COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 10, 2024

Introduction

The Civil Rules Advisory Committee met in Denver, Colorado, on April 9, 2024. Members of the public attended in person, and public on-line attendance was also provided. Draft Minutes of that meeting are included in this agenda book.

In August 2023 proposed amendments to Rule 16(b)(3)(B)(iv) and 26(f)(3)(D) dealing with privilege log issues, and a new proposed Rule 16.1 on MDL proceedings, were published for public comment. The first hearing on the proposed amendments and rule was held in Washington, D.C. on Oct. 16, 2023. 24 witnesses signed up to speak at that in-person hearing. Additional public hearings were held by remote means on Jan. 16 and Feb. 6, 2024, and presented the views of more than 60 additional witnesses. The public comment period ended on

Feb. 14, 2024. At its April 9 meeting, the Advisory Committee unanimously voted to forward the "privilege log" amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to the Standing Committee for adoption. It also unanimously voted to forward Rule 16.1, as revised after the public comment period, to the Standing Committee for adoption.

Part I of this report presents these two action items. It includes summaries of the testimony and comments received during the public comment period. It also includes notes regarding the post-public-hearing revisions to each proposal. The "privilege log" rule amendments remained exactly the same, but the Committee Note was shortened. The proposal of a new Rule 16.1 for MDL proceedings was revised by removal of the coordinating counsel provision and reorganized to focus on sequencing of management activities. As detailed in the notes of the MDL Subcommittee's two online meetings considering the public comment, careful thought was given to these changes. After that subcommittee effort was completed, further style revisions were adopted on recommendation of the Standing Committee's Style Consultants. Accordingly, the revised rule proposal included in this agenda book reflects the style consultants' contributions as well as the Subcommittee's revisions.

Part II of this report provides information regarding ongoing subcommittee projects:

(a) Rule 41(a)(1) Subcommittee: The Rule 41(a) Subcommittee, chaired by Judge Cathy Bissoon, is addressing concerns (raised by Judge Furman, a former member of this committee, among others) about possible revisions to that rule to resolve seemingly conflicting interpretations in the courts. The work is ongoing on this topic, and outreach to bar groups has occurred and is continuing. The reports received to date indicate that limiting Rule 41(a) to dismissals of an entire action can create difficulties that may present more frequent problems due to multiparty litigation in the 21st century compared to the 1930s norm, when the rule was originally adopted. It appears that an amendment should be seriously considered, but what exactly it should include remains uncertain. Though no proposed amendment was ready for consideration at the Advisory Committee's April meeting, it is hoped that there will be at least a rough draft for review at that committee's October meeting.

(b) Discovery Subcommittee ongoing projects: Besides producing the privilege log amendments mentioned above, the Discovery Subcommittee, chaired by Chief Judge David Godbey, is working on two ongoing projects and has discussed a third that will be taken up by a newly-appointed subcommittee addressing that project. The Subcommittee's ongoing projects are:

(i) Service of subpoena -- whether Rule 45(b)(1) should be amended to clarify what methods are required in "delivering a copy [of the subpoena] to the named person," as the rule directs. Courts have reached different conclusions on whether this rule requires in-person service. The Advisory Committee's current orientation is to amend Rule 45(b)(1) to permit service of a subpoena by means permitted under any of several provisions of Rule 4 for service of original process.

(ii) Filing under seal -- whether rule changes are warranted with regard to court authorization of filing under seal or the procedures used to obtain such authorization. Some

procedural specifics that have been proposed might be seen as intruding on local practice in some districts. Initial feedback has been obtained from representatives of the Federal Magistrate Judges Association, and it is expected that there will be a need to consult with clerks of court via the Advisory Committee's clerk liaison.

(c) Expanded disclosure requirements regarding interests in corporate parties: A Rule 7.1 Subcommittee, chaired by Justice Jane Bland (Texas Supreme Court), has begun gathering information about this topic, including a review of various local rules. This review has identified a variety of possible alternative descriptions of what must be disclosed, but to date the Subcommittee has not settled on what would be the best approach to a possible amendment. It has also received and considered the February 2024 update of Advisory Opinion No. 57 from the Judicial Conference Codes of Conduct Committee.

(d) Cross-border discovery issues: Judge Michael Baylson (E.D. Pa.) and Prof. Steven Gensler (U. Okla.) proposed study of possible rule amendments to address issues raised by cross-border discovery and explored in their *Judicature* article. A Cross-Border Discovery Subcommittee was appointed, chaired by Judge Manish Shah (N.D. Ill.), and it has begun work. For the present, it is focused on discovery for use in American proceedings rather than American discovery for use in proceedings in foreign tribunals. It has obtained initial feedback from the Federal Magistrate Judges Association and the Department of Justice, and is expecting to participate in a number of additional events with bar groups and other associations interested in the area. It is not presently clear whether there is a productive role for rule amendments.

Part III of this report provides information about other ongoing topics:

(a) Random assignment of cases: This new topic was introduced during the Standing Committee's January meeting, and it has continued to attract attention on several fronts. In March 2024, the Judicial Conference approved a new policy on this subject, and in late 2023 the Department of Justice provided a submission urging consideration of a rule amendment to address these issues. The topic remains under study by the Advisory Committee, in part to gauge the effect of the Judicial Conference's new policy. It remains unclear whether Civil Rule amendments are the most appropriate response to these concerns; the existence of single-judge divisions of district courts may largely be a matter of statute, and presently case assignment practices are handled locally as might be contemplated by 28 U.S.C. § 137(a). Circumstances may differ considerably in different districts, particularly in large states that are somewhat sparsely populated.

(b) Use of the word "master" in the rules: The American Bar Association has urged that the word "master" be replaced in Rule 53 and other places where it appears in the Civil Rules with the term "court-appointed neutral." The proposal asserts that the word "master" is not accurate, that "court-appointed neutral" is becoming the standard term, and that "master" is freighted with unfortunate historical connotations. The word has been used in Anglo-American jurisprudence for a long time, a use that does not seem intrinsically linked to slavery or other historical issues. It also is used by the Supreme Court, and appears in at least one provision in 28 U.S.C. Further work is needed to determine whether it appears elsewhere in the United States

Code. Initial views of Standing Committee members on this issue would be helpful to the Advisory Committee.

(c) Remote testimony: Particularly due to the pandemic, but also to technological change more generally, the possibility of remote testimony during trials and court hearings has become more prominent. It has been proposed that both Rule 43(a) (dealing with criteria for permitting remote testimony) and Rule 45 (authorizing a subpoena to compel an unwilling witness to report to a remote location to give such remote testimony be amended to make such arrangements easier. At the same time, there is concern about whether relying on remote testimony could undercut the value of in-person testimony in court and, sometimes, invite something akin to witness tampering. A new subcommittee, headed by Judge Hannah Lauck (E.D. Va.) was appointed after the April Advisory Committee meeting to study this issue. It is expected to begin work before the October meeting of the Advisory Committee. Somewhat parallel issues are pending before the Bankruptcy Rules Committee.

(d) Demands for jury trial in removed cases: A style change to Rule 81(c)(3)(A) in 2007 changed verb tense in a way that might confuse some about whether a jury trial must be demanded within 14 days of removal. The reported problem with the 2007 style change is that the rule might now be read to say that no demand need be made after removal unless the federal court so orders in the case if the time to make a demand in state court had not yet arrived. But it seems that the rule was intended to exempt cases from Rule 38's demand requirement only when the state court rules never required a jury demand, which might mean that practitioners in such states would be unfamiliar with the need to demand a jury. If a demand was required at any point in the state courts, one could expect careful practitioners to focus on when it is due in federal court upon removal, even if that is earlier in the litigation than would be required in state court.

One response might be to undo the 2007 change in verb tense: "If the state law does ~~did~~ not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." But there might nevertheless be uncertainty about whether a given state is among those exempted from Rule 38's demand requirement. An alternative proposal would require a demand under Rule 38 in every removed case without regard to state-court practice unless a jury demand was made before removal, resolving the possible ambiguity. Research by the Rules Law Clerk shows that there may be no requirement to demand a jury trial in as many as nine states, so a competing concern would be the risk of unsettling practices for lawyers from those states. At its April meeting, the Advisory Committee decided to continue studying the alternative of a blanket demand requirement after removal without regard to state practice.

I. ACTION ITEMS

A. Privilege log amendments proposed for adoption

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv) were published for public comment. There was much comment, from both "producer" and "requester" viewpoints. Summaries of the testimony and written comments on these proposed amendments are included in this agenda book.

After the public comment period, the Discovery Subcommittee met to discuss the comments. Notes of that Feb. 7, 2024, meeting are in this agenda book. There was no consideration of changing the rule amendments themselves, but considerable attention was given to the Committee Note to the Rule 26(f) amendment. The Standing Committee recommended during its January 2023 meeting that this Note be shortened, and the Subcommittee decided after the public comment period to shorten it further.

Though various proposals were made during the public comment period for Note language or rule language to prescribe what should be in a log, the Subcommittee's view was that "no one size fits all." Largely for this reason, it seemed that observations in the Note about burdens and methods of ameliorating those burdens are not likely to be particularly useful in individual cases. Nevertheless, there was extensive commentary about the Note. Some urged that it overly favored producing parties. Others urged that it be strengthened to support positions often adopted by producing parties.

The Subcommittee's consensus was to avoid Note language that seems to favor one "side" or the other. Thus, although the burdens on the producing party of preparing a detailed log can be large, the burdens on the requesting party to make use (perhaps even make sense) of a privilege log are often very heavy as well. Much depends on the circumstances of a given case.

Another challenging aspect going forward is the potential role of technology. Whether or not the term "metadata log" has meaning, it seems clear that many say the term means different things to different people. And though some witnesses contended that pretty soon technological advances will supplant existing methods of dealing with logging and simplify (and speed up) the process, it is not possible to be confident about what technology will bring, or when.

Altogether, these thoughts pointed toward pruning controversial statements from the Note. Accordingly, the revised Note below sets the scene for early consideration of privilege log issues while avoiding taking positions on many of the issues raised by participants in the public comment process.

Rule 26(b)(5)(A) cross-reference amendment: There have been proposals that a cross-reference be added to Rule 26(b)(5)(A) itself. But the Subcommittee did not favor taking this additional step. Because it was proposed by several who testified at hearings or submitted written comments, some explanation may be helpful.

In the first place, though adding this change to the existing amendment package should not require republication, it really seems not to add anything. The published amendment directs the parties to address compliance with this rule in their 26(f) meeting. That being the case, it seems odd to add something to this rule to remind people that Rule 26(f) applies. Anyone interested in what must be done at a 26(f) meeting presumably should begin by consulting 26(f); checking 26(b)(5)(A) as well seems an odd effort.

It somewhat seems that proponents of an amendment to 26(b)(5)(A) (from the "producer" perspective) were hoping that the revision there would either disapprove judicial decisions calling for a document-by-document log and/or promote categorical logs. The Subcommittee does not favor taking these steps; the "chaste" draft discussed on Feb. 7 avoided taking such positions.

And there is a more general rulemaking point here: Making cross-references might well be avoided unless necessary. To take a tendentious example, one might think that a cross-reference to Rule 11 might be included in Rule 8(a)(2). Surely Rule 11(b) bears on what attorneys should do as they devise their allegations to satisfy Rule 8(a)(2). The cross-reference idea might lead to a slippery slope toward multiple additions to rules that do not do more than call attention to other rules.

In sum, the Subcommittee recommended adoption of the published rule amendments with a shortened Note, but no change to Rule 26(b)(5)(A) itself.

Rule 45 amendment possibility: During the public comment period, some urged that Rule 45 also be amended to address compliance with Rule 26(b)(5)(A) by nonparties subject to subpoenas. The Subcommittee discussed this possibility during its Feb. 7 meeting and decided it did not warrant action.

Putting aside the possibility that this change could call for republication, a major concern was that the current amendment package is keyed to the Rule 26(f) meeting, which does not involve nonparties who receive subpoenas. Moreover, though there have been many reports about the burdens on parties caused by privilege log requirements, there has not been a comparable level of comment about such problems resulting from subpoenas. In addition, Rule 45(d) already specifically commands those serving subpoenas to "take reasonable steps to avoid imposing undue burden or expense" on the person served with the subpoena, and also says that the court "must enforce this duty and impose an appropriate sanction * * * on a party or attorney who fails to comply."

Post-Public-Comment revisions

Below in underscore/overstrike format are the post-public-comment changes the Subcommittee recommended to the full Advisory Committee. Following that version is a "clean" version of the proposed amended rule and Committee Note.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

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

* * * * *

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

* * * * *

Committee Note

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties. ~~costs, often including a document-by-document "privilege log."~~

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. ~~Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens.~~ This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

~~Requiring this discussion at the outset of litigation is important to avoid problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period.~~

This amendment also seeks to provide ~~grant~~ the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials. Depending on the

nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

~~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.~~

~~In some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. For example, it may be that communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. These or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.~~

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment, and should minimize problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

~~Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency of claims that producing parties have over-designated responsive materials. Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case. It can be difficult to determine whether certain materials are subject to privilege protection, and candid early communication about the difficulties to be encountered in making and evaluating such determinations can avoid later disputes.~~

"Clean" version of Revised Rule and Note

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties.

