corporate defense machinations and challenging legal hurdles. Despite these challenges, our clients have the strength to come forward and pursue justice in what is the strongest and most equitable court system in the world. This strength is why, today, millions of Americans understand the risks associated with, for example, tobacco and opioid use. Those litigations and other litigations have and will save lives and have enabled hard-working American citizens to obtain economic justice for the wrongs that have befallen them.

Second, the Rules provide that plaintiffs must plead, in good faith, the elements of their claim. To be clear, the Federal Rules of Civil Procedure ***do not*** require that plaintiffs establish elements of their claim—*i.e.*, proof of use of the product—even before discovery has commenced. Our system operates as it does to enable those who have been aggrieved to have the opportunity to *prove* their claims, especially in a system wherein the aggrieved are often facing multinational, billion-dollar, lobbyist-protected Goliaths hiding behind the country's wealthiest defense firms—who ensure that we need to fight for every piece of evidence to which our clients are entitled.

Third, "proof of product use" is not a fixed and defined term. Proof of product use is driven by the nature of the litigation, the stage of the litigation, and the decisions of an informed Court. In some cases, an affidavit may be sufficient for proof purposes, while, in other cases, receipts may be warranted. There is no uniform definition of "proof of product use." Requiring the artificial production of "product use" evidence prior to discovery will destroy countless valid claims under what proponents of this proposed Rule change tout as being increased "efficiency" for those who have been so aggrieved.

Fourth, in many instances, the *defendants* or third parties are the gatekeepers of product use information—hiding key product information in defense strategy and obfuscation. For example, in *In re: Paraquat Products Liability Litigation*, MDL No. 3004, records related to use of paraquat by California plaintiffs who suffer from Parkinson's disease, were maintained by the State of California. As such, the ability to obtain these records and tie the records back to the plaintiffs' exposures in the early stages of the action remains largely in the hands of a government entity. Requiring that plaintiffs provide proof of use at or before the date of the first Case Management Conference in that litigation would have stripped plaintiffs of their ability to prosecute their claims.

Another key example of defendants' gamesmanship inherit in hiding proof of product use is exemplified in *In re: Abbott Laboratories, et al., Preterm Infant Nutrition Products Liability Litigation*, MDL No. 3026. There, Defendant Mead Johnson moved the court to dismiss several plaintiffs' cases on the grounds that those plaintiffs failed to identify the manufacturer of the defective infant formula used. However, many of these plaintiffs' medical records did not identify the manufacturer of the infant formula. Instead, Defendant Mead Johnson refused to produce the product information on the basis that the cases[1] were not cases that the Court had selected as "bellwether" or test cases in the litigation. To her credit, the Honorable Rebecca R. Pallmeyer—the presiding judge in this MDL and the Chief Judge of the United States District Court for the Northern District of Illinois—found that the product information that Mead Johnson was strategically refusing to produce "will satisfy the court for purposes of a Rule 12(b)(6) challenge." *See* Minute Entry, dated December 21, 2023, attached hereto as **Exhibit A**.

Similarly, in *In re: Hair Relaxer Marketing, Sales Practices, and Products Liability Litigation*, MDL 3060, the Honorable Mary M. Rowland—also of the United States District Court for the Northern District of Illinois—ordered the defendants to produce core and key product identification directly relating to the plaintiffs' ability to establish product use. *See* Minute Entry, dated July, 14, 2023, attached hereto as **Exhibit B**.

We are bound by our ethical obligations to ensure that we file claims, on behalf of our clients, in good faith—and we do. When we do not, the remedy is dismissal or Rule 11 motion practice. Respectfully, a rule change that would require that plaintiffs prove key

[1] Discovery in these cases has been stayed because they are not bellwether cases (which would be set for additional discovery).

elements of their claims prior to discovery would "do harm"—the very thing that this Committee strives not to do by their rule changes.

I also write to encourage the Rules Committee to expressly include diversity as a factor in case leadership appointments. While proposed Rule 16.1(c)(1) notes that the MDL transferee judge has a responsibility in the leadership selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent all plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds," the proposed Rule does not squarely address the need for the transferee judge to consider racial, ethnic, sexual orientation and identity, disability, gender and religious diversity in making a leadership determination. The importance of considering these additional factors is paramount—especially as class and multidistrict litigation are frequently the only avenues that promote access to justice for marginalized communities. Other MDLs have suffered from "blind spots" that a lack of diversity creates—through no malice or ill intent. Ensuring that the attorneys who represent marginalized communities have experiences which mimic their own not only promotes trust in the judicial process, but it also encourages fairness and equity when fashioning remedies that directly impact these communities.

Respectfully submitted,

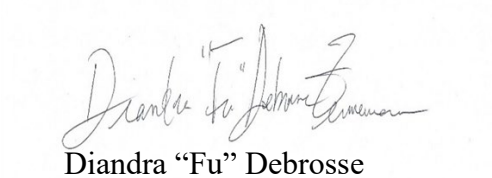

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF NextGen 1.7.1.1
Eastern Division

Shannon E. Hall, et al.

Plaintiff,

v.

Case No.: 1:22−cv−00071
Honorable Rebecca R. Pallmeyer

Abbott Laboratories, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, December 21, 2023:

MINUTE entry before the Honorable Rebecca R. Pallmeyer: Telephone conference held. Mead has filed motions to dismiss in certain individual member cases, arguing that Plaintiffs have not established that Mead is the manufacturer of the infant formula at issue. To determine whether Mead is in fact the manufacturer of the formula in these cases, the court directs Plaintiffs in each case at issue to serve (or re−serve) targeted requests for information from medical providers concerning the products administered to their infants. If Plaintiffs demonstrate to the court that these targeted requests yield no or only inconclusive information, Mead will be directed to confirm or deny the existence of an "exclusive contract" with the medical providers; the court recognizes that an affirmative answer to this question will not establish that the infant was in fact provided with Mead products, but will satisfy the court for purposes of a Rule 12(b)(6) challenge. Mailed notice. (cp,)

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF NextGen 1.7.1.1
Eastern Division

In RE: Hair Relaxer Marketing, Sales Practices, And Products Liability Litigation, et al.

Plaintiff,

v.

Case No.: 1:23−cv−00818
Honorable Mary M. Rowland

L'Oreal USA, Inc, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, July 14, 2023:

MINUTE entry before the Honorable Mary M. Rowland: Counsel for Plaintiffs and Defendants and respective bankruptcy counsel appeared. The Court heard further argument about the short form complaint (SFC) and about the Revlon bankruptcy proceeding as it relates to the September 14, 2023 MDL filing deadline set in the bankruptcy court's April 2023 confirmation order. The Court rules as follows: first, to facilitate finalizing the SFC, Defendants must respond to Plaintiffs' interrogatories requesting that Defendants identify the products and product ID's by Tuesday 7/18/23 at noon central time. By 7/21/23, the interrogatories must be verified (and can be supplemented if necessary). Parties can meet and confer about the remaining interrogatory responses and deadline extensions if needed. The Court also raised the issue of incorporating an additional question on the SFC to establish subject matter jurisdiction. The revised SFC shall be filed on the docket by 8/1/23. Second, for the reasons explained during the hearing, the Court declined to move the September 14, 2023 date or enter a new direct file order. Status hearing on 8/23/23 at 1:00pm CST remains set. All parties present remotely (NON−VIDEO) for today's hearing who wish to have their appearance reflected of record are directed to provide their name and firm to liaison counsel, who shall provide that information to the official court reporter by email, Laura_Renke@ilnd.uscourts.gov, by noon Monday, 7/17/23. Mailed notice. (dm,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

TAB 9

RABIEJ LITIGATION
LAW CENTER

WRITTEN TESTIMONY ON PROPOSED NEW RULE 16.1
ADVISORY COMMITTEE ON CIVIL RULES HEARING (JANUARY 16, 2024)
December 22, 2023

Thank you for the opportunity to submit my statement on the preliminary draft of proposed new Rule 16.1 of the Federal Rules of Civil Procedure. I included my earlier comments' submission, which recommends 43 style and formatting corrections and suggestions as well as 26 substantive suggestions. I speak on my behalf only. I hope that the Committee finds the comments and suggestions useful.

The suggestions are self-explanatory. I would be pleased to answer any questions about them. To the untrained eye, many of the 43 style suggestions may seem inconsequential, but vigilantly maintaining word and formatting consistency as well as adherence to the committees' style guidelines throughout the rules is important otherwise the painstaking decades-long work of previous committees will suffer degradation.

At the hearing, I would appreciate the opportunity to first address two earlier substantive suggestions and one new substantive suggestion as well as two administrative suggestions concerning the publication of amendments for public comment and style consultants.

I would like again to congratulate the Committee for its dogged persistence in advancing a major improvement to the administration of justice and persuading a skeptical bench and bar of the merits and necessity of the proposed rule, which I wholeheartedly endorse.

SUMMARY STATMENT OF TESTIMONY AT JANUARY 16, 2024, HEARING

ONE --- One of the main features of Rule 16.1 is a list of matters that can be considered at the initial-management conference. The Committee Note explains that the individual matters in the list were selected because "(e)xperience has shown, however, that the matters identified in Rule 16.1(c)(1)-(12) are often important to the management of MDL proceedings." The discretionary selection recognizes that "(n)ot all MDL proceedings present the type of management challenges this rule addresses," and the listed matters are most relevant in the largest mass-tort MDLs. The problem is that the list is not as comprehensive as

the list of matters currently contained in pretrial orders of virtually every mega MDL, which consist of 97.43 percent of all pending actions in MDLs as of December 15, 2023.

While acknowledging that "a transferee judge regularly schedules an initial MDL management conference," the Committee Note neglects recognizing the near unanimity in the pretrial orders of mega mass-tort MDLs that refer to the same matters listed for consideration. The orders in these MDLs include the standard line: "The items listed in MCL 4th Sections 22.6. 22.61, 22.62, and 22.63 shall, to the extent applicable, constitute a tentative agenda for the Initial Conference." The matters listed in the MCL are more comprehensive than in Rule 16.1. The orders also separately refer to a handful of additional items, *e.g.*, class actions and statements summarizing issues.

Although the draft expressly provides that the judge or lawyers can address any matter, the consequence is predictable that transferee judges, particularly the majority who will be new to MDLs, will rely on the rule for guidance and use the same language of yesteryear, but substitute "Rule 16.1," *i.e.,* "The items listed in Rule 16.1 shall, to the extent applicable, constitute a tentative agenda for the Initial Conference." The language will become entrenched over time and important matters that should have been raised, may go unnoticed at the initial-management conference.

For example, Brown Greer's MDL Centrality is an information-exchange platform that many mega mass-tort MDLs are beginning to use as a standard tool to manage the enormous volume of data. As former Judge Vaughn Walker noted at a Center conference, technology has become indispensable in meeting the MDL challenge. It is a topic that should not be overlooked at the MDL's outset. (*See* Substantive Comment 17.)

The Committee Note rightfully recognizes that a "mandatory checklist" is inappropriate. But unless clear guidance is provided prompting the judge and lawyers to affirmatively look to other sources for additional matters, human nature will take over and the Rule's listed matters will become the default.

The three new sentences recommended in "Substantive Suggestion 8" would alert judges and lawyers to look at other sources, which list additional topics that might be more useful in particular MDLs. And in some MDLs, these other topics might be critical.

TWO ---- At the Committee's first hearing, there was a discussion about making explicit, what I had believed obvious, that the other Federal Rules of Civil Procedure apply to MDLs. If the Committee decides to add a statement in the Committee Note to that effect, I suggest that careful thought be given to how Rule

16, which overlaps, is intended to apply to a Rule 16.1 initial-management conference. Analyzing the interplay between the rules, which both cover pretrial conferences, raises interesting questions.

One case in point is that Rule 16(d) also addresses the contents of orders made after a pretrial conference. Which provision applies to an MDL order? Probably Rule 16.1(d), but why invite litigation? Moreover, to my eyes, the language of Rule 16(d), though similar, is better than the language in Rule 16.1(d), and the Committee Note to Rule 16(d) explains the procedure and its implications much clearer than the Note to Rule 16.1 as well. Similar questions arise about the interplay between the overlapping MCL §§ 11.2, *et seq*., which deals with initial conferences in complex litigation and MCL §§ 22.6 *et seq*., which deals with initial case-management orders in mass torts. That has caused confusion and offers a warning.

Clarity is needed in the rule, otherwise unnecessary ambiguity and confusion will result. Whatever the Committee decides, the interplay between Rule 16 and Rule 16.1 should be clear to prevent future litigation.

THREE — At the Committee's first hearing, several witnesses indicated that large percentages (25%-50%) of actions filed in mass-tort MDLs were unsupportable and possibly fraudulent. Several committee members asked the witnesses to provide empirical data on the claimed high percentages. I would be grateful if the Committee shared any empirical data on the number of unsupportable claims that might be provided.

The Center is holding a unique workshop under the leadership of Ken Feinberg with five top MDL judges and 15 plaintiff and 15 defense MDL lead counsel at Northwestern University School of Law in August. Ken will try to hammer out practical procedures and practices acceptable to both sides and the judges to address the problem of questionable tag-along claims.

Our first panel will examine the available empirical data. Bayer's comment submitted on October 15, 2023, noted that plaintiffs voluntarily dismissed 98 cases (2.3% of the pending 4,174 actions) and requested delays for 200 more cases (4.8% of pending actions) in the *Roundup* MDL. Additional data is needed to ascertain the extent of the problem, especially whether it reaches 25%-50% levels.

The Committee may want to consider requesting the defense and plaintiff witnesses to provide data from the claims administrators whom they work with on the number of claimants who are determined to be ineligible to receive any amount post settlement and the reasons for the ineligibility. Claims administrators have this data but will not reveal it, because it may risk alienating their clients, usually the plaintiff lead counsel. This data would be useful in determining the true parameters of the problem and to the extent that the Committee can induce defense

and plaintiff lawyers to urge claims administrators to disclose the information the better we will understand the problem.

FOUR --- At the Center conferences over the years, judges and lawyers have expressed much interest in proposed Rule 16.1. Many expressed strong opinions going both ways. Based on the interest and my past experience, I would have expected comments on the proposal to be submitted by 5 -10 judges and more than 100 lawyers. As of December 21, not a single judge submitted a comment, and only eight submissions were posted on the <Regulations.gov > website. (It is true that the number of witnesses is solid, but I suspect unrelated reasons for this.) The miniscule number submitting written comments should sound alarm bells for every Committee member about the effectiveness of the public notice seeking comments.

Two recommendations are offered to increase the number of public comments:

(A) The instructions on how to submit comments on the AO rulemaking website are difficult to locate and understand and the information on the <Regulations.gov> website, which is linked to the AO website to submit a comment, is even more frustrating to understand and navigate.

I, along with many judges and lawyers are from the older generation and find websites unfriendly. If the Committee wants more comments from the public the instructions need to be revised wholesale to simplify and clarify step-by-step the comment-submission process. The location of the instructions should also be highlighted and easy to find on the website.

The rules committees have always strived to make the public-comment process as user-friendly as possible. There should be no fear of insulting our intelligence by "dumbing down" the instructions.

(B) The Committee should reconsider the decision not to publish the proposed amendments in hard copy. Again, many lawyers and judges in my age category refrain from reading long passages on the computer screen. In fact, studies have shown that most people will read longer passages only in print, not on the computer screen.

Of course, any document can be printed from the computer, but many rule amendments are long, and printing is inconvenient. It is understood that the cost of printing hard copies is not insignificant (back in the day, it cost my office $12K to print and mail 10,000 copies to all federal judges, state supreme court justices, all state bars, all law schools, and a separate mailing list for those interested in the rulemaking process). But the effort was worthwhile, and we believed that it was necessary to fulfill our statutory responsibility to provide "appropriate public notice." The goal was never to provide the minimum notice, but the best notice that

is practicable to get the public's input to ensure the legitimacy of the rulemaking process.

Because the Federal Rules have the force of law, the Judicial Conference has always given top priority to the rules committees' work. There is little doubt that the AO would accede to a Committee request to incur the added expense in notifying the bench, bar, and public in the most effective way to get as many comments as possible on rule amendments. And the Judicial Conference Budget Committee would assuredly be sympathetic to any such request for funding, if the AO concluded otherwise.

From personal experience, I saw the benefit of hard-copy versus electronic print. As the Director of the Duke Center on Judicial Studies, I acquired and ran the journal *Judicature* for three years. The first question was whether to publish the journal only electronically or in hard copy. The cost for hard copies was more than $100,000 annually. After much research on marketing studies, it was decided to publish the journal both electronically and in hard copy. The cost was paid from revenue that the Center earned (no school funding), which made my decision more difficult because I had to find ways to earn the revenue. But the decision was never regretted.

FIVE — Lastly, I would encourage the Committee to consider asking the Committee's style consultants to provide comments and suggestions on the reporters' draft Committee Notes. I well recognize the reluctance having style consultants second guess the work of top scholars, but Joe Kimble and Bryan Garner, when he is available, are national treasures not only because of their expertise and acumen but almost as importantly for their institutional knowledge of consistent word usage and formatting as well as adherence to the committees' style guidelines throughout the rules. The latter is becoming more important with the addition of new reporters. Of course, the reporters can accept or reject any style-consultant suggestion.

The goal continues to be to produce substantively neutral rules that are "easy to read and understand – as clear in content and meaning as it is possible to make them, and as crisp and readable as clarity permits."

COMMENTS SUBMITTED ON OCTOBER 1, 2023

The proposed new rule is particularly gratifying as it fulfills my own decade-long crusade championing an amendment to the Federal Rules to Civil Procedure to address MDLs.[1] Although some in the bench and bar will remain skeptical and even hostile, I urge the Committee to stay the course.

I would like to take this opportunity to clarify the data that drew attention to the need for a new rule. Nearly a decade ago, I was the first to compare the statistics maintained by the JPML staff with those of the Administrative Office of the U.S. courts and found that the individual actions centralized in MDLs represented more than 40% of the pending civil cases in all the district courts. That percentage has jumped to more than 60%, largely because of the recently settled 3M Combat Earplug MDL.

My statistical discovery has been cited often, but it has caused some confusion. Statements are often cavalierly made in the literature that MDL actions represent more than 60% of the federal courts' docket. But that is accurate only if the "docket" means pending civil cases. It is inaccurate if it refers to the number of civil cases filed during the year, which is the common understanding of most people when you say "docket." In fact, the annual filings of new actions in MDLs is now about 60,000, which represents 20% of the annual civil-case filings. In other words, MDLs are adding 60,000 new cases annually to the courts' dockets. The 20% is hefty, and it is rising, but it is far lower than 60%.

I have grouped my comments into two categories: (1) style and formatting corrections and suggestions; and (2) substantive suggestions. Regarding the first category, many of the corrections and edits are admittedly nit-picks, but they further the critical value of consistency throughout the rules promoted by the Committees' various style projects to limit confusion and ambiguity.

I hope that the Committee finds these comments useful, which are my own and do not necessarily reflect the views of the Center nor of any persons associated with the Center.

A. STYLE AND FORMATTING CORRECTIONS AND SUGGESTIONS

1. Header: "PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE" -- The word "Amendments" in the headers to proposed amendments to the Bankruptcy Rules (pages 61 and 80) and Appellate Rules

[1] *See* AS I SEE IT, editorial comment, Rabiej, John, 101 Judicature, No. 3, p. 2 (2017). ("Providing uniform procedures that are consistently followed throughout the country is the raison d'être of the federal civil rules….Yet no civil rule provides uniform procedures that can be applied consistently to MDL litigation throughout the country."

(pages 26 and 47) are plural. The word "Amendments" in the headers for the Civil Rules (pages 120 and 123) should be plural to be consistent.

2. Line 2. "Initial ~~MDL~~ Management Conference." The Modifier "MDL" before "Management Conference" should be struck. It is verbiage. Line 5 got it right by omitting the "MDL" modifier in front of "management conference." The caption of Rule 16.1 is "Multidistrict Litigation." All subsequent provisions must refer to MDL proceedings. There simply is no need to add the word "MDL" in front of "management conference" every time it is mentioned. Although a single reference to the unnecessary modifier would not be significant, the problem with the draft is that the modifier is used often throughout the draft. The fear that someone will somehow misread the reference to apply to some proceeding in another type of case is not reasonable. For example, the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions do not constantly add the modifier "admiralty" before every noun or action because it is already clear.
3. Line 12: "work with plaintiffs or ~~with~~ defendants to prepare…." The second "with" is not incorrect but it is verbiage, unless the Committee believes that added emphasis is needed to focus on "defendants" in this provision, which seems unlikely.
4. Line 17: "to meet and prepare a report ~~to be submitted to the court~~ filed before the conference begins." Substituting the word "filing" reduces verbiage. More importantly, it makes clear that the report is part of the official record, which is important in this instance because all the other lawyers in the MDL should have the opportunity to view it. (But filing has other consequences, which are addressed in Substantive Comment 2 directed at Lines 46-48 and Substantive Comment 19 directed at Lines 260-266, *infra*.)
5. Lines 18-23: "The report must address any matter designated by the court~~,~~. ~~which may include any matter listed below or in Rule 26.~~ The report may also address any matter in Rule 16 or any other matter that the parties wish to bring to the court's attention, including the following~~:~~:" The transition from subdivision (c) to paragraph (1) is awkward. With a little tweaking that was done above, it was smoothed over without changing the substance.
6. Line 52: "whether consolidated pleadings should be prepared ~~to account for multiple actions included in the MDL proceedings~~;" Verbiage.
7. Line 73: "Initial ~~MDL~~ Management Order." Verbiage.
8. Line 74: "the court should enter an initial ~~MDL~~ management order" Verbiage.
9. Lines 75-77: "address the matters designated under Rule 16.1(c) ~~-- and any other matter in the court's discretion~~." Verbiage. The court always has the discretion to address whatever it wants in its orders. Retaining the language is inconsistent with the long-established style tradition of eliminating the

words "in the discretion of the court," which was heavily sprinkled throughout the rules. Is there any doubt that a judge can insert whatever matters they want in their own orders? The style projects uprooted these weeds.

10. Lines 82-83: "It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings~~,~~ upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will ~~to~~ promote the just and efficient conduct of such actions." Initially, the suggestion was limited to deleting the unnecessary comma punctuation. But in checking on the statutory § 1407, it might be worthwhile to consider adding the full text of the statute. Frankly, I had not focused on this criterion, because it has not attracted much attention. But perhaps under certain circumstances, it might have some significance and adding the full statutory text cannot harm.
11. Line 89: "in the Federal Rules of Civil Procedure ~~Rules~~…." Customary to refer to the formal title.
12. Line 105: "~~Rule 16.1~~ Subdivision (a)." I suspect the caption was inadvertent. But a hallmark feature of the rules committees' style projects, which painstakingly scrutinized and restylized every federal rule, was to maintain consistency throughout the rules. It is important that the draft rules and Committee Notes conform with consistent usage, otherwise future committees will need to undertake comprehensive restylization projects.
13. Line 105: "Rule 16.1(a) recognized that ~~the~~ a transferee judge…" For me, this is a close call, but the more general reference sounds a bit better.
14. Line 106: "an initial ~~MDL~~ management conference" Verbiage, especially because the lead-in clause refers to actions taken by a transferee judge, which can only mean an MDL proceeding.
15. Line 108: "an initial ~~MDL~~ management conference" Verbiage.
16. Line 109: "That initial ~~MDL~~ management conference." Verbiage.
17. Lines 111-112: "Although holding an initial ~~MDL~~ management conference in an MDL proceeding~~s~~ is not mandatory." The unnecessary reference to an *MDL* conference in an *MDL* proceeding highlights the verbiage. Also, singular is more consistent with the style guidelines and is more appropriate in this sentence.
18. Line 116: "~~Rule 16.1~~ Subdivision (b)." Consistency.
19. Line 116. "Rule 16.1(b) recognizes that the court may designate…" Consistent usage; see line 105: "Rule 16.1 (a) recognizes *that*…"
20. Line 120: "the initial ~~MDL~~ management conference" Verbiage.
21. Line 129: "the initial ~~MDL~~ management conference" Verbiage.
22. Line 132: "~~Rule 16.1~~ Subdivision (c)." Consistency.
23. Lines 148-149: "the initial ~~MDL~~ management conference" Verbiage.

24. Line 150: "~~Rule 16.1~~ Subdivision (c)(1)." Consistency.
25. Lines 150-151: "Appointment of leadership counsel is not universally needed in every MDL proceeding~~s~~." Singular is more consistent with the style guidelines.
26. Line 152: "manage the ~~MDL~~ proceedings" Verbiage. The immediately preceding sentence refers to appointment of counsel in "*MDL* proceedings" and sets the context for the next sentence, making it clear that managing proceedings means the *MDL* proceedings.
27. Line 177: "claims by individuals who suffered injuries~~,~~ and also claims by third-party". Unnecessary comma punctuation.
28. Line 191: "the initial ~~MDL~~ management conference" Verbiage.
29. Lines 199-200: "Subparagraph (B) ~~of the rule~~ therefore prompts" Verbiage and inconsistent usage. (See line 203, omitting reference to "*of the rule*").
30. Line 239: "the responsibilities non-leadership counsel" Delete the hyphen punctuation in "nonleadership," consistent with lines 39 and 232.
31. Line 248: "~~Rule 16.1~~ Subdivision (c)(2)." Consistency.
32. Line 260: "~~Rule 16.1~~ Subdivision (c)(3)." Consistency.
33. "~~Rule 16.1~~ Subdivision (c)(4)." Consistency.
34. Line 285: "~~Rule 16.1~~ Subdivision (c)(5)." Consistency.
35. Line 285: "For case-management purposes" Insert hyphen between the words, consistent with the style guidelines.
36. Line 299: "~~Rule 16.1~~ Subdivision (c)(6)." Consistency.
37. "~~Rule 16.1~~ Subdivision (c)(7)." Consistency.
38. "~~Rule 16.1~~ Subdivision (c)(8)." Consistency.
39. "~~Rule 16.1~~ Subdivision (c)(9)." Consistency.
40. Line 331: "~~Rule 16.1~~ Subdivision (c)(10)." Consistency.
41. Line 347: "~~Rule 16.1~~ Subdivision (c)(11)." Consistency.
42. Line 364: "~~Rule 16.1~~ Subdivision (c)(12)." Consistency.
43. Line 364: "An MDL transferee judge~~s~~ may refer" Singular is more consistent with the style guidelines.

B. SUBSTANTIVE SUGGESTIONS

1. Lines 40-42: "whether and, if so, when to establish a means for compensating ~~leadership~~ counsel for common-benefit work." The intent of the text is to address common-benefit funds as explained in the Committee Note (lines 240-247). The text refers only to compensating leadership counsel. It is ambiguous and does not reflect existing practices, which address compensation of hundreds of nonleadership lawyers for doing common-benefit work. It would be more useful to expand the text to reflect existing practices and include all counsel instead of addressing only compensating "leadership

counsel," which will cause confusion as to the compensation of nonleadership counsel.