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

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nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

Changes Made After Publication and Comment

There were no changes to the rule amendment after the public comment period. The Committee Note was shortened.

Post-Public-Comment revisions

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Management.

* * * * *

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

* * * * *

(B) *Permitted Contents.*

* * * * *

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

* * * * *

Committee Note

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words – "and management" – are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid

problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes, ~~between themselves,~~ it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case there is no overarching standard for all cases. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

"Clean" Version of Rule and Committee Note

Rule 16. Pretrial Conferences; Scheduling; Management

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Changes Made After Publication and Comment

There were no changes to the rule amendment after the public comment period. Two small modifications were made to the Committee Note.

Notes of Discovery Subcommittee Meeting

Feb. 7, 2024

On Feb. 7, 2024, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Those participating included Judge David Godbey (Chair) and subcommittee members Judge Jennifer Boal, Ariana Tadler, Helen Witt, Joseph Sellers, David Burman, Carmelita Shinn. Additional participants included Emery Lee of the FJC, Allison Bruff and Zachary Hawari of the Rules Support Office, and Professors Richard Marcus, Andrew Bradt, and Edward Cooper.

Before the meeting, Prof. Marcus had circulated a sketch of some possible revisions to the Committee Note, and Helen Witt had circulated some further possible revisions. There were no suggestions for changing the proposed amendment to the rule.

Rule 26(f) Amendment

A starting point was that there seemed to be consensus on the objectives of the amendment. The goal is to move up serious consideration of the logging method for the case and thereby avoid problems of the sort that have emerged too often inappropriately late in the discovery process.

At the same time, the three public hearings make clear that there is a significant divide in the bar between what one could call the "requesting" parties and the "producing" parties. At the first hearing, most of those who addressed privilege log issues were producing parties, and at the third hearing they were mainly requesting parties.

So the participants focused on the Note, including both the revisions circulated by Prof. Marcus and the further revisions circulated by Ms. Witt.

One recurrent topic was the extent or manner in which the Note should address the costs of various forms of privilege logging. On the one hand, preparing a detailed document-by-document log can be extremely expensive. The Committee Note that accompanied the addition of 26(b)(5)(A) in 1993 recognized that possibility and suggested that other methods might (including describing the withheld documents "by categories") might be preferred when "voluminous documents are claimed to be privileged." Several on the producing party side urged that the courts had not attended to the guidance provided by this note and instead had gravitated toward document-by-document logging.

But one point emerging from the hearings is that evaluating a privilege log can be very burdensome also when there are many documents involved, and that opaque logging methods can make that burden even greater.

There was considerable discussion of the risk that the Note might be seen to put a "thumb on the scale" in evaluating what would work in a given case. And it was noted that a overarching preference for one method or another might not be suitable to some cases. Instead, for some

types of materials one method might make most sense, while a case might also involve other sorts of materials for which a different method might make more sense. It would be unwise to take the position that a single method would be necessary for all production in a given case.

Since the only changes under consideration were to the Note, it was asked whether the content of the Note really made that much difference. Justice Scalia, for example, said more than once that what matters is what the rule says, and that the Note has little importance. And the objection we have repeatedly heard is that the cautions in the 1993 Note to 26(b)(5)(A) when it was added to the rules were overlooked by the courts, hardly suggesting the relatively minor wording changes to the Note will make major differences in practice. But a different view was offered, stressing that more recently attention to the Note has considerably increased; what we say in the Note will be taken into account.

Another topic was the concern by requesting parties about over-designation, or what might be called inappropriate designation of certain materials as privileged. Though that concern was cited by several witnesses during the public comment period, it is not clear that the rule should take a position on whether it is rare or endemic.

Another point to keep in mind is that there are other privileges that implicate additional specifics not important with regard to the attorney-client and work product privileges. For example, one witness on Feb. 6 reported on the privileges that arise in civil rights litigation against police officers and prisons. There are many such cases in the federal courts and it could easily be that a privilege log for such cases would need different specifics than a commercial or product liability case.

A theme emerged: Given the contentious nature of the debate about costs and the variability of cases, perhaps the most prudent course would be for the Note to be relatively "agnostic" about costs and over-designation. Another idea would be to sidestep taking a position on whether document-by-document designation should be the norm.

Agreement on this point stressed that there are really three things to emphasize: (1) early attention to the method to be used is key; (2) both judges and parties need to be reminded that the rule is flexible and that it does not adopt a preference for any particular method or even a single method for everything to be produced in a given case; and (3) whatever method is adopted for a given case, the basic goal is to enable the other side to assess the privilege claim.

Caution was expressed about "drafting on the fly," even as to Note language. Instead, it seemed preferable to permit Prof. Marcus to try to incorporate the themes discussed during the meeting into a revised Note, building in part on the redraft from Ms. Witt and suggestions by other Subcommittee members.

Another theme emerged: Insisting that the parties deal with these issues up front and leaving it to judges to regulate privilege log issues when the parties cannot agree on the method of logging seems preferable to trying to prescribe in the Note, or to endorse certain methods. The goal is not so much to tell judges "this is what to do," but to tell parties "you can persuade the other side or the judge to do things in the way you think they should be done." Prescribing

solutions in advance and across the board is unwise. And we have been told that technology may soon play an outsized role in managing some of the burdens of privilege logging.

A reminder was offered: The first time this proposed amendment came before the Standing Committee, there was no problem with the small rule changes, but resistance to the length of the Note. The discussion suggests that things included in the Note as published could appropriately be removed in the expectation that the rule will bring the matter to the judge's attention, and that a judge may flexibly design a suitable method for the case in question. So shortening the Note might actually please the Standing Committee.

The resolution was for Prof. Marcus to circulate a new revision of the published Note based on the circulations before this meeting and the discussion during the meeting. Ideally, that could be evaluated by an exchange of email among members of the Subcommittee rather than necessitating another meeting.

Rule 26(b)(5)(A)

The amendment package did not include any change to Rule 26(b)(5)(A) itself. There was support (from the "producer" side) for including a cross-reference in that rule to call attention to the change to Rule 26(f) about method of logging.

Some who urged a change to this rule also urged that it should say that document-by-document logging is not required or preferred, and perhaps even offer the alternative of categorical logging.

The memo from Prof. Marcus circulated before the meeting offered a "chaste" cross reference to the amendment to Rule 26(f), to say that a party withholding privileged material must make the claim of privilege "after complying with Rule 26(f)(3)(D)."

The draft Note for this possible amendment to 26(b)(5)(A) included a bracketed quotation from the 1993 amendment to the rule that some on the "producer" side said had not been taken seriously enough under the rule. It was agreed that including this quotation of something already in the record (in the 1993 Note) would not be consistent with the Subcommittee's consensus on avoiding taking positions on what method or methods to use to satisfy the rule.

A concern was raised about making any change to this rule. When this additional change was proposed after the Standing Committee remanded the proposed amendment to permit the Advisory Committee to shorten the Note, the reaction was that it would be odd for somebody who is complying with Rule 26(f) to be looking at Rule 26(b)(5)(A) to find out how to do so. Unless lawyers are simply overlooking Rule 26(f), it might be odd to put a reminder in 26(b)(5)(A) that they should comply with 26(f).

Moreover, the Rule 26(b)(5)(A) issue would arise only after a Rule 34 request had gone out. Even though it is now permissible to make "early" Rule 34 requests before the 26(f) discovery-planning meeting occurs, compliance with those "early" requests is to occur only after the 26(f) conference. As a consequence, it would not be usual that 26(b)(5)(A) issues would

emerge at the time of the 26(f) conference independent of the proposed amendment to that Rule 26(f). So amending this rule also might not be important unless the Subcommittee wishes to take a position on whether document-by-document, categorical, or some other method is preferred.

And another caution was raised -- the rules do not usually include cross-references unless needed. For example, one could say that Rule 11(b) has a bearing on issues pertinent to motions to dismiss under Rule 12(b)(6), but Rule 12(b)(6) does not include a cross-reference to Rule 11.

The question whether to propose an amendment to Rule 26(b)(5)(A) in addition to the published amendment proposals will remain open. Adding that to the amendment package likely would not mean that republication should be required.

Rule 45 Amendment?

Some witnesses in the hearings have urged that Rule 45 be amended as well. That rule does use the same method for logging of withheld materials as does Rule 26(b)(5)(A). The sketch circulated by Prof. Marcus included a possible amendment to Rule 45.

A significant problem with amending Rule 45, however, would be that the pending amendment proposals are keyed to the Rule 26(f) discovery-planning meeting and designed to make the parties (and the judge) attend to the method of privilege logging up front. There is no similar meeting requirement with regard to subpoenas, and they almost always occur after the 26(f) meeting has occurred, since formal discovery may not occur until the parties have devised a discovery plan.

Moreover, though there have been many complaints about the burdens of privilege logging on parties, there has been scant suggestion that subpoena practice has presented similar problems. Rule 45 already directs that the party serving the subpoena avoid unduly burdening the nonparty subject to the subpoena.

The consensus was not to pursue a Rule 45 amendment further.

Summary of Testimony and Comments

This memo summarizes the testimony and written comments about the privilege log proposals during the public comment period. When possible, it gathers together comments from the same source, including both testimony and separate written submissions. On occasion, the summary of testimony includes the written testimony submitted by witnesses.

The written submissions are identified with only their last four digits. The full description of each of them is USC-Rules-CV-2023-0001, etc. This summary will use only the 0001 designation for that comment.

The summaries attempt to identify matters of interest by topics. For some of the initial topics there may not have been comments or testimony. If none are received on those topics they will be removed from the final summary. The topics are as follows:

Privilege Log Amendments

General

Timing of Meet and Confer

Categorical Logging

"Rolling" Logging and Timing

Use of Technology

Amending Rule 26(b)(5)(A) As Well

Amending Rule 45 As Well

Washington Hearing (Oct. 16)

General

Robert Keeling & 0003: He regularly serves as "discovery counsel" in major matters. Sometimes that includes millions of documents to review, and turns up tens of thousands for which privilege can be claimed. There is a broad consensus that reform is necessary due to the very large costs of preparing privilege logs, sometimes exceeding $1 million. Despite that, privilege logs themselves often do not include important information. But these proposed amendments will not alleviate the problems that exist, in part because they do not directly amend Rule 26(b)(5)(A). The rule should embrace Sedona Principle 6, giving the responding party to the right to select the appropriate method of preparing a privilege log. It should also provide some general guidelines on privilege log practices. He tends to be called in on asymmetric litigations, and in those the principle of proportionality tends to get lost. There is good reason for caution in screening for privilege, particularly given the risk of inadvertent waiver.

Doug McNamara: I support the proposed amendments because they will aid the courts and the parties to address privilege claims by focusing on the timing and production of logs, and the method for doing so. This can avoid unnecessary delays. It would be useful to consider providing examples of what should be in a proper log. For example, the Committee Note (at line 51-54) might be revised as follows:

> In some cases, it may be suitable to have the producing party deliver a document-by-document ~~listing with explanations of the grounds for withholding the listed materials~~ privilege log. Courts have found as adequate privilege logs that provide a brief description or summary of the contents of the document; the number of pages and type of document; the date the document was prepared; who prepared and received the document; the purpose in preparing the document; and the specific basis for withholding the document.

Regarding the risk of privilege waiver, Rule 502(b) provides protection, along with the 26(b)(5)(B) clawback right. And a rule 502(d) order should provide almost ironclad protection.

Alex Dahl (LCJ) & 0003: This proposal is flawed because it does not focus on the real source of the problems -- Rule 26(b)(5)(A) itself. There are thirteen references to 26(b)(5)(A) in the proposal, demonstrating that it is the real source of the problems being addressed. There is no question that rule changes are needed. For one thing, even though the Committee Note to the 1993 rule adoption cautioned that document-by-document logs are not required, many courts and lawyers misconstrue the rule to require that sort of log in every case. And since 1993 the explosion of digital data has resulted in ever-increasing burdens of the privilege process. But "[o]nly an amendment to Rule 26(b)(5)(A) can sufficiently clarify that the rule does not require document-by-document privilege logs but rather allows producing parties to create categorical privilege logs or to agree on other alternatives." At the very least, 26(b)(5)(A) should be amended to reference the changes to 26(f). These changes would benefit requesting parties as well as producing parties, for as things now stand requesting parties often must review thousands of entries, irrespective of importance. Often challenges to privilege logs are used as a tool by overly aggressive counsel to impose extra expenses on producing parties. But privilege log disputes rarely result in the production of documents or data that are dispositive of a case or claim. Furthermore, the lack of uniformity among courts (including in local rules) undermines uniformity in the federal court system.

Jonathan Redgrave: There is a significant level of nuance in modern privilege log practice. This proposal is useful, but not sufficient.

Amy Keller (& no. 0055): This rule does the job that needs to be done. I have reviewed millions of privilege log entries, and recognize that all parties to civil litigation have had complaints about privilege logs. But many of those issues could be resolved with early discussion about the how, when, and in what format the logs should be produced, and *if* categorical logging is suitable for their particular case. No "one size fits all" solution is appropriate. That is why courts and parties should strive to resolve these problems collaboratively. I enthusiastically support the proposed amendments to Rules 16 and 26 because they move in this direction. "Resolving those issues at the outset of litigation will reduce the

number of disputes the parties have during the discovery process." In a major MDL proceeding recently, we found that leaving the details of logging until a later date ultimately led to significant disputes and *months* of meet and conferring, in part because the defendants insisted on categorical logging. Document-by-document logging is often essential, because only that ensures that producing parties do a secondary review after initial designation of materials as privileged. Even so, requesting parties' challenges to designations (based on detailed logs) regularly produce the concession that many withheld documents are not actually privileged.

Lana Olson (Defense Research Institute) & 0006: DRI supports that proposed amendments to Rule 16 and 26. They will encourage parties to devise proportional and workable privilege log protocols, while facilitating timely judicial management where necessary to avoid later disputes. This is a way to avoid the continual frustration with document-by-document logging. Those logs seldom enable the parties or the court to assess the privilege claims. This problem has escalated due to the exponential proliferation of ESI since Rule 26(b)(5)(A) was adopted in 1993. But despite the 1993 Committee Note recognizing flexibility with regard to logging methods, too many parties and courts adhere to the notion that every document must be separately logged. Doing that is very labor-intensive, and regularly constitutes the largest category of pretrial spending in document-intensive litigation. "Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, and make and then validate initial privilege calls, and then construct a privilege log describing each withheld document."

Amy Bice Larson: The LCJ comments generally align with my views and experience. She has found that the plaintiff side treats document-by-document logging as the default rule.

John Rosenthal: Modern litigation is excessively burdensome and expensive, and privilege review and logging are usually the largest component of that wasteful reality. The current proposals go a long way toward righting the ship. But something must be changed in 26(b)(5)(A) itself for this to work. Unfortunately the courts did not take the sensible comments in the 1993 Note to heart. The result has been a "default" of document-by-document logging that some plaintiff-side lawyers use as a club.

Jan. 16 Online Hearing

Jeanine Kenney: The Committee's thoughtful approach reflects current practice and will reduce privilege log disputes. Requiring early meet-and-confer sessions will encourage early resolution of the required format, content, and timing of privilege logs, and will minimize or eliminate later time-consuming disputes and reduce the need for "do-overs." We always try to talk with the other side early in litigation. But the Note does not do an adequate job in addressing the widespread problem of over-withholding and undervalued document-by-document logs. And the Note seems somewhat slanted. "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." "Purported burdens of compliance should not be a justification for non-compliance with Rule 26(b)(5)(A). There is too much discussion in the Committee Note of the burdens on the producing party.

Lori Andrus: I support the proposed rule changes. But I urge the Committee to make changes to the Note: I have never found that the failure of the parties to communicate about the nature of the privileges and materials involved to be a concern. There is too much emphasis on costs for producing parties in the Note. I recommend striking the sentence in the last paragraph of the Note referring to that possibility. In addition, I would strike the sentence about large costs that appears in the first paragraph of the Committee Note. I also support the proposal of Doug McNamara that specific language be added to the Note explaining what should be in a privilege log.

Emily Acosta (testimony & 0020): Many privilege logs are too long because documents have been improperly designated. Over-designation, or "fake privilege," is increasingly pervasive, as illustrated by the recent Google litigation. And increased costs are a result of recent law firm rate hikes and salary increases for associates. If a change is made, "reform rewards bad behavior."

David Cohen: For big cases, waste is upon us. It can cost as much as $4 million to prepare a privilege log. The courts disregarded what the Committee Note said in 1993 about the new Rule 26(b)(5)(A) requirement. Having a requirement to discuss this set of issues up front is an excellent start. We need to do something like the 2015 amendment to Rule 26(b)(1) regarding proportionality.

Chad Roberts (eDiscovery CoCounsel, PLLC): Rapidly emerging technologies are highly likely to fundamentally change historical assumptions concerning the costs and burdens of document-by-document privilege logs. The language of the rule proposal prudently emphasizes flexibility. The comments of some others urging that the amendments go further would likely result in a rule that would be obsolete by the time it went into effect. The preparation of a document-by-document privilege log requires two tasks: (1) identifying the responsive items that contain privileged content; and (2) summarizing those items in a way that complies with the rule and avoids disclosing privileged material. The second task is the one that generates the preponderance of costs associated with document-by-document privilege logging.

Feb. 6 Online Hearing

Seth Carroll: As a plaintiff civil rights lawyer, I believe the proposed amendments will ensure flexibility to adjust to privilege concerns based on the circumstances of each case, and avoid unnecessarily specific or rigid application that may not meet the varying needs of discovery. Party agreement due to Rule 26(f) consultations will likely reduce discovery disputes and promote efficiency. In a straightforward excessive force case against a single officer, the burden of identifying the specific documents withheld is relatively low. On the other end of the spectrum is a correctional heat-stroke case with hundreds of thousands of pages of documents and a variety of privilege claims, including self-evaluation privilege, joint-defense privilege, and claims about proprietary information. In a case like that, the cost and burden on both sides is significantly greater, but so also is the risk that privilege logs can be used to obstruct discovery of relevant evidence. Efforts to insert "proportionality" into this rule topic should be resisted. Some municipal or corporate actors will attempt to hide probative documents by using unilateral "proportionality" concerns.

William Rossbach: From 40 years' experience litigating plaintiff-side cases involving medical, scientific, and engineering issues, I strongly support the proposed amendments to mandate early development of privilege claim principles. It is critical to have this set of issues addressed at the outset. There are almost always delays. In some cases there is major problem with delayed disclosure of privilege logs, over-designation of allegedly privileged materials, and inadequate descriptions of what has been withheld. I agree with others on the plaintiff side who have already testified, including Mr. McNamara, Ms. Keller, and Ms. Andrus. I think that the Note is somewhat slanted in its emphasis on the burdens of logging on the producing party without also recognizing the burdens on the requesting party of inadequate logs that do not afford a basis for a confident assessment of privilege claims. I think that the Note should be revised along the following lines:

> Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-document "privilege log." However, such privilege logs may well be required to provide the information the party seeking discovery needs to assess the validity of the privilege claims, as the rule requires.

I also think (along with others) that it would be desirable for the Note to provide a description of what a log should include, as proposed by Mr. McNamara. I also note that some of the burden on corporate parties "has been the previously unimaginable corporate expansion of internal communication with large 'cc' lists which likely reduce the validity of a privilege claim." For example, recently the FTC and DOJ have been warning companies under investigation not to delete their Slack or Signal chat histories.

Brian Clark: I support the proposed rule amendments, but have concerns about the Note. In the District of Minnesota, such planning has long been encouraged as a part of case preparation. The stress on "burden" looks only to producing party efforts, and the Note seems to suggest that a categorical or metadata log is sufficient. But big corporations regularly overclaim privilege, and a categorical log would insulate that behavior. And there is a wide variety of views about what a metadata log is or should contain. I think the sentence at the beginning of the Note about the costs of document-by-document logging should be stricken.

Amy Zeman: Overall, this proposal is very well done. The Committee's efforts to amend the rules regarding privilege logs have resulted in a fair and effective proposal that will benefit parties and the courts. The proposed changes provide needed flexibility while ensuring that parties address the need for case-specific solutions early in the litigation. But I find that the Note places too great an emphasis on the cost of preparing a privilege log and not enough on the harm inherent in over-designation. This imbalance inappropriately suggests that a party may withhold material but fail to provide sufficient information to back up the claim. And it overlooks the ever-developing role that technology plays in producing privilege logs. I think that the following should be added at the end of the first paragraph of the Note:

> And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery.

Adam Polk: From years of experience representing plaintiffs, I support the amendments that align with best practices -- (1) engage early; (2) produce privilege logs on a rolling basis, and (3) exercise flexibility when it comes to logging over the life of a case. I have some concerns about the Committee Notes, however.

Kate Baxter-Kauf: Based on my experience in data breach, privacy, and cyber security litigation, I believe the proposed amendments are helpful and likely to aid the parties, in part by frontloading resolution of disputes. In my practice, the substantive privileges are often based on state law, while Rule 26(b)(3) applies to work product protections. Resolving these privilege issues often involves multiple layers of factual inquiry. "Evaluating and litigating a privilege log dispute in this arena is often a multistage process that is time intensive, expensive, and laborious for the parties and especially courts." But the Note unduly emphasizes the burdens of preparing for production and fails properly to address the burdens on the requesting party that result from flaws or insufficiency in the privilege log. For a variety of reasons, "document-by-document privilege logs exist and are the default mechanism for compliance with Rule 26(b)(5)(A), at least in the complex litigation in which I am involved." I think the Note material on when a document-by-document log is appropriate and inviting consideration of a "categorical" log should be removed.

Anthony Mosquera (Johnson & Johnson): The amendment should prompt adoption of modern approaches regarding the format of a privilege log. Presently the presumption is a document-by-document log. That should be replaced with a presumption in favor of a modern metadata log or a categorical log.

Robert Levy (Exxon): The proposal requires early engagement on privilege log issues, which is potentially helpful, but it does not address the underlying issue, which is the presumption applied by many courts that document-by-document logging is requires in all cases.

Aaron Marks (Committee to Support Antitrust Laws): We support the proposed rule, but have concerns about the Committee Note. The rule strikes an appropriately modest balance that will benefit litigants and courts. But the Note makes needlessly strong statements about a variety of topics:

(1) The Note stresses "burdens" on producing parties without also focusing on the substantial burdens imposed on requesting parties and courts and does not adequately recognize that Rule 26(b)(5)(A) imposes on the party asserting a privilege the burden to show that it applies;

(2) The first paragraph of the Note says document-by-document logs are "often" associated with large costs, which is likely to be interpreted by courts as expressing a preference against document-by-document logs. This paragraph should be removed. Moreover, our experience has been that document-by-document logs entail minimal burden in most cases that are not complex, which make up most of the federal docket. When larger numbers of documents are involved, the vast majority of the log consists of metadata.

Pearl Robertson: It is desirable to encourage early cooperation, but the parties must not be handcuffed by early agreements that prove unhelpful. The second sentence of the Note, referencing the costs of creating a privilege log, should be removed. For one thing, technology can reduce such costs. There should be no suggestion in the notes that categorical logging be considered. The better option is a metadata log.

Maria Salacuse (EEOC): The EEOC supports the proposed amendments to require parties to discuss privilege logs and report to the court about that subject. Unfortunately, those logs are often an afterthought and only supplied in response to a threat of a motion to compel. In some cases, producing parties do not provide logs until after depositions, thereby preventing the requesting party from asking witnesses about documents that should have been produced. Even then, the logs ultimately produced do not sufficiently describe the withheld documents to permit us to assess the privilege claim. The proposed amendment appropriately focuses on discussion up front. At the 26(f) stage, the parties are poised for such a discussion because document review has not yet commenced. At the same time, the amendments provide the parties and the court with discretion to tailor the logging method the specific case. We propose addition of the following at the end of the first paragraph of the Note (line 27 in the amendment proposal):

> Application of the Rule in a manner that does not allow the receiving parties to assess adequately the claim of privilege likewise imposes burdens on such parties and the court and may prevent parties from identifying improperly withheld documents.

In addition, we propose that the following be added to the Note at line 50:

> Whatever approach is agreed upon, the privilege log must provide sufficient information for the parties and the court to assess the privilege claim for each document withheld consistent with Rule 26(b)(5)(A).

And at line 65 we would add the following underlined language:

> But the use of categories calls for careful drafting and application keyed to the specifics of the action to ensure that the use of any categories or other approach provides sufficient information to assess the privilege consistent with Rule 26(b)(5)(A).

We disagree with assertions made by some that the rule should adopt a presumption that non-traditional logs, such as metadata or categorical logs, are preferred.

Brian Clark: As a plaintiff-side antitrust lawyer, I support the proposed amendments. But I have concerns with the Note and intend to focus on that. Early discovery planning, including privilege logs, is critical. But the Note over-emphasizes the burden and cost of logging. I find this inappropriate for several reasons: (1) large corporations are advised by counsel to label everything "privileged" even when no colorable claim of privilege exists. A categorical log would obscure this practice. (2) Though "metadata log" may have some appeal, there is a wide range of views on exactly what that is. Trying to decipher such a log can be extremely burdensome. (3) Privilege is an area in which there are perverse incentives to withhold non-privileged relevant information. Even under the current regime, I see vast over-designation. (4)

To the extent the producing party has legitimate burden concerns, the obvious solution is Fed. R. Evid. 502(d). I think the second sentence of the Committee Note should be stricken; the Note should not be dismissive of document-by-document logs.

Written comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): The proposed changes will force communication about these issues. But the changes do not go far enough. The reality is that the undue burdens that motivated the amendment proposal do not exist in all cases, but instead are concentrated in "document-heavy" cases. At least in those cases, the parties are probably not going to be prepared to address these concerns in a meaningful way at the 26(f), conference, with occurs before any document discovery has actually occurred.

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I think the proposed amendments properly recognize that early discussions are a productive way to eliminate disputes and expedite the resolution of disputes over privilege. But I think the Committee Note inappropriately suggests that in "large documents" cases document-by-document logging may not be warranted. "The more documents that are withheld the more important it is that the responding party be able to assess the claims of privilege."

Federal Magistrate Judges Association (0018): "FMJA Rules Committee members are in full agreement with the proposed changes, including the flexibility it allows for parties and the Court to determine the best process for addressing privilege n a case-by-case basis to determine how best to minimize the burden and expense of privilege logging."