2. Lines 46-48: "identifying the principal factual and legal issues likely to be presented in the MDL proceedings, which should be presented in a separate submission to the court" The Committee Note explains the general purpose and benefits of the provision, but it differs from present practices of many large MDLs in important respects. The insertion of the added clause is designed to make clear that the position statements are not part of the report, which might raise unwanted problems. (The reasons for the separate submissions are explained in the suggestions to Lines 260-266, *infra.)*

3. Lines 73-77: "After the conference, the court should enter an initial ~~MDL~~ management order addressing the matters raised in the report or at the initial management conference ~~designated under Rule 16.1(c)~~" The draft language is ambiguous. The lawyers are to address the "matters designated in Rule 16.1(c)." The miscue is whether the lawyers must address the items designated in subdivision (c) or those designated by the transferee judge. The text of the draft rule at line 19 indicates that the "report must address any matter designated by the court," which adds weight on focusing solely on the matters the judge selected. But in addition to this miscue, the draft may be read to omit reference to items that the lawyers themselves raise independently, which may be outside of Rule 16 or Rule 16.1, for example, one of the topics in the Manual for Complex Litigation. Clearly the order should not be read to necessarily exclude matters raised by the lawyers. The suggested language covers both and fulfills the purpose of the draft language.

4. Lines 93-103: "~~On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings~~." The purpose of this rule is to provide general guidance to the bench and bar on MDL proceedings and not prescriptive requirements, which diverges with traditional rulemaking. But the draft goes too far and ventures into areas far afield. Its usefulness is modest. The *Manual for Complex Litigation* is the more appropriate place for such information.

5. Lines 102-104: "~~In both MDL proceedings and other multiparty litigation, the~~ The Manual for Complex Litigation ~~also may be~~ is a source of guidance for these other proceedings as well as all MDL proceedings." Transition language is added to account for the deletion of the preceding sentences in the draft.

6. Lines 122-126: "~~While there is no requirement that the court designate coordinating counsel, the court could consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference~~." This language adds little to what is better said in lines 118-121, which nicely and concisely explains the purpose of the coordinating counsel. The added language also is ambiguous and creates confusion. What does "facilitate the *management of the action* at the initial conference" mean? Is it limited to the discussions at the conference; but then why expand it to the "*management of the action,*" which might give counsel an inside advantage on leadership appointments.

7. Lines 126-127: "After the initial management conference, ~~t~~the court ~~may designate~~ can consider retaining the coordinating counsel to assist ~~the court~~ it on administrative matters before leadership counsel is appointed." The draft is ambiguous. Does it only refer to appointing coordinating counsel before the initial conference and before appointing leadership counsel, or is it intended to apply to an appointment that continues after the initial management conference until leadership counsel is appointed. It is one thing to "assist the court" in holding the initial management conference, and another thing in "assisting the court" in other matters before leadership counsel is appointed, which usually is about 30 days after the initial conference is held.

   Many transferee judges retain the services of a coordinating counsel, but on a limited basis, so as not to provide that counsel with an advantage in the selection of leadership counsel. Members of the bar are rightfully sensitive about the possibility that the court's designation of a coordinating counsel provides an inside advantage to the individual lawyer before the other lawyers interested in a leadership appointment have had an opportunity to present their own qualifications for the consideration of the court. The suggested language clarifies the counsel's duties.

8. Lines 132-143: "The germaneness and urgency to address certain topics at the initial management conference will depend on the nature of the MDL, the judge's and parties' familiarity with MDL practices and procedures, and the importance and necessity of input from leadership counsel, who may not yet

have been appointed. Subdivision (c) lists certain case-management topics that might be useful to discuss at the initial management conference, particularly in some large MDLs, but expressly provides discretion to the court and the parties to address other topics. These other topics are described in the Manual for Complex Litigation, which contains more comprehensive lists of topics that may be useful. The court ordinarily should order the parties to meet to provide a report to the court about the matters it designates~~d in the court's Rule 16.1(c) order prior~~ before ~~to~~ the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters."

It was reported at the Center's recent MDL Bench-Bar Leadership conference held at the Northwestern University School of Law that the Committee considered the results of a study that showed there was little uniformity about the topics listed by MDL courts in their pretrial orders. The inference being that there is little consensus about what topics should be considered at the initial management conference. As of September 15, 2023, there were 172 pending MDLs. It is not surprising that many of the pretrial orders in these 172 MDLs were not unanimous in listing the same topics or any topics for consideration at the initial management conference.

To be clear, however, the substantial majority of pretrial orders in the 19 mega mass-tort MDLs, which list the topics to be considered at an initial management conference, are remarkably the same. [2] These mega mass-tort MDLs consist of more than 97% of actions pending in all 172 MDLs (i.e., 408,636 actions).

How these mega mass-tort MDL courts manage their actions should be the touchstone for Rule 16.1. The Committee Note acknowledges as much at lines 92-93, 150-151, and 206. The orders in these MDLs refer to topics listed in § 22.6 of the Manual for Complex Litigation, e.g., "The items listed in MCL 4th

[2] *Zantac* MDL 2924, Pretrial Order # 1 (Feb. 14, 2020). The identical or very similar language is contained in the case-management orders in the following large MDLs; (i) *Vioxx*, MDL 1657 – pretrial order # 1; (ii) *Propulsid* MDL 1355 – pretrial order # 1 (Aug. 22, 2000); (iii) *Xarelto*, MDL 2592 – pretrial order # 1 (Dec. 17, 2014); (iv) *Elmiron* MDL 2973 – case management order No. 1 (Dec. 18, 2020); (v) *Taxotere* MDL 3023, pretrial order # 1 (Feb. 25, 2022); (vi) *Avandia* MDL case management order No.1, Feb. 28, 2008); (vii) *Zoloft*, MDL 2342 – pretrial order No.1 (May 4, 2012); (viii) *Syngenta*, MDL 2591 – preliminary practice and procedure order (Dec. 22, 2014); (ix) *3M Combat Arms Earplug*, MDL 2885—pretrial order No. 2 (April 5, 2019); (x) *Acetaminophen-ASD-ADHD,* MDL 3043 – pretrial: preconference submissions (Oct. 10, 2022); (xi) *Paraquat* MDL 3004 – case-management order No. 1 (June 10, 2021); and (xii) *Baycol* MDL 1431 – pretrial order (Jan. 16, 2002).

Sections 22.6. 22.61, 22.62, and 22.63 shall, to the extent applicable, constitute a tentative agenda for the Initial Conference." [3]

The problem with focusing on a select number of topics, like Rule 16.1, is that it fails to take into account how the bench and bar will apply the rule after it is promulgated. There is no reason to believe that the bench and bar will behave differently after the Rule takes effect. In fact, by enshrining these selected topics in the rule without meaningful clarification, the bench and bar likely will focus solely on them, disregarding many topics that might be more important under the specific circumstances of the case solely because the rule provided no guidance pointing them in the right direction. Unless revised, I suspect that the language of the pretrial orders will change to: "The items *listed in Rule 16.1(c)* shall, to the extent applicable, constitute a tentative agenda for the initial conference." The revised Committee Note is intended to alert the bench and bar that there are many other topics that are often raised at these conferences that may be particularly pertinent and useful in their MDL.

9. Lines 143-145: "Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-(12) are often especially important to the management of large MDL proceedings." The added qualifiers are necessary because the items in (c)(1)-(12) are irrelevant in many, if not, in most smaller MDLs. Common-benefit funds are not established in most MDLs, as only one example.

10. Lines 151-153: "But, to manage the proceedings, the court may decide to appoint leadership counsel, which may include lead counsel, members of a leadership committee (executive or steering committee), and chairs of subcommittees." A court typically appoints two-three lead counsel. But it also appoints others to leadership positions, as acknowledged in Lines 199-202. Several MDL courts have been giving increased attention to appointments to these subordinate leadership positions. The revision clarifies the scope of the rule provision.

[3] There are a few notable exceptions today where the court in a large MDL enumerated specific topics to discuss at the initial management conference instead of referring to the Manual's lists of topics. But the suggested revision of the Committee Note would apply to most other MDLs and clarify the purpose of listing only some of the topics, which might exclude very important topics to the judge and lawyers. *See Philips Recalled CPAP*, MDL 3014 – Pretrial Order # 1, enumerating 12 topics: *BARD Implanted Port Catheter*, MDL 3081, pretrial order regarding initial case management conference, enumerating 21 topics with many subtopics (Aug. 22, 2023).

11. Lines 170-175: "~~MDL proceedings do not have the same commonality requirements as class actions, so substantially~~ The MDL court may sometimes need to account for different categories or parties that may be included in the same ~~MDL~~ proceeding and appoint leadership comprised of attorneys who represent parties asserting a range of claims in the proceeding." The deleted language is unnecessary. It introduces the concept of mass-tort MDLs as quasi-class actions and may add confusion.

12. Lines 179-180: "~~The court may sometimes need to take these differences into account in making leadership appointments~~." The sentence was moved up in the suggested revision above.

13. Line 181-182: "Courts have selected leadership counsel through combinations of formal applications, interviews, consensus-selection proposing a slate of candidates, and recommendations from other counsel and judges who have experience with MDL proceedings." In smaller MDLs, the slate-selection approach is common. In larger MDLs, the slate-selection approach is making a comeback with lawyers consciously making an effort to propose diversified candidates. The draft language, which includes "recommendations from other counsel and judges" may be intended to address the slate-selection method. But, if so, the reference is too opaque. In many situations, the slate-selection is the most appropriate. The rule should be neutral on which method may work best in a particular case.

14. Lines 203-206: "Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement, when the timing is appropriate." Lawyers have expressed strong concerns about some judges pressuring for premature settlement before they have had an opportunity to contest the validity of the claims. And there is concern that MDL judges view remand of cases as failure. The suggested language addresses these concerns.

15. Lines 209-211: "Nevertheless, leadership counsel ordinarily play a key role in communicating and working with counsel and with opposing counsel and the court about settlement and facilitating discussions about resolution." The suggestion recognizes the need to consult with nonleadership counsel in reaching a settlement.

16. Lines 214-217: "In its supervision of leadership counsel, the court should ~~make every effort to~~ ensure that leadership regularly communicate with nonleadership counsel as to developments in the MDL so that nonleadership counsel are properly informed and can effectively represent their respective clients. ~~counsel's participation in any settlement process is appropriate.~~" The draft is unclear as to its purpose, i.e., what is "appropriate" settlement conduct. The ambiguity may create confusion and raise unnecessary concerns about judicial intervention in settlement negotiations. The suggested language is aimed at a clearly defined objective. If the Committee intends to address another problem, the language should be clear to be useful.

17. Line 226: "for monitoring the proceedings. The court and leadership counsel should consider deploying a dynamic, online central-exchange platform as a shared-document management tool to facilitate the exchange, storage, access, search, and analysis of hundreds and thousands of gigabytes of data and documents in the larger MDLs." The draft Committee Note omits reference to technology tools, which are becoming indispensable in managing the larger and even the smaller MDLs. The importance of deploying these shared information platforms early in the litigation should be acknowledged in the rule.

18. Lines 245-247: "But ~~it may be best to defer~~ ~~entering~~ ~~a specific order~~ the court should consider whether to set a fixed percentage of the estimated settlement proceeds as the assessment or a tentative percentage adjusted in the course of the proceedings ~~until well into the proceedings, when the court is more familiar with the proceedings~~." The draft provision deferring the establishment of a common benefit fund is not feasible. Lawyers incur substantial out-of-pocket expenses, which must be paid immediately.[4] The real question deals with what percentage. Some courts have fixed an early percentage, which had to be increased later in the proceedings requiring additional consents from all involved. The better practice is to make clear to everyone as early as possible that the common-benefit fund assessment will be assessed but that it may be adjusted later in the proceeding.

19. Lines 260-266: "~~Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early~~

[4] *See Social Media Adolescent Addiction*, MDL 3047, common benefit order (Mar. 6, 2023) filed a few months after the JPML transfer, which assessed a 10% common-benefit fund percentage.

~~discovery, and certain legal issues should be addressed through early motion practice~~. In a separate transmission to the court, the plaintiffs and defendants should submit to the court a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. The court should make clear that these statements will not be filed, will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings. The parties' statement should list all pending motions, as well as all related cases pending in state or federal court, together with their current status, including any discovery taken to date, to the extent known. The parties should be limited to one such submission for all plaintiffs and one submission for all defendants." The suggested language is the standard language used in many case-management orders in large MDLs.[5] As stated by the transferee judge in *Tasignia* MDL 3006, pretrial order No. 1, the purpose of these position statements is "to assist the Court *with an overview of the litigation." (emphasis added)*

The usefulness of the position statements would be severely undermined if the statements could be used against a party later in the proceeding. It would effectively eliminate frank discussions and create unwarranted confusion and wasted efforts on producing watered-down position statements that have little use. The suggestions explain what information the transferee judges find useful in these position statements and explain why they specifically do not bind the parties. If the provision cannot be cleanly distinguished within subdivision (c) as a document separate from the report, it probably makes more sense to separate this provision from subdivision (c) entirely and insert it as a new subdivision (d).

The differences from the draft language are apparent. Instead of speculation about how the provision might be used and their value, the suggested

[5] The identical language is contained in the case-management orders in the following large MDLs; (i) *Vioxx*, MDL 1657 – pretrial order # 1; (ii) *Zantac*, MDL 2924 – pretrial order # 1; (iii) *Xarelto*, MDL 2592 – pretrial order # 1; (iv) *Elmiron* MDL 2973; (v) *Taxotere* MDL 3023, pretrial order # 1; (vi) *Avandia* MDL case management order No.1; (vii) *Zoloft*, MDL 2342 – pretrial order No.1; and (viii) Syngenta, MDL 2591 – preliminary practice and procedure order. Case Management Order No. 1 in *Paraquat* MDL 3004, the transferee judge deferred the submission of the position statements until after the appointment of leadership counsel: "After the court appoints plaintiffs' leadership counsel, the court will solicit position briefs from the parties outlining their views on the primary facts, claims, and defenses involved in the litigation, as well as the critical factual and legal issues." The transferee judge in *Tasignia* MDL 3006, pretrial order No. 1 took a slightly different approach and required submission of briefs of no more than five pages in each member case outlining their views of the factual and legal issues and many more topics. The order stated that "These briefs are not binding, will not waive any claims or defenses, and may not be referenced or offered in evidence against any party in later proceedings."

language is intended to provide useful information to the lawyers trying to comply with the rule. Most importantly, the suggestions make clear that these position statements are not binding, do not waive any claims or defenses, and may not be referenced or offered in evidence in later proceedings. The reasons are self-evident.

20. Lines 270-273: "Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented~~, largely~~ as a management method for planning and organizing the proceedings as well as identifying unsupportable claims." Although the extent of the filing of meritless claims is hotly disputed, there is virtually universal consensus that some unsupportable claims are filed in large MDLs. Growing numbers of calls for better screening measures are being discussed to reduce the numbers. Fact sheets have become increasingly longer (e.g., 20-70 pages) and are used for screening purposes, with provisions requiring submission of some evidence of product use or exposure. As the larger MDLs grow in size from tens to hundreds of thousands of claims, the importance of fact sheets as a screening mechanism will become more pronounced. The rule should not ignore this important role of fact sheets.

21. Lines 299-303: "A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication. Information on methods to handle discovery efficiently can address, for example, the following: (i) common-issue discovery; (ii) procedures for handling already-completed common-issue discovery in pre-MDL cases; (iii) establishment of early ESI protocols; (iv) overall time limits on each side's number of deposition hours; (v) benefits of forbidding written discovery motions; (vi) necessary early protective orders; and (vii) procedures to handle privilege disputes." To many eyes, consolidated discovery is the primary purpose for MDLs. The suggested language adds meat to the draft, which makes it more useful. The items were recommended by Judge David Campbell, former chair of the Advisory Committee on Civil Rules and preeminent jurist, in a law review article.[6]

22. Lines 313-314: "courts generally conduct management conferences, often online so that lawyers from around the country can participate, throughout the duration of the MDL proceedings…." Judges are increasingly holding

[6] ADVICE TO A NEW MDL JUDGE ON DISCOVERY MANAGEMENT, Judge David Campbell & Jeffrey Kilmark, 89.4 UMKC Law Review 889 (2021).

remotely held conferences as a general matter. It may be helpful to highlight this in the MDL context, even if obvious.

23. Lines 319-321: "it may be that judicial assistance could facilitate the settlement at the appropriate time of some or all actions before the transferee judge." The suggested language may eliminate unnecessary controversy, which may be raised by those who object to viewing MDL solely as a means of settlement or even hint at such a conclusion. The suggestion fortifies the sentiment expressed in the next sentence in the draft Committee Note: "Ultimately, the question whether parties reach a settlement is just that – a decision to be made by the parties."

24. Lines 343-344: "identifying the appropriate transferor district court for transfer ~~at the end of the pretrial phase~~ on remand…" I believe the draft Note is aimed at addressing remands. The draft language may raise questions about the meaning of the pretrial phase and when it ends for all or some cases; better to clarify the meaning so that all can easily understand.

25. Lines 357-361: "If the court is considering adopting a common benefit fund order, it should consider~~ation of~~ the relative importance of the various proceedings ~~may be important~~ to ensure a fair arrangement and be aware of the unsettled law regarding assessing common benefit fees on lawyers involved in related state-court actions, with or without their consent." If the intent of the draft Committee Notes is to address Judge Chhabria's concern about assessing a common-benefit assessment on counsel in related state-court MDL actions, the language is opaque. The suggested language tries to clarify the intent.

26. Lines 379-383: "Because active judicial management of MDL proceedings must be flexible, the court should ~~be open to~~ anticipate modifying its management order…." The initial management order is entered at the beginning of the case, when the judge is grappling with scores of issues that need immediate action at a time when the judge has had insufficient time to learn about the case. The suggested language is stronger and clearer in describing what happens in these MDLs.

I look forward to the Committee hearing on January 16, 2024.

Thank you.

John Rabiej,
Founder and President
Rabiej Litigation Law Center

TAB 10

GIRARD SHARP

January 2, 2024

Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
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Re: Proposed New Federal Rule of Civil Procedure 16.1

Dear Members of the Advisory Committee on Civil Rules:

My name is Dena Sharp, and I am a partner with Girard Sharp LLP. We represent plaintiffs in class actions and other complex cases. I serve as co-lead counsel in the *In re JUUL* MDL before Judge William H. Orrick III. I am also lead counsel in several other complex antitrust MDLs (and non-MDLs), and serve on the plaintiffs' steering committee in the *In re Philips CPAP* MDL.

Before I offer a small handful of observations and suggestions for the Committee's consideration, I wish to acknowledge the considerable effort the Committee has obviously devoted to the important objective of creating a toolkit for effective judicial management of MDLs. The draft Rule and Note promote the flexibility and discretion that an MDL transferee court needs to effectively manage its docket in a manner that is tailored to the needs of the unique MDL before it, while consistent with Rule 1's principles.

The modest amendments suggested below aim to underscore the proposed Rule's flexibility; round out the transferee court's toolkit by providing additional context for MDL practice, including in matters with a class action component; and address the important subject of sequencing—of the Rule 16.1(c) topics, of the leadership proceedings and interim appointments, and the many other moving parts in the early stages of an MDL.

1) **Clarification that certain Rule 16.1(c) topics may be addressed at the initial conference on a preliminary basis only, or deferred to later case management conferences, will promote flexibility.**

The topics listed in Rule 16.1(c) are comprehensive. Each may raise complex, multifaceted, and highly dynamic questions over the life of a case. Even in the best of circumstances, there is only so much the parties and court can cover in the initial conference.

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Effective judicial management of an MDL often calls for periodic status conferences, resulting in what amounts to an ongoing conversation between the court and counsel on both sides of the "v." Consequently, as a matter of sequencing and in the interest of the orderly conduct of the proceedings, in most cases the topics identified in 16.1(c) are best addressed on an iterative basis over a series of case management orders entered in the MDL (as Rule 16.1(d) implicitly acknowledges).

Though the draft Rule is not prohibitive in this regard, express language clarifying that the initial MDL management conference is likely not the last will leave less margin for error in the reading of Rules 16.1(a) and 16.1(c) together. Minor adjustments along these lines may also address concerns that have been raised about how best to handle the 16.1(c) topics meaningfully prior to leadership appointments (discussed further below), and may encourage MDL judges to hold periodic conferences with counsel, a practice most practitioners believe correlates with greater efficiency and speedier outcomes.

One option is to include language in the text of Rule 16.1(c) that specifies that the transferee court may determine, on its own or on the suggestion of a party, that certain topics on the 16.1(c) list are best addressed on a preliminary basis at the initial conference, or deferred to a later conference:

> The report must address any matter designated by the court, which may include any matter addressed in the list below or in Rule 16. The transferee court may determine, or a party may suggest, that certain topics should be addressed on a preliminary basis at the initial conference, or deferred to a subsequent conference, as appropriate for the needs of the MDL, and consistent with Rule 16.1(d). The report may also address any other matter the parties wish to bring to the court's attention.

Alternatively, if the Committee is not inclined to revise the language of the proposed Rule itself, similar points could be made in the Note to Rule 16.1.(c).

2) Frontloading leadership appointments and encouraging the transferee court to set expectations about that process will help advance the case and shorten the pre-leadership appointment phase.

To address concerns about setting an overly ambitious Rule 16.1(c) agenda before appointment of leadership, the Committee should consider encouraging the transferee court to use its initial MDL order to: (1) expedite leadership proceedings by entertaining applications at the initial status conference or as soon after as practicable, and (2) provide guidance on the court's expectations and preferences for the leadership application process.

Prioritizing leadership appointments reduces costs and is consistent with Rule 1, allowing the parties and the court to reach the merits of the claims as soon as possible, and with less wheel-spinning. Early guidance from the transferee court as to leadership may include: the number of lead or co-lead counsel the court is inclined to appoint; whether the court is inclined

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to appoint a plaintiffs' steering committee, executive committee, or some other committee structure; whether the court is receptive to "slates" or prefers individual applications; whether the court will accept "self-ordered" proposals, or make its own appointments; whether the court prefers formal motion practice or shorter letters accompanied by resumes (brevity, and no reply briefs, are often favored by courts and counsel); whether the court wishes the parties to provide contact information for other judges before whom applicants have appeared; and whether the court prefers to hold a formal hearing, or conduct interviews of applicants, or decide leadership based on written submissions. With the court's direction, applicants can tailor their efforts, all in the hopes of getting leadership appointments in place as quickly as possible.

In the *JUUL* MDL, for example, Judge Orrick's initial pretrial order set out his plan for leadership appointments, specified topics each leadership applicant should address, identified criteria the court intended to apply, set a timeline for submissions, and notified leadership applicants that they would have an opportunity to address the court briefly at the initial status conference in the MDL. *See In re JUUL Labs Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. 3:19-md-02913-WHO, ECF 2 ¶ 7 (N.D. Cal. Oct. 02, 2019) (pretrial order) (attached as Exhibit 1). The court also identified topics in the *Manual for Complex Litigation* relating to initial and subsequent case management orders, and organization of counsel as "a tentative agenda for the conference," and invited suggestions from the parties as to any other case management proposals or additional agenda items. *Id.* ¶8. And while Judge Orrick directed the parties to submit "a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues," the order noted that these "statements will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings." *Id.* ¶9.

Focusing the initial status conference in the MDL on appointing leadership and otherwise addressing topics that the parties are able to productively, if preliminarily, cover in that pre-leadership circumstance has the net effect of advancing the MDL, while acknowledging the limited authority the various parties and counsel may have prior to leadership appointments.

3) Designation of "interim counsel," where appropriate, may be an alternative to "coordinating counsel."

The idea behind streamlining leadership appointments is to shorten the pre-leadership phase, thereby reducing costs and time to disposition. Designation of "coordinating counsel" as proposed in draft Rule 16.1(b) has the potential to help expedite early stage proceedings as well, but concerns have been expressed over the practical implications of creating an additional position for counsel.

To address those concerns, the Committee may wish to instead adopt the nomenclature and approach already followed by some MDL judges to describe this temporary role as an "interim counsel" position, thus emphasizing that counsel's appointment is limited to serving until the court considers the full complement of leadership applications and attendant proposals. *See, e.g., JUUL*, No. 3:19-md-02913-WHO, ECF 250 (N.D. Cal. Nov. 11, 2019) (minute order

appointing counsel in an "interim capacity" to "move the initial discovery process forward and to address other issues as necessary," but emphasizing that "interim MDL appointments are just that, interim"); *In re Philips Recalled Cpap, Bi-Level Pap, & Mech. Ventilator Prod. Liab. Litig.,* No. 2:21-mc-01230-JFC (W.D. Pa. Nov. 11, 2021), ECF 33 (pretrial order appointing "interim lead plaintiffs' counsel" for the purpose of negotiating an interim proposed preservation order).

The "interim counsel" language aligns with Rule 23(g)(3)'s provision for appointment of class counsel before determining whether to certify any class. *See id.* ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action."). While the duties of interim *class* counsel under Rule 23 will differ from those of interim counsel in a mass tort MDL (as discussed further below), the "interim" concept better captures the intent of Rule 16.1(b) without introducing a new titled counsel position.

4) The Rule and Note should reflect that not all MDLs are product or device mass tort cases.

The draft Rule focuses largely on product and device mass tort MDLs, which to be sure present many of the difficult case management issues that prompted the Committee to undertake these revisions. As the Committee recognizes, however, cases that are centralized under section 1407 include a range of cases beyond product and mass tort claims, such as antitrust, securities, privacy, consumer protection cases, and more. Recent years have also seen an increase in "hybrid MDL" proceedings, which may include personal injury claims, class action claims, claims brought on behalf of public entities like school districts and Native American tribes, medical monitoring claims, and more.

The proposed adjustments below intend to account for the range of matters that fall within the ambit of section 1407 by adding express references to Rule 23(g) and class counsel appointments to the leadership considerations, focusing on the "legal effect" of a consolidated class action complaint under draft Rule 16.1(c)(5), and differentiating between types of MDLs in certain instances.

a) ***Leadership proceedings and Rule 23(g).***

With respect to leadership appointments, the Note acknowledges that a transferee court faced with leadership decisions may need to take into account the range of claims and plaintiff interests in the MDL. The draft does not reference Rule 23(g), however, which governs the appointment of counsel in a class action.