Minnesota State Bar Association (0034): The MSBA has voted to support these rule changes. It believes they will foster increased transparency and possibly efficiency between parties and the court.

American Ass'n for Justice (0038): "Some defense-side commenters have focused on a minority of cases involving huge document productions. Of course, there is an objection to document-by-document logs in these cases, but it would be a mistake to draft a rule based on mega-document productions." The appropriate method of logging needs to reflect the number of documents involved in the case, and the proposed amendments strike the right balance as presently written. In particular, AAJ favors retaining Note language emphasizing flexibility in designing logging methods. But the Note should be fortified by clearer emphasis on the problems created by over-designation. At least, emphasis in the Note on the cost of logging should be removed. In addition, as suggested by Douglas McNamara, a definition of an appropriate log could be added to the Note.

John Rosenthal (0039): Discovery of ESI has greatly magnified the cost of discovery, and the review of ESI for production is the largest cost in discovery. Review and logging of documents withheld on the basis of privilege is the largest cost component of discovery. This large cost is compounded by the reality that many courts and parties continue to construe Rule

26(b)(5)(A) as requiring document-by-document logging. The proposed amendments do not directly address the fundamental problem resulting from the routine insistence of many judges on document-by-document logs.

Jory Ruggiero (0040): The Rule 26(b)(5)(A) requirement is critical to fair litigation. In a state court case raising the same issues as a federal MDL, the defendant withheld over 3,700 documents as privileged. But when the court eventually screened them, it turned out that 99% were not privileged. I support the proposed rule amendments, but think the Note should be modified to remove emphasis on the burdens of preparing logs. The logs are essential.

Christine Spagnoli (0044): As a plaintiff's lawyer, I have often had to obtain court orders to probe the specifics of privilege claims, and have often obtained court orders to produce based on those specifics. I generally agree that the proposed changes are helpful, I urge the Committee to take account of the fact that not all cases involve large productions such as those in mass tort cases, and that the rule needs to be flexible to address individual cases.

Hon. John Facciola & Jonathan Redgrave (0045): We strongly urge that flexibility and a focus on the needs of the case be retained in the rule and Note. Some proposals to amend the Note would undermine this objective. If the Note suggests that deviation from the document-by-document method must be justified by a showing of burden by the producing party, that would undermine the amendments' purpose. The 1993 Committee Note got it right -- document-by-document logs are sometimes appropriate, sometimes not. And categorical logging should not be categorically rejected. It is also important to retain the current draft Note's emphasis on burden. Failure to act will worsen the already bad situation in which we operate.

Lawyers for Civil Justice (0053): "Privilege review is the largest single expense in civil litigation." This problem is getting worse due to changes in technology. There is a critical "rules problem" due to the incorrect tendency of many courts to interpret Rule 26(b)(5)(A) as regarding document-by-document logging as the default. The solution is clear -- amend Rule 26(b)(5)(A) to clarify the this is not the default requirement. In addition, the concept of proportionality should be prominently featured in the Note to this amendment.

In-house counsel at 33 corporations (0056): Many courts misconstrue 26(b)(5)(A) to require a document-by-document log in every case despite the 1993 Committee Note. This mistake results in "one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation." We believe that the solution must lie in amending 26(b)(5)(A) itself, not only the rules addressed in the published proposed amendments, including a presumption that the parties are not required to log trial preparation documents created after the commencement of litigation.

Mackenzie Wilson (0057): I support the proposed rule because it calls for early discussion and allows flexibility depending on each individual case. I believe that logs should be exchanged early in the case, updated regularly, and should thoroughly explain why each document was withheld. Even though the cases I handle usually do not involve large numbers of documents, I find that vital documents are often withheld without justification. Switching to a categorical log would be unfair to both parties.

Benjamin Barnett & David Buchanan (0058): We are both now at Seeger Weiss, but Barnett spend years on the defense side, with an emphasis on eDiscovery. We fully support the proposed amendment to Rule 26(f). Mandating an early discussion and that this topic be included in the report to the court will product benefits. But the draft Note could be a source of future problems -- particularly the emphasis on the cost of preparing a log -- belong in the Note. We have found that one of the real drivers of the costs associated with privilege challenges is that corporate defendants over-designate early in the litigation. We dispute the draft Note assertion that Rule 26(b)(5)(A) has not been applied flexibly.

Leah Snyder (0061): Privilege logs must be detailed and complete so parties trying to ascertain the accuracy and appropriateness of the privilege asserted can do so. Over-designation remains a serious problem and categorical logs can conceal bad actors. I believe this rule change will assist the parties in ensuring the logs are appropriate and tailored to provide needed information to the parties.

Briordy Meyers (0063): These amendments are well intentioned, but they don't go far enough. The interpretation of 26(b)(5)(A) "has created an entire sub-industry in the legal profession of attorneys, vendors and legal technology dedicated to addressing claims that go to the heart of the attorney-client relationship and legal ethics." It has forced courts and lawyers to spend weeks, months, and even years wrangling with a problem that is completely self-imposed and did not exist before 1993. "Rule 26(b)(5)(A) is, on its face, inconsistent with Rule 26(b)(1) and Rule 1." But the proposed amendments may lead to even worse outcomes by provoking disputes in cases in which they would not arise absent the rule change. The best solution would be to amend 26(b)(5)(A) to remove the description requirement. Short of that, presumptively valid methods should be included in an amended rule.

MaryBeth Gibson (0064): In an MDL before Judge Grimm, Special Master Facciola ordered that the parties not use categorical logs. Subsequently, defendant Marriott turned over thirteen thousand documents that were indispensable to plaintiffs' case. Had the Special Master permitted a categorical log, these documents would not have been produced. Though categorical logs may be appropriate, that should depend on negotiations between the parties. "Simply put, burden should not be an excuse to demonstrating privilege on a document-by-document basis pursuant to Rule 26(b)(5)."

Joseph Gugliemo (0065): Party agreements about methods for logging, including categorical methods, can be beneficial. But that's only possible once the parties have enough information, and I worry that these amendments would result in hasty and premature arrangements. An official presumption in favor of early resolution of these questions also raises risks of creating perverse incentives for gamesmanship. I therefore recommend rejecting these amendments as written. The problem is timing; often the party's relationship with counsel has not reached a suitable point to make such arrangements. So one party, and the court, will be flying blind at the outset. Often the dynamics are not clear until well into the litigation, after custodians, search terms, and structured data sources have been identified. "For one thing, a hasty agreement on privilege logging can yield large-scale withholding of non-privileged but responsive documents because one party does not fully understand the other's practice regarding, e.g., the inclusion of counsel on email."

Google LLC (0067): The proposed changes do not adequately address the massive challenges associated with privilege logs, and the Committee Note will unintentionally exacerbate the problems. Additional amendments to the rules and Notes are needed. One addition that is needed is a reference to proportionality. There is, at best, a vague reference to proportionality in the current Notes. Proportionality is particularly important with regard to asymmetrical litigation, where parties rarely can reach agreement about solving problems like these. Discovery disputes about logging can readily sidetrack the entire case. The Note should be strengthened with regard to alternative methods of logging, including categorical logging. Metadata or "metadata plus" logs are another possibility. And rolling logs ought not be endorsed for large document cases because they can be a major burden when production may be occurring on a monthly or even bi-weekly basis. This idea overlooks the reality that privilege review is a difficult and time-consuming undertaking. It would be better for the Note to endorse "phased" or "tiered" logging. And in large scale litigation it would usually be true that the log should be prepare only as the production process is nearing completion.

Patrick Oot (0070): I offer examples of privilege logs that cost nearly $500,000 to produce. Despite Fed. R. Evid. 502, the costs of privilege review and logging have continued to escalate. The costs are intolerable, and a change is essential.

Timing of Meet-and-Confer

Robert Keeling & 0003: At the time of the Rule 26(f) conference, the parties are unlikely to be in a position to negotiate a workable privilege logging method. Any privilege protocol developed at this early stage is likely to be too generic to be helpful and to be upset by unanticipated factors or problems. Involving the court at this early point is not an attractive prospect because key information will not be available. It is "far more efficient * * * to compile the privilege log after the majority of documents have been reviewed." It would be more meaningful to change 26(b)(5)(A) itself.

Doug McNamara: "The sooner the better." It is too common that producing parties don't deliver a log until "substantial completion" of document discovery, which may be just before the end of fact discovery. Too often, junior lawyers or contract attorneys making the first cut over-designate, and more senior counsel focus on the review only later. By that time, depositions may have been taken, and only after that do "deprivileged" documents get produced, which may create a need for redeposition. But there is no reason to defer depositions until after the review of the documents and submission of the log is completed. I want the documents ASAP. So I'm more than willing to sign onto a 502(d) order.

Jonathan Redgrave: The early conference is important, and not just in really big cases. Early judicial involvement is very helpful.

Lana Olson (Defense Research Institute) & 0006: Too often, early discussion prompts the other side to demand document-by-document logging. But there is a need to discuss these matters early, though that is productive only if both sides are reasonable. If needed, it is possible to postpone arrangements for logging.

Amy Bice Larson: At the beginning of the case, you don't know enough about the client's information to make precise arrangements. At that point, it is often (despite "early" requests allowed under Rule 34) to know what the other side will be asking for.

Jan. 16 Online hearing

Jeanine Kenney: It is important that the conference between counsel about the manner of logging withheld materials occur prior to document review because the format and means of compliance may implicate how that review proceeds. In some multi-defendant litigation, for example, parties negotiate the precise fields that should be provided. To address concerns that any party may not have sufficient information at the time of the 26(f) conference, some protocols build in an escape hatch permitting modification of the protocol by agreement or by court order for good cause shown, or include placeholders for later negotiations over certain questions.

Jennifer Scullion: It is good to insist that the lawyers "talk more." But we must be careful to add breathing room in the process.

Feb. 6 Online Hearing

William Rossbach: The most important change is to make early development of a method for dealing with privilege claims mandatory and at the outset of litigation. As the Committee Note says, this should go a long way toward alleviating many of the problems with privilege claims by forcing early attention by the parties and the court on these issues. I stress that Rule 26(b)(5)(A) says the description should "enable other parties to assess the claim" of privilege.

Amy Zeman: I disagree with those who arguing that discussions about privilege logs are premature at the Rule 26(f) stage. This discussion is a natural component of a discovery plan, and it is disingenuous to argue that parties would at this point have sufficient information to design a discovery plan but not to address privilege log issues.

Adam Polk: My practice has borne out the effectiveness of addressing privilege issues early, and involving the judge early in the case has proved valuable. In one case, for example, the judge ordered that the privilege log be produced no more than fourteen days after disclosures or discovery responses were due. The judge's order also specified what a log had to contain: (a) the subject and general nature of the document; (b) the identity and position of its author; (c) the date it was communicated; (d) the identity and position of all addressees and recipients; (e) the document's present location; and (f) the specific privilege and a brief summary of any supporting facts. This directive "served as a starting point for discussions concerning compliance with Rule 26(b)(5) and streamlined those discussions in the case." Failure to develop "rules of the road" in other cases has resulted more protracted disputes about privilege assertions.

Kate Baxter-Kauf: Early discussions of logging documents and communications to be withheld on the basis of privilege is exceptionally helpful as a way to encourage discussion of types of documents for which a dispute may already be ripe. A meet and confer to narrow any dispute should commence immediately.

Pearl Robertson: Though early discussion of the format for privilege logs is useful, it is also important to recognize that experience during the litigation informs the actual process. Parties ought not be handcuffed by early agreements that eventually prove unhelpful. It seems that the proposed amendment is in line with what parties have been doing. But the stress on cost considerations is misguided; "the cost of compliance with Rule 26(b)(5)(A) is not the appropriate test for balancing the receiving party's right to the disclosure of discoverable information."

Written Comments

Lea Malani Bays (016): Speaking from the plaintiff perspective, I feel that "the comments arguing that the timing of privilege log discussions and productions should be delayed until later in the document review process will lead to a significant disadvantage for receiving parties and will likely disrupt court schedules with disputes over privilege emerging closer to the end of discovery. * * * Discussions regarding privilege logs may last longer than one initial meeting, as the parties more thoroughly explore issues related to discovery."

Federal Magistrate Judges Association (0018): "[A] court can often provide guidance and resolve privilege disputes early in the case. Importantly, a court's order for complying with Rule 25(b)(5)(A) does not rely on party agreement, though great weight will be given the parties' preferences. This approach is consistent with active case management and the court's obligations under Rule 1."

Categorical Logging

Robert Keeling & 0003: The rule should endorse standards that focus on whether the party claiming privilege protection has engaged in a reasonable process for logging privileged documents, rather than whether every withheld document was perfectly logged. "As with document production, the withholding party is in the best position to determine how to establish its claim of privilege and should have the flexibility to decide what type of log is best suited to meet the needs of the case."

Doug McNamara: "My experience with categorical logging is categorically bad." In one large MDL, a categorical approach led to a situation in which over 13,000 documents were "de-privileged" late in the discovery process. In part, the problem resulted from the use of "broad categories" for logging withheld documents. In a case before Judge Chhabria (N.D. Cal.), after the initial logging was challenged the producing party de-privileged 63% of the documents originally withheld. "With categorical logging, who sent it, who received it, what was it and when is often reduced to generic buckets like 'communications between client and outside counsel.'"

Alex Dahl (LCJ) & 0007: There should be a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation.

Amy Keller: Categorical privilege logs can be prone to gamesmanship and over-designation. In a recent MDL proceeding, for example, defense counsel refused to (1) agree what categories would be used; (2) include an attestation by an attorney to provide reasonable context as to the role of the person making the privilege assertion; (3) include specific data points for categorical logs; and (4) provide distinct data points for document-by-document logs. Instead, defendants insisted on category descriptions that were facially overbroad while producing millions of documents and indicating that they had withheld substantial numbers of other documents. Only after we involved the Special Master (retired Magistrate Judge Facciola) did defendant finally provide a document-by-document privilege log. That process resulted in one defendant producing 13,000 additional relevant documents that had been previously marked privilege. Had the parties used only categorical logs, we would never have gotten these documents. Many of them spoke directly to defendants' liability, and plaintiffs had been seeking their production for years. Had a document-by-document log been required from the outset, that would have avoided significant expense and avoided duplication of effort made necessary by the initial use of a categorical approach to logging. Proportionality considerations can be given weight as well.

Lana Olson (Defense Research Institute) & 0006: Some categories of documents and ESI are facially privileged or protected and can be agreed by the parties to be excluded from logging. For example, communications between counsel and client regarding the litigation after the complaint is served are clearly protected. The proposed amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example those exclusively between in-house counsel and outside counsel of an organization might be so clearly privileged that they need not be logged. Designing express exclusions, as allowed by the proposed amendments both reduces the burdens of reviews and logging and avoids possible disputes regarding the scope of logging needed in the case.

Jan. 16 Online hearing

Jeanine Kenney: The Note inappropriately suggests that document-by-document listing is appropriate only in "some" cases. This comment could suggest that this method is not generally necessary even though it is the standard approach in most cases and in most courts. In my experience, that method is generally the only meaningful method. "[N]o commenter 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." Using alternative forms generally results in more, not fewer, disputes. In particular, the note inappropriately suggests that such logs are in appropriate in larger cases. "But is large-withholding cases * * * in which document-by-document information is most essential." Categorical methods have been widely criticized. In some cases and for some narrow categories, they may have a use. But there is a risk they might become a mechanism for failing to conduct a proper review in the first place. Some favor "tiered logs," but do not explain how one decides what belongs in which tier.

Lori Andrus: I have agreed to certain categorical exclusions from logging in specific cases. For example, often we will agree that communications with litigation counsel after the filing of the complaint need not be logged. But as a general matter so-called "categorical" logs fail to provide courts sufficient information to support privilege assertions. I have never seen a

case where categories of documents could be grouped together while still providing sufficient detail to permit the privilege claim to be determine whether the document is at least potentially protected from disclosure.

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Adam Polk: Some mix of logging conventions, whether document-by-document or categorical, within a single case may make sense under certain circumstances. In the N.D. Cal., for example, the model order provides that "[c]ommunication involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log." Sometimes parties also include communications involving in-house counsel.

Kate Baxter-Kauf: "In my experience, categorical logs merely increase the burden and cost of evaluating privilege disputes for the parties, and lengthen and overly complicate privilege disputes, making it harder for the parties to narrow or eliminate disputes and requiring court intervention in more instances."

Robert Levy (Exxon): The rule should say that logs are not required absent a showing of need with regard to the following categories: (1) all communications with outside counsel; and (2) communications after suit is filed.

Aaron Marks (Committee to Support Antitrust Laws): Categorical logs burden receiving parties and litigants. An opaque categorical log inevitably spawns disputes between the parties. "Unlike document-by-document logs, there is no historical baseline expectation of what constitutes an appropriate 'categorical log.'" Such a method by its nature requires determining an appropriate level of abstraction for the categories. Due to the stakes, the parties dispute even basic structural components of categorical logs. And in any event, use of this technique increases the number of disputes about whether the privilege assertions are justified. Parties frequently force hundreds of documents into a single "category" because the description of the category is likely to be at a high level of abstraction. But the proposed Note would encourage expansion of their use without discussing how to relieve their shortcomings. And categorical logs prevent cases from being resolved on their merits because the lead to improper withholding of non-privileged materials. Rather than fostering use of categorical logs, the Note should move toward promoting "the primacy of traditional, document-by-document logs." They actually entail the least overall burden and avoid the need for case-specific log format disputes that will result without the presumption that document-by-document logs are what the rules mandate. The current Note does not even maintain "maximum flexibility" because it takes a substantive position that document-by-document logs are "often" associated with "very large costs." The burdens on the requesting party deserve equal time. And document-by-document logs focus the range of disputes and save court time.

Pearl Robertson: The Note should not refer to use of categorical logs because they do not provide the amount of information Rule 26(b)(5)(A) requires. Instead, they produce disputes.

Written comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): At the time the 26(f) conference occurs, counsel are not usually in a position to discuss these issues in a meaningful manner in "significant document cases." "It is invariably too early in the process to address privilege log issues with any specificity, as counsel are still typically getting their arms around the types, sources, and volume of documents and ESI that is responsive to identified or expected requests for production." In addition, in "asymmetric document cases," the document-light party will often demand a document-by-document log. We worry that if the parties are not really ready to discuss such issues at this early point, when the issues arise later "the court may give them short shrift, believing that they should have been raised at the Rule 16 conference." "If this Rule change is to work as intended, there is not substitute for an available judge who is ready to engage with counsel." We think that "the most appropriate time to address privilege -log issues is at the time of initial production." Too often, when only one side has the major burden of producing documents "the party seeking discovery may seek the most expensive method of logging. * * * [T]he court must be prepared to address the demand at the initial Rule 16 conference."

Federal Magistrate Judges Association (0018): "Many cases do not involve complex privilege issues and are candidates for categorical logs or short document-by-document logs. Other cases may call for a hybrid approach, using a combination of categorical logging and document-by-document logging for specific subject areas, custodian or time periods. Still other cases may benefit from a categorical log with a metadata log. This comment is not meant to endorse any particular methodology for privilege logging but rather to applaud the proposed Rule's flexibility as to approach and call for privilege issues to be discussed at the outset of the case."

"Rolling" Logging & Timing

Robert Keeling & 0003: The references to "rolling privilege logs" are inconsistent with modernizing privilege logging practice and ineffective and inefficient. Parties may over-withhold because they are not familiar enough with the documents to make informed decisions about which to withhold. Instead, it is better to defer preparation of a privilege log until the majority of documents involved have been reviewed by the lawyers most familiar with the issues. It would be better to call for "tiered" or "staged" logging. This approach would prioritize production and logging of key documents and resolving potential disputes early in the discovery process. "Even if the parties are able to reach agreement on a privilege protocol at the outset, it may be so generic as to be unhelpful in establishing key aspects of the privilege review." You really only know about the characteristics of the data collection after completing the initial review, which is unlikely to be completed at the time of the 26(f) conference.

Alex Dahl (LCJ) & 0007: The amendments should suggest tiered logging rather than rolling production. The main change would be to substitute "tiered" for "rolling." The idea is to focus first on the materials most likely to be critical to the resolution of the case, rather than trying to review and log all potentially discoverable materials. Rather than involving huge

expenditures of money and substantial delays, this approach can focus attention on the key issues, just as with a tiered approach to document production.

Jonathan Redgrave: The difference between "rolling" and "tiered" logging is significant.

Lana Olson (Defense Research Institute) & 0006: Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important, so it is that all documents withheld on privilege grounds have the same value in the litigation. Sampling and other procedures can be used to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, and the same sort of approach could be effectively employed to focus the logging effort. Some critics of the proposed amendments assert that categorical and iterative logging may provide an incentive to cheat the system. But that assumes that lawyers will violate their oaths and the rules of ethics. "If a lawyer is going to cheat, he or she will do so under a document-by-document log or a categorical log."

Jan. 16 Online hearing

Jeanine Kenney: It is valuable that the Committee Note highlights the importance of rolling privilege logs. This practice may prevent or at least restrict over-withholding by giving producing parties early guidance that can be used to inform later privilege reviews. Fed. R. Evid. 502(d) orders offer a significant solution to the concern that prompt production of some material may inadvertently include items that should have been withheld.

Andrew Myers (Bayer): The rolling and iterative approach to privilege review is a good idea.

Feb. 6 Online Hearing

Seth Carroll: Permitting "tiered" logs is undesirable. Defendants in the civil rights cases I handle sometimes try to hide probative documents behind unilateral "proportionality" concerns. Endorsing "tiered" logging or discovery would tend in that direction.

Amy Zeman: The Note's nod to rolling productions is well placed and references a common and effective discovery tool I regularly use in my cases. I disagree with the argument by another commenter that a party cannot simultaneously focus on document review and privilege log production. "Replacing 'rolling' production with 'tiered' production would compound the problem of over-designation rather than solving it, while adding opacity to the process." The comments favoring the use of "tiered" describe it on the basis of materiality and importance of the materials to be produced, but offer no explanation on who would make that determination. If that is left up to the producing party, there is an obvious path to discovery abuse.

Adam Polk: The Committee Note is right that delaying production of the privilege log until the close of discovery can create serious problems. When that happens, the party seeking

discovery is delayed in identifying documents that may have been improperly withheld. In order to resolve privilege disputes, sampling or preliminary rulings from the court can prove valuable. Only periodic production of logs over the course of discovery allows the parties to timely raise those disputes, often on an iterative basis.

Kate Baxter-Kauf: Describing "rolling" log production in the Note is exceptionally helpful to the parties. But a "tiered" approach would produce problems. The idea is that the logging should first be done with regard to the "important" documents. Though that sounds sensible, the problem is that only the producing party can make the "importance" determination. "This has the potential to lengthen disputes about privilege and logging as the parties *also* dispute which documents and requests for production are most material to the litigation and *then* discuss both format and content of privilege logs."

Robert Levy (Exxon): The Note should be altered to remove the reference to "rolling" logs. It would be better to use the term "tiered" logs. Rolling logs do not always work well because document productions are methodical and proceed by custodian.

Pearl Robertson: Rolling privilege logs are desirable. They are not more burdensome than "final" logs, and may actually produce less burden. They can also potentially cure the problem of over-designation.

Use of Technology

Robert Keeling & 0003: Sometimes objective metadata logs (to-from, date, etc.) may be useful without the effort of individual characterization of documents and pertinent privileges. Sometimes that approach permits opposing counsel to focus on certain items and perhaps demand a document-by-document log only of those items.

Doug McNamara: "Technology assisted review can easily capture the metadata of authors, recipients, and dates of communications to help with log creation. This data can then be converted from CSV files into spreadsheets and exported." Use of metadata logs can cut down significantly on the effort, but eventually "you have to have the last column" (specifying the privilege claimed). But the to/from listing can point up instances in which the company has adopted a policy of having counsel added as a cc on almost every message.

Alex Dahl (LCJ) & 0007: "While artificial intelligence and other technological advancements have increased the capability and efficiency of finding potentially privileged documents, litigants cannot use these tools alone to assert their privilege claims under the current rules. Instead, creating privilege logs remains a manual, burdensome, and exceptionally expensive process in litigation."

Lana Olson (Defense Research Institute) & 0006: "Providing initial logs with limited information, for example logs abased on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information is needed to assess the privilege claims."

Amy Bice Larson: Technology can't tell you what privilege applies. Only a trained professional can do that.

Jan. 16 Online hearing

Jeanine Kenney: If a metadata-type log is agreed to, it will be important up front to address documents for which metadata provides little or no information or inaccurate information, and any manual information that must be supplemented, how hard copy versus electronic documents will be logged, the physical format of logs (e.g., sortable spreadsheets), etc. Document-by-document logs are usually generated through automated processes, imposing limited burden. "True" metadata logs "are a type [of] low-burden document-by-document log that remain[s] an option for every type of case."

Lori Andrus: "Technological advances have made privilege logs much cheaper to generate in the last few years, and those costs will continue to plummet."

Jennifer Scullion: I do not think a typical metadata log suffices. Sometimes a "metadata plus" log will be helpful. Another technique that can be used is a "quick peek" (with Evidence Rule 502(d) protections) that persuade opposing counsel that materials on a certain topic are not worth the trouble to examine in the current litigation.

Chad Roberts (eDiscovery CoCounsel, PLLC): The draft rule is "pitch perfect." It is important to avoid getting too far in front of the technology, though the technology is improving by leaps and bounds. Pretty soon, generative AI will be able to summarize documents, so the privilege log can be produced quickly and inexpensively. "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. * * * Some electronic discovery problems that seemed insurmountable in the recent past are no longer so." Powerful analytics software has greatly economized the task of identifying responsive content within a collected data set. "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." But providing a summary of the content of these items has remained a repetitive manual task. Most every major developer of evidence management platforms is doing research seeking to use large language models for 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."

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Robert Levy (Exxon): Privilege logs involve significant costs and due to the large increase in documents and records the cots continue to rise even with the advent of technology.

Written Comments

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I have found that metadata logs do reduce the burden of privilege logging because they do not require any human input, but that too often they do not provide sufficient insight into the basis for the privilege claims. Metadata field can help supplement a privilege log, sometimes by filling in gaps that otherwise would exist, but the are usually not sufficient on their own.