Leadership considerations in a class action differ from those in a mass tort case. A leadership appointment under Rule 23(g) is often "winner take all," in the sense that class counsel is appointed by the court to represent the proposed class(es) as a whole and is vested with authority over *all* the class's potential claims. Rather than presiding as lead counsel over claims brought by individuals or entities who have retained different lawyers to represent them, as may be the case in a mass tort MDL, Rule 23(g) vests class counsel with not just the authority,

but the obligation, to prosecute the class's claims in the best interests of the class—"an obligation that may be different from the customary obligations of counsel to individual clients." Fed. R. Civ. P. 23(g) advisory committee's note to 2003 amendment; *see also id.* ("Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it.").

Parallel class and non-class leadership appointments in a single MDL may be appropriate in some proceedings. The transferee court can make that determination, with an understanding that Rule 23(g) places class counsel in a unique position, and does not invite backseat driving by other counsel (which does occur in non-class cases, as illustrated by the draft Rule's discussion of how leadership may handle activity by "nonleadership counsel").

Including explicit cross-references to Rule 23(g) in Rule 16.1(c)(1)(B) and its Note, along with a handful of other suggestions noted below, will provide the transferee court with important perspective on class actions and the unqiue characteristics of a Rule 23(g) appointment, particularly for those MDLs that are comprised of class actions or include a class action component:

> Rule 16.1(c)(1)(B):
> …the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities, and whether appointment of counsel for the proposed class(es) under Rule 23(g) is warranted.
>
> Note to Rule 16.1(c)(1):
> … MDL proceedings in non-class cases may ~~do~~ not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some mass tort MDL proceedings there may be claims by individuals who suffered injuries, and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these types of differences into account in making leadership appointments, including whether appointment of counsel for the proposed class(es) under Rule 23(g) is warranted.

b) ***Consolidated pleadings.***

The consolidated pleadings question that Rule 16.1(c)(5) considers—"whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings"—also raises an issue specific to class actions. As the Note acknowledges, the relationship between consolidated pleadings and individual pleadings "depends on the purpose of the consolidated pleadings in the MDL proceedings." And as the Supreme Court explained in the

Gelboim v. Bank of America case cited in the Note (a class action), a key question is whether the master complaint is "meant to be a pleading with legal effect" or, instead, "only an administrative summary of the claims brought by all the plaintiffs." 574 U.S. 405, 413 n.3 (2015).

The consolidated complaint in a class action serves the critical purpose of aggregating *all* the class's claims into a single pleading that has "legal effect" for the class through judgment. A key feature of Rule 23 is that the class action binds together the class members it implicates (absent a request for exclusion). The class action complaint is intended by its nature to have preclusive effect, in other words.

The master complaint in a mass tort MDL, in contrast, often serves the distinct purpose of providing a single complaint defendants may move against through omnibus or "cross-cutting" Rule 12 motions. The master complaint identifies the claims and defenses that will inform the scope of discovery and other aspects of trial preparation. It does not have the same binding "legal effect" as a consolidated class action complaint, however.

To address this important difference, the following addition could be made to the Note to Rule 16.1(c)(5):

> The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Cases proceeding under Rule 23 may, for example, require only a consolidated complaint which supercedes individual class action complaints falling with the class or classes defined in the consolidated complaint. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp*., 574 U.S. 405, 413 n.3 (2015).

****

Thank you again for the opportunity to address the Committee on January 16, 2024. I look forward to answering any questions that members of the Committee might have.

Respectfully submitted,

/s/ Dena C. Sharp

Dena C. Sharp
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EXHIBIT 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: JUUL LABS INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:
ALL ACTIONS

Case No. 19-md-02913-WHO

PRETRIAL ORDER #1

The Judicial Panel on Multidistrict Litigation ("the Panel") has transferred certain product liability and marketing sales practices actions relating to Juul Labs. Inc.'s products to this Court for coordinated pretrial proceedings. As the number and complexity of these actions warrant holding a single, coordinated initial status conference for all actions in *In Re: Juul Labs, Inc. Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2913, the Court ORDERS as follows:

1. APPLICABILITY OF ORDER

Prior to the initial case management conference and entry of a comprehensive order governing all further proceedings in this case, the provisions of this Order shall govern the practice and procedure in those actions that were transferred to this Court by the Panel. This Order also applies to all related cases filed in all divisions of the Northern District of California and all "tag-along actions" later filed in, removed to, or transferred to this Court.

2. COORDINATION

The civil actions transferred to this Court or related to the actions already pending before this Court are coordinated for pretrial purposes. Any "tag-along actions" later filed in, removed to, or transferred to this Court, or directly filed in the Northern District of California, will

automatically be coordinated with this action without the necessity of future motions or orders. This coordination does not constitute a determination whether the actions should be consolidated for trial, nor does it have the effect of making any entity a party to any action in which he, she, or it has not been named, served, or added in accordance with the Federal Rules of Civil Procedure. To facilitate the efficient coordination of cases in this matter, all parties to this action shall notify the Panel of other potential related or "tag-along" actions of which they are aware or become aware.

3. MASTER DOCKET FILE

The Clerk of Court will maintain a master docket case file under the style "*In Re: Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation*" and the identification "MDL No. 2913." When a pleading is intended to apply to all actions, this shall be indicated by the words: "This Document Relates to: ALL ACTIONS." When a pleading is intended to apply to fewer than all cases, this Court's docket number for each individual case to which the document relates shall appear immediately after the words "This Document Relates to."

4. FILING

Each attorney of record is obligated to become a Northern District of California ECF User and be assigned a user ID and password for access to the system. If she or he has not already done so, counsel shall register forthwith as an ECF User and be issued an ECF User ID and password. Forms and instructions can be found on the Court's website at www.cand.uscourts.gov/cm-ecf. All documents shall be e-filed in the Master file, 19-md-02913. Documents that pertain to one or only some of the pending actions shall also be e-filed in the individual case(s) to which the document pertains. Registration instructions for pro se parties who wish to e-file can be found on the Court's website at www.cand.uscourts.gov/ECF/proseregistration.

5. APPEARANCES

Counsel who are not admitted to practice before the Northern District of California must file an application to be admitted *pro hac vice*. *See* N.D. Cal. Civil Local Rule 11-3. The requirement that *pro hac vice* counsel retain local counsel, *see* N.D. Cal. Civil Local Rule 11-3(a)(3) and 11-3(e), is waived and does not apply to this MDL action. The Court generally

requires in person as opposed to telephonic appearances for any counsel wishing to participate in a hearing and allows attorneys to listen to the proceedings by telephone if they do not intend to speak.

6. LIAISON COUNSEL

Prior to the initial status conference, counsel for the plaintiffs and counsel for defendants shall, to the extent they have not already done so, confer and seek consensus on the selection of a candidate for the position of liaison counsel for each group who will be charged with essentially administrative matters. For example, liaison counsel shall be authorized to receive orders and notices from the Court on behalf of all parties within their liaison group and shall be responsible for the preparation and transmittal of copies of such orders and notices to the parties in their liaison group and perform other tasks determined by the Court. Liaison counsel shall be required to maintain complete files with copies of all documents served upon them and shall make such files available to parties within their liaison group upon request. Liaison counsel are also authorized to receive orders and notices from the Panel or from the transferee court on behalf of all parties within their liaison group and shall be responsible for the preparation and transmittal of copies of such orders and notices to the parties in their liaison group. The expenses incurred in performing the services of liaison counsel shall be shared equally by all members of the liaison group in a manner agreeable to the parties or set by the Court failing such agreement. Appointment of liaison counsel shall be subject to the approval of the Court.

7. LEAD COUNSEL & PLAINTIFFS' STEERING COMMITTEE

The Court will consider the appointment of lead counsel(s) and a Plaintiffs' Steering Committee ("PSC") to conduct and coordinate the pretrial stage of this litigation with the defendants' representatives or committee. The Court requires individual application for a lead counsel or steering committee position. Any attorney who has filed an action in this MD litigation may apply for a lead counsel or steering committee position or both. Applications/nominations for plaintiffs' lead counsel(s) and PSC positions must be e-filed in master case no. 19-md-02913 on or before **October 16, 2019**. A courtesy copy must be mailed directly to chambers.

Each attorney's application shall include a resume no longer than two pages and a letter no longer than three pages (single-spaced) addressing the following criteria:

(1) professional experience in this type of litigation, including MDL experience as lead or liaison counsel and/or service on any plaintiffs' committees or subcommittees;

(2) the names and contact information of judges before whom the applicant has appeared in the matters discussed in response to No. 1 above;

(3) willingness and ability immediately to commit to time-consuming litigation;

(4) willingness and ability to work cooperatively with other plaintiffs' counsel and defense counsel;

(5) access to resources to prosecute the litigation in a timely manner;

(6) willingness to serve as lead counsel, a member of a steering committee, or both;

(7) any other considerations that qualify counsel for a leadership position.

Applications may also include an attachment indicating the names of other counsel who have filed cases in this MDL litigation and support the applicant's appointment as lead counsel or a PSC member.

The main criteria for membership in the PSC will be: (a) willingness and availability to commit to a time-consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation.

All responses or objections to applications must be e-filed in the Master file, 19-md-02913, on or before **October 23, 2019**, and are likewise limited to three single-spaced pages. The Court will hold an initial status conference on **November 8, 2019**, at 2:00 p.m., in Courtroom 2, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. At that time applicants will have the opportunity to address the Court briefly in person. Thereafter, the Court will appoint lead counsel(s) and members of the steering committee(s), if needed, as promptly as practicable.

8. DATE OF INITIAL STATUS CONFERENCE AND CONFERENCE AGENDA

Matters relating to pretrial proceedings in these cases will be addressed at an initial status

conference to be held on **November 8, 2019**, at 2:00 p.m., in Courtroom 2, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. Counsel are expected to familiarize themselves with the Manual for Complex Litigation, Fourth ("MCL 4th") and be prepared at the conference to suggest procedures that will facilitate the expeditious, economical, and just resolution of this litigation. The items listed in MCL 4th Sections 22.6 (case management orders), 22.61 (initial orders), 22.62 (organization of counsel), and 22.63 (subsequent case management orders) shall, to the extent applicable, constitute a tentative agenda for the conference If the parties have any suggestions as to any case management orders or additional agenda items, these suggestions shall be filed with the Court by **October 23, 2019**.

9. POSITION STATEMENT

Plaintiffs and defendants shall submit to the Court by **October 23, 2019**, a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. These statements will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings. The parties' statements shall identify all cases that have been transferred to or related before this Court, and shall identify all pending motions in those cases. The statements shall also list all related cases pending in state or federal court (that have not already been transferred to this Court), together with their current status, including any discovery taken to date, to the extent known.

10. INITIAL CONFERENCE APPEARANCES

Each party represented by counsel shall appear at the initial status conference through the party's attorney who will have primary responsibility for the party's interest in this litigation. Parties not represented by counsel may appear in person or through an authorized and responsible agent. To minimize costs and facilitate a manageable conference, parties with similar interests may agree, to the extent practicable, to have an attending attorney represent the party's interest at the conference. A party will not by designating an attorney to represent the party's interest at the conference be precluded from other representation during the litigation, nor will attendance at the conference waive objections to jurisdiction, venue or service.

11. RESPONSE EXTENSION AND STAY

Defendants are granted an extension of time for responding by motion or answer to the complaint(s) until a date to be set by this Court. Pending the initial case management conference and further orders of this Court, all outstanding discovery proceedings are stayed, and no further discovery shall be initiated. Moreover, all pending motions must be re-noticed for resolution once the Court sets a schedule for any such motions. Any orders, including protective orders, previously entered by any transferor district court shall remain in full force and effect unless modified by this Court upon application.

12. PRESERVATION OF EVIDENCE

All parties and counsel are reminded of their duty to preserve evidence that may be relevant to this action, including electronically stored information. Any evidence preservation order previously entered in any of the transferred actions shall remain in full force and effect until further order of the Court. Until the parties reach an agreement on a preservation plan for all cases or the Court orders otherwise, each party shall take reasonable steps to preserve all evidence that may be relevant to this litigation. Counsel, as officers of the court, are obligated to exercise all reasonable efforts to identify and notify parties and non-parties, including employees of corporate or institutional parties, of their preservation obligations.

13. COMMUNICATION WITH THE COURT

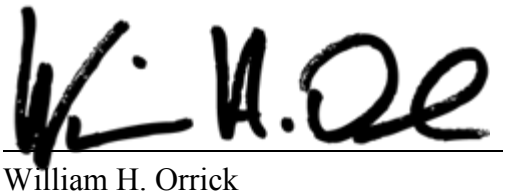
Unless otherwise ordered by this Court, all substantive communications with the Court shall be in writing and e-filed. The Court recognizes that cooperation by and among plaintiffs' counsel and by and among defendants' counsel is essential for the orderly and expeditious resolution of this litigation. The communication of information among and between plaintiffs' counsel and among and between defendants' counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorneys' work product, and cooperative efforts contemplated above shall in no way be used against any plaintiff by any defendant or against any defendant by any plaintiff. Nothing contained in this provision shall be construed to limit the rights of any party or counsel to assert the attorney-client privilege or attorney work product doctrine.

14. DATE OF INITIAL CASE MANAGEMENT CONFERENCE

Once the structure for plaintiffs' representation has been determined, the Court will set a date for an initial case management conference, which will address discovery and other issues.

IT IS SO ORDERED.

Dated: October 2, 2019



William H. Orrick
United States District Judge

United States District Court
Northern District of California

TAB 11

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December 29, 2023

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

Re: Comment on Proposed New Federal Rule of Civil Procedure 16.1 – Multidistrict Litigation

Dear Members of the Rules Committee:

My name is Fred Longer. I am a practicing attorney and partner in the law firm of Levin, Sedran & Berman LLC in Philadelphia, Pennsylvania. I submit these comments about the proposed Rule 16.1 to the Federal Rules of Civil Procedure which I understand is designed to address perceived abuses or flaws in existing Multidistrict Litigation (MDL) practice. I thank the Committee for its considerable time and efforts to draft a rule intended to assist judges presiding over an MDL.

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 MDLs. In this space, I frequently chair or co-chair law and briefing committees. Currently, I am Co-Chair of the law and briefing committee in *In re: Aqueous Film-Forming Foams Products Liability Litigation,* MDL No. 2873 (D.S.C.) and *In re Zantac Products Liability Litigation*, MDL No. 2924 (S.D. Fla.).

Years ago, I authored an article, *The federal judiciary's supermagnet*, TRIAL at 19 (July 2009), which noted that the Judicial Panel on Multidistrict Litigation does not centralize litigation based on its merits, "[r]ather it acts as a weigh station along the federal highway of docket management." Implicit in my thought is the notion that an MDL is just a docket management tool; it is not monolithic, nor is it outcome determinative. An MDL affords a transferee judge enormous opportunities to employ different management techniques – novel (*e.g.,* appointment of a Leadership Development Committee) and traditional (*e.g.,* Rule 12 or 56 motions practice) – to create efficiencies and facilitate the prosecution and defense of the case for all parties involved. So, while I support efforts to improve the MDL process, the imposition of a Rule of Civil Procedure (which should be trans-substantive) on a management tool seems misguided. For this reason, I oppose regulating MDL practice through rulemaking as it is unnecessary. However, if proposed Rule 16.1 is to be implemented, I have a few suggestions to improve it.

While I commend the Rules Committee for its efforts to apply some structure to modern MDL practice, many of the proposed Rule's fixes amount to solutions to problems that do not exist or are matters ordinarily left to best practices guides. Some comments have homed in on this, particularly those of Lawyers for Civil Justice, who likened this Committee's efforts to a vanity project, calling the proposal "aspirational," not a rule.[1] Others are less complimentary, calling the proposal an "absurdity" and declaring that the "'MDL Rule' isn't worth the paper it's printed on."[2] I prefer to think that much ado is being made by those possessing the most resources who are interested in rigging the system to suit their purposes. For equal justice under the law to apply, those with the loudest megaphones should not be heard above those who can barely whisper.

Proposed Rule 16.1 is unnecessary.

The Draft Minutes of the June 2023 Meeting of the Committee on Rules of Practice and Procedure report an MDL rule is needed to address concerns that 1) "MDLs account for a large portion of the federal docket" and 2) some transferee judges perceive "they lack clear, explicit authority [to do things] necessary to manage an MDL."[3] The proposed Rule 16.1 does nothing to address the first concern since the proposed rule focuses on considerations a transferee court is to take for effective case management. Many defense-oriented comments complain of docket congestion allegedly caused by the lack of vetting by counsel for personal injury plaintiffs in pharmaceutical cases. But many of the problems attributed to pharmaceutical product MDLs are not present in other types of MDLs. Calls for a uniform MDL rule mandating receipts or medical records at jump street amounts to overkill for most other MDLs. Their variety

[1] LCJ Comment to the Advisory Committee on Civil Rules at 1 (Sept. 18, 2023) [Comment ID SC-RULES-CV-2023-0003-0004].
[2] *See* James M. (Bexis) Beck, *CPAP MDL Overinflates Plaintiffs' Claims* (Dec. 4, 2023), available at https://www.druganddevicelawblog.com/2023/12/cpap-mdl-overinflates-plaintiffs-claims.html.
[3] Agenda, Meeting of the Advisory Committee on Civil Rules at Page 38-39 of 570 (Oct. 17, 2023), available at https://www.uscourts.gov/file/76890/download.

practically defies the requested vetting conditions. At present, there exists by "docket types" consolidated litigations involving air disasters, antitrust, common disasters, contract, employment practices, intellectual property, miscellaneous (from National Security Agency Telecommunications Records Litigation to Uber Technologies, Inc., Passenger Sexual Assault Litigation), Products Liability, and Securities.[4] And the second concern – whether explicit authority exists for judges to manage their dockets – is already addressed by Rule 83.

As the sky is not falling, I believe that benign neglect is the better course of action for this Committee. The phrase "If it ain't broke, don't fix it" comes to mind as some things are better left well enough alone. MDL judges need flexibility to address myriad differences that exist between MDLs, such as the number of defendants, the number of plaintiffs, the number of counsel, the presence of class actions vs. individual actions or a combination of both, issues with foreign sovereigns, third-parties, and state-federal coordination, just to name a few. To confine them with a rule could restrict them from nurturing new methods to accommodate their unique circumstances. Incubating new ideas is the touchstone of MDL practice. For example, to my knowledge, Plaintiffs Fact Sheets were first developed in the *Fenphen* litigation. Defense Fact Sheets were first implemented in the *Vioxx* litigation. Censuses were first evaluated in the *Zantac, JUUL*, and *3M Earplug* litigations. Innovations such as these could unintentionally be snuffed out with too much regulation. I recognize that great efforts have been made to craft a dedicated rule to address the so-called "rulelessness of MDLs" that causes some anxiety from a perceived lack of "predictability."[5] These criticisms are as misguided as they are incorrect. Congress has broadly granted through the MDL statute permission for consolidated proceedings which are limited only to procedures "not inconsistent with … the Federal Rules of Civil Procedure."[6] And, in addition to the judiciary's inherent authority, the Federal Rules of Civil Procedure already afford district court's broad discretion to fashion procedures in their courtrooms to fit their needs.[7]

In the event proposed Rule 16.1 proceeds, some modifications are in order.

If a Rule must be enacted to address these apprehensions, then it must adhere to the aphorism *primum non nocere, i.e.,* "First, do no harm." And it is here that the proposed Rule 16.1 largely succeeds. It is chock full of useful guideposts for the uninitiated transferee judge to consider at the onset of any new MDL. But most, if not all of the guideposts provided in the

[4] See https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Docket_Type-December-15-2023.pdf.
[5] Testimony of Christopher Campbell, *In the matter of Proposed Amendments to the Federal Rules of Civil Procedure*, Transcript of Proceeding at 101 (Oct. 16, 2023) [available at https://www.uscourts.gov/file/76799/download].
[6] 28 U.S.C. §1407(f).
[7] *See* Fed.R.Civ.P. 83(b), and the comment thereto ("This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §§2072 and 2075, and with the district local rules.").

proposed Rule 16.1, are already available in Westlaw/Lexis, reference manuals, docket entries from prior MDLs, or through a telephone call seeking advice from a veteran colleague. Nevertheless, certain provisions in the proposed Rule 16.1 give me pause. To begin, Subsection (a) calls for an "*Initial* MDL Case Management" conference at which all of the matters described in Subsection (c) are to be reported on and discussed. But what if the transferee court first wanted to appoint Plaintiffs' leadership so that the report contemplated by Subsection (c) could be accomplished by counsel empowered to represent all the plaintiffs in the litigation *before* the initial case management conference? That option is precluded by the proposed Rule 16.1. Perhaps, my concern about timing is just a technicality of drafting, but as written, the proposed Rule dictates a sequential structure for the first judicial conference that may be unwanted.

For a second example, Subsection (b) creates the post of "Coordinating Counsel," which has never existed in my experience. In the past, courts have appointed liaison counsel sometimes to administer initial communications between the bench and the bar before leadership appointments are completed. This newly minted designee is not well described in the proposed Rule nor the accompanying comments. Adding new layers of counsel could spur contests within the plaintiffs' bar for an interim, undefined position that is unnecessary if the court were to instead focus on immediately addressing plaintiffs' leadership appointments. And, as drafted, the proposed Rule could be interpreted to invite the appointment of a complete outsider who has no meaningful connection to the litigation and who creates turmoil in the ranks of Plaintiffs' and Defendants' counsel. Who is to pay for this potential designee and how does this provision comport with Rule 1's directive to administer justice speedily and inexpensively? The answer is not explained. I recommend against including this Subsection.

Third, the proposed Rule 16.1 mentions Rule 16 but provides no guidance on how the two rules will be co-administered. How the two rules are to work in tandem should be made clearer.

The Committee Notes are overbroad, and some are inaccurate

Finally, some of the Committee's notes are inaccurate, which could potentially distort later proceedings. As the Committee is no doubt aware advisory committee notes are often relied upon to interpret the meaning of the rule.[8] My principal concern is with this sentence : "MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding, and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding." In a data breach or antitrust MDL comprised solely of consolidated class actions, this reference paints with too broad a brush and could haunt class counsel from ever obtaining class certification. I recommend its removal. While I understand the focus of the proposed Rule 16.1 is to address mass torts or product liability cases, it should not be lost on the Committee that the one-size-fits-all proposal will apply to other docket types and, therefore, should not unwittingly prejudice parties *ab initio*.

[8] *See, e.g., United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) ("[T]he Advisory Committee Notes provide a reliable source of insight into the meaning of a rule").

I also take issue with the comment to Rule 16.1(c)(11). The rule addresses "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." However, the Comment veers into "avoiding overlapping discovery" and the "fair arrangement" of allocating common benefit funds. These tangential and speculative concerns are troublesome in a Committee Note. I recommend the removal of this Comment.

Conclusion

MDL judges should have the utmost flexibility to administer their dockets of often complex and protracted litigation. To hamstring them at the outset with criteria available in best practices guides seems unduly patronizing and restrictive. Nevertheless, should the Committee resolve that more regulation of the judiciary is warranted, then my few suggestions to avoid the requirements being imposed at the "initial" conference, and the imposition of a needless coordinating counsel should be followed.

Respectfully,

/S/

FREDERICK S. LONGER

TAB 12

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Douglass A. Kreis (FL)*
Neil D. Overholtz (FL)* (1972-2022)
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Bobby J. "Brad" Bradford (FL, AL)*
Stephen H. Echsner (FL)*
Daniel J. Thornburgh (FL, MN)*
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January 02, 2024

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 Federal Rule of Civil Procedure 16.1 Comment

Dear Mr. Secretary and Committee Members of the Advisory Committee on Civil Rules:

I am a partner at Aylstock, Witkin, Kreis, and Overholtz, PLLC and have focused my practice on complex litigation of all forms since I began practicing law in 2007. My partners and I have specialized knowledge and experience with complex litigation, multidistrict litigations (MDL), and class action cases including all litigation-related proceedings and procedures from inception through resolution. Our firm have been routinely appointed by various courts across the country to MDL committees and subcommittees with diverse roles and responsibilities too numerous to set forth comprehensively herein.[1] I am currently appointed to leadership in the 3M Combat Arms Earplug MDL 2885 (on the Discovery Committee and assist my partner Bryan Aylstock in his role as Lead Counsel), Hair Relaxer MDL 3060 (Plaintiffs Executive Committee) and Proton Pump Inhibitor MDL 2789 (Plaintiffs Executive Committee).

1. Background and Flexibility of MDLs

The Federal Rules of Civil Procedure (FRCP) were promulgated in 1937 to "govern civil proceedings in the United States" with the primary purpose "to secure the just, speedy, and inexpensive determination of every action and proceeding."[2] While the FCRP are a mechanism of the court system, the MDL process is also a mechanism of the court **process**. The intersection between the two is unique to this area of legal practice. In MDLs, the civil rules are applied appropriately and MDLs counsel and court are not attempting to circumvent the FRCP. As such, there is a lack of urgency and need for an MDL specific rule.

Due to need, there are areas of litigation – such as social security and class action claims – which have been enacted by law. Specifically, the Social Security Act was enacted in 1935 whereas

[1] Please refer to my resume and the firm's resume for specific appointments and notable complex/multidistrict litigation experience.
[2] Fed. R. Civ. P. 1.

FRCP 23 paved the way for class actions to be filed in federal court. The Class Action Fairness Act of 2005 (CAFA) further expanded federal jurisdiction for class actions. In 1968, Congress enacted 28 U.S.C. section 1407 which established the Judicial Panel on Multidistrict Litigation (JPML) with the authority to consolidate numerous claims into one jurisdiction before a transferee judge for the purpose of coordinating pretrial discovery.

Some legal historians or academic enthusiasts for mass joinder might argue that the mass torts of today were never the intention of a strict reading of USC 1407. It is true that the JPML was created during a different era. It was a time when moving all claims made sense due to the nexus of the physical injury point. Over time mass torts have been expanded due to the nature of national commerce. Now, it is not the nexus of the injury at a specific point but instead the nexus of litigation in a specific location based on a variety of factors focused on during decades of JPML rulings and USC 1407.

While the FRCP are a mechanism of the court system, the MDL process is also a mechanism of the court process. At no point prior to now has there been an intersection between the two. In MDLs, the civil rules are applied and there is no way that MDLs are attempting to circumvent the FRCP.

Each MDL has distinct and unique claims, injuries, products, and parties involved. It would be entirely limiting and unreasonable to expect that each litigation that is deemed "complex" follow the same exact trajectory. To quote, Judge Rodgers' perspective on MDLs in the 3M Litigation, the largest mass tort to date, during the First Case Management Conference:

> One thing that certainly I've learned from my experience just as a judicial officer but also specifically in the complex litigation realm with the Abilify MDL is that there is no magic formula or recipe for handling any MDL. Every one is unique, has its own unique challenges. Approaches that may work in one context do not necessarily fit or work in another (3M MDL First Management Conference Transcript, 04/17/2019, p. 8: 05-12).