Amending Rule 26(b)(5)(A) As Well

Robert Keeling & 0003: Although the 1993 Committee Note properly foresaw that document-by-document logging would not be appropriate in every cases, many courts have treated the amended rule as requiring that in every case. Producing parties will not know their full custodian list, the prevalence of privilege documents or the complexity of the issues that may arise one document review begins. Trying to tame the privilege log beast without amending 26(b)(5)(A) is unlikely to work.

Alex Dahl (LCJ) & 0007: The best way to improve privilege log practice would be to adopt the proposal of Judge Facciola and Jonathan Redgrave and add a sentence to Rule 26(b)(5)(A):

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

Adding this sentence will help ensure that courts and parties turning to 26(b)(5)(A) will learn that the rules require them to take the initiative in addressing the appropriate method of logging withheld items. The Committee Note should say that "there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation.."

Jonathan Redgrave: Rule 26(b)(5)(A) is the source of the current difficulties. Unless something is done to change that rule, the reform effort will not succeed.

John Rosenthal: Because the document-by-document expectation has become ingrained (even though the 1993 Note actually pointed in a different direction), this rule must be changed, if only to call attention to the new regime of a sensible negotiated method of satisfying the disclosure requirement. There are many less onerous methods, including categorical logging, metadata logs, and what I call "categorical plus" -- using either a metadata log or other categorical approach, and following up with possible targeted document-by-document logging.

Jan. 16 Online hearing

Jeanine Kenney: Amending this rule could impose greater, not lesser, burdens and parties and prevent judges from establishing their own standing policies and procedures on privilege logs. It must be remembered that compliance with this rule is not optional, so invoking proportionality is not justified.

David Cohen: Amending this rule also would be a good idea. The goal should be to put teeth in the 1993 Committee Note that recognized that document-by-document logging is not essential in many cases.

Andrew Myers (Bayer): Amending this rule also would be a good idea. Better yet, find a way to give real teeth to the 1993 Committee Note recognizing that document-by-document logging is not necessary in every case.

Feb. 6 Online Hearing

Robert Levy (Exxon): It is important to amend 26(b)(5)(A) as well because this is the rule that govern privilege withholding.

Written Comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): We believe it would be helpful to add a conforming sentence to Rule 26(b)(5)(A)(ii) to emphasize the importance of the court's role in preventing privilege log disputes. We suggest the following additional sentence:

> Where necessary to prevent undue burden, the method of compliance with subdivisions (A)(i) and (ii) shall be determined by the court after consultation with the parties.

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I oppose amending Rule 25(b)(5)(A). "Although some members of the defense bar are still encouraging drastic changes to Rule 26(b)(5), I believe the Committee's more measured approach is the right one." Many, perhaps most, parties do in fact carefully review privilege logs and find them necessary for determining whether designations should be challenged. "Non-traditional logs such as metadata logs and categorical logs cannot be presumptively appropriate under this rule. Categorical logs do not reduce the burden of privilege logging; the major burden is making the privilege determination (when properly done), not listing the results on a log.

American Ass'n for Justice (0038): Defense bar suggestions that Rule 26(b)(5)(A) also be amended should be rejected. For one thing, the published amendment proposal did not include a proposed change to this rule, and as a consequence AAJ members and plaintiff-side practitioners were not focused on this possibility and did not comment on it. The proposal by Judge Facciola and Mr. Redgrave would invite controversy, by emphasizing "undue burden" and "proportional to the needs of the case" in the Note. Moreover, there are reasons to refrain from cross-

references. "While AAJ itself has on occasion proposed cross-referencing in other rulemaking, it believes that cross-referencing is most suitable when there is a *choice* between two rules to apply." That is not the case here, so the cross-reference is unnecessary, and the draft Note proposed by LCJ would be strongly opposed by AAJ and its members.

John Rosenthal (0039): This rule should also be amended to clarify (a) that document-by-document logging is not required, (b) that courts and parties should consider alternative means of satisfying this rule, (c) that there should be a rebuttable presumption that certain categories of documents need not be logged, (d) what is the exact information needed to establish a claim of privilege, and (e) that Rule 502(d) orders can include provisions that ensure that information contained in a log cannot form the basis for a claim of waiver. Unless these changes are made, requiring additional conferences among counsel under the proposed rule amendments will not address the fundamental burden problems. The 1993 Committee Note to this rule when adopted got it right, and changes are needed to set things right again.

Hon. John Facciola & Jonathan Redgrave (0045): In January, 2023, we formally proposed that a cross reference be added to Rule 26(b)(5)(A), but that was not included in the amendment packet sent out for public comment. We believe that the public comment period confirms the need for a neutral addition to Rule 26(b)(5)(A). Continued, misplaced adherence in cases to document-by-document logs imposes unwarranted burdens on parties and courts. Adding a cross-reference should support and enhance the proposed amendments. Submissions urging that the rule require document-by-document logging show that an amendment to counter this trend in decisions is needed. We propose that the following be added:

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

This addition explicitly clarifies that there is no required or default manner of compliance, and that the parties and the court should address compliance in each case with reference to the specifics of that case. This addition would also show that the concept of proportionality should be considered. Because many courts and parties presume, erroneously, that this rule requires document-by-document logging, the absence of a reference in 26(b)(5)(A) to the new Rule 26(f) provision will in practice undermine the amendment. Adding the reference here will also ensure that parties are fully aware that they must address privilege logs early in the case. This amendment will trigger attorneys to consult the amendments to Rule 26(f) and 16(b).

Google LLC (0067): Rule 26(b)(5)(A)(i) and (ii) should be amended as follows:

> (i) expressly make the claim; ~~and~~
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed -- and do so in a manner using any reasonable method or format proportional to the needs of the case that, without revealing information itself privileged or protected, will enable other parties to assess the claim;~~.~~ and

(iii) a party receiving a description of information withheld on the basis of privilege or trial-preparation materials may not object solely on the basis of the method or format utilized by the party making the claim.

Amending Rule 45 As Well

Oct. 16 hearing

Alex Dahl (LCJ) & 0007: Although Rule 45 makes clear that nonparties should be entitled to greater protection against undue burdens, it fails to provide that expressly with respect to privilege logging. Yet nonparties are unlikely to be involved in Rule 26(f) negotiations. If the Committee does not want to address Rule 45 presently, it should take up the topic in the future to provide protection for nonparties.

Jonathan Redgrave: We need an amendment to Rule 45 connecting to Rule 26(b)(5) as well.

Feb. 6 Online hearing

Robert Levy (Exxon): Rule 45 should be amended as well to address the fundamental fairness of burden on third parties to litigation. But it is not clear how the Rule 45 setting provides something like the Rule 26(f) discovery-planning conference required of the parties

B. New Rule 16.1 for adoption

The Rule 16.1 proposal received a great deal of commentary during the public comment period. A summary of the commentary is included in this agenda book. The MDL Subcommittee met twice after the public comment period to consider changes to the rule proposal and to the Committee Note. The first meeting was on Feb. 23, 2024, and the second on March 5, 2024. Notes of both these meetings are included in this agenda book. To provide context, each set of notes includes, as an Appendix, the drafting ideas discussed by the Subcommittee during that meeting.

These notes should fully introduce the extensive discussions of the Subcommittee, which produced a revised amendment proposal that was included in the agenda book for the Advisory Committee's April 9 meeting and is included below as a "clean" version which was included in the Advisory Committee agenda book for that meeting. After the agenda book was prepared, the Standing Committee style consultants presented suggestions for style changes. There followed considerable discussion of those changes and many of them were adopted. The resulting restyled revision of the Rule 16.1 proposed amendment was then circulated to the Advisory Committee members during the April 9 meeting and the Advisory Committee unanimously voted to approve this amendment for adoption.

The rule proposal adopted on April 9 therefore appears first after this introduction, with its companion Committee Note. Though the markups that follow suggest substantial changes from preliminary drafts, there really is only one significant change -- the removal of the "coordinating counsel" provision in Rule 16.1(b) of the preliminary draft. Except for that, the changes mainly resulted from reorganization of the matters listed in proposed Rule 16.1(c) in the preliminary draft.

Here is a quick roadmap of the revised rule proposal and the detailed material that follows:

(1) Eliminating the "coordinating counsel" position: Proposed Rule 16.1(b) invited the court to consider appointing an attorney to act as "coordinating counsel." After the public comment period was completed, on Feb. 23 the Subcommittee considered whether this position might be retained as "liaison counsel," with invocation of the Manual for Complex Litigation (4th) use of the term in § 10.221 (referring to "liaison counsel" who would deal with "essentially administrative matters"). But discussion led the Subcommittee to conclude that the strong reaction against creation of this new position provided a reason for removing it from the rule entirely. It no longer appears in the rule.

(2) Providing that unless the court orders otherwise, the parties must address all the topics listed in the rule: The published draft made the parties' obligation to address certain matters depend on the court taking the initiative to order them to address those specific matters. But requiring affirmative action by the court to get a report on the listed matters seems unnecessary, particularly since the parties can tell the court that it's premature to address certain items. That is implicit in the breakout of certain matters listed in Rule 16.1(b)(3), on which the parties are directed only to provide their "initial views." And the rule continues to say the parties

may raise whatever matters they wish to raise whether or not the court ordered them to do so. This shift in no way limits the court's discretion, but it may sometimes reduce the burden on the court and also perhaps suggest to the parties that they might suggest that the court excuse a report on certain topics. The goal is to prepare the court to make the most effective use of the initial management conference.

(3) Subdividing the topics listed in published Rule 16.1(c) into two categories, one directing the parties to provide their views on certain topics and the other calling for the parties' "initial views": These two categories of reporting responsibilities would be divided between Rule 16.1(b)(2) and Rule 16.1(b)(3). These groupings are:

Group 1, in Rule 16.1(b)(2) provides that the parties must provide their views on the following:

(A) Whether leadership counsel should be appointed, and if so address a number of matters bearing on the appointment of leadership counsel.

(B) Previously entered scheduling or other orders that should be vacated or modified;

(C) A schedule for additional management conferences;

(D) How to manage the filing of new actions in the MDL proceedings;

(E) Whether related actions have been filed or are expected to be filed, and whether to consider possible methods of coordinating with those actions.

Group 2 in Rule 16.1(b)(3) provides that the parties must provide the court with their "initial views" on the following unless the court orders otherwise:

(A) Whether consolidated pleadings should be prepared to account for the multiple actions in the MDL proceedings.

(B) Principal legal and factual issues likely to be presented;

(C) How and when the parties will exchange information about the facial bases for their claims and defenses. The revised Note makes clear that this is not discovery, and mentions that the court may employ expedited procedures to resolve some claims or defenses based on this information exchange. It also provides that the court should take care to ensure that the parties have adequate access to needed information.

(D) Anticipated discovery;

(E) Likely pretrial motions;

(F) Whether the court should consider measures to facilitate resolution; and

(G) Whether matters should be referred to a magistrate judge or a master.

(4) Initial management order: The court should enter an initial management order regarding how leadership counsel would be appointed if that is to occur and adopting an initial management plan that controls the MDL proceedings until the court modifies it.

Below is a detailed explanation of the evolution of the revised amendment proposal approved by the Advisory Committee at its April 2024 meeting. It seems useful to provide a list of the items that follow as a roadmap to what's in this agenda book:

- Clean version of revised rule and Note (approved at April 2024 Advisory Committee meeting) (after revision in response to suggestions of Style Consultants), and the GAP report noting those changes as approved
- Clean version of rule and Note as included in agenda book for the April 2024 meeting (before further revisions in response to suggestions of Style Consultants)
- Preliminary draft of proposed Rule 16.1 and Committee Note (published for public comment in August 2023)
- Overstrike/underline version showing changes between published preliminary draft and proposed rule in agenda book for April 2024 Advisory committee meeting (second item above)
- Notes from March 5, 2024, meeting of MDL Subcommittee (including appendix showing interim redrafts discussed during that meeting)
- Notes from MDL Subcommittee meeting of Feb. 23, 2024 (including appendix showing interim redrafts discussed during that meeting)
- Summary of testimony and comments received during public comment period

Revised Proposed New Rule 16.1 and Note
(Approved by Advisory Committee)

Rule 16.1. Multidistrict Litigation

(a) Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

(b) Report for the Conference.

(1) ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

(2) ***Required Content: the Parties' Views on Leadership Counsel and Other Matters.*** The report must address any matter the court designates — which may include any matter in Rule 16 — and, unless the court orders otherwise, the parties' views on:

(A) whether leadership counsel should be appointed and, if so:

(i) the timing of the appointments;

(ii) the structure of leadership counsel;

(iii) the procedure for selecting leadership and whether the appointments should be reviewed periodically;

(iv) their responsibilities and authority in conducting pretrial activities and any role in resolution of the MDL proceedings;

(v) the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;

(vi) any limits on activity by nonleadership counsel; and

(vii) whether and when to establish a means for compensating leadership counsel;

(B) any previously entered scheduling or other orders that should be vacated or modified;

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

(D) how to manage the direct filing of new actions in the MDL proceedings; and

(E) whether related actions have been — or are expected to be — filed in other courts, and whether to adopt methods for coordinating with them.