The committee must understand that there have been decades of MDL litigation where the FRCP, as they exist, have already been adequately applied. Codifying the types of clauses included in proposed Rule 16.1 will have an unintended consequence of changing the fabric of mass torts unless this committee considers the comments provided herein. There is not an urgent need for change because mass torts have existed for 50 years working hand in hand with the FRCP.

While there is a shift toward larger MDLs and an ever growing volume of cases that are in the federal judiciary related to mass torts, that does not indicate on its face that a rule should be created to "fix" a system that is not inherently flawed. The size of mass torts are being driven by the size of consumer sales and consumption as well as by ever growing access to information in a digital age. Mass torts themselves do not generate larger mass torts; the increased sale and defect of the products over which consumers bring lawsuits expand the size of an MDL. As such there is no urgency or broken system that needs to be resolved to fix the MDL process to the extent as outlined in Rule 16.1.

The MDL mechanism as it relates to products liability litigation furthers the main objective of the FRCP: it provides individual consumers across America who have been negatively harmed, impacted, or injured by the products of corporations an opportunity to hold those corporations accountable for their wrongdoing. There is no similar check on widespread corporate malfeasance other than the MDL. Any perceived or actual limitations on individual consumers to seek redress in the court system could be improper without careful consideration prior to enacting any changes to existing procedures, rules, and practices.

2. Unsupportable Claims

I appreciate the hard work of the committee in carefully considering all that has resulted in the creation of the Proposed Rule 16.1. While I acknowledge that the MDL process is not without flaws, I seek to enhance awareness about how proposed Rule 16.1 in its current draft requires additional changes and why certain provisions in the proposed rule, including Rule 16.1 (b) and Rule 16.1(c), are not appropriate nor necessary to be addressed at an initial conference per Rule 16.1 (a). Before jumping into the specifics of those changes, I will briefly address the defense-side comments that focus on "unmeritorious claims."

Despite widespread efforts to change tort litigation and reduce damages over the past 50 years via tort reform, there is an ever shifting momentum in this country to ensure plaintiffs have a right to a day in court -- especially when harmed by defective or dangerous products and devices. One example of this was the recent repeal in Michigan of a law that has been in effect for nearly 30 years and has banned pharmaceutical liability lawsuits in the state. This legislative change will provide an avenue for residents of the 10th largest state in the country (by population) to seek recourse against pharmaceutical companies that have manufactured products and devices that have injured or killed individuals.

The FRCP enumerates the requirements for filing a lawsuit. These requirements have been and continue to be utilized in MDL. A plaintiff understands and believes their claim meets the requirements at the time of filing. However, until proven otherwise that does not mean a plaintiff's claim is meritorious or supportable by science as well as law. The Lawyers for Civil Justice credits, in their comment, the filing of large amounts of mass tort cases to the "unaddressed FRCP problem" for "inviting counsel to 'get a name, file a claim.'[3] There is no prohibition on filing meritorious cases simply because defense counsel does not want to defend against a large volume of lawsuits by those harmed by the exact companies against who lawsuits are brought. Furthermore, as discussed throughout, the MDL process remains one of the only mechanisms in our country for consumers to hold companies accountable for their dangerous and defective products.

In the 3M Litigation, concerns over unmeritorious claims or potentially fraudulent (or missing-in-action plaintiffs) were raised repeatedly throughout multiple years of litigation. The volume of filed cases swelled rapidly to 20,000 with hundreds of thousands of additional claims being tolled on agreements between the parties. The tolled (or other unfiled cases) were uniquely addressed by Judge Rodgers – requiring establishment of an administrative docket, a rapid census process and eventually, requirement of production of a DD214 to establish military

[3] Lawyers for Civil Justice (LCJ Comment), p.5.

service (or an alternative proof) of use of the 3M earplugs during the timeframe they were commercially available. The 3M Combat Arms Earplug litigation at its height had over 300,000 claimants with filed lawsuits. More than 270,000 unique claimants were identified for participation in the Settlement program announced in August of 2023 within an ongoing settlement program today[4]. A large volume of claims is not enough for a prima facie case that the claims are an "unaddressed FRCP problem" or that counsel "get a name, file a claim." This resolution occurred in large part due to the flexibility the MDL Court had to address the unique issues central to the litigation and the flexibility to direct discovery to the best result for all parties.

3. Discretionary Nature of Rule 16.1

Proposed Rule 16.1 appears to provide discretionary guidance during the inception of a mass tort by suggesting that the transferee court schedule an initial MDL management conference, designate a coordinating counsel as well as ask that the parties prepare a report containing suggested topics in preparation for the management conference. While a rule like this one could be helpful to the court in clarifying initial objectives of the parties, the current draft as it stands provides unnecessary suggestive framework that will result in creating redundancy and potentially even more complications during initial formation.

In the 3M litigation, the JPML order consolidating the 3M cases was entered on April 3, 2019 and by April 17, 2019, the court held the First Case Management conference during which multiple important threshold topics were discussed including the leadership appointment structure, the direct filing process, and pleadings, to name a few (3M MDL First Management Conference Transcript, 04/17/2019).

There are currently multiple authorities that judges and parties currently rely on and that have meaningfully been utilized in complex litigation. The existing procedures and practices contained in the Annotated Manual for Complex Litigation (2017), the updated version of the Manual for Complex Litigation (4th ed.) ("MCL"), has served as sufficient framework and guardrails to assist the court and litigants in setting the pace and foundation for the formation of a mass tort and beyond. For example, at the outset of the 3M litigation, the court via the Pretrial Order No. 2, required counsel "to familiarize themselves with the MCL and be prepared at the conference to suggest procedures that will facilitate the expeditious, economical, and just resolution of this litigation" (3M Litigation Pretrial Order No. 2, 2019-04-05). The court even went as far as to include the most updated version of the Manual, the Annotated Manual for Complex Litigation (2017), to be the most up to date version relied upon during this MDL (3M MDL First Management Conference Transcript, 04/17/2019, 16:19- 17:02).

Again, there currently exists sufficient framework and safeguards for MDLs to operate absent Rule 16.1. Specifically, the Annotated Manual for Complex Litigation (2023) includes the following general principles:

[4] At the time of this submission, Registration and Election to participate in the Combat Arms settlement closes on January 25, 2024, and more than 2/3 of the identified claimants have made an election in the program to date. The process speaks for itself.

> "Fair and efficient resolution of complex litigation requires at least that (1) the court exercise early and effective supervision (and, where necessary, control); (2) counsel act cooperatively and professionally; and (3) the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings." (Annotated Manual for Complex Litigation | May 2023 Update)[5]

4. Rule 16.1(b) – Coordinating Counsel

While the rule appears inherently flexible, providing discretionary guidance to designate a coordinating counsel seems to be redundant and duplicative. The appointment of a coordinating counsel early in the litigation would be entirely and frustratingly inefficient. For one, the language of the rule is silent as to the requirements of the experience of the coordinating counsel with complex litigation. How will the court determine who the coordinating counsel will be? Will this add a layer to the leadership appointment process requiring yet another round of leadership applications? Will this coordinating counsel be neutral? Or will coordinating counsel become a de facto interim lead counsel for one party or the other?

Additionally, the rule is ambiguous as well as silent about the familiarity of the coordinating counsel with the current litigation as well as prior experience of coordinating counsel with complex litigation. Would someone who was involved in the Talc litigation be appointed to coordinating counsel in an antitrust litigation? How can the court expect an individual in the position of coordinating counsel to meaningfully contribute to and complete the requirements of the below provisions, (b)(1) and (b)(2), of Rule 16.1 if the coordinating counsel has no familiarity with the parties and current issues before the court?

> (b)(1) assist with the conference; and
>
> (b)(2) work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).

Although criticism of "repeat players" in mass torts exists, the expertise gained from years of experience working on complex litigation cannot be substituted by an inexperienced third party. In the 3M MDL, the court appointed Bryan Aylstock, a law partner of mine and one the founders of our firm, to be the interim lead and liaison counsel on April 5, 2019 (3M MDL Pretrial Order No. 2, 04/05/2019, p. 4 – 5). Mr. Aylstock was not only conveniently located to the court but had the recognized expertise and known reputation of doing "an outstanding job" in prior MDL litigations before the court (3M MDL First Management Conference Transcript, 04/17/2019, p. 19: 03-25). Mr. Aylstock was ultimately appointed lead counsel of the 3M litigation after the court conducted a fair and transparent appointment process (3M MDL First Management Conference Transcript, 04/17/2019, p. 19: 16-25).

Personally, it was not until after more than a decade of practice, focused solely on mass torts and complex litigation, that I had gained the experience to handle the complexities of this type of work. Prior to experiencing multiple MDLs from start to completion – whether it be dismissal or settlement resolution – it can be difficult for any practicing attorney to fully realize all of the

[5] Ann. Manual Complex Lit. § 10 (4th ed.)

different components or be prepared to address layered complexities within a specific litigation. The underlying defect or injury varies widely across MDLs; you "learn a new industry" every few years when working as a litigator in MDLs. But the underlying process, formalities and guidance provided by the MCL are applied through the lens of experience gained in prior litigation. Handling a litigation with a large volume of individual plaintiffs is complex and different than handling a litigation against multiple unique defendants who sold similar products resulting in related injuries. MDLs rarely involve plaintiffs with identical circumstances against a single defendant. While much criticism is brought about "repeat players" in MDLs; experienced litigators are needed to lead and guide these cases through the MDL system appropriately and effectively. Furthermore, it is well known that "transferee judges tend to seek guidance from predecessors, peers, and lawyers who have litigated other multidistrict proceedings."[6]

The leadership process is better left addressed during the leadership appointment and application period. During the leadership period in the 3M litigation, the court set out to establish a "diverse team" of "individuals who have demonstrated the capacity, the knowledge, and the skill set, reputation, resources, and energy to effectively and efficiently lead the MDL" (3M MDL First Management Conference Transcript, 04/17/2019, p. 20: 01-09). Again, this underscores the importance of and the for need for practitioners who understand the complexity and intricacies of complex litigation as well as understand what future problems can arise from the very start of any litigation.

Finally, I would be remiss to fail to mention that any additional costs and fees placed on clients by this discretionary appointment would no doubt decrease the ultimate recovery, if successful, for a client on the plaintiff's side. These associated fees and costs are avoidable by the current practice of appointing a neutral party such as a magistrate or special master to assist the court with the initial management conference.

The coordinating counsel appointment appears duplicative of the purpose of the magistrate or special master in supporting the court. It also appears to step into the process of the JPML in appointing a judge to oversee the MDL. The JPML has already gone through the arduous process of determining where to consolidate and which judge to consolidate in front of. Why is it needed to add another layer of court appointed counsel to coordinate for the judge who has just been appointed and selected? This is not the process in the Manual for Complex Litigation where the court appoints an intermediate lead counsel and an intermediate lead counsel for defendant. If the court needs assistance, the neutral should be the magistrate or special master.

Prior to the First Management Conference in the 3M Litigation, Judge Rodgers assigned Magistrate Judge Gary Jones to be the magistrate in the litigation (3M MDL PTO 1, 2019-04-05). On the record, Judge Rodgers recognized Magistrate Judge Jones' prior experience working on the *Abilify* MDL and stated that he would be relied on for many issues including electronic discovery, ESI, in the 3M Litigation (3M MDL First Management Conference Transcript, 04/17/2019, p. 5: 15-25). Additionally, Ellen Reisman was appointed the Common Benefit

[6] Elizabeth Chamblee Burch and Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017)

Special Master to work closely with Lead Counsel and the Common Benefit Fund Committee (3M MDL Order of Appointment, May 28, 2019).

Further, during the leadership appointment process in 3M, Judge Rodgers utilized a panel consisting of three neutrals, in addition to herself, to help with seating plaintiff's leadership. The panel members were Judge Rodgers, Judge Jones, Orran Brown, and Ellen Reisman (3M MDL Civil Minutes – General, 05/21/2019). The neutrals were appointed to assist the judge early on with managing the litigation. Further, retired Judge David Herndon was appointed a Special Master to help the court "in moving the affirmative defenses into a posture for dispositive motion practice as well as "help facilitate and manage discovery" (3M MDL Order of Appointment, 10/15/2019). The requirement for a coordinating counsel appears to be a limitation on an MDL judge's authority to appoint those neutrals, magistrates or Special Masters required for the efficient management of a unique litigation.

As it relates to the committee note related to 16.1(b), "recognizing the court may designate of coordinating counsel and specifically the inclusion of "perhaps more often on the plaintiff side than the defendant side –"; there are already mechanisms and steps for MDL judges to address this need.[7]

5. Rule 16.1(a) in conjunction with Rule 16.1(c)

Rule 16.1(a) guides the transferee court to schedule an initial MDL management conference. This conference can and does set the stage and pave the way for an efficient and clear MDL case management plan.

However, based on experience, it is most appropriate to only include the below topics currently referenced in the proposed Rule.16.1(c) report to be provided to the court during the Rule 16.1(a) initial management conference:

(1) whether leadership counsel should be appointed, procedure for appointment, structure of leadership counsel, and related responsibilities;

(2) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

(3) <u>to the extent possible and without prejudice to leadership counsel after appointment</u>,[8] identifying the principal factual and legal issues likely to be presented in the MDL proceedings;

[7] In re: *Actos (Pioglitazone)*, three special masters were appointed to assist the court when the court realized that additional neutrals were necessary to assist in the organization of the litigation and appointed them via the court's inherent powers. The court wrote "Other MDL Courts, facing similar challenges, have easily concluded that appointment of Special Masters was appropriate to help the Court with various pretrial, trial, and post-trial tasks…The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation" (Actos Order Appointing Special Masters, 04/11/2012).

[8] I recommend that the underlined language be incorporated into 16.1.(c)(3) of the draft rule.

(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 them.

Limiting the inclusion to the above provisions directs the parties and the court to only consider what is essential at this stage of the case. Addressing additional topics confuses the issues and is, quite frankly, too early in the discovery process to do anything other than hamstring the parties and the Court from achieving the purpose provided by 28 USC 1407 – coordination for pretrial discovery.

There is a significant disadvantage to Plaintiffs' counsel made by requiring additional specific discovery requirements prior to any leadership structure being appointed; regardless of the usefulness of an appointed coordinating counsel. Although the provisions of Rule 16.1(c) proport to be a tool for the court to use, if the language of the proposed rule is not adapted to limit the topics, individual plaintiff's counsel will be required to make decisions that are more appropriate for an appointed leadership counsel.

Further, any decisions made to include the below provisions would substantially impair the development of the MDL resulting in plaintiff's counsels inability to represent our clients adequately and responsibly:

(4) how and when 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 assessing 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);

(12) whether matters should be referred to a magistrate judge or a master.

These items should be removed from Rule 16.1 or made entirely optional within the associated comments.

For the above reasons, there is not an urgent nor dire need for the provisions included in the current draft of Rule 16. However, if it is ultimately enacted, the Proposed Rule should be

narrowed to remove inappropriate and unnecessary provisions better left to the discretion of the MDL Court and the parties.

I appreciate the effort and time that the Committee has spent on this matter and look forward to speaking with the Committee during the remote hearings on January 16, 2024. Every individual who has been involved in the process of developing Rule 16.1 shares the goal and hope that final promulgation of this Rule will not hinder the adjudication of justice for claimants across the country. The recommendations submitted herein are in furtherance of that intention. At that time, I intend to answer any questions that Committee members may have for me and elaborate on my comments if afforded the opportunity.

Sincerely,

Jennifer Hoekstra

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FIRM RESUME

With twenty-four licensed attorneys and over three hundred staff members, AWKO has the resources, infrastructure, and experience to prosecute even the most complex national litigations. The firm utilizes a robust case management database designed for use in class and other complex litigation, which can track client communications, written pleadings, correspondence, and other case information for tens of thousands of matters and clients. AWKO employs an on-site IT team and database administrators as well as software developers to remain on the cutting edge of litigation and claims administration technology.

MULTIDISTRICT LITIGATION

Since AWKO's formation twenty-one years ago, courts around the country have appointed the firms' attorneys to leadership roles in product liability litigation, involving the claims of hundreds of thousands of plaintiffs, collectively. Most recently, after serving as Lead Counsel as well as lead trial counsel in multiple successful trial verdicts, AWKO attorneys successfully spearheaded the successful resolution of the largest MDL in history:

- *In re: 3M Combat Arms Earplug Products Liability Litigation*, 3:19-md-2885 (Lead Counsel on behalf of Plaintiffs; Executive Committee; Discovery & ESI Committee; Experts and Science Committee);

Other representative examples include:

- *In Re: Ethicon, Inc., Pelvic Repair System Prod. Liab. Litig.*, MDL 2327 (Coordinating Co-Lead Counsel and PEC) (overseeing MDLs 2187, 2325, 2326, 2327, 2387, 2440, 2511) and (Co-Lead, overseeing In Re: Ethicon, Inc.);
- *In Re: Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, MDL 2004 (Co-Lead);
- *McLaughlin v. Bayer Essure, Inc., et al.,* 14-7315 (E.P. Pa.) (Co-Lead Counsel and PSC);
- *In Re: Abilify Prod. Liab. Litig.*, MDL 2734 (Liaison Counsel, PEC and Co-Chair of the Common Benefit Committee);
- *In Re: Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.*, MDL 2342 (Coordin. Counsel);
- *In Re: Effexor (Venlafaxine Hydrochloride) Prod. Liab. Litig.*, MDL 2458 (Co-Lead and Multi-District Coordin. Counsel);

- *In Re: Avandia Marketing, Sales Practices and Prod. Liab. Litig.,* MDL 1871 (Co-Lead; Advisory Committee, and Common Benefit Fee Committee);
- *In Re: Proton-Pump Inhibitor Prod. Liab. Litig.*, MDL 2789 (Co-Chair, PEC);
- *In Re: Elmiron (Pentosan Polysulfate Sodium) Prod. Liab. Litig.,* MDL 2973 (PEC);
- *In Re: Fluoroquinolone Prod. Liab. Litig.*, MDL 2642 (PEC);
- *In Re: Biomet M2a Magnum Hip Implant Prod. Liab. Litig.*, MDL 2391 (PEC);
- *In Re: Incretin Mimetics Prod. Liab. Litig.*, MDL 2452 (PEC);
- *In Re: Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, MDL 2385 (PEC);
- *In Re: Actos (Pioglitazone) Product Liability Litigation*, MDL 2299 (PSC and Pl. Settlement Rev. Comm'ee);
- *In Re: Viagra Products Liability, MDL 1724* (PSC and Co-Lead Settlement Counsel);
- *In Re: Stryker Rejuvenate and ABGII Hip Implant Prod. Liab. Litig.*, MDL 2441 (PSC);
- *In Re: Ethicon, Inc. Power Morcellator Prod. Liab. Litig.*, MDL 2652 (PSC);
- *In Re: Xarelto (Rivaroxaban) Prod. Liab. Litig., MDL 2592 (PSC);*
- *In Re: Zimmer NexGen Knee Implant Prod. Liab. Litig*., MDL 2272 (PSC);
- *In Re: Fleet Oral Sodium Phosphate Litigation*, MDL 2066 (PSC);
- *In Re: Trasylol Prod. Liab. Litig.*, MDL 1928 (PSC).
- *In Re: Recalled Abbott Infant Formula Prod. Liab. Litig*., MDL 3037 (N.D. Ill.) (Co-Lead);
- *In Re: Hair Relaxer Marketing, Sales Practices, and Prod. Liab. Litig*., MDL 3060 (N.D. Ill.) (PEC);
- *In Re: Tepezza Marketing, Sales Practices, and Prod. Liab. Litig.*, MDL 3079 (N.D. Ill.) (PEC); and
- *In Re: Social Media Adolescent Addiction/Personal Injury Prod. Liab. Litig.*, MDL 3047 (N.D. Cal.) (PSC).

Judges nationwide also routinely appoint AWKO attorneys to committees and subcommittees with diverse roles and responsibilities too numerous to set forth comprehensively herein.

CLASS ACTIONS

The firm's attorneys have significant experience as lead counsel in class litigation in national and state class actions, including:

- *In re: Johnson & Johnson Sunscreen Marketing, Sales Practices and Products Liability Litigation*, MDL Docket No. 3015 (S.D. Fla.);
- *Beth Bowen v. Energizer Holdings, Inc., Edgewell Personal Care Company, Edgewell Personal Care Brands, LLC, Edgewell Personal Care, LLC, Playtex Products, Inc., and Sun Pharmaceuticals, LLC*, Case No. 20:21-cv-04356-MWF-AGR, (C.D. Ca., Western Division);
- *In re: Procter & Gamble Aerosol Products Marketing and Sales Practices Litigation*, Case No. 2:22-md-3025, (S.D. Ohio, Eastern Division);

• *In re: MCI Non-Subscriber Telephone Rates Litig.*, MDL Docket No. 1275 (S.D. Ill);
• *In re: America Online, Inc. Version 5.0 Software Litig.*, MDL Docket No. 1341 (S.D. Fla);
• *Ouellette v. Wal-Mart*, Circuit Court, Washington Co., Fla., Case No. 67-01-CA-32;
• *In re: DryClean USA Litig.*, Circuit Court, Dade Co., Fla., Case No. 02-27169-CA-27;
• *In re: Shell Defective Gas Litigation*, Circuit Court, Dade Co., Florida, Case No. 04-12297-CA-10;
• *Begley v Ocwen Loan Servicing, LLC*, Case No. 3:16-cv-00149-MCR-CJK (N.D. Fla.); and
• *Hinote, et al. v. Ford Motor Company, et al.*, Circuit Court, Escambia Co., Fla., Case No. 2004-CA-01658; and
• *In Re: East Palestine Train Derailment*, 4:23-CV-00242 (N.D. Oh.) (PSC).

Members of the firm have also litigated other national class action cases, including: *In re: Honey Transshipping Litigation*, 13-cv-02905, (N.D. Ill.); *Cottrell, et al. v. Alcon Laboratories, et al.*, 3:14-cv-05859 (Dist. of N.J.); *Gustavesen, et al. v. Alcon Laboratories*, 1:14-11961 (Dist. of Mass.); *In re: Microsoft Antitrust Litigation,* MDL Docket No. 1332 (D. Md.); as well as numerous state court class actions such as *In re: Baker v. Baptist Hospital, Inc.,* Circuit Court, Santa Rosa County, Florida, Case No. *2010-CA-1591; Patel v. Citizens Property Ins. Corp.*, Circuit Court, Escambia County, Florida, No. 05-284; and *Lowry v. Vanguard Fire & Cas. Co.*, Circuit Court, Santa Rosa County, Florida, Case No. 05-674.

AWKO attorneys present and publish nationwide on diverse topics pertinent to litigating complex, medical product liability cases, including ESI, general and specific discovery topics, legal issues, scientific and medical topics, as well as claims administration.

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CURRICULUM VITAE

Practice area focuses exclusively on nationwide Complex/Multidistrict Litigation proceedings, including substantive participation in the following cases:

- *In re: Hair Relaxer Marketing Sales Practices and Products Liability Litigation* (NDIL)
  - Appointed, Plaintiffs' Executive Committee
  - Co-Chair Discovery Coordination Committee
  - Co-Chair Electronically Stored Information/Discovery (ESI) Committee
  - Co-Chari Hair Relaxer Product Testing Committee
  - Member, Godrej/Strength of Nature Discovery Committee
- *In re: 3M Earplugs Product Liability Litigation* (NDFL)
  - Appointed, Discovery & ESI Subcommittee
  - Member of *Estes-Hacker-Keefer* March 2021 Bellwether Trial Team
  - Trial Counsel for *McCombs* May 2021 Bellwether Trial
  - Member of *Baker* June 2021 Bellwether Trial Team
  - Trial Counsel for *Adkins* September 2021 Bellwether Trial
  - Trial Counsel for *Blum* October 2021 Bellwether Trial
  - Trial Counsel for *Camarillo* October 2021 Bellwether Trial
  - Trial Counsel for *Finley* December 2021 Bellwether Trial Team
  - Member of *Montero* December 2021 Bellwether Trial Team
  - Member of *Sloan-Wayman* January 2022 Bellwether Trial Team
  - Trial Counsel for *Vilsmeyer* March 2022 Bellwether Trial Team
  - Member of *Kelley* April 2022 Bellwether Trial Team
  - Member of *Vaughn* April 2022 Bellwether Trial Team
  - Trial Counsel for *Beal* May 2022 Bellwether Trial Team
- *In re: Proton-Pump Inhibitor Product Liability Litigation* (D. NJ)
  - Member of May 2023 and September 2023 Trial Teams
  - Appointed, Plaintiffs' Executive Committee
  - Team Leader for Takeda Defendants Deposition and Discovery
  - Member of Third Party Discovery Team
  - Member of Regulatory and Clinical Discovery Teams
  - Member of Privilege Log Review Team
- *In re: Xarelto (Rivaroxaban) Product Liability Litigation* (E.D. La.)
  - Member of the Philadelphia *Cooney* trial in August 2018
- *In re: In re: Actos (Pioglitazone) Product Liability Litigation* (W.D. La.)
  - Plaintiffs' Verdict: Allen v. Takeda Pharmaceutical and Eli Lilly & Co. ($9 billion).
  - Global Settlement of $2.7 billion.

- *In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation* (N.D. Tex.)
    - Appointed, Law and Briefing Committee
    - Plaintiffs' Verdicts: *Aoki et. al. v. DePuy et. al.* ($498 million); *Andrews et. al. v. DePuy et al.* ($1 billion); *Alicea et al. v. DePuy et al.* ($248 million).
- *In re: Genetically Modified Rice Litigation* (E.D. Mo.)
    - Six Plaintiffs' Verdicts totaling over $52 million.
    - Overturned Arkansas statutory punitive damages cap (upheld by Ark. Supr. Ct.)
    - Global Settlement of $750 million.

EDUCATION

Columbia College of Columbia University (Deans List). B.A. 2001
Tulane University Law School. J.D. 2007
Tulane University Law School. Certification in Environmental Law 2007

BAR ADMISSIONS

Louisiana State Courts, 2008
United States District Court, Eastern District of Louisiana, 2009
United States District Court, Western District of Louisiana, 2010
United States Court of Appeals, Fifth Circuit, 2009
United States Court of Appeals, Eighth Circuit, 2010

MEMBERSHIPS

Louisiana State Bar Association
Federal Bar Association
American Association for Justice
Florida Justice Association

HONORS & ACHIEVEMENTS

Senior Articles Editor, Tulane Journal of Technology and Intellectual Property.
Gary Lawton Fretwell Crest Award, Tulane University Law School.
Society of Women Trial Lawyers Board Member.

NOTABLE COMPLEX/MULTIDISTRICT LITIGATION EXPERIENCE

Point person for Lead Counsel in *In re: 3M Earplugs Product Liability Litigation* (NDFL, Rodgers, J.). Trial Counsel (or Member of trial teams) for more than a dozen of the sixteen bellwether trials that obtained more than $300 million in verdicts against 3M. Member of the Discovery & ESI Committee; Coordinator of discovery and pre-trial matters, communication with Special Masters, court officials, defense counsel, and Plaintiffs' Leadership. Co-Chair of Bellwether ESI and point person for Remand Discovery issues.

Point person for Lead Counsel in *In re: Actos (Pioglitazone) Product Liability Litigation*, MDL 2299 (W.D. La., Doherty, J.). Coordinator of discovery and pre-trial matters for Special Masters, court officials, defense counsel, and Plaintiff Steering Committee members. Member of bellwether trial team that obtained $9 billion verdict against Takeda Pharmaceuticals (N.A. and Int'l.) and Eli Lilly & Co. (*Allen v. Takeda et al*) and integrally involved in the subsequent $2.7 billion global settlement. Prepared for and participated in more than forty fact-discovery depositions relating to liability of Takeda Pharmaceuticals and Eli Lilly employees.

Appointed by Judge Ed Kinkeade Member of Law and Briefing Committee in *In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation*, MDL 2244 (N.D. Tex.). Coordinator of discovery and pre-trial matters for Special Masters, court officials, defense counsel, and Plaintiff Steering Committee members. Member of trial team in bellwether trials resulting in a $498 million verdict (*Aoki et al*), $1 billion verdict (*Metzler et al*) and $250 million verdict (*Alicea et al*). Prepared for and participated in more than forty fact-discovery depositions relating to liability of DePuy Orthopaedics and Johnson & Johnson employees.

Member of trial team for five bellwether trials that obtained over $4 million in judgments prior to a global $750 million global settlement in *In re: LLRICE 601 Contamination Litigation*, MDL 1811 (E.D. Mo., Perry, J.). Responsible for participating in preparation of exhibit lists and witness designations and evidentiary arguments as well as drafting oppositions to Motions in Limine and Motions for Directed Verdict, Post-Trial Motions and 8th Circuit Appellate briefing. Prepared report for and participated in Economic Expert depositions relating to market loss damages. Prepared and participated in more than seventy-five fact-discovery depositions relating to liability of Bayer CropScience and Bayer AG employees.

Member of trial team that obtained $48 million verdict against Bayer AG, Bayer CropScience AG, and Bayer CropScience LP on behalf of 12 rice farmers in Lonoke County, Arkansas relating to the discovery of Bayer's regulated genetically modified rice in the U.S. commercial rice supply. *Schafer v. Bayer CropScience LP*, CV-06-413 (Ark. Cir. Lonoke Co. 2010). Assisted with the appellate process and successfully upheld $48 million verdict and overturned the statutory Arkansas punitive damages cap as unconstitutional at the Arkansas Supreme Court. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518 (2011). (GMO Rice).

Prepared for and participated as first or second chair in 30(b)(6) Hard Copy Retention, Information Technology, Retention, Corporate Organization and Spoliation depositions, involving corporate representatives from Takeda, Eli Lilly, Bristol-Myers Squibb, Sanofi Synthelabo, Johnson & Johnson, DePuy Synthes and Zimmer Holdings.

INVITED PRESENTATIONS & SPEAKING ENGAGEMENTS

TLMT Bench & Bar Conference and Women's Summit Panel Moderator, December 5-7, 2023. Topics: "Behind the Curtain," "Deposition Tips and Tricks" and "AI Judgement Day"

Co-Chair and Moderator of HarrisMartin's MDL Conference: Oral Decongestant and Mass Tort Updates, November 29, 2023

EDI Judicial Training Symposium Panel Speaker, November 15, 2023. Topic: "The 26(g) Statement: Understanding a Proportional Search"

MTMP Panel speaker, October 12, 2023. Topic: "3M Military Earplugs Settlement"

MTMP Panel speaker, October 10, 2023. Topic: "You've Got Cases, Now What?"

HarrisMartin's MDL Conference Speaker, September 27, 2023. Topic: "3M Earplugs Update"

Women En Mass Pannel Speaker, September 12, 2023. Topic: "3M Ear Plug Litigation: The End Game is Finally Here! Details and Deadlines Regarding the Global Resolution Program"

Minnesota Associate for Justice, 41st Annual Convention Panel Speaker, August 19, 2023. Topic: "Keeping your Sh*t Together through Career Transitions and Life Challenges"

Co-Chair and Moderator of HarrisMartin's MDL Conference: Class Action and Mass Tort - Examining the Blurred Lines in Recent Complex Litigation, July 26, 2023

AAJ Hair Relaxer Litigation Group Panel Speaker, July18, 2023

HarrisMartin Webinar Speaker, June 28, 2023. Topic: "Bard Powerport Implantable Port"

Society of Women Trial Lawyers 2023 Conference Panelist, May 11, 2023. Topic: "Civil "Baston Challenge" a Case Study with Lessons Learned"

TLMT Panel Speaker, March 21, 2023. Title: "Complex Litigation Trials – Effective Opening Statements"

Law and Forensics Webinar, March 15, 2023. Title: "Everything E-Discovery: The 2023 Attorney's Guide"

MTMP Connect Chemical Hair Relaxer Litigation Update Webinar, February 7, 2023

Co-Chair of Harris Martin's MDL Conference: Hair Straightener and Social Media Update, January 25, 2023

MTMP Connect Webinar Speaker, December 7, 2022. Topic: "Chemical Hair Relaxer Litigation"

HarrisMartin's MDL Conference: Navigating Current Mass Tort Litigation Panel Speaker, November 30, 2022. Topic: "Mass Tort Update"

George Washington University Bench Bar Conference Panel Speaker, November 17, 2022. Topic: "Preparing the Mass Tort Trial"

Women En Mass Panel Speaker, October 04, 2022. Topic: "3M Litigation: What is Happening Here and What is the End Game?"

AAJ Technology and Science Section Speaker, July 19, 2022. Topic: "Big Brother is Watching: Biometric and Other App Tracking from Your Fitbit and Apple Watch – Drawing a Line on Discoverability"

Mass Tort Special Masters Summit Speaker, June 7, 2022. Topic: "eDiscovery issues in Mass Tort MDLs"

MTMP Panel Speaker, April 5, 2022. Topic: “Case Study of a Mass Tort Project: 3M Earplugs”

Society of Women Trial Lawyers Panel Speaker, March 13, 2022; Topic: “Deposition Designations and Process During Trial”

AAJ 3M Combat Earplugs Litigation Group Speaker, February 14, 2022

Law & Forensics web seminar, November 19, 2012. Topic: “A Guide to eDiscovery in Artificial Intelligence”

AAJ Technology and Science Section Speaker, August 26, 2021

Law & Forensics web seminar, July 13, 2021. Topic: “What Lawyers Must Know About Technology to Avoid Losing Clients or Their License”

Law & Forensics web seminar, July 8, 2021. Topic: “Understand the Federal Rules of Civil Procedure in the eDiscovery Process”

HarrisMartin web seminar, April 20, 2021. Topic: “TX Power Outage”

Bioethics Course Guest Lecture, April 1, 2021. Tulane University School of Law, New Orleans, LA

Law & Forensics web seminar, March 16, 2021. Topic: “Preparing Social Medial Evidence for Trial – Part 2”

Harris Martin web seminar, March 12, 2021. Topic: “3M Combat Arms Earplugs – Litigating with the Government as a Witness”

AAJ web seminar, December 8, 2020. Topic “E-Discovery and Client Management During COVID-19”

AAJ web seminar, July 27, 2020. Topic: “Hot Topics in Mass Tort Litigation”

AAJ web seminar, January 16, 2020. Topic: “ESI Protocols, Social Media, and Emerging Personal Devices”

HarrisMartin's 3M Combat Earplugs Litigation Conference, May 30, 2019. Topic: “Military Discovery, Science and Other MDL 2885 Hurdles.”

MTMP Panel Speaker, April 11, 2019. Topic: “3M Ear Plug Litigation”

MTMP Panel Speaker, April 10, 2019. Topic: “Proton-Pump Inhibitor Panel”

MTMP Panel Speaker, April 10, 2019. Topic: “3M in NDFL Leadership.”

Thompson Reuters web seminar, March 5, 2019. Topic: “Best Practices in e-Discovery: Let the Rules Guide You.”

Thompson Reuters web seminar, February 13, 2019. Topic: “Cutting E-Discovery Costs Can Save Your Clients Time and Money.”

AAJ February 2, 2019. Specialized Track: Discovery and Litigation Strategies for Drug and Device Cases CLE Titled: “Trends in Phased Discovery: Making It Work for Your Client’s Case.”

HarrisMartin's MDL Conference Panel Speaker January 30, 2019. Topic: “The Significance of Proposed Rule Changes in MDL Procedures & Valsartan.”

PUBLICATIONS

“Pharmaceutical Document Review – More Robot Than Lawyer?” American Bar Association Tort Trial & Insurance Practice, Vol. 18, No, 2, Winter 2016.

Faulkner v. Nat’l Geographic Enter. Inc.: Conflict over Defining Revisions, 8 Tul. J. Tech & Intell. Prop. 247 (2006).

TAB 13

LUFF LAW FIRM PLLC

Patrick Luff
luff@lufflaw.com

January 2, 2024

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 am a practicing attorney and the founder of the Luff Law Firm, a nationwide law firm that regularly represents individuals in multidistrict litigation. In the course of my practice, I have served as co-lead counsel of a state-level multidistrict litigation and on the steering committee for several federal multidistrict litigations. I am also a former professor of law, having taught civil procedure, administrative law, and statutory interpretation at Washington and Lee University School of Law, Sandra Day O'Connor College of Law - Arizona State University, and the University of Oklahoma College of Law. I have also published extensively on mass torts and related matters. It is with this diverse experience that I submit the following written testimony on Proposed Federal Rule of Civil Procedure 16.1 to the Advisory Committee on Civil Rules.

1. Multidistrict Litigation is Multifaceted

As the Committee correctly observes, "[t]here is no single method that is best for all MDL proceedings."[1] That is not surprising, given the variety of cases found in multidistrict litigation. Consider the types of cases listed in the Judicial Panel on Multidistrict Litigation's Docket Type Summary from December 15, 2023: (1) air disaster; (2) antitrust; (3) common disaster; (4) contract; (5) employment practices; (5) intellectual property; (6) products liability; (7) sales practices; (8) securities; and the catchall (9) miscellaneous.[2] For this very reason, the Committee should eschew one-size-fits-all rulemaking for multidistrict litigation—prescriptive or otherwise.

The current, fourth edition of the Manual for Complex Litigation contains 786 pages of

[1] Proposed Rule 16.1(c)(1), Committee Note.

[2] *See MDL Statistics Report – Docket Type Summary*, U.S. Judicial Panel on Multidistrict Litigation, Jan. 2, 2024, *available at* https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-January-2-2024.pdf.

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guidance. While it is true that the Manual for Complex Litigation is about more than multidistrict litigation, and it addresses more than just early-stage case management, the fact remains that to the extent that multidistrict litigation judges need guidance, they have it. Indeed, the Committee acknowledges as much when it writes "[i]n both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance."[3] True, given its length and breadth the Manual for Complex Litigation "may not be easily digested by a judge (or lawyer) newly introduced into MDL proceedings,"[4] but this fact simply underscores the complex nature of multidistrict litigation and serves as further caution against attempting to conform such a diverse field of litigation into a brief set of suggestions.

2. Rulemaking Should Not Beget Rulemaking

One judicial member of the Committee has observed that while Proposed Rule 16.1 is entitled "Multidistrict Litigation," the Proposed Rule in fact is largely concerned with the initial status conference.[5] I share the concern voiced by a judicial member of the Committee about " 'mission creep.' "[6] What begins as a discussion of initial matters to be discussed in the first status conference quickly becomes a clarion call for a comprehensive set of procedures to govern multidistrict litigation. A seemingly innocuous rule providing mere suggestions for early management could quickly become an unwieldy leviathan; recall again the length of the Manual for Complex Litigation.

Lest this concern be dismissed as an unrealistic slippery slope, it bears observing that corporations, their trade associations, and the attorneys who serve as their counsel—all well-represented in these proceedings—have used this forum to advocate for far more than the "valuable starting point for the court and the attorneys" intended by Proposed Rule 16.1.[7] Instead, the self-styled "Lawyers for Civil Justice," Bayer, and attorneys who regularly represent defendant-corporations in multidistrict litigation have all asked the Committee to deal with something completely different: the issue of "claim insufficiency." The Committee should refuse this request for broader rulemaking related to multidistrict litigation. If the committee were inclined in the future to discuss "claim insufficiency," however, that matter would better be dealt with through an amendment to FED. R. CIV. P. 23 that allows class certification of individuals

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3 Proposed Rule 16.1, Committee Note.

4 Draft Minutes, Civil Rules Advisory Committee, March 28, 2023, at 6.

5 *Id.*

6 *See id.* at 8.

7 *See id. at* 6.

injured by corporate misconduct.

3. Claim Insufficiency is Best Dealt with Through Class Treatment

When corporate defendants, their counsel, and their trade organizations bemoan claim insufficiency in multidistrict litigation, their concerns tend to focus on a particular *type* of multidistrict litigation—that involving personal injury and consumer protection claims. For example, Bayer's comment bemoans the "wasteful and expensive distraction" insufficient claims cause because of "a protracted PFS process that operates as a multi-step discovery dispute; through selection (and then voluntary dismissal) of cases for initial or post-remand trials; and during settlement discussions where other complicating issues like double-representations, deceased clients, or clients who cannot be located or contacted, reveal themselves."[8]

The solution is simple. Amend Rule 23 to relax certification requirements and allow for class treatment of personal injury and consumer protection claims. If companies like Bayer truly wish to hasten "resolution of meritorious claims,"[9] class treatment of these claims would do so. It would be unnecessary for injured individuals to file their claims during the pendency of the litigation due to statute of limitations concerns, since limitations would be tolled during that time.[10] The burden of preparing and filing tens or hundreds of thousands of complaints would be eliminated. The burden on courts to process those complaints would be eliminated. And the burden on corporations to hire expensive defense counsel to review and answer each such complaint would be eliminated. Similarly, there would be no need for time-consuming and expensive diversions relating to plaintiff fact sheets. Neither the court nor the parties would be saddled with time-consuming, expensive ancillary litigation about what should and should not be contained in the fact sheets. Plaintiffs' counsel would not have to complete fact sheets, and defendants' counsel would not have to review them. There would be no need for the inevitable, protracted process of raising and correcting deficiencies allegedly contained in those fact sheets. And of course, the efficiencies would not stop there. Bayer's and others' criticisms of short-form complaints, bellwether selections, remands, and other matters common in multidistrict litigation involving personal injury and consumer protection claims would likewise be diminished greatly or eliminated. To be sure, there would still be claims that would ultimately be unsupported, but they would be better addressed during the claims resolution process as opposed to the litigation process, requiring far fewer collective resources to weed out as a result.

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8 *Comment on Proposed Federal Rule of Civil Procedure 16.1 of Bayer U.S. LLC*, Oct. 15, 2023, at 2.

9 *Id.*

10 *See, e.g.*, Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 554 (1974).

Freed of these distractions, the parties and the courts could focus on the merits of the litigation and enjoy a far more just, speedy, and inexpensive resolution of claims.

Respectfully,

Patrick A. Luff

TAB 14

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January 2, 2024

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 Members of the Advisory Committee:

My name is Emily Acosta, and I am Senior Counsel at Wagstaff Law Firm. I have more than a decade of complex litigation experience, primarily in the context of mass torts, where I have represented both defendants and plaintiffs. I have been court-appointed to plaintiffs' leadership positions in state and federal court; most of my experience relates to preparing cases for trial and, in recent years, I have played a consequential role in trials involving dangerous pharmaceuticals like the blood thinner Pradaxa, and defective medical devices like IVC filters and transvaginal mesh, as well as faulty consumer products like the cancer-causing weedkiller, Roundup. I write to provide my perspective to the Advisory Committee, based on my experience.

I. PURPOSE OF THE FEDERAL RULES

While many of the comments submitted, thus far, are quick to note that the Federal Rules aim to ensure the just and speedy determination of every action and proceeding, many of the same comments are also quick to advocate for changes, which would almost certainly ensure the opposite.

Over the course of my career, I have seen that the multidistrict litigation format—particularly in personal injury-type products liability cases—is a powerful and effective mechanism for creating efficiencies and empowering ordinary citizens to hold corporations accountable for wrongdoing. To be sure, for someone injured by a corporation's negligence (or even deliberate indifference) an MDL is, perhaps, the only place where a single individual can stand toe-to-toe with a multinational corporation and ask that it be held accountable for harms it has caused.

And so—consistent with the Federal Rules—any changes to the Rules should endeavor to promote fairness and justice as much as efficiency. As discussed in greater detail below, I believe some of the proposed changes strike an appropriate balance, while others raise serious concerns.

II. MULTIDISTRICT LITIGATIONS

A. AREAS OF AGREEMENT AND SUPPORT

Proposed Rule 16(c): Report for Initial MDL Management Conference Subsections 1, 3, 10 & 11

I generally support the idea of an initial MDL Management Conference and believe the topics covered in subsections 1 (appropriateness and scope of leadership appointments), 3 (likely factual and legal issues presented),[1] 10 (management of new actions); and 11 (management of related actions) could be appropriately addressed at an initial case management conference.

And unlike other matters addressed in subsection c, which I discuss below, counsel for both parties—even if not technically appointed by the Court—can likely address these preliminary matters accurately and without (inadvertently) contradicting or undermining a later-appointed leadership team.

B. AREAS OF DISAGREEMENT AND CONCERN:

1. Subsection (b): Designation of Coordinating Counsel

Subsection B provides the option for the Court to designate "coordinating counsel." *See* Proposed Rule 16.1(b) ("The transferee court may designate coordinating counsel . . ."). While the intention may be to facilitate an efficient initial management conference, the Proposed Rule lacks clarity and, in practice, is not needed since a fair amount of coordination occurs naturally between the parties.

It is unclear how to select coordinating counsel. As an initial matter, the Proposed Rule provides no guidance as to *how* the Court should select coordinating counsel, including what criteria or qualifications to consider. And, as my colleague, Ms. O'Dell points out, the Proposed Rule also does not contain a requirement that the appointed coordinating counsel actually have a stake in the litigation—something critical to ensuring that coordinating counsel "speaks" for the side she purports to represent.[2]

Who is this solution for? Setting aside the ambiguity of the Proposed Rule, in practice, there is actually little need for this kind of Rule. For a single defendant case, the Proposed Rule is somewhat superfluous because that party will already have a lawyer positioned to take a lead speaking (and, often, strategic) role at an initial management conference. Similarly, in multi-defendant MDLs, there will be

[1] Because of the limitations associated with not having leadership appointed at the time of an initial MDL management conference, discussed below, if the parties are required to identify "the principal factual and legal issues likely presented in the MDL proceedings," they should be permitted to revise those statements—if needed—later. For example, one lawyers' theory of liability might be slightly different (and, thus, implicate different factual issues) than the theory ultimately pursued by leadership counsel; another lawyer may have consulted with an expert, who believes the product is defective for a particular reason, (and certain facts are needed to explore the viability of that theory), while the expert ultimately put forth by the MDL sees the case differently. While, in practice, it is rare that lawyers have truly divergent views of a litigation, binding all plaintiffs to a particular sub-set of (unappointed) lawyers' views of the case is inappropriate. And likely problematic in the long run.

[2] *See* Comment from P. Leigh O'Dell (Oct. 6, 2023).

a certain amount of informal coordination in anticipation of the conference and there is a limit to the Court's ability to minimize the number of lawyers speaking for each defendant since, as a matter of due process, each defendant is entitled to designate a lawyer to speak on its behalf.

By contrast, a plaintiffs' leadership structure will rarely be in place at this early stage of an MDL. In this regard, this proposed subsection targets an issue that affects almost exclusively the plaintiffs' side, which the comments seem to acknowledge.

Does it create another problem? Additionally, if the goal is efficiency—as the Comments to the Proposed Rule suggest—the solution should be to select and appoint a permanent leadership structure quickly, not to delay that process by first appointing a lawyer (or lawyers) to temporary positions before formally adopting a more lasting structure. While perhaps an obvious and related point, it is worth reiterating: both sides cannot have productive conversations about how to organize and move a litigation forward unless and until both sides are vested with decision-making authority. Appointing coordinating counsel, then a formal plaintiffs' leadership structure only delays and hinders the parties' ability to work together and to present legitimate disputes to the Court.

Is this a problem that needs solving? Again, since the justification for the Proposed Rule is to promote efficiency, it is notable that this "problem" is more hypothetical than verifiable. In practice, it is rare that multitudes of plaintiffs' lawyers show up to an initial MDL conference and demand to address the Court. And even in those rare circumstances, forcing the Court to choose between competing plaintiffs' lawyers—each with their own perspective on the trajectory of the litigation and its overall strategy—seems to create inefficiency, not minimize it.

Proposed solution. In short, there is no need to enact Subsection B because doing so will disrupt the natural coordination that already occurs and, as written, it is ambiguous and does not provide the court with appropriate guidance for how to select coordinating counsel. Accordingly, I recommend it is removed.

2. Proposed Rule 16(c): Report for Initial MDL Management Conference Subsections 2, 4, 5, 6, 7, 8, 9, & 12

Lack of authority to negotiate. Many of the issues set forth in subsection c are undoubtedly important to the efficient and appropriate management of an MDL. But to make decisions about whether prior CMOs should be vacated (subsection 2) or propose a discovery plan (subsection 6), for example, both sides will likely need decision-making authority, which is something that likely cannot be conferred until leadership counsel is appointed.[3]

Prematurity. Other provisions are premature and will do little to advance the litigation, if addressed at an initial management conference (rather than later, when both sides have more information). Subsection 12, for instance, simply asks "whether" a magistrate judge or a master should be appointed. But "whether" is usually not the difficult question, but rather "how." And the question of "how" or "what" the magistrate or master should oversee is almost never clear at the beginning of a litigation. Sometimes guidance related to initial pleadings or electronic discovery efforts is helpful and sometimes having a third party that can rule in real-time on objections in depositions is desirable.

[3] Subsections 4, 5, 7, and 8, likewise, usually require the kind of substantive decision-making that is ordinarily reserved for leadership counsel.

But neither party has enough information about the claims and defenses at the time of an initial management conference to make a cogent recommendation to the court.

Lack of information. Similarly, neither side has enough information to evaluate resolution (subsection 9) in a meaningful way. Without the benefit of discovery, the plaintiffs do not have any ability to assess liability and punitive conduct and, similarly, the defendant does not have enough information to determine possible exposure or the strength of any legal or factual defenses. Of course, the goal of an MDL is to reach some sort of resolution, but *what* that resolution looks like cannot be addressed before both parties have enough information to form opinions on critical issues. Further, addressing settlement at an initial conference is not only futile, but could, in fact, frustrate later efforts to ultimately resolve a dispute.

Proposed solution. It is indisputable that addressing some (or all) of the issues set forth in Subsections 2, 4, 5, 6, 7, 8, 9, & 12 are often necessary and critical to efficiently and effectively managing an MDL, so the issue is not so much whether these should be addressed by the parties and the court, but rather when. As written, the rule requires a formal, written report in advance of the conference, which as discussed above presents both the problem of (1) identifying who exactly is empowered to negotiate on each side and (2) whether each side has enough input (and possibly information) to engage productively.

Accordingly, I suggest changing the rule to order litigants to be prepared to discuss any matter designated by the Court. Accordingly, the Rule would be revised as follows:

> **(c) Preparation For Initial MDL Management Conference.** The transferee court should order the parties to meet and be prepared to address any matter designated by the court, which may include any matter addressed in the list below or in Rule 16.

This proposed solution avoids duplicative or counterproductive work caused by negotiations between parties that do not actually have proper authority, and gives the Court the flexibility to decide—with the input of the litigants—how and when to address certain matters efficiently.

C. SO-CALLED "UNSUPPORTABLE CLAIMS" & THE APPROPRIATE SOLUTION

As defined by the MDL subcommittee, "unsupportable claims" are claims that fall into three categories: (1) a claim where the plaintiff did not use the product involved; (2) a claim where the plaintiff did not suffer the adverse consequence at issue; or (3) where the claim is time-barred under applicable law. And while the first category is clearly problematic, the other two—in practice—are much more difficult to define.

1. In practice, identifying an "unsupportable claim" can be difficult.

To be clear, verifying whether a client used the product at issue is usually not challenging or ambiguous. By contrast, the inquiry into whether a claim is time-barred or whether a client has been hurt in the "right" way, is often highly fact-specific. Because two of these situations are not like the first, it is misleading to lump all three together.

i. "Compensable Injuries" often evolve with a litigation.

Proof of a compensable injury is difficult to define because the universe of compensable injuries is often developing over the course of a litigation, both as a function of civil discovery, but also of scientific discovery. For example, in a case where the plaintiffs claim use of the product caused cancer, the analysis of whether any particular client has a compensable injury is not as simple as determining whether she has cancer. Rather, it is an analysis involving whether there is sufficient exposure, other explanations for the cancer, and whether—generally—it is the kind of cancer attributable to this specific product. And so, these "questions" are often not answered definitively until expert reports are disclosed. Notably, experts often rely not only on published literature, but also on internal studies and data performed either by the defendant (or authorized third parties) regarding the product at issue.

ii. Whether a claim is "time-barred" is often litigated, not clear-cut.

As an initial matter, including claims "where the claim is time-barred under applicable law" within the definition of "unsupportable claim" is overly simplistic because it does not take into account the actual realities of how statutes of limitation are applied in practice. The majority of states have some form of a discovery rule that will apply in product liability cases.[4] In those states, the evidence as to when an individual plaintiff should have appreciated that her injury was wrongfully caused is often highly fact-specific and will vary from plaintiff to plaintiff. Sometimes the plaintiff's claim will not be time-barred and sometimes it will be.

Indeed, because this inquiry is specific to each plaintiff, this issue—*i.e.*, whether a claim is time-barred—is often extensively litigated. And simply arguing that a specific claim is time-barred, does not make it so (and even when the moving party prevails, it still does not automatically make the exercise of litigating the issue worthless or wasteful).

Certainly, if it were the case that a party occasionally (or even frequently) winning a particular motion was sufficient to deem such a motion categorically frivolous, then motions related to federal preemption would surely be frivolous under this standard. To be sure, federal preemption is raised in virtually every medical device, pharmaceutical and consumer products case, but rarely disposes of a personal injury-type litigation as a matter of law (despite most corporate defendants insisting that the cause of action is preempted by federal law).

In short, whether a claim is time-barred or the claimant has suffered a compensable injury is often not as straightforward as failing to use the product at issue; grouping all three circumstances together is misleading and somewhat obscures the issues, and attempts to inject a rules-based solution into state-based product liability law.