(3) ***Additional Required Content: the Parties' Initial Views on Various Matters.*** Unless the court orders otherwise, the report also must address the parties' initial views on:

(A) whether consolidated pleadings should be prepared;

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

(C) discovery, including any difficult issues that may arise;

(D) any likely pretrial motions;

(E) whether the court should consider any measures to facilitate resolving some or all actions before the court;

(F) whether any matters should be referred to a magistrate judge or a master; and

(G) the principal factual and legal issues likely to be presented.

(4) ***Permitted Content***: The report may include any other matter that the parties wish to bring to the court's attention.

(c) Initial Management Order. After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased since the statute was enacted but has leveled off in recent years. These actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation (MDL proceedings) in the Civil Rules. The addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. Of course, 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 in handling those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop an initial management plan for the MDL proceedings and, thus, this initial conference may only address some of the matters referenced in Rule 16.1(b)(2)-(3). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b)(2)-(3) should be of great value to the transferee judge and the parties.

Rule 16.1(b)(1). The court ordinarily should order the parties to meet to submit a report to the court about the matters designated in Rule 16.1(b)(2)-(3) prior to the initial management

conference. This should be a single report, but it may reflect the parties' divergent views on these matters.

Rule 16.1(b)(2). Unless the court orders otherwise, the report must address all of the matters identified in Rule 16.1(b)(2) (as well as all those in 16.1(b)(3)). The court also may direct the parties to address any other matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

The rule distinguishes between the matters identified in Rule 16.1(b)(2)(B)-(E) and in Rule 16.1(b)(3) because court action on some of the matters identified in Rule 16.1(b)(3) may be premature before leadership counsel is appointed, if that is to occur. For this reason, 16.1(b)(2) calls for the parties' views on the matters designated in (b)(2) whereas 16.1(b)(3) requires only the parties' initial views on those matters listed in (b)(3).

Rule 16.1(b)(2)(C) directs the parties to suggest a schedule for additional management conferences during which the same or other matters may be addressed, and the Rule 16.1(c) initial management order controls only until it is modified. The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceeding. Experience has shown, however, that the matters identified in Rule 16.1(b)(2)(B)-(E) and Rule 16.1(b)(3) are often important to the management of MDL proceedings.

Rule 16.1(b)(2)(A). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointments may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel and many times this will be one of the early orders the transferee judge enters. Rule 16.1(b)(2)(A) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first topic is the timing of appointment of leadership. Ordinarily, transferee judges enter orders appointing leadership counsel separately from orders addressing the matters in Rule 16.1(b)(2)(B)-(E) and 16.1(b)(3).

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Rule 16.1(b)(2)(A)(ii) therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

The procedure for selecting leadership counsel is addressed in item (iii). There is no single method that is best for all MDL proceedings. The transferee judge is responsible to ensure that the lawyers appointed to leadership positions are able to do the work and will responsibly and fairly discharge their leadership obligations. In undertaking this process, a transferee judge should consider the benefits of geographical distribution as well as differing experiences, skills, knowledge, and backgrounds. Courts have considered the nature of the actions and parties, the

needs of the litigation, and each lawyer's qualifications, expertise, and access to resources. They have also taken into account how the lawyers will complement one another and work collectively.

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. For example, in some 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 need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

Item (iv) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

An additional task of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Item (v) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As item (vi) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, item (vii) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for the management of case staffing, timekeeping, cost reimbursement, and related common benefit issues. But it may be best to defer entering a specific order relating to a common benefit fee and expenses until well into the

proceedings, when the court is more familiar with the effects of such an order and the activities of leadership counsel.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify one or more classes, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

Rule 16.1(b)(2)(B)-(E) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that often are important in the management of MDL proceedings. The matters identified in Rule 16.1(b)(2)(B)-(E) frequently call for early action by the court. The matters identified by Rule 16.1(b)(3) are in a separate paragraph of the rule because, in the absence of appointment of leadership counsel should appointment be warranted, the parties may be able to provide only their initial views on these matters at the conference.

Rule 16.1(b)(2)(B). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which they were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

Rule 16.1(b)(2)(C). The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceeding to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(D). When large numbers of tagalong actions (actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceeding) are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for remand at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related litigation (e.g., state courts and bankruptcy courts) at the case management conferences.

Rule 16.1(b)(2)(E). On occasion there are actions in other courts that are related to the MDL proceeding. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may happen that a party to an MDL

proceeding is a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceeding. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such actions in other courts have been filed or are anticipated.

Rule 16.1(b)(3). As compared to the matters listed in Rule 16.1(b)(2)(B)-(E), Rule 16.1(b)(3) identifies matters that may be more fully addressed once leadership is appointed, should leadership be recommended, and thus, in their report the parties may only be able to provide their initial views on these matters.

Rule 16.1(b)(3)(A). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers, in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in all MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceeding. 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).

Rule 16.1(b)(3)(B). In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that in many cases an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are issues that should be addressed early in the proceeding (e.g., jurisdiction, general causation, or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information may be ordered independently from the discovery rules, which are addressed in Rule 16.1(b)(3)(C). Alternatively, in some cases, transferee

judges have ordered that such exchanges of information be made under Rule 33 or 34. Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

Rule 16.1(b)(3)(C). A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceeding may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

Rule 16.1(b)(3)(D). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

Rule 16.1(b)(3)(E). Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution.

Rule 16.1(b)(3)(F). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(b)(3)(G). 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 discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(b)(4). In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

Rule 16.1(c). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. An initial management order need not address all matters designated under Rule 16.1(b) if the court determines the matters are not significant to the MDL proceeding or would better be addressed in a subsequent order. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be

flexible, the court should be open to modifying its initial management order in light of developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

Changes Made After Publication and Comment

Three changes were made to the rule amendment after the public comment period: (1) The "coordinating counsel" provision in preliminary draft Rule 16.1(b) was removed; (2) The various reporting matters in preliminary draft Rule 16.1(c) were subdivided into Rule 16.1(b)(2) and (b)(3); and (3) the rule was revised to mandate reports on all those matters unless the court orders otherwise. The Committee Note was revised to reflect these changes.

Revised Proposed New Rule 16.1 and Note[1]
(Clean)

Rule 16.1. Multidistrict Litigation

(a) Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial management plan for orderly pretrial activity in the MDL proceedings.

(b) Preparing a Report for the Initial Management Conference. The transferee court should order the parties to meet, prepare and submit a report to the court before the conference. Unless otherwise ordered by the court, the report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter in Rule 16. The report also may address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed and, if so, it should also address the timing of the appointment and:

(A) the procedure for selecting leadership counsel and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) the role of leadership counsel in any resolution of the MDL proceedings;

(D) the proposed methods for leadership counsel to regularly communicate with and report to the court and nonleadership counsel;

[1] This version of the revised rule appeared in the agenda book for the Advisory Committee's April 9 meeting, and was further revised in response to suggestions from the Standing Committee's Style Consultants to produce the version beginning on p. 43 of this report. This version reflects changes made after the public comment period but before the style review.

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel.

(2) The report also must address:

(A) any previously entered scheduling or other orders that should be vacated or modified;

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

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

(D) 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

(E) whether consolidated pleadings should be prepared.

(3) The report also must address the parties' initial views on:

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

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

(C) anticipated discovery in the MDL proceedings, including any difficult issues that may be presented;

(D) any likely pretrial motions;

(E) whether the court should consider measures to facilitate resolution of some or all actions before the court; and

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

(c) Initial Management Order. After the initial management conference, the court should enter an initial management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(b) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. 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. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop a management plan for the MDL proceedings and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b) should be of great value to the transferee judge and the parties.

Rule 16.1(b). The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in Rule 16.1(b) prior to the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters, as they may affect parties differently. Unless otherwise ordered by the court, the report must address all the matters identified in Rule 16.1(b)(1)-(3). The court also may include any other

matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) directs the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(b)(1)-(3) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

Counsel often are able to coordinate in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

Rule 16.1(b)(1). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly discharge their leadership obligations, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

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. For example, in some 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 differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceedings. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

Subparagraph (C) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the

common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

Rule 16.1(b)(2) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) often call for early action by the court. The matters identified by Rule 16(b)(3) are in a separate section of the rule because, in the absence of appointment of leadership counsel should appointment be recommended, the parties may be able to provide only their initial views on these matters.

Rule 16.1(b)(2)(A). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

Rule 16.1(b)(2)(B). The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(C). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be

appointed specifically to report on developments in related state court litigation at the case management conferences.

Rule 16.1(b)(2)(D). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(b)(2)(E). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceedings. 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).

Rule 16.1(b)(3). Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

Rule 16.1(b)(3)(A). 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 discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(b)(3)(B). In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceedings.

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

Rule 16.1(b)(3)(C). 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.

Rule 16.1(b)(3)(D). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

Rule 16.1(b)(3)(E). Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution.

Rule 16.1(b)(3)(F). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(c). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent

developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

Proposed New Rule 16.1 and Note[2]
(As Published in August 2023)

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings.

(b) Designating Coordinating Counsel for the Conference. The transferee court may designate coordinating counsel to:

(1) assist the court with the conference; and

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

(c) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address any matter designated by the court, which may include any matter listed below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

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

(A) the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

[2] New material is underlined in red.

(C) their role in settlement activities;

(D) proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel;

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

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

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

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

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

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

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

(9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);

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

(11) whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

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

(d) Initial MDL Management Order. After the conference, the court should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. 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 framework for the initial management of MDL proceedings.

Not all MDL proceedings present the type of management challenges this rule addresses. 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. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs to develop a management plan for the MDL proceedings. That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(c) may be of great value to the transferee judge and the parties.

Rule 16.1(b). Rule 16.1(b) recognizes the court may designate coordinating counsel -- perhaps more often on the plaintiff than the defendant side -- to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.

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. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings,

counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.

Rule 16.1(c). The court ordinarily should order the parties to meet to provide a report to the court about the matters designated in the court's Rule 16.1(c) order prior to the initial MDL management conference. This should be a single report, but it may reflect the parties' divergent views on these matters. The court may select which matters listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may also include any other matter, whether or not listed in those rules. Rules 16.1(c) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow. Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-(12) are often important to the management of MDL proceedings. In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

Rule 16.1(c)(1). Appointment of leadership counsel is not universally needed in MDL proceedings. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. This provision calls attention to a number of topics the court might consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

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. For example, in some 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 differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. 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 16.1(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).

The rule also calls for a report to the court on whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

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. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that -- a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(d). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities non-leadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

Rule 16.1(c)(2). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may

warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

Rule 16.1(c)(3). 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 discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(c)(4). Experience has shown that in MDL proceedings an exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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.

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

Rule 16.1(c)(5). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. 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. 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).

Rule 16.1(c)(6). 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.

Rule 16.1(c)(7). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

Rule 16.1(c)(8). The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively

manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(c)(9). Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the settlement of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that -- a decision to be made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate settlement.

Rule 16.1(c)(10). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.

Rule 16.1(c)(11). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(c)(12). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(d). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings

or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel were appointed after the initial management conference under Rule 16.1(a).

Revised Proposed Rule 16.1 and Note[3]
(Redline)

Rule 16.1. Multidistrict Litigation

(a) Initial ~~MDL~~ Management Conference. After the Judicial Panel on Multidistrict Litigation ~~orders the transfer of~~transfers actions, the transferee court should schedule an initial management conference to develop ~~a~~an initial management plan for orderly pretrial activity in the MDL proceedings.

(b) ~~Designating Coordinating Counsel for the Conference~~. ~~The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

~~**(c)**~~ **Preparing a Report for the Initial Management Conference.** The transferee court should order the parties to meet ~~and~~, prepare and submit a report ~~to be submitted~~ to the court before the conference ~~begins. The~~. Unless otherwise ordered by the court, the report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter ~~listed below or~~ in Rule 16. The report ~~may~~ also may address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed~~,~~ and, if so, it should also address the timing of the appointment and:

[3] This version reflects changes made to produce the revised rule that was in the April 9 agenda book and also appears beginning on pg. 52 above. This version was further revised in response to suggestions from the Standing Committee's Style Consultants to produce the final version approved by the Advisory Committee on April 9, which begins on p. 43 above.

(A) the procedure for selecting ~~them~~ leadership counsel and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) ~~their~~the role of leadership counsel in ~~settlement activities~~any resolution of the MDL proceedings;

(D) the proposed methods for ~~them~~leadership counsel to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel~~;~~.

(2) ~~identifying~~ The report also must address:

(A) any previously entered scheduling or other orders ~~and stating whether they~~that should be vacated or modified;

~~**(3)** identifying the principal factual and legal issues likely to be presented in the MDL proceedings;~~

~~**(4)** how and when the parties will exchange information about the factual bases for their claims and defenses;~~

~~**(5)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;~~

~~**(6)** a proposed plan for discovery, including methods to handle it efficiently;~~

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

~~**(8)**~~ **(B)** 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);~~

~~(10~~ **(C)** how to manage the filing of new actions in the MDL proceedings;

~~(11~~ **(D)** 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

~~(12~~ **(E)** whether consolidated pleadings should be prepared.