[4] *See*, for example, Matthiesen, Wickert & Lehrer, S.C.'s "PRODUCT LIABILITY IN ALL 50 STATES," available online at: https://www.mwl-law.com/wp-content/uploads/2018/02/PRODUCT-LIABILITY-LAW-CHART.pdf.

2. Proposed solution (which is already exists): Rule 11.

While many commenters suggest a "rules-based" solution is needed to address so-called "unsupportable claims,"[5] there is little discussion of enforcing the Rules already in place that are designed to prevent foul play. In particular, Rule 11 empowers a court to impose a broad array of sanctions to deter inappropriate behavior and provides a mechanism for the allegedly offending attorney (or law firm) to correct filings that (arguably) violate the Rule on an expedited basis to avoid the imposition of sanctions.

Put another way, there is no problem raised by commenters, like DRI, that cannot be addressed using Rule 11.[6] To the extent that there is problem with "unsupportable claims," the solution is not to merely enact more rules, but rather to enforce those that litigants already have.

3. MDL Size Reflects Overall Trends, it's not Inherently Nefarious.

It is undeniable that MDLs are growing in size. But why is less clear… or, at least, it should be. Many commenters simply attribute this trend to an increased carelessness and willingness to file meritless claims. But that theory, completely ignores a significant drivers of MDL size: potential claimants.

MDLs concerning consumer products (not drugs or medical devices) usually have more potential claimants. Just as it is indisputable that MDLs are growing in size, it is likewise apparent that more MDLs are focused on alleged defects in consumer products, not in drugs or medical devices. And a product that can be bought at a grocery or convenience store is much more widely available than something like a drug or medical device, which usually requires a prescription from a physician. Put another way, a consumer product-centered MDL will usually have many, many more potential plaintiffs than an MDL centered around a defective drug or medical device (and will, almost certainly, involve more plaintiffs simply by virtue of the fact that there are more potential claimants).

Large ≠ Unmanageable. Implicit in many comments submitted thus far is the idea that large litigations are inherently and necessarily unmanageable. This simply is not true. Indeed, there are recent examples of large, consolidated litigations being resolved efficiently. Take *In re: Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-md-02843-VC, for example. The litigation was originally prompted by news media reports in March 2018 that Cambridge Analytica—a data mining firm—had improperly harvested information from up to 87 million Facebook users. And as discovery progressed, the litigation expanded to more broadly target the social media giant's data-sharing practices (which, naturally resulted in even more possible claimants). In the end, on October 10, 2023, District Court Judge Chhabria, issued an order granting final approval of the $725 million class action settlement; nearly 18 million people submitted valid claims.[7]

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[5] *See* Comments from The DRI Center for Law and Public Policy (Oct. 11, 2023).

[6] Notably, many comments were written and submitted before the recent changes to FCC rules, which closed a previous "lead generator" loophole. *See* FCC Press Release, available online at: https://docs.fcc.gov/public/attachments/DOC-399082A1.pdf.

In sum, to peg frivolity and unscrupulous practices as the sole (or even primary) drivers of MDL size is overly simplistic and completely ignores recent trends like the shift in product liability litigation towards torts centered around consumer products, where there are (usually) many, many more potential claimants.

III. PRIVILEGE LOGS

Some comments, like Mr. Keeling's from October 5, 2023, encourage a loosening of the current Rules and practices for "large cases," citing the considerable time and expense needed to prepare an appropriate privilege log. But these comments seem to completely ignore the widespread practice of over-designating documents as privileged (when they are not) and the astronomical increases in law firm salaries, both of which are much more meaningful cost-drivers.

Many privilege logs are too long because documents have been improperly designated. Over-designation or "fake privilege" is increasingly pervasive, and the most prolific offenders are often large corporations. For example, in a recent jury trial involving Google and Epic Games, lawyers for Epic showed jurors emails from two in-house Google lawyers communicating on an internal company chat, who joked about so-called "fake privilege"—a practice of unnecessarily involving a lawyer in a matter to make it confidential.[8] But this practice is not confined to improper claims of privilege, it is also very common for corporate defendants to claim nearly every document produced in a litigation is "confidential" or "highly confidential," only to have that designation withdrawn when challenged—often without motion practice.

Put another way, if the transaction costs associated with privilege logs and confidentiality designations are "too high" in "large cases," that is, at least partially, a direct result of choices made by many corporations (and their lawyers) pre-suit as well as during litigation; indeed, the decision to over-classify as privileged (and to over-designate as confidential) documents that are not *actually* privileged (or confidential) increases costs and is completely avoidable.

Increased costs are a reflection of recent rate hikes and salary trends, too. Since many law firms bill for their time, the cost of creating an appropriate privilege log is directly related to the amount of time it takes to create one (and the "cost" of that time). But despite this obvious relationship between costs and hourly rates, many comments say nothing about this significant cost-driver. And that is a big piece of the puzzle. Just in past few years, many law firms have increased billing rates (and salaries) dramatically, and there is no reason to believe this trend is over. In fact, the opposite may be true: annual rate hikes are likely the new reality. Law.com described this phenomenon as follows:

> . . . multiple analysts this month have suggested the average standard rate increase in 2024 could be between 6% and 8%.

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[7] *See* Forbes article describing the settlement, available online at: https://www.forbes.com/advisor/legal/facebook-class-action-lawsuit-settlement/#:~:text=About%2017.7%20million%20Facebook%20users,lawyers%20involved%20in%20the%20suit.

[8] *See* "Google In-House Attys Joked About 'Fake Privilege,' Jury Told," Law360, available online at: https://www.law360.com/articles/1765405/google-in-house-attys-joked-about-fake-privilege-jury-told.

> For context, the average increase in standard rates, . . . through the first half of 2023 among Am Law 200 firms was roughly 7.7%, according to Wells Fargo Private Bank Legal Specialty Group, with analysts there calling it 'some of the highest growth in billing rates we've seen.'"
>
> Of course, some law firms go well above the average rates. About 15% of Am Law 100 firms increased their rates more significantly—between 10% and 20%—last year. Thomson Reuters . . . found the average across segments was near 6% through the first half, with Am Law 100, Second Hundred and midsize firms all setting high-water marks not seen since at least the first decade of the 21st century.[9]

Associate salaries are also rising dramatically. For firms of 501-700 lawyers, for instance, the median first-year salary grew from $155,000 in 2021 to $200,000 in 2023.[10] And exploding salaries are not just a recent trend; associate salaries have been on the rise for decades. In 1999, for example, a starting associate salary in 1999 was $115,000, and in 1987 it was $68,000.

Here, reform rewards bad behavior. Put simply, "large cases"—like the kind I handle every day—do not need different rules and should not have different rules when it comes to producing privilege logs and providing confidentiality designations. This is another example of a problem that corporate defendants have largely created and now complain about; to reward them with reform would be manifestly unjust and counter to the stated purpose of the Federal Rules. The changes made during informal rulemaking are fitting and strike the appropriate balance between justice and efficiency.

IV. Conclusion

I agree with others that have suggested that the Committee should promulgate a more limited rule, which focuses on items that need to be done first, like appointing leadership and establishing a general framework for the administration of the MDL.

Thank you for the opportunity to address the Committee on January 16, 2024. I look forward to sharing my comments in greater detail and to answering any questions that members of the Committee might have.

Sincerely,

Emily T. Acosta

---

[9] *See* "Big Law's Approach to Billing Rate Hikes in 2024," Law.com, available online at: https://www.law.com/americanlawyer/2023/10/30/big-laws-approach-to-billing-rate-hikes-in-2024/#:~:text=What%20You%20Need%20to%20Know,%25%2C%20according%20to%20Wells%20Fargo.

[10] *See* AboveTheLaw real-time coverage of this topic, available online at: https://abovethelaw.com/2023/12/biglaw-raise-bonus-tracker-2023/#:~:text=Since%20we%20broke%20the%20news,salaries%20for%20midlevel%20and%20senior.

TAB 15

TADLER LAW LLP
OWN THE ROOM

New York, NY • San Francisco, CA

January 2, 2024

Via Electronic mail to: RulesCommittee_Secretary@ao.uscourts.gov

Statement of A.J. de Bartolomeo

Co-Managing Partner, Tadler Law LLP

Before the Advisory Committee on Federal Rules of Civil Procedure for Proposed FRCP 16.1

January 16, 2024 Hearing (Virtual)

Thank you for providing an opportunity for public comment on the [Proposed] Federal Rule of Civil Procedure 16.1. My name is A.J. de Bartolomeo and I am a Partner at Tadler Law LLP. I have over 30 years of experience practicing law in and managing complex litigation, including class actions, mass torts, business to business, and bankruptcy litigation. Many of these cases have been prosecuted using the multidistrict litigation (MDL) process.

Designating Coordinating Counsel for the [Initial] Conference (Rule 16.1(b).

Based on my experience in MDLs, I respectfully request that the Committee provide more clarity as to the role and responsibility of Coordinating Counsel as provided for in this provision. The primary concern I see with the "Designating Coordinating Counsel" provision is that proposed Rule 16.1(b) does not define the role or identify any qualifications or credentials necessary for this position. Proposed Rule 16.1(b)(1) and (2) set out that coordinating counsel will work with the Court, the plaintiffs **or** the defendants to "assist the court with the [initial] conference" and "work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c)."

Given that Proposed Rule 16.1 is intended to assist the MDL judge with case management of the MDL in the interests of efficiency and economy, the absence of any defining role or responsibility for Coordinating Counsel may create more complications in the ultimate management of an MDL after the court appoints a lead counsel structure.

If the Committee intends for Coordinating Counsel to proceed akin to Liaison Counsel in the MDL, the Manual on Complex Litigation for Liaison or Lead Counsel in MDLs provides helpful guidance that delineates the roles and responsibilities of that designated liaison counsel. To that end, Proposed Rule 16.1(b) could be revamped to provide specific responsibilities to "Coordinating Counsel" as follows:

> *Liaison counsel.* Charged with essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions. Such counsel may act for the group in managing document depositories and in resolving scheduling conflicts. Liaison counsel will usually have offices in the same locality as the court. The court may appoint (or the parties may select) a liaison for each side, and fi their functions are strictly limited to administrative matters, they need not be attorneys.

See Manual for Complex Litigation, 4th Ed., 2009, §10.221 (Organizational Structure).

Furthermore, because the current draft does not identify if the "Coordinating Counsel" is intended to be acting on behalf of plaintiffs or defendants, and again, if the intention is to serve as a liaison to the Court to avoid multiple and conflicting presentations at the early stage of an MDL, appointing one from each of plaintiffs' and defendants' counsel would provide a balanced approach with those two appointed firms/lawyers coordinating the positions of each respective side. This addresses a concern over the absence of any requirement that the designated Coordinating Counsel have any interest in the subject MDL litigation, have a case filed in the subject MDL litigation, be familiar with the legal or factual issues in the MDL litigation, or even if the designated Coordinating Counsel would be acting on behalf of the plaintiffs or the defendants. Amending the proposed Rule 16.1 to clearly identify whose position(s) "Coordinating Counsel" represents will provide the court with a better process in managing the complex litigation before it.

Timing for Addressing the Issues to be Included In the Report for the Initial Conference (Proposed Rule 16.1 (c)(1) –(12)).

Proposed Rule 16.1(c) requires that the transferee court "should order the parties to meet and prepare a report submitted to the court before the conference begins" and then sets out 12 items to be included in report submitted by the parties in advance of the Initial Conference.

The Proposed Rule begins by codifying a general practice in MDL litigation, that is, having the court address "whether leadership counsel should be appointed, and if so. . ."

identifying considerations as to the procedure for selection, structure, role and other issues pertaining to plaintiffs' counsel organization.[1]

Once the court establishes that leadership structure, those counsel have the responsibility to address the matters listed in Proposed Rule 16.1(c)(2)-(12). Without first appointing the counsel that will manage and run the prosecution of the MDL action, presenting competing views on how to manage the case going forward *before appointing case leadership* may foster confusion rather than efficient management of the complex litigation. Organizing the lawyers first provides the necessary predicate for organizing the case. In a recent MDL data breach class action in which our firm holds a leadership position, *In re: Marriott International, Inc. Customer Data Security Breach Litigation,* No. 19-md-2879 (D. Md.) (Hon. Paul Grimm) (5 separate plaintiff tracks), at the Initial Conference, the Honorable Paul Grimm (Ret.) issued a case management order designating the plaintiffs' counsel leadership and liaison counsel structure for each of the 5 plaintiffs' tracks, plus a discovery liaison between and among the tracks. In that way, *after* the Initial Conference the different plaintiff's tracks were able to prepare for and be properly represented in the meet and confer discussions with defense counsel leading up to the first Rule 26(f) conference.

In the [proposed] Rule 16.1, the recitation of matters identified in the Proposed Rule 16.1(c) are best divided into two conferences defined by before appointment of counsel and after. The Proposed Rule can still include the series of items identified at (2)-(12), though in a new subparagraph, adding 16.1(e) immediately after 16.1(d) as follows:

> **(e) After the appointment of lead counsel through the process identified in subparagraph (c) above, the court shall direct plaintiffs' lead counsel to meet with defense counsel to consider and report to the Court on the following matters in connection with the Rule 26(f) conference, to the extent that these matters are not already addressed by Rule 26(f):**
>
> **[* renumbering (2)-(12) as (1)-(11) here]**
>
> (1) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

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[1] Proposed Rule 16.1(c)(1)(A) through (F) raise detailed questions pertaining to the selection process, structure, cope and content of role, limitations on activities, and compensation. The Proposed Rule should consider including the same considerations in the designation of "Coordinating Counsel" in Rule 16.1(b).

(2) identifying the principal factual and legal issues likely to be presented in the MDL proceedings;

(3) how and when the parties will exchange information about the factual bases for their claims and defenses;

(4) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(5) a proposed plan for discovery, including methods to handle it efficiently;

(6) any likely pretrial motions and a plan for addressing them;

(7) a schedule for additional management conferences with the court;

(8) 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);

(9) how to manage the filing of new actions in the MDL proceedings;

(10) 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; and

(11) whether matters should be referred to a magistrate judge or a master.

In this way, the Proposed Rule does not inadvertently operate to put the plaintiffs and their counsel at a disadvantage when meeting and discussing the items now listed at Proposed Rule 16.1(c) (2) through (12) -- the consolidated pleadings, facts, legal issues, discovery and witnesses, settlement and other matters about which the defendants may likely have more information. Moreover, without an established leadership structure in advance of discussing the core issues and procedures to manage the case, who negotiates and discusses these issues with defendants' counsel? And if among plaintiffs' counsel there are different approaches, interests and legal claims, whose will control and bind the prosecution of the case? The Proposed Rule of course cannot answer these questions and so dividing the items listed in subparagraph (c) avoids the problems the Proposed Rule and the MDL process seek to avoid. As the Manual for Complex Litigation guides, "The types of appointments and assignments of responsibilities will depend on many factors. The most important is achieving efficiency and economy without jeopardizing fairness to the parties."

Moreover, Proposed Rule 16.1(c)(2) through (12) will be prioritized differently depending on the legal claims and defenses presented in the MDL and the strategy determined by

appointed Lead Counsel. Again, "one size does not fit all." It seems reasonable, efficient and productive to allow counsel leadership to meet and confer on the 11 specified issues to prioritize, sequence and quantify each of the issues depending on the issues in the case. Based on my experience in MDLs, I can see a different prioritization for a mass tort case than for an antitrust case, a consumer protection case, or a consumer data breach case. To allow the parties – after meaningful discussions in their meet and confer meetings on the actual issues in that case– to present their agreed-to positions and their separate positions to the Court seems to be the more judicially efficient and economical choice. It also ensures consistency in the procedures outlined in Fed. R. Civ. P. 26(f) which also apply to MDLs.

Thank you for your consideration of these comments and for your hard and dedicated work on the Federal Rules.

Yours very truly,

A.J. de Bartolomeo
TADLER LAW LLP

TAB 16

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January 2, 2024

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:

Thank you for the opportunity to submit my comments regarding the proposed Rule of Civil Procedure 16.1. What follows are my personal observations on the proposed new rule for addressing multidistrict litigation cases, offered in the hope that the Committee will find them useful. I anticipate that my testimony at the January 16, 2024 hearing will follow the outline of these comments.

RULE 16.1 SHOULD ESTABLISH A DISCLOSURE REQUIREMENT TO ELIMINATE CLAIMS THAT ARE NOT VIABLE.

MDL litigation needs a rules-based mechanism to require each plaintiff to demonstrate shortly after filing those basic facts showing claim viability, such as pertinent injury and exposure to the product at issue. The MDL Subcommittee has recognized the existence of the "unsupportable claims" problem, estimating that non-viable cases make up between one-fifth to one-half of all claims filed in any given MDL matter would fail to withstand scrutiny of these most fundamental elements.[1]

[1] MDL Subcommittee Report at p.3, line 166 -p.4, line188 *in* ADVISORY COMMITTEE ON CIVIL RULES NOVEMBER 2019 AGENDA BOOK 139 (2019), available at https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf

Judges who have experienced the challenge of managing MDL litigation concur that aggregation attracts unsupportable claims, and that there should be a procedure to weed out non-viable cases before they clog the consolidated proceeding. Chief Judge Clay Land observed after handling two MDL matters that "many cases are filed with little regard for the statute of limitations and with so little pre-filing preparation that counsel apparently has no idea whether or how she will prove causation," which lead to MDL proceedings "becom[ing] populated with many non-meritorious cases that must nevertheless be managed by the transferee judge."[2] Chief Judge Land urged that "[a]t a minimum" judges in MDL consolidated proceedings should have available "approaches that weed out non-meritorious cases early, efficiently, and justly."[3]

Similarly, after handling the massive asbestos MDL, Judge Eduardo C. Robreno recognized that "aggregation promotes the filing of cases of uncertain merit."[4] Based on his experience,

> unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process. Therefore, courts must establish procedures by which, at an early point, each plaintiff is required to provide facts which support the claim through expert diagnostics reports or risk dismissal of the case.[5]

The Preliminary Draft of Rule 16.1 does not establish this critical "toll gate." Subsection (c)(4) takes an approach that fails to accomplish the necessary result: identifying early in the life of a claim if there is evidentiary support for the most basic factual allegations underlying a viable claim covered by the MDL proceeding. To make a meaningful impact on the unsupported claim problem, the text of subsection (c)(4) should be modified to project that disclosures demonstrating fundamental claim viability is a necessary step that plaintiffs must take in order to participate in the MDL proceeding. The revision suggested by Lawyers for Civil Justice would substantially improve the proposed rule.[6]

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[2] *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig*., 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

[3] *Id*. at *2 (emphasis added).

[4] Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 187 (2013).

[5] *Id*. at 186-87 (emphasis added). *See also* Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 107 Ky. L.J. 467, 492 (2018):

> early scrutiny of individual claims is critical to the fair and efficient resolution of an MDL proceeding. In many MDLs, a large percentage of the claims that are filed have no merit. The failure of MDL courts to weed out such claims can significantly impair the effective resolution of such proceedings.

[6] Lawyers for Civil Justice, *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*

DISCUSSING SETTLEMENT IN RULE 16.1 OR THE COMMITTEE NOTE IS UNHELPFUL AND PROBLEMATIC.

The Preliminary Draft of Rule 16.1 and Draft Note, as presently phrased, is counter-productive with respect to the unsupportable case problem because the emphasis on settlement as a court interest encourages the filing of non-viable claims. With two mentions of settlement in the text of the rule itself, and ten more references in the Draft Note — including the trumpet blast that "[i]t is often important that the court be regularly apprised of developments regarding potential settlement" — the Preliminary Draft and Draft Note reinforce the widespread misperception that MDL consolidation is a mechanism for global settlement rather than management of pretrial proceedings.[7] Chief Judge Land observed that signaling settlement to be a significant court concern spurs the filing of meritless claims:

> [T]he 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.[8]

Other commentators have similarly concluded that "to the extent the settlement narrative is perpetuated in MDL proceedings, it is likely to have a profoundly negative effect--incentivizing

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that Are Inconsistent with Existing Rules and Other Law at 6 (Sept. 23, 2023), available at https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0004.

[7] One commentator observes that it has become "accepted wisdom within both the academy and among practitioners" that "the goal of multidistrict litigation, or at least its frequent result, is a global settlement of asserted claims that resolves the litigation." Smith, *supra* n. 5, at 468. S*ee also*, *e.g*., *Delaventura v. Columbia Acorn Tr*., 417 F. Supp. 2d 147, 150-52 (D. Mass. 2006) **(**"the 'settlement culture' ... is nowhere more prevalent than in MDL practice. ... Thus, it is almost a point of honor among transferee judges ... that cases so transferred shall be settled rather than sent back to their home courts for trial. ... Indeed, MDL practice actively encourages retention even of trial-ready cases in order to "encourage" settlement."); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 4 (2021) (Noting MDL proceedings' "relentless drive to global settlement."); Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 Ga. L. Rev. 1287, 1288 (2019) ("In federal multidistrict litigation (MDL) in particular, . . ., transferee judges often work hard to move the parties toward a negotiated global resolution."); S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 Clev. St. L. Rev. 391, 393 (2013) ("federal multidistrict consolidation under 28 U.S.C. § 1407, . . . has become the most common mechanism for the collective management and settlement of mass tort matters in the last decade.").

[8] *In re Mentor*, 2016 WL 4705827, at *1.

counsel to file meritless claims at the expense of both defendants and those plaintiffs whose claims have merit."[9]

A rules-based emphasis on global settlement is not consistent with the purposes of MDL consolidation, namely promotion of "the just and efficient conduct" of cases with respect to "pretrial proceedings."[10] MDL courts should focus their attention on case development and management issues, as doing so will lead to data points that shed light on the merits of the parties claims and defenses.[11] The references to settlement in subsections (c)(1)(C) and (c)(9) of the Preliminary Draft Rule, as well as those discussions of settlement in Draft Note, should be dropped.

I look forward to the opportunity during the January 16, 2024 hearing to address these issues further and to answer any questions that the Committee members may have.

Very Truly Yours,

Lee Mickus

[9] Smith, *supra* n. 5, at 473. *See also* Brown, *supra* n. 7, at 395-96 (2013) ("The demand for streamlined settlement increases as the volume of claims increases. This, in turn, may lead to an influx of dubious claims.").

[10] 28 U.S.C. §1407.

[11] For example, Prof. Erichson notes the irony that after Judge Polster in the *Nat'l Opiate Litigation* MDL had initially focused on settlement negotiations, declaring that "[p]eople aren't interested in figuring out the answer to interesting legal questions like preemption ... or unraveling complicated conspiracy theories[,]" the case progressed toward resolution only after "the judge ruled on numerous legal issues including the statute of limitations, civil RICO, civil conspiracy, public nuisance, and preemption." Erichson, *supra* n. 7, at 1301 (citations omitted). As another example, state-to-state variation on issues such as the liability of product distributors may have outcome-determinative effects but may be "overlooked or sometimes even conceptualized as one part of a generalized — and nonexistent — 'national tort law' that MDL judges apply in the aggregate with an eye toward settlement." Gluck and Burch, *supra* n. 7, at 5.

TAB 17

From: Scott Partridge
To: RulesCommittee Secretary
Subject: Re: Request to testify at MDL Rules Hearing
Date: Tuesday, January 02, 2024 3:11:40 PM

Dear Secretary,

Thank you for forwarding the schedule of witnesses for the January 16 hearing. I look forward to providing testimony before the Advisory Committee on Rule 16.1 and wish to provide a brief overview of the perspective I will offer.

I spent 27 years in private practice with a focus on representing defendants in strategic litigation, mass torts, class actions and MDLs. I joined Monsanto Company in 2006 and as Chief Deputy General Counsel had responsibility for the Company's litigation. After five years, I moved into a newly created business role to lead a coordinated effort across the Company to resolve disputes and prevent conflicts. I led that initiative for seven years settling Monsanto's most significant litigations. After participating in negotiating and completing the sale of Monsanto to Bayer, I served as General Counsel of Bayer US from 2018 to 2022. On January 1, 2023, I formed Partridge LLC to assist parties in resolving disputes, with a focus on mass torts and MDLs. During my years of practice as outside counsel, Head of Litigation, Business Strategy Lead, and General Counsel, I have been involved in the settlements of hundreds of thousands of claims in litigation, most of those being claims in MDLs and class actions.

The Advisory Committee is proposing to put settlement issues prominently in the Rule. In my experience, the most critical factor in facilitating the settlement of any mass tort, and particularly MDLs, is the accurate understanding of the universe of claims. It should be noted that the structure of a well-managed litigation is the same structure that encourages early and efficient settlement: a clear presentation of the factual and legal bases for claims, an understanding of the nature and scope of damages, and a statement of defenses.

The accumulation of meritless claims in an MDL will delay and often prevent a settlement. In my experience, a large percentage of meritless claims ultimately fall out of MDLs, most frequently because, for instance, in product liability cases, the product at issue was not used or the individual did not have a compensable injury. As a result of the assertion of such a large volume of meritless claims and the lack of an early and efficient process to screen those claims, it usually takes years before those claims are removed from the litigation. Thus, a path for early resolution is often blocked.

Most defendants wishing to pursue settlement of an MDL favor an early and efficient path to do so. To illustrate issues confronting an MDL defendant, particularly a publicly traded company, assume 100,000 claims have been filed in the MDL. Based upon prior experience with products MDLs, it is

anticipated that that approximately 30% of the claims will not qualify for compensation under a contemplated settlement plan. Assuming a hypothetical average individual claim value of $100,000, the publicized volume of 100,000 claims produces an inflated theoretical exposure to the defendant of $10 billion. Although the 100,000 total number of filed claims has been reported to the court by the parties and has been widely reported in popular media and by financial analysts, the defendant knows that the true potential exposure is substantially reduced and realistically is in the range of $7 billion.

The publicly traded MDL defendant is faced with a myriad of issues given the volume of meritless claims parked in the MDL. What should be reported in quarterly and annual securities filings – 100,000 claims as shown in court records? What financial exposure is contemplated and to be reported – the inflated $10B or anticipated realistic number $7B? What dollar number does the company use for a reserve? Which number is reported to insurers to give timely notice of a covered claim? Are shareholders and employees advised to ignore the court records showing 100,000 claims? And importantly, if the defendant wishes to pursue settlement, and needs to borrow funds, what numbers will form the basis of securing financing, at what interest rate, and what representations will lenders seek?

These are some of the issues that an MDL defendant faces because of the typical volume of meritless claims inflating the size of an MDL. These issues confound the Court's administration of the litigation, complicate the settlement process, and can prevent settlements from taking place until the meritless claims have been removed from the system and an understanding of compensable claims has been determined. Unfortunately, under the current Rules, this does not occur until years of MDL litigation. To promote early and efficient settlements, the MDL courts and the parties need a Rule to prevent meritless claims from entering the system.

Respectfully submitted,

Scott S. Partridge

Scott S. Partridge
314-952-4132
Partridge LLC

TAB 18

No testimony outline or comment was submitted
by January 2, 2024.

TAB 19

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USC-RULES-CV-2023-0003-0024

POPE MCGLAMRY
ATTORNEYS AT LAW

January 3, 2024

VIA EMAIL TRANSMISSION
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed New Federal Rule of Civil Procedure 16.1 – Multidistrict Litigation

Dear Members of the Rules Committee:

My name is Mike McGlamry. I am a practicing attorney, President, and shareholder in the law firm of Pope, McGlamry, Kilpatrick, Morrison & Norwood, P.C. in Atlanta, Georgia. I submit my comments about the proposed Rule 16.1 to the Federal Rules of Civil Procedure, a proposed rule aimed at addressing what some believe are abuses or flaws in existing Multidistrict Litigation practice. The Committee has worked diligently and exhaustively for a long time, on very difficult and contentious issues, and for that you should be commended.

I have practiced continually since 1982 in state and federal courts around the country and have had extensive involvement in mass tort and class action litigation in numerous capacities. Over the past 20 plus years, I have been appointed class counsel in 54 state and federal court class actions, the most recent being in September 2023, in *VanZant v. Hill's Pet Nutrition Inc., et al,* Civil Action No. 17-C-2535, in the Northern District of Illinois, Eastern Division. I have been appointed lead or co-lead counsel in multiple MDLs, including in *In Re: Zantac (Ranitidine) Products Liability Litigation,* MDL No. 2924, Southern District of Florida, West Palm Beach Division; and *In Re: Wright Medical Technology, Inc. Conserve Hip Implant Products Liability Litigation*, MDL No. 2329, Northern District of Georgia, Atlanta Division. I have also served as a member of the Plaintiff's Executive Committee or Plaintiff's Steering Committee in at least a half dozen additional MDLs and/or state court consolidations. In addition, I have participated, since its inception, with Emory Law School's Institute for Complex Litigation and Mass Claims.

Rule 16.1 is far reaching, extremely complex and encompasses most, if not all, of the most critical decisions in an MDL, including case strategy, case direction, motions practice, discovery, and settlement. Although I applaud the Committee for its efforts to better manage MDLs, which is needed, I want to focus my attention and hopefully the Committee's, on the selection of Plaintiff's Leadership. My testimony is directed at what I consider the most critical issue in an MDL from the Plaintiff's perspective: who will lead the case for the Plaintiffs.

Defendants come into an MDL with their chosen counsel in place and prepared to move forward. Courts do not and should not dictate or choose who represents defendants. On the other side of the "V" in most MDL contexts, multiple – often hundreds, if not thousands – of individual plaintiffs are represented by multiple different counsel. By the time of consolidation, there are usually dozens if not hundreds of law firms with filed cases, at various stages, that will be swept into the MDL. Since an MDL could involve multiple class actions and different types of cases (products liability, Qui Tam, data breach, patent invalidity or infringement, employment, anti-trust, securities fraud, etc.), the transferee Court must decide how best to structure the Plaintiff's Leadership. The plaintiffs in every MDL deserve the best leadership counsel the Court can appoint in the context of the specific claims and issues in that MDL. And leadership counsel differ in experience, expertise, skill, history with the court and opposing counsel, caseload, political involvement, reputation, and connections.

So, what's the big hurry for an MDL Court to select a coordinating, interim, or temporary leadership to proceed with an initial MDL Case Management Conference to set the structure for the entire MDL per proposed Rule 16.1? I can appreciate that a court would want to get things moving, but let's not put the cart before the horse. "Multidistrict litigation provides an opportunity for the efficient administration of the law. It enables multiple suits, containing multiple claims, relying on multiple theories of harm, and brought in multiple jurisdictions, to be aggregated in one court, and managed for pretrial purposes by one judge."[1] In consideration of the average length of MDLs, the time necessary to implement appointment of permanent Plaintiff's Leadership expeditiously and efficiently, is a drop in the bucket. If product liability MDLs average 4.7 years to complete, with other types lasting even longer, [2] why not take 30-60 days up front to appoint a complete, diverse, and appropriate Plaintiffs' leadership counsel team?

Otherwise, in my opinion, proposed Rule 16.1 presents problems with both fairness and practical application.

1. Practical considerations

Let's take the practical problem first. As proposed, Rule 16.1(b) allows the court to designate a coordinating counsel to assist with the Rule 16 conference and the conference report. But there is no criterion, no process, no direction, and no structure for that decision. Is the same criterion for selection of permanent leadership counsel to be employed? If the court is going to take the time, energy, and resources to select experienced, diverse, talented, representative coordinating counsel, why not do so permanently?

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[1] Jennifer E. Sturiale, *The Other Shadow Docket: The JPML's Power to Steer Major Litigation*, 2023 U. ILL. L. REV. 105, 149 (2023).

[2] Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in MultiDistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1889-90 (2022).

There are ramifications to a coordinating, interim, or temporary leadership, some of which the court may not be aware. I have been in those types of positions. What the court, and this Committee might not realize, is that until the Plaintiff's Leadership is put in place, constant and intense pressure, manipulation, negotiations, and alliance building will occur behind the scenes. These pressures necessarily distract interim/ coordinating counsel from the real work at hand, and the utilization of such a stop-gap measure is unfair to both coordinating and ultimately, permanent leadership counsel – not to mention to the Plaintiffs whose cases are swept into the MDL.

There are additional practical ramifications of a non-permanent leadership counsel. Serving in an interim position requires the same time, effort, and expertise as any permanent position. It is a daily, hourly, ongoing, full-time process. However, interim leadership generally involves a limited number of people, whereas a permanent leadership counsel encompasses a much greater number. Those individuals eventually appointed to permanent leadership who were not part of the initial coordinating or interim counsel don't have the benefit of being involved, hearing what took place, hearing what decisions were made and why, etc. Later, they may disagree with earlier decisions that they had no part in or were not made privy to. That can be a practical nightmare.

2. Fairness considerations

Now to the fairness problem, which in my opinion, greatly outweighs even the practical problem. Proposed Rule 16.1(c) (1-12) sets out the potential issues to be addressed and/or decided upon at the Rule 16 conference, and encompasses some of the most critical, strategic, and irreversible decisions counsel for both sides must make. I want to focus just on a couple of the 12 issues outlined in Rule 16.1(c) to illustrate my point: it's not fair for an interim (even if ultimately permanent) coordinating counsel to make the decisions necessary to address the overarching, case defining, irreversible issues set forth in Proposed Rule 16.1(c)(5, 6, 7 and 9).

Rule 16.1(c)(6) addresses "a proposed plan of discovery," probably the most critical decision point by Plaintiff's Leadership in any MDL. A proposed "plan of discovery" could include decisions about the scope of discovery, bifurcation, trifurcation, bellwether selection, timing and sequencing of discovery, scheduling, use of special masters, magistrates, etc. In every MDL that I have been engaged in, any discovery plan takes months to envision, develop, organize and more importantly, obtain buy in from all or even most of Plaintiff's Leadership. It is not fair to the plaintiffs in the MDL nor Plaintiff's Leadership to empower coordinating counsel with the authority to dictate – or burden them with the mandate to determine – this point of no return.[3]

[3] Some may argue or suggest that interim counsel positions have been ordered and Plaintiff's counsel have participated in them in some recent MDLs. First, those interim positions did not envision the authority necessary by the Proposed Rule, and second, the fact that it happened doesn't make it right or the best way to proceed. Plaintiff's counsels are always going to participate, and even suggest that it is the best way forward, if it means they have a chance at a permanent leadership position.

Proposed Rule 16.1(c) subparts (5) and (7) address consolidated pleadings and pretrial motions. These too are critical issues that can and should take months for leadership counsel to envision, discuss, draft, negotiate and decide upon. Once again, it is unfair to empower a

coordinating counsel to not only make decisions about whether to have consolidated pleadings and develop a plan to address them via pretrial motions. Again, once those cards are played, they cannot be pulled back. So, proposed Rule 16.1 empowers coordinating counsel, who are selected absent any criteria, process, direction, and or structure, to bind all plaintiffs for all time.

Proposed Rule 16.1(c)(9) addresses settlement, including, "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." (Fed. R. Civ. P. 16 (c)(2)(I)) Again, there is no more critical yet personalized decision than settlement, particularly in an MDL. Aside from whether a case is ripe to begin settlement discussions, the act and art of settlement have to consider multiple complicated and nuanced issues/ considerations: the court, the opposing counsel, any intermediary (special master, mediator, court as mediator), the caseload and who controls it, merits of the case, damages, values, future liability and damages, consensus of leadership counsel, and a host of additional real-world potential problems and realities. Imagine telling any permanently appointed Leadership Counsel that a coordinating counsel has made all of the settlement decisions for them at the beginning of the case.

In my opinion, it is proper and necessary to provide the transferee court with a framework to assist in managing an MDL. And getting things moving on the front end is part of that management. But it shouldn't be done in a rush, to the detriment of the plaintiffs and ultimate leadership counsel. An MDL is a process, a long process, that equally deserves patience and thoughtfulness as much as rules and order. Plaintiffs and Plaintiff's Leadership Counsel deserve a careful and appropriate decision-making process on the front end to select appropriate permanent leadership counsel, particularly if the court is to consider critical case management, structure, and substance decisions at an early case management conference. Proposed Rule 16.1's interim leadership short circuits this process, to the detriment of Plaintiffs and their claims.

Respectfully submitted,

Michael L. McGlamry

TAB 20

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January 2, 2024

Mr. H. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Summary of Testimony Before the Advisory Committee on Civil Rule 16.1 concerning MDL Proceedings

Dear Mr. Byron:

I am partner at Johnson Becker, PLLC. Our firm specializes in representing plaintiffs who have been injured in products liabilities actions as a result of medical devices, pharmaceuticals or consumer products. Our firm has served as Co-Lead Counsel, members of Plaintiffs' Executive Committees, and members of Plaintiffs' Steering Committees in several multi-district litigations (MDLs). Over the past twenty years, I have held a variety of leadership, as well as support, roles in multi-district litigations. Currently, I serve as Vice Chair Settlement in the *In re: Philips Recalled CPAP, Bi-Level Pap, and Mechanical Ventilator Products Liability Litigation (MDL 3014)*.

I support the proposed Rule 16.1 as a method to provide guidance to the Courts and parties. The considerable effort by the Committee to improve the MDL process through implementation of this rule is appreciated. Rather than highlight the areas of agreement with the proposed rule, I would like to focus on those areas I find most concerning in the mass tort context.

I. Coordinating Counsel vs. Leadership Counsel

The proposed rule contemplates that a separate coordinating counsel may be appointed in order to facilitate a coordination process. The comments accurately reflect this is an issue primarily on the plaintiffs' side. Whereas, defendant(s) will have likely selected their lead and liaison counsel by the time an initial conference is scheduled. Unfortunately, this two-step approach in the mass tort context, lacks the necessary continuity. In fact, this two-step approach may result subsequent delays once qualified leadership is appointed.

Selection of plaintiffs' counsel often hinge upon several factors including whether an agreed upon leadership structure exists from cooperative counsel prior to the MDL formation, competing plaintiff cooperative groups that have collaborated on the litigation as well as judicial preference for creating their own plaintiff appointed leadership who have a stake in the litigation. In fact, the comments contemplate a variety of factors for the court to consider when appointing leadership while the comments related to coordinating counsel provide little guidance.

Leadership, in the mass tort arena, is best served when there exists a continuity related to who is tasked with overall representation of plaintiffs. In fact, appointing first a coordinating counsel that is later replaced by leadership counsel may slow the process when continuity is lacking. Additionally, strategic planning may be impacted should changes occur between coordinated counsel and final appointed leadership.

II. Report Subject Matter described in Rule 16.1 (c)

The proposed rule reiterates that the rule may contemplate the subject matter identified in Rule 16, any of the 12 topical areas described within the proposed 16.1 as well as any matter designated by the court or issues the parties wish to bring to the court's attention. In this respect, much of subpart (c) is duplicative of the topical areas in the existing rule. However, when you take into consideration the complexities surrounding mass tort claims addressing this breadth of issues at the initial status is premature.

A. Topics at Issue

…
(4) how and when the parties will exchange information about the factual basis 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;
…
(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);
…
(12) whether matters should be referred to a magistrate judge or a master.

The six topical areas above are better suited in the mass tort context once leadership has been appointed. Appointed leadership should be afforded the opportunity to coordinate, and where necessary reach out to non-appointed leadership firms, in order to develop a cohesive plan that takes into account not only the potential size of the MDL but how best to facilitate the sharing of information in a timely manner that does not disproportionately impact individual plaintiff firms.

Delaying these discussion points until a leadership team is appointed will not disproportionately impact the parties Rather, it allows for a streamline focus during the initial 60 to 90 days of the consolidated mass tort to collect and analyze previously entered orders to determine their potential impact to move coordinated discovery forward as well as to hone the principal factual and legal issues which will be common to individual claims. In fact, it will likely allow for procedures to be implemented that may streamline the litigation creating efficiencies by allowing leadership to develop a comprehensive plan.

The regularly scheduling of case management conferences between appointed leadership and defendants will keep the court for matters essential to move forward in the litigation. This is a common practice within established MDLs including *MDL 3014 Philips Recalled Respiratory Devices, MDL 3026 Abbott Laboratories, et al, Preterm Infant Nutrition, MDL 3037 Recalled Abbott Infant Formula and MDL 3079 Tepezza*.

Therefore, I encourage the Committee to finalize a limited rule that focuses on the critical first steps of a developing mass tort. I thank you for this opportunity to address the Committee later this month and look forward to sharing my comments in more detail as well as answering any questions that the panel may present.

Respectfully submitted,

/s/Lisa Ann Gorshe

Lisa Ann Gorshe, Esq.
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January 2, 2024

VIA EMAIL

RulesCommittee_Secretary@ao.uscourts.gov
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: R. Hampton Testimony Regarding Proposed Rule 16.1

Dear Members of the Advisory Committee:

My name is Rachel Hampton, and I am a Senior Managing Associate at Sidley Austin LLP with a focus on complex litigation, including the defense of mass torts. I joined the bar in 2017, and became a full-time associate at Sidley in 2019, after clerking for nearly two years. At the January 16, 2024 Hearing on the Proposed Amendments to the Civil Rules, I plan to offer my perspective regarding the proposed new Rule 16.1 as a more junior member of the bar and as someone who has been closely following this amendment process, but is less experienced in the world of MDLs.[1]

I look forward to addressing the Advisory Committee at the upcoming hearing and thank the Advisory Committee for the opportunity to present my views on this topic.

Rachel L. Hampton
Senior Managing Associate

[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.

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January 2, 2024

VIA EMAIL

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

Re: A. Rothman Testimony Regarding Proposed Rule 16.1

Dear Members of the Advisory Committee:

My name is Alan Rothman, and I am a Partner at Sidley Austin LLP.[1] Over the past two decades, I have been involved in more than two dozen MDL proceedings in a wide array of matters for defendants in the pharmaceutical, medical device, consumer product, chemical and other industries. I am also the author of "And Now a Word from the Panel," a *Law360* column regarding the Judicial Panel on Multidistrict Litigation and MDL practice (a column which just completed its 11th year).

At the January 16, 2024 Hearing on the Proposed Amendments to the Civil Rules, I plan to address the proposed new Rule 16.1, including its proposed subsection 16.1(c)(4). I intend to focus on the efficiencies gained, and resources conserved, by obtaining limited information at an early stage of MDL proceedings regarding the product(s) allegedly ingested by plaintiffs (or to which they were exposed) and their alleged subsequent injuries. I offer this perspective from my MDL experience as well as a topic about which I have written. *See*, *e.g.*, Alan E. Rothman & Mallika Balachandran, *Early Vetting: A Simple Plan to Shed MDL Docket Bloat*, 881 UMKC Law Rev. 89.4 (2021), available at https://irlaw.umkc.edu/cgi/viewcontent.cgi?article=1006&context=lawreview (copy also enclosed).

[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.

I thank the Committee for the opportunity to present at the January 16 Hearing and for its consideration.

Respectfully,

Alan E. Rothman

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Article 7

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Early Vetting: A Simple Plan to Shed MDL Docket Bloat

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Sidley Austin LLP

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EARLY VETTING: A SIMPLE PLAN TO SHED MDL DOCKET BLOAT

Alan E. Rothman* & Mallika Balachandran**

I. INTRODUCTION

The scales of justice are clearly tipping. Even the most cursory review of Multidistrict Litigation ("MDL") statistics reflects a docket imbalance which cannot be ignored. There can be little dispute that "the number of federal cases swept into an MDL" has "exploded."[1] As of the end of fiscal year 2019, there were a total of 134,462 individual actions in nearly 200 pending MDL proceedings.[2] By the end of fiscal year 2020, that number had ballooned to 327,204 individual actions in 176 MDL proceedings.[3] The burgeoning MDL dockets are particularly acute in product liability and other personal injury MDLs ("Product Liability/Personal Injury MDLs"), where the creation of an MDL (or even the mere filing of an MDL petition) is inevitably followed by a jump in the number of new cases. In fact, some MDL judges recognize that creation of an MDL often leads to the filing of claims with questionable merit.[4]

The current system enables plaintiffs to file claims with ease, at a low cost and without a procedure in place to quickly determine whether the case should

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*Alan E. Rothman is Counsel at the law firm of Sidley Austin LLP and a member of its Product Liability Practice Group. He has two decades of experience representing pharmaceutical, medical device, consumer products and other companies in connection with more than twenty MDL proceedings. Mr. Rothman has written scores of articles, and is a frequent lecturer, on topics related to MDL and jurisdictional issues. Mr. Rothman notes that this article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. The content therein does not reflect the views of the firm.

**Mallika Balachandran is an associate at Sidley Austin LLP and a member of its Litigation Practice Group.

[1] Ryan C. Hudson, Rex Sharp & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801 (2021).

[2] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2019*, www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf. *See also* Hudson et al., *supra* note 1; Alan Rothman, *And Now a Word from the Panel: MDLs Continue to Thrive*, LAW360 (Feb. 21, 2020).

[3] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2020*, www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf. In early 2021, MDLs surpassed a new milestone. Since the inception of MDL proceedings, there have now been more than one million individual actions in those litigations. Alison Frankel, *As MDL Cases Surpass 1 Million, Defense Group's Push for Early Vetting Heats Up*, Reuters (Mar. 17, 2021).

[4] *In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 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"). *See also* Alan Rothman, *Managing MDL Mania: A Modest Early Vetting Proposal*, NEW YORK L. J. (2019).

even be on the docket. There are two gateway questions that should be asked and answered every time a case is filed: Did the plaintiff ingest, use (or was the plaintiff otherwise exposed to) the named defendant's (or defendants') product? Did the plaintiff sustain an injury subsequent to use of that product? Absent an affirmative answer to those two basic questions, with at least some documentation as support, there would be no good faith basis to file an action. Thus, this information should be readily available to plaintiffs' counsel. The time has come to adopt and implement a simple early vetting remedy to support the *bona fides* of these MDL actions.

With these principles in mind, we are prepared to delve deeper into the underpinnings of the docket bloat, what efforts have previously been made and why they have fallen short of the mark. Section II examines the data behind the explosion of case filings in MDLs. Section III provides an explanation as to why MDLs facilitate a surge in case filings, cases that would never have been filed outside of the MDL context. Section IV provides an historical overview of approaches taken by MDL courts to screen cases before them, as well as recent MDL reform efforts with respect to early vetting. Thereafter, Section V explains why a streamlined early vetting process with limited information offers a quick, efficient solution, whereas other winnowing tools used by MDL courts do not provide the essential relief required to quickly "reduce the waistline" and bring MDLs back into shape.

II. EXPLODING MDL DOCKETS: DELVING INTO THE DATA

MDLs comprise a large portion of the federal civil caseload. In recent years, the number of individual actions in MDL proceedings have comprised more than 50% of the overall federal civil docket.[5] As noted above, by the end of FY 2020, there were 327,204 individual actions pending in MDL proceedings.[6] It is the spiraling number of individual actions in a particular type of MDL proceeding (namely, Product Liability/Personal Injury MDLs) which should raise eyebrows.

Product liability and personal injury cases occupy a large portion of the MDL population. Based on a review of the MDL dockets, approximately only one-third of the pending MDL proceedings involve this genre of litigation, but those MDLs include the vast majority of the individual actions in all of the MDL proceedings.[7]

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[5] *See* Hudson et al., *supra* note 1. For purposes of this analysis, the overall federal civil docket figure (the denominator) excludes habeas corpus and social security cases.

[6] *See* United States Panel on Multidistrict Litigation, *supra* note 2.

[7] *See* Hudson et al., *supra* note 1, at 803 (top 10 MDL proceedings alone by number of actions, which each included product liability and/or personal injury claims, embodied most of the individual actions in MDL proceedings); *see also* United States Judicial Panel on Multidistrict Litigation, *Calendar Year Statistics,* www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf (61 of the 185 pending MDL proceeding were product liability MDLs). Even the most cursory review of more current MDL data reflects that individual actions continue to flood Product Liability/Personal MDLs. United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report-Distribution of*

Another unusual feature of MDL proceedings is the rapid pace with which individual actions surge at the outset of those proceedings. In the six Product Liability/Personal Injury MDLs created after January 1, 2019 through the end of FY 2019, 203,706 individual actions were pending by the end of the following fiscal year (FY 2020).[8]

III. FUELING THE FIRE: WHY MDLs FACILITATE A SURGE IN CASES

Before addressing a solution to MDL docket bloat, it is important to understand what is fueling this growth within Product Liability/Personal Injury MDLs, not seen in mill-run litigations. A key reason for the increase in the number of cases in MDL proceedings is the ease with which plaintiffs are able to add their cases to the MDL and avoid individual scrutiny. But why is it so easy to file cases in an MDL proceeding as compared to the overall federal docket? And why does the system appear to enable the filing of meritless cases?

First and foremost, an MDL proceeding creates a "piggyback" effect. In many MDLs, a plaintiffs' leadership group is appointed by the court with responsibility for spearheading the litigation on behalf of plaintiffs. This allows for other plaintiffs' counsel who are willing to sit on the sidelines (and later pay a "common benefit" fee from any ultimate recovery to be divided among plaintiffs' leadership)[9] to file a case and leave the heavy lifting to others. Moreover, the ensuing growth in cases encourages even more filings – often fueled by plaintiffs' attorney advertising – because the more cases are filed, the less likely it is that any individual complaint from among the growing pool of cases will be subject to early challenges, whether via a motion to dismiss or otherwise.

In addition, there are also two often utilized devices in MDL litigation which can be drivers of the increase: (1) Master Complaints; and (2) Direct Filing Orders. These factors, even if they have value for other purposes, minimize the marginal cost of adding a case to the MDL. A Master Complaint is an omnibus complaint filed by plaintiffs' leadership which includes all of the common allegations, including causes of actions, against the defendants. New plaintiffs can adopt the Master Complaint and file a Short-Form Complaint which includes

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Pending MDL Dockets by Actions Pending, www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-15-2021.pdf.

(almost all of MDL proceedings with 500 or more individual actions are Product Liability/Personal Injury MDL proceedings). Product Liability/Personal Injury MDLs consisting primarily of class actions generally have few actions due to the collective nature of a putative class (often embodying thousands or more class members).

[8] This data is based on a review of the MDL statistical data as of the end of FY 2020 for the six Product Liability and Personal Injury MDLs created between January 1, 2019 and September 30, 2019 (including MDL Nos., 2875, 2885, 2886, 2887, 2903 and 2905), available at www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf. (which includes data regarding the number of cases filed in, and transferred to, MDL proceedings).

[9] *See* Hudson et al., *supra* note 1, at 809.

certain information about their case (but with no proof to support their claim required), without spending the time to prepare their own detailed complaints. Moreover, to avoid the need to file cases in plaintiffs' home states – where personal jurisdiction and venue would likely be proper – and avoid the costs of retaining local counsel and MDL transfer, MDL courts often enter a Direct Filing Order. Such orders enable plaintiffs from around the country to file their cases directly in the MDL forum, even if personal jurisdiction and venue are improper there. (Defendants preserve personal jurisdiction and venue objections until the conclusion of pretrial proceedings.)

Moreover, the data suggests that the attraction of filing directly in an MDL proceeding is fueling the increase in cases. As of the end of FY 2020, more than 200,000 of the 203,706 individual actions pending in Product Liability/Personal Injury MDLs created since January 1, 2019 through the end of FY 2019, had been filed directly in the transferee court.[10]

IV. HISTORICAL AND CURRENT APPROACHES

a. The Historical Approach: Modified MDL Discovery

Historically, attempts to deal with information relating to individual cases within an MDL have taken the form of modified discovery, albeit by different names. The goal has been to create a uniform set of questions and streamline the discovery process so as to avoid the need for typical individual case-specific discovery. The most common form of that substitute discovery has been the use of a "Plaintiff Fact Sheet" ("PFS").[11] The PFS has commonly been a lengthy questionnaire, often consisting of dozens of pages, with numerous questions (including subparts and charts) ranging from personal background (residence, education, employment) to medical histories of the plaintiff and family members, identity of physicians, prior litigations filed by the plaintiff, insurance coverage and damages sought. Tucked away are numerous questions relating to product use (or exposure) and its duration. The typical PFS also includes document requests to support the answers to the wide range of information sought, including a request for medical authorizations to release a slew of records.

In practice, the PFS questions are a result of a heavily negotiated, protracted process. Although the bidding often begins with using a template PFS from another MDL, that does little to avoid what is usually months of negotiations among counsel before finalizing the treatise of questions ultimately used in a given MDL proceeding.

Moreover, the PFS is hardly an expeditious process. Once a PFS is agreed upon, which is often months (and in some instances more than a year) after creation of the MDL, there is a drawn-out timeline for information to be provided and for

[10] United States Panel on Multidistrict Litigation, *supra* note 3.

[11] In cases with a PFS, a Defendant Fact Sheet ("DFS"), requiring defendants to respond to a set of case-specific questions (often relating to contact between sales representatives and plaintiffs' physicians) is typically negotiated and ordered as to certain actions within the MDL as well.

deficiencies to be challenged. That process often takes many months. When a plaintiff fails to provide information, the plaintiff is offered an opportunity to cure the defects. Fighting over the sufficiency of a PFS itself can become a litigation within a litigation.[12]

While the hope of some may have been that the PFS process would identify and eliminate meritless claims, the process is so tortured and protracted that it in no way resembles an early vetting process. Nor is the PFS simple enough to provide just the basic information necessary to determine whether a plaintiff has an initial basis to file a case.

A limited number of courts have used shorter questionnaires at the outset of an MDL proceeding, well before the PFS process, to specifically target the bona fides of plaintiffs' allegations of exposure to the product and/or a relevant injury.[13] This approach is much more useful as a gateway function at "an early stage" to "help resolve certain issues in this litigation in a timely manner."[14] But such targeted efforts at the outset of an MDL are exceedingly rare.

b. Help Is on the Way?: Recent MDL Reform Efforts

Over the past several years, there have been a number of MDL reform efforts to tackle the surge in MDL case filings (among other issues). The subject of early vetting has been on the agenda of the MDL Subcommittee of the Advisory Committee on Civil Rules (the "MDL Subcommittee") for potential amendment of the Federal Rules. The MDL Subcommittee has acknowledged that "the early vetting proposals have been in response to the 'Field of Dreams' problem -- sometimes JPML centralization of litigation is followed by the filing of a large number of new claims," but "how to best address the issue has evolved [and] [t]hat evolution continues."[15]

In 2017, a House bill included a provision to require evidentiary support of exposure and injury within forty-five days and for the court to thereafter rule on the sufficiency of that evidence. That bill died in Congress and "the focus of the [MDL] Subcommittee turned to the [PFS]."[16] As part of the "evolution" of the process, "[i]n place of reliance on PFS/DFS practice, the more promising idea came to be known as a 'census,' an effort to gain some basic details on the claims

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[12] In fairness, the most effective use of the PFS to whittle down cases is not in determining whether a case is meritless, but in enabling a defendant to ultimately seek dismissal of a case for failure to complete the PFS.

[13] *See, e.g.*, *In re* Zofran (Ondansetron) Prod. Liab. Litig., No. 1:15-cv-2657-FDS, 2016 WL 3058475 (D. Mass.
May 26, 2016) (early disclosure order requiring each plaintiff to provide certain product identification information, with supporting records identifying the manufacturer of the product, within thirty days).

[14] *Id.*

[15] Advisory Committee on Civil Rules, *Agenda Book*, 145-46 https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf (April 2, 2020) (citing Fairness in Class Action Act (H.R. 985)).

[16] *Id.* at 147.

presented -- evidence of exposure to the product at issue -- so as to permit an initial assessment."[17] Recently, a few MDL courts have entered a "census order," but the "census" includes a considerable number of questions, as well as topics not exclusively limited to proof of exposure and injury. The length of that process suggests that while it may ultimately have value to obtain case-specific information, it (like the PFS) is not an early vetting solution to quickly identify meritless claims.

V. MDL EARLY VETTING: SHORT, SWEET, AND EFFECTIVE

To put it all together, there appears to be an evolving consensus that there must be a system for an initial assessment of claims. Precisely as the MDL Subcommittee articulated, "there should be a beginning for an information exchange."[18] But the processes adopted in MDL proceedings have not facilitated the necessary immediate exchange of information. What is needed is effective and simple early vetting that is truly a "beginning," consisting of the limited information that counsel should have had the moment a case is filed. And what is that information? Answers to two questions which could fit on a postcard:

> **Proof of Exposure**: Did you ingest, use or were you otherwise exposed to the named defendant's/defendants' product?
> **Proof of Injury**: Did you sustain an injury subsequent to that ingestion, use or exposure?

And what documentation is needed? Two pieces of paper: One page of a record documenting and identifying the exposure (ingestion or use) to a named defendant's product, and one page of a record reflecting the alleged injury subsequent to the date of exposure (ingestion or use). This is a form of an initial disclosure, which the Federal Rules should require be provided in every case within an MDL proceeding. It will winnow the cases which should never have been filed and reduce the bloat that meritless cases create on an MDL court's docket. In multiple defendant cases, it will enable defendants who do not belong to be dismissed at the outset.

Some might (and in fact do) argue that the system cannot sustain such early scrutiny in the context of a large MDL because there are simply too many cases. But such an argument is circular. There are so many cases in an MDL because it is too easy to file a case which can fly under the scrutiny radar for months, if not years. We have reached a point where a rule to address the spike in MDL cases is critical.

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[17] *Id.*
[18] *Id.*

VI. CONCLUSION

Keep it simple and start early. With these two critical ingredients, a realistic early vetting procedure will have the best chance to succeed across all Product Liability/Personal Injury MDL proceedings. At the same time, it will enable MDL courts and the parties to thereafter fashion discovery best suited for the particular needs of that MDL (whether as a PFS, census order or otherwise) without the bloat of clearly meritless claims. Even more importantly, this proposed early vetting is a sustainable "weight loss" program which can readily be applied as new cases are filed, leaving a more fit, manageable docket for the benefit of all.

TAB 23

No testimony outline or comment was submitted
by January 2, 2024.

TAB 24

SEEGERWEISS LLP
NEW YORK • NEW JERSEY • PHILADELPHIA • NEWTON, MA

January 2, 2024

VIA ELECTRONIC MAIL

Rules Committee Staff
Office of the General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle NE, Room 7-300
Washington, DC 20544

Re: Draft Federal Rule of Civil Procedure 16.1
Written Testimony of Jennifer Scullion

To the Advisory Committee on Civil Rule:

Thank you for providing this opportunity to testify concerning proposed Federal Rule of Civil Procedure 16.1 (Multidistrict Litigation) (the "Draft Rule".

I am a partner at Seeger Weiss. Our firm exclusively represents plaintiffs in complex litigation, including MDLs and class actions. We represent clients in many areas, including product liability, drug injury, environmental contamination, and public nuisance. My own practice also includes representing clients damaged through antitrust violations and consumer fraud.

As the draft Committee Note observes, MDLs come in many shapes and sizes and with varying levels of complexity. It is critically important that organization and management begin early, as the Draft Rule contemplates. However, it also is critically important to try to ensure that whatever organization and management structures are put in place "fit" the unique needs and challenges of that MDL. In practice, that is best done through a focused series of initial case management conferences (a) to examine what type of leadership structure is needed and whether any immediate orders are needed pending leadership[1] and (b) once a structure is in place, to formulate and put in place appropriate schedules and protocols tailored to the particular needs of the MDL—i.e., are there multiple "tracks" of plaintiffs, are there any class actions contemplated within the MDL, are there state court proceedings to coordinate with, are there ongoing criminal investigations to accommodate?

Respectfully, as presently proposed, the Draft Rule appears to try to do too much, too soon, suggesting a combined report addressing both how to decide leadership within the MDL and what leadership would then propose to do to advance the MDL. This overlooks the significant role that MDL leadership plays in weighing in on nearly all of the matters the Draft Rule identifies as potential topics for the Initial MDL Management Conference Report. For example:

[1] Such as to address already-pending scheduling orders.

- In antitrust and consumer fraud matters (among others), it is not uncommon for different counsel to have very different views on how to frame the core theories of the case. Until leadership (and or interim class counsel)[2] is appointed, it often will not be practical or useful to provide a report "identifying the principal factual and legal issues likely to be presented in the MDL." Draft Rule 16.1(c)(3). Moreover, the Draft Committee Note seems to contemplate that this portion of the Initial MDL Management Conference Report would be used not only to identify "principal" issues, but to propose "early discovery" or "early motion practice" on such issues. The potential for phasing, bifurcation, or "prioritization" of isolated factual or legal issues is among the most contested and consequential in an MDL, including because of the delay and prejudice it can visit on plaintiffs. For that reason, such proposals often are the subject of full briefing and argument by the parties. It does not serve the interests of justice or the courts to try to make such decisions at the very threshold of the MDL through a preliminary, *ad hoc* report.
- Similarly, modifications to existing scheduling orders (16.1(c)(2)), the potential for use of consolidated pleadings or for use of "master" pleadings (16.1(c)(5)), timing and nature of motions to dismiss and for class certification (16.1(c)(7)), and a proposed discovery plan (16.1(c)(6)) are all matters that the parties should be given some time to confer on once leadership is set. But the Draft Rule contemplates having these matters addressed (on the plaintiff side) through an *ad hoc* group potentially led by "coordinating counsel." The likely, practical result of this is that the Initial MDL Management Conference Report will discuss these matters in only the most superficial of ways and not be of any real value to the MDL court.
- How and when to approach settlement discussions is among the most important issues in an MDL. And those issues often may be impacted by other choices, such as how to frame up the core theories in the case, how many "tracks" of plaintiffs and defendants are set up, and what class actions, if any, are contemplated within the MDL. While it certainly can be helpful to begin addressing settlement processes early, it makes better sense to settle on a leadership structure and map out some of the "big picture" issues first, rather than having the parties submit premature proposals through an *ad hoc* drafting process (as Draft Rule 16.1(c)(1)(C) and 16.1(c)(9) contemplate).

I recognize that the Draft Rule states that all of the "matters" listed under 16.1(c) are optional. But codifying them in a rule will tend to make them more mandatory in practice (or, potentially, lead to disputes over what is or not appropriate to include in the Initial MDL Management Conference Report in any particular case). That the Draft Rule also contemplates the need for "coordinating counsel" to help the parties prepare the Initial MDL Management Conference Report only underscores that the kind of report the Draft Rule contemplates is premature and that nearly all of the matters listed in Draft Rule 16.1(c) are better left to MDL Leadership and/or Interim Class Counsel (for MDLs that include one or more classes) to address in a timely and orderly manner after organization and an opportunity to confer.

To the extent that the Committee's goal is to draft a rule that seeks to help MDLs get organized and managed relatively quickly and efficiently, the Draft Rule could be recrafted:

[2] Many MDLs, including antitrust and consumer fraud MDLs, include one or more class actions. As currently drafted, neither the Draft Rule nor the Committee Note seem to contemplate this additional level of complexity.

- To clarify in 16.1(a) that the purpose of the Initial MDL Management Conference is to allow the MDL court to "consider and take appropriate action" (borrowed from FRCP 16(c)(2)) on the leadership and imminent scheduling matters set forth in Draft Rule 16.1(c)(1) and (2) [each as modified below].
- To eliminate the provision for designation of coordinating counsel (16.1(b)).
- To revise 16.1(c) to eliminate the requirement of a report and instead allow the MDL Court to set a schedule and format (such as letter briefs of no more than X pages) for the parties to make submissions on:

  [Modified 16.1(c)(1)] "whether leadership counsel and/or interim class counsel should be appointed, and if so"

  a. the procedure for selecting them and, in the case of leadership counsel, whether the appointment should be reviewed periodically during the MDL proceedings; and

  b. the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities.

  [Modified 16.1(c)(2)] "identifying any imminent deadlines in any previously entered scheduling or other orders and stating whether they should be vacated or stayed ~~or modified~~." and

  [16.1(c)(11)] "whether related civil or criminal actions have been filed or are expected to be filed in other courts [including state courts] and whether to consider possible methods for coordinating with them."[3]

The balance of the matters listed under Draft Rule 16.1(c) can be addressed in the ordinary course at subsequent case management (or discovery case management) conferences, as is done now. That said, the Committee Note could include the suggestion that, during any leadership application process, the MDL Court may want to solicit views of applicants on such issues as case tracks, schedule, core claims and theories, and other issues that will demonstrate an understanding of the case and of the critical role of competent leadership in MDL proceedings.

I look forward to addressing the above and any questions the Committee may have.

Respectfully submitted,

/s/ Jennifer Scullion
Jennifer Scullion

[3] In antitrust cases, it is important to know whether the Antitrust Division of the DOJ has any pending criminal proceedings that overlap with the claims in an MDL. In addition, in the Committee Note on this provision, it would be useful to refer to the State Antitrust Enforcement Venue Act, which precludes the JPML from forcing the transfer into an MDL of antitrust actions brought by state attorneys general or by the DOJ Antitrust Division. It will be important for an MDL court to be aware of such actions early on for planning and coordination.

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TAB 25

STUEVE SIEGEL HANSON

January 2, 2024

VIA EMAIL TO:

RulesCommittee_Secretary@ao.uscourts.gov

Statement of Norman E. Siegel
Partner, Stueve Siegel Hanson LLP
Before the Committee on Rules of Practice and Procedure

January 16, 2024

Thank you for providing an opportunity to testify before the Committee regarding the proposed Rule 16.1 addressing Multidistrict Litigation. My name is Norman Siegel, and I am a partner at Stueve Siegel Hanson LLP, a 30-lawyer firm in Kansas City, Missouri. Over my 30-year career, I have primarily practiced in complex litigation, including on the defense side as a partner at Sonnenschein (now Dentons), and on the plaintiff side over the last two decades at Stueve Siegel Hanson. My firm has served as lead counsel in some of the largest class action cases recently centralized by the Judicial Panel on Multi-District Litigation, including *In Re: Syngenta AG MIR162 Corn Litigation* (MDL 2591), *In Re: Equifax Inc. Customer Data Security Breach Litigation* (MDL 2800), *In Re: American Medical Collection Agency Data Security Breach Litigation* (MDL 2904), *In Re: Capital One Consumer Data Security Breach Litigation* (MDL 2915), and *In Re: T-Mobile Customer Data Security Litigation* (MDL 3019).

I submit this testimony to address a facial disconnect between proposed Rule 16.1, which appears to be drafted to address product liability MDLs, and the MDL cases my firm typically handles, which are class actions. The disconnect is apparent throughout the proposed rule and the comments, which distinguish MDLs and class actions without acknowledging that many MDLs *are* centralized class actions.[1] The Comment to Rule 16.1(c)(1) is illustrative of the problem—the third paragraph provides that "MDL proceedings do not have the same commonality requirements as class actions," a statement that is accurate only if "MDL proceedings" is read as "product liability and common disaster MDLs centralizing individual claims."

The issue also manifests in proposed Rule 16.1(b), which provides that the Court "may designate coordinating counsel" to perform various ministerial and substantive roles at the initial MDL Management Conference contemplated by Rule 16.1(a). While this procedure may lead to

[1] The JPML's latest data reveals 68 pending MDLs classified as "products liability" or "common disaster"—most of which are consolidated individual actions. There are 73 pending MDLs classified as "antitrust" or "miscellaneous actions"—most of which are consolidated class actions, including data breach and privacy class actions. There are 13 pending "sales practices" MDLs, and 3 pending "securities" MDLs, all of which are class actions.

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some efficiencies in product liability and common disaster MDLs seeking to redress personal injuries, it is counterproductive to the efficient management of class actions. Instead, overlapping class actions centralized in an MDL should start with the consideration and appointment of interim class counsel that will represent the class throughout the pendency of the MDL. In my experience in MDLs centralizing upwards of 300 class actions, an initial order from the transferee court providing for a schedule for motions for appointment of interim class counsel should always be the first order of business in any case involving overlapping class actions. Once appointed, interim class counsel is empowered to speak for the class and enter agreements with opposing parties on matters that typically would be addressed during the initial case management conference, including a discovery plan and pretrial motion schedule—issues likely to impact the merits of the case that should not be handled by a separately designated "coordinating counsel."

Moreover, proposed Rule 16.1(c)(1) fails to acknowledge that there is *already* a rule that provides for the appointment of interim class counsel to address pretrial activities in class actions. Rule 23(g)(3) provides that "The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Contrary to the open-ended language in proposed Rule 16.1(c)(1)(A)-(C) for consideration of "leadership counsel," Rule 23(g) also provides the specific criteria the court "must consider" in appointing interim class counsel (Rule 23(g)(1)(A)) and provides that where multiple lawyers seek appointment—as in most class action MDLs—"the court must appoint the applicant best able to represent the interests of the class" (Rule 23(g)(2)). The Comments to the 2003 Amendments make clear the purpose of Rule 23(g): "It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action." The Manual elaborates that such appointment should occur before (or at) the initial case management conference, particularly in instances where class actions may be consolidated and where a number of lawyers may compete for class counsel appointment—the situation in most class action MDLs: "In such cases, designation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement." Manual for Complex Litigation, Fourth § 21.11. This construct, now well established in Rule 23(g) and the practice of most transferee courts in class action MDLs, runs counter to the proposed so-called "coordinating counsel" and "leadership counsel," which may undertake actions or agreements that conflict with the designated role of interim class counsel.

I respectfully propose three potential solutions for this problem. *First*, MDLs consisting solely of centralized class actions should be excluded from the proposed rule by indicating the rule will not apply to centralized cases brought under Rule 23. *Second*, in MDLs that may include both individual claims and separately representative claims brought under Rule 23 ("hybrid MDLs"), language can be added to the Committee Note to make clear that nothing in Rule 16.1 should be read as superseding Rule 23(g), including consideration of the appointment of interim class counsel prior to the initial conference. *Third*, if the need for "coordinating counsel" is deemed necessary in class action or hybrid MDLs, the Committee Note should make clear that the role of

"coordinating counsel" is limited to purely ministerial duties pending the appointment of interim class counsel pursuant to Rule 23(g).

Thank you for you work on these rules, and I look forward to addressing any questions from the Committee.

TAB 26

No testimony outline or comment was submitted
by January 2, 2024.

TAB 27

No testimony outline or comment was submitted
by January 2, 2024.

TAB 28

No testimony outline or comment was submitted
by January 2, 2024.

TAB 29

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January 8, 2024

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

Subj: Testimony and Comments Regarding Proposed Amendments to Civil Rules 16 and 26 Related to Privilege Logs

Dear Members of the Committee:

Thank you for the opportunity to provide comments and testimony concerning the proposed amendments to Federal Rules of Civil Procedure 16(b) and 26(f).

Summary

Rapidly emerging technologies are highly likely to fundamentally change historical assumptions concerning the costs and burdens of document-by-document privilege logs and compliance with Rule 26(b)(5)(A).

The language of the proposed amendments and corresponding Committee Notes prudently emphasizes *flexibility*. This approach will continue to promote innovation and efficiencies tailored to the specific needs of each case.

Calls by some commentators for the proposed amendments to go further in the form of substantive presumptions or specifics concerning privilege logging would likely result in a Rule that had become obsolete by the time of its effective date.

Professional Background

My name is Chad Roberts and I am in my thirty-third year of civil litigation practice with an emphasis in complex litigation, mass torts, and multi-district litigation. An engineer by training, my practice since 2014 has been dedicated to the conduct of electronic discovery in complex civil litigation, with an emphasis on the use of technology to leverage the management of very large volumes of electronic evidence. My firm primarily represents consumers, small business owners, and local governments with electronic discovery in civil litigation. My *curriculum vitae* is attached.

I am very familiar with current litigation support technologies and corresponding workflows used in large scale electronic discovery productions, including those technologies used in the creation of privilege logs with thousands of entries.

The more difficult task in privilege logging

The preparation of a document-by-document privilege log requires two unique tasks: 1) the *identification* of responsive evidence that contains privileged content; and 2) the *summarization* of the content in a way that complies with Rule 26(b)(5)(A)(ii), specifically, a summary created ". . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim [of privilege]."

In modern electronic discovery, it is this second task – the task of textually summarizing the privileged content without compromising the privilege itself – that generates the preponderance of costs associated with document-by-document privilege logging.

Current Approaches to Privilege Logging

There is a healthy and robust commercial marketplace for litigation support technologies that address both the growing diversity of digital evidence and the increasing volumes in which it occurs. Over the past several decades, this commercial marketplace has constantly responded – in waves and cycles – with technology solutions to these challenges. Some electronic discovery problems that seemed insurmountable in the recent past are no longer so.

Modern electronic discovery is conducted using evidence management software platforms. These platforms are used to host potentially responsive information while that information is being analyzed for responsiveness and privilege. Typically in this process, discrete files (documents) of potentially responsive digital information are collected from the producing party's information environment. Using *processing software*, the files are broken down into their constituent parts that include the metadata associated with the file (document) and the textual content of the file (document). The extracted information about these processed document files is then ingested into the evidence management platform.

In the past ten years, powerful analytics software associated with these evidence management platforms has greatly economized the task of identifying responsive content within a larger collected data set. While the discrimination of *privileged* responsive content from non-privileged responsive content remains a more nuanced challenge for software analytics, there exist well established work-flows using a variety of search methodologies that can reliably and satisfactorily *identify* the vast preponderance of documents likely to contain privileged information. Thus, using the evidence management platforms to generate a list of the privileged content, the creation of the privilege log itself tends to be a manageable task.

In the past, the task of *summarizing* the privileged content ". . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim

[of privilege]" has remained a repetitive manual task typically assigned to new lawyers. *Rapidly emerging technologies, however, have the potential to reliably automate these kinds of tasks.*

The next generation of litigation support tools

Most every major developer of evidence management platforms has disclosed research, development, and testing initiatives associated with plans to deploy the technologies of large language models (LLM's) applied to electronic discovery tasks. These technologies have the potential to reliably generate non-privileged summaries of textual content based upon established criteria, and are likely to automate the repetitive and more expensive lawyer-intensive process of privilege log creation in ways not previously available.

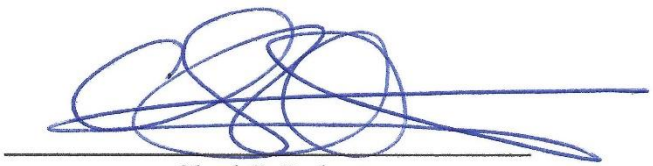
Conclusion

The purpose of my comments is to reinforce the wisdom and prudence of the Committee's current approach to addressing compliance with Rule 26(b)(5)(A)(ii): *flexibility*. This includes flexibility available to the parties and flexibility available to the Court.

Working assumptions about the costs, burdens, and case-specific reasonableness of privilege logging will be constantly evolving in fundamental ways. The Committee's present approach emphasizing flexibility will encourage continuing innovation and creativity in crafting case-appropriate solutions to Rule 26(b)(5)(A) compliance. It is the only approach that will permit the proposed amendments to remain relevant and impactful over the course of future years.

Thank you for the opportunity to contribute to the dialog.

eDISCOVERY COCOUNSEL, PLLC



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Professional

2014-Present	eDISCOVERY CoCOUNSEL, PLLC, Jacksonville, FL Principal and Founder
2000-2014	SPOHRER & DODD, P.L., Jacksonville, FL Partner and Trial Lawyer
1992-2000	HOLLAND & KNIGHT, LLP, Jacksonville, FL Litigation Partner
1991-1992	FOLEY & LARDNER, Jacksonville, FL Litigation Associate

Educational

1991	FLORIDA STATE UNIVERSITY COLLEGE OF LAW J.D., *magna cum laude* Associate Editor, *Florida State University Law Review*
1989-1991	Speech Writer and Research Assistant to Dean Talbot D'Alemberte President-Elect of the American Bar Association
1981	GEORGIA INSTITUTE OF TECHNOLOGY B.S., Engineering Science and Mechanics

Civic

2003-2008	JACKSONVILLE AREA LEGAL AID, INC. Board of Directors (President, 2007)
2004	Florida Bar President's *Pro Bono* Award, Fourth Judicial Circuit
1992-Present	American Inns of Court, Chester Bedell Chapter 2004-Present Master of the Court

Martindale Hubbel "AV" Rated since 1996
Bar Admissions: Florida (FBN: 896977), Georgia (GBN: 608307), Eleventh Circuit Court of Appeals, Southern, Middle, and Northern District Courts of Florida

Other

1981-1988	Lieutenant (Surface Warfare), UNITED STATES NAVY

Electronic Discovery

Positions:

American Association for Justice
- Co-Chairman, Electronic Discovery Litigation Group (2017 – present)
- MDL Rules Amendments Committee (2021 – present)

Samford University Cumberland School of Law (Adjunct Professor)
- Legal Project Management and Electronic Discovery (2019 - 2020)

The Sedona Conference – Working Group 1 (2019 – present)

Certifications:

CEDS (2016 - present); Association of Electronic Discovery Specialists.
RCA (2017 – present); Relativity™ Certified Administrator

CLE Presentations:

Conference Name	Title	Date
The Sedona Conference	Generative AI in Electronic Discovery	2023
Jacksonville Bar Association	Effective Meet and Confers with contemporary electronic information sources	2023
Complex Litigation E-Discovery Forum	Cyber Security Trends for eDiscovery Practice	2023
University of Florida E-Discovery Conference	Emerging Trends in eDiscovery Sources	2023
Georgetown University School of Law – Advanced Electronic Discovery Institute – Washington, DC	The Duty of Competence – Professional Standards for Practitioners	2022
Louisiana Bar Judicial Conference – Destin, FL	Digital Evidence in the Courtroom	2022
eDiscovery and Information Governance Retreat – Newport, CA	Plaintiffs' Side Electronic Discovery Issues	2022
CLEF - Complex Litigation eDiscovery Forum	Pending Rule Amendments and Case Law	2022
National Employment Lawyers Association	e-Discovery & ESI Primer	2022
University of Florida E-Discovery Conference	eDiscovery in Healthcare	2022
EDRM™	Privacy as a Rule 26 Burden	2021
ACEDS-Jacksonville	Electronic Health Records	2021
Jacksonville Justice Association	E-Discovery Workflows	2021

Conference Name	Title	Date
MTMP™	E-Discovery Basics	2021
Louisiana Association for Justice	Louisiana Judicial Conference	2021
Louisiana Association for Justice	Evidence Visualization in the Courtroom	2021
American Association for Justice	Electronic Discovery during Covid 19	2020
The Florida Bar Annual Evidence Seminar	Electronic Discovery by the Rules	2020
The Master's Conference – Washington DC	Proportionality Objections under Rule 26	2019
2019 Louisiana Judicial College	Electronic Discovery Practice and Procedure	2019
RelativityFest 2018	Plaintiffs' Side Rule 26 Conferences	2018
National Legal Aid and Defender Association 2018 Annual Conference	ESI for Legal Aid Clients and Causes	2018
MDL Conference 2018 American Association for Justice	eDiscovery ESI Protocol Orders	2018
Advanced 30(b)(6) Seminar - 2018	Rule 30(b)(6) Depositions for ESI Information Sources and Electronic Discovery	2018
The Master's Conference - Orlando	Electronic Discovery for Plaintiffs - Evidence Management (Legal Project Management) Principles	2017
Florida Justice Association Workhorse Seminar	eDiscovery for Plaintiffs' Counsel	2017
Technology and Law Conference of the Jacksonville Bar Association CLE	Electronic Discovery and Information Governance CLE	2016
North Carolina Advocates for Justice Discovery Conference CLE	Plaintiffs' Discovery for the Contemporary Plaintiffs' Practice CLE	2016
Jacksonville ACEDS Chapter	Analysis in the EDRM	2016
Florida Justice Association CLE Conference	CLE Electronic Discovery for the Plaintiffs' Paralegal	2015

Publications

Publication name	Title	Date
Trial Magazine – July 2023	Navigating Data Security in eDiscovery	2023
Trial Magazine – May 2020	Artificial Intelligence in the E-Discovery Toolkit	2020

Publication name	Title	Date
American Association for Justice (AAJ)	ESI Protocol Orders - Strategic Purposes for Plaintiffs	2018
Trial Magazine - November 2018	Turn the Tables on ESI	2018

TAB 30

No testimony outline or comment was submitted
by January 2, 2024.