(3) The report also must address the parties' initial views on:

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

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

(C) anticipated discovery in the MDL proceedings, including any difficult issues that may be presented;

(D) any likely pretrial motions;

(E) whether the court should consider measures to facilitate resolution of some or all actions before the court; and

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

~~(d~~**(c) Initial ~~MDL~~ Management Order.** After the initial management conference, the court should enter an initial ~~MDL~~ management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(~~e~~b) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There ~~previously was~~has been no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the ~~type of~~ management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. 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. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial ~~MDL~~ management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop a management plan for the MDL proceedings~~.~~ and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial ~~MDL~~ management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(~~c) may~~b) should be of great value to the transferee judge and the parties.

Rule 16.1(b). ~~Rule 16.1(b) recognizes the court may designate coordinating counsel -- perhaps more often on the plaintiff than the defendant side -- to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.~~

~~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. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~

~~**Rule 16.1(c).**~~ The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in ~~the court's~~ Rule 16.1(~~c) order~~b) prior to

the initial ~~MDL~~ management conference. This should be a single report, but it may reflect the parties' divergent views on these matters~~. The court~~, as they may ~~select which~~affect parties differently. Unless otherwise ordered by the court, the report must address all the matters ~~listed~~identified in Rule 16.1(~~c) or Rule 16 should be included in the report submitted to the court, and may also~~b)(1)-(3). The court also may include any other matter, whether or not listed in ~~those rules.~~Rule 16.1(b) or in Rule 16. Rules 16.1(~~c~~b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) directs the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(~~c~~b)(1)-(~~12~~3) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial ~~MDL~~ management conference.

Counsel often are able to coordinate in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(~~c~~b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

Rule 16.1(b)(1). Appointment of leadership counsel is not universally needed in MDL proceedings~~.~~, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. ~~This provision~~The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) calls attention to ~~a number of~~several topics the court ~~might~~should consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly ~~represent plaintiffs~~discharge

their leadership obligations, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

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. For example, in some 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 differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. ~~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 16.1(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).~~

The rule also calls for ~~a report to~~advising the court ~~on~~ whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL ~~proceeding.~~proceedings. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with ~~specifics~~specific suggestions on the leadership structure that should be employed.

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. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that -- a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about~~ resolution~~. It is often important that the court be regularly apprised~~ of ~~developments regarding potential settlement~~claims. Resolution may be achieved by such means as early exchange of ~~some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.~~information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in ~~accord~~accordance with the court's initial management order under Rule 16.1(~~d~~c). In some ~~MDLs~~MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities ~~non-leadership~~nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

~~**Rule 16.1(c)(2).**~~

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

Rule 16.1(b)(2) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) often call for early action by the court. The matters identified by Rule 16(b)(3) are in a separate section of the rule because, in the absence of appointment of leadership counsel should appointment be recommended, the parties may be able to provide only their initial views on these matters.

Rule 16.1(b)(2)(A). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ~~("transferor district courts").~~. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district

courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

~~Rule 16.1(c)(3).~~

Rule 16.1(b)(2)(B). The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(C). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.

Rule 16.1(b)(2)(D). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(b)(2)(E). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in MDL

proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceedings. 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).

Rule 16.1(b)(3). Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

Rule 16.1(b)(3)(A). 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 discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(~~c)(4).~~b)(3)(B). In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that ~~in MDL proceedings~~ an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. ~~Whether early~~Early exchanges ~~should occur~~ may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as ~~whether~~ motions to dismiss or other early matters ~~might render~~and their impact on the ~~effort needed to~~early exchange of information ~~unwarranted~~. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL ~~proceeding~~proceedings.

~~**Rule 16.1(c)(5).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. 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. 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).~~

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances, – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

Rule 16.1(~~c)(6~~b)(3)(C). 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.

Rule 16.1(~~c)(7~~b)(3)(D). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

~~**Rule 16.1(c)(8).** The Rule 16.1(a) conference is the initial MDL management conference.~~

Rule 16.1(b)(3)(E). ~~Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.~~

~~**Rule 16.1(c)(9).**~~ Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the ~~settlement~~resolution of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that ~~—~~ a decision to be made by the parties. But ~~as recognized in Rule 16(a)(5) and 16(c)(2)(I),~~ the court may assist the parties in ~~settlement~~ efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate ~~settlement~~resolution.

~~**Rule 16.1(c)(10).**~~

Rule 16.1(b)(3)(F). ~~Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.~~

~~When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.~~

~~**Rule 16.1(c)(11).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.~~

~~The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.~~

~~**Rule 16.1(c)(12).**~~ MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(~~d~~c). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel ~~were~~is appointed after the initial management conference under Rule 16.1(a).

Notes of MDL Subcommittee Meeting
March 5, 2024

The MDL Subcommittee of the Advisory Committee on Civil Rules met via Teams on March 5, 2024, to complete its post-public-comment revisions to proposed Rule 16.1. It had earlier met on Feb. 23, 2024, to begin the task of considering and reacting to the public comments.

Participants included Judge David Proctor (Chair of the Subcommittee); Judge Robin Rosenberg (Chair of the Advisory Committee), Judge Hannah Lauck, Ariana Tadler, Joseph Sellers, David Burman, Prof. Richard Marcus (Reporter to the Advisory Committee), Prof. Andrew Bradt (Associate Reporter to the Advisory Committee), Prof. Edward Cooper (Consultant to the Advisory Committee). Also participating were Emery Lee (FJC) and Allison Bruff and Zachary Hawari of the Administrative Office.

Before the meeting, Prof. Marcus had circulated the latest version of the post-hearings revisions to proposed Rule 16.1. That draft is an appendix to these notes. Members of the Subcommittee had circulated reactions to this draft by email before the meeting, indicating considerable agreement on word choices in the draft. The meeting was introduced as an opportunity for the members of the Subcommittee to proceed through the draft, noting where there was unanimity on revisions and also where items called for more discussion. For simplicity, these notes will proceed in the order of the lines on the draft as circulated to the Subcommittee. Unfortunately, the line numbering in the Appendix may not correspond exactly with the draft the Subcommittee discussed.

Line 4 [Rule 16.1(a)]: "MDL" would be removed from the title to (a).

Line 5 [Rule 16.1(a): It was agreed to remove the word "of," so the rule would read "After the Judicial Panel on Multidistrict Litigation transfers actions, . . . "

Line 7 [Rule 16.1(a): It was agreed that the bracketed "begin to" need not be included in the rule text, though those words should be retained in the Note.

Line 19: The words "Initial Management" would be added to the title of (b) before "Conference."

Lines 20-21 [Rule 16.1(b): It was agreed that the lines should be revised to read ". . . should order the parties to meet, and prepare and submit a report to the court before the conference."

Lines 25-26 [Rule 16.1(b)]: After discussion, the consensus was to leave the revised language of the last sentence as published, except that "may" would be moved after "also."

Line 64 [Rule 16.1(b)(3)]: The word "initial" would be used before "views."

Lines 95-96 [Rule 16.1(c)]: "MDL" would be removed from the title of this subdivision and from the first sentence.

Line 135 [Note to 16.1(a)]: The words "begin to" would be retained in the Note.

Line 182 [16.1(b) Note]: The words "begin to" would be retained in the Note.

Line 193 [16.1(b) Note]: The word "coordinate" would be substituted for the word "organize" that was in the draft.

Lines 213-14 [Rule 16.1(b)(1) Note]: The language would be changed to read " . . . appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of . . . ."

Line 217 [Rule 16.1(b)(1) Note]: The word "should" would be substituted for the word "might."

Lines 225-26 [Rule 16.1(b)(1) Note]: The phrase "discharge their leadership obligations" would be used.

Line 260 [Rule 16.1(b)(1) Note]: The bracketed sentence at the end of the paragraph would be retained, but the phrase "– sometimes one year –" would not be included.

Line 272 [Rule 16.1(b)(1) Note]: "cross-cutting motions" would be changed to "pretrial motions."

Line 298 [Rule 16.1(b)(1) Note]: As a Reporter's call, "accord" would be changed to "accordance" – "in accordance with the court's management order."

Lines 318-26 [Rule 16.1(b)(1) Note]: There was much discussion of whether this added paragraph about the relationship between Rule 16.1 and Rule 23(g) sent the correct message when addressing the management of MDL proceedings including class actions. There has been considerable concern about these issues in the class action bar. One suggestion was to replace the last sentence of the paragraph with something like: "Rule 16.1 does not displace Rule 23(g), which continues to apply to class actions."

The concern is that MDLs may include class actions and other actions. Among other things, there may be individual actions brought by those who opted out of the class action after certification. And in some MDLs there may be multiple class actions, maybe so many that the court has to appoint some form of leadership counsel to manage the multiple class actions. And there may be derivative actions as well. Moreover, sometimes the class action is used as the vehicle for settling an MDL, i.e., to conclude that was previously a more "ordinary" MDL that did not originally include class actions.

One perspective is that in some sorts of class actions – perhaps antitrust and securities provide good examples – there are established practices that we do not desire to disrupt. Indeed, the PSLRA has its own provisions about selection of the lead plaintiff and that party's authority to pick the lawyer for the class. But somewhat similar class-action issues can arise in other sorts of MDLs, such as consumer protection and data breach MDLs. Some may be entirely made up of class actions, while in others there might be a mix of sorts of cases.

And there is no assurance that class certification (and therefore appointment of class counsel under Rule 23(g)) will be an early decision. In one major MDL, for example, though there were a number of class-action complaints the question of class certification was deferred while other matters were addressed. In that MDL, a *Daubert* ruling eventually ended the proceeding, so the question of certification never had to be reached.

The Rule 23(g) authorization for interim class counsel means that a 23(g) appointment can occur well in advance of class certification in some instances, including MDL proceedings. But MDL leadership counsel are different from class counsel. Even interim class counsel can, for example, propose a classwide settlement to the court that can include an agreement by defendant to certification for purposes of settlement and be binding on all class members who do not opt out. MDL leadership counsel cannot do that.

One basic point that was emphasized was a familiar one – MDLs come in many different sizes and shapes. The public comment period demonstrated that the class action bar is worried about the interaction of 16.1 and 23(g), but the reality may well be that there is no blanket solution to the potential difficulties presented by class actions – perhaps with appointed class counsel – alongside other actions with appointed leadership counsel – in some MDL proceedings.

After much discussion, the resolution was **the Subcommittee members should circulate proposed Note language to improve the presentation of what is currently in lines 318-26**.

Lines 331-38 [Rule 16.1(b)(2) and (3) Note]: Concern was raised about the use of the words "administrative" and "substantive" to characterize the difference between the topics in (b)(2) and (b)(3). Some of the matters in (b)(2), such as whether to use consolidated pleadings, might seem fairly "substantive." But they would ordinarily be topics that ought be considered seriously up front. Saying "administrative" might, however, suggest that under *Gelboim* such combined pleadings might be viewed as superseding individual complaints, which is not what is meant. One potential solution would be to remove the language at lines 332-33 – "are generally of an administrative nature, and" leaving "The matters identified in Rule 16.1(b)(2) often call for early action by the court." But the next sentence says that more "substantive" matters in 16.1(b)(3) stand in "contrast," which doesn't seem quite right.

Perhaps the focus should be on what is ripe for potential court action at the initial management conference or shortly thereafter, in contrast to others that more often are wisely deferred until after leadership counsel are appointed if such an appointment is contemplated. Another suggestion was that the distinction is "categorical," and perhaps the (b)(2) is more about "procedural" matters and (b)(3) more about "substantive" matters.

After considerable discussion, as with lines 318-26, the resolution was that **the Subcommittee members should circulate proposed Note language to improve the presentation at lines 328-38.** It seemed that the Subcommittee was in essential agreement about what the Note should say but uncertain about how to express that agreement.

Lines 372-73 [Rule 16.1(b)(2)(C) Note]: The consensus was to revise the language to read: " . . . it is important to address other matters that can arise, such as properly handling . . . ."

Line 392 [Rule 16.1(b)(2)(D) Note]: It was agreed to replace "coordinating" with "the coordination of" so the line would read: "For example, the coordination of overlapping discovery is often important."

Lines 404-16 [Rule 16.1(b)(2)(E) Note]: The draft language would be shortened considerably:

> The Rules of Civil Procedure apply in MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings. Decisions whether to use master pleadings . . . .

The discussion of pleading rules and the question whether to include defenses here would be removed as unnecessary in this portion of the Note, which is basically about consolidated pleadings rather than the "vetting" topic.

Line 436 [Rule 16.1(b)(3)(B) Note]: "and defenses" would be retained.

Line 454 [Rule 16.1(b)(3)(B) Note]: The discussion agreed on revising the sentence at lines 454-55 as follows: "Other factors such as pending motions to dismiss, might include whether there are legal issues that should be addressed . . ." But the previous sentence might make this addition redundant: "And the timing of these exchanges may depend on other factors, such as motions to dismiss or other matters and their impact on the early exchange of information." **The addition of this language might be reconsidered in light of the presence of similar language in the prior sentence.**

Lines 458-68 [Rule 16.1(b)(3)(B) Note]: The Note would be shortened and simplified to read as follows:

> This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

This change removed the unnecessary invocation of certain (but not other) Civil Rules.

Lines 488-49 [Rule 16.1(b)(3)(C) Note]: The underscored sentence at the end of the paragraph would be deleted. The question of evidence preservation was not raised in the published preliminary draft, and might be a provocative thing to add at this point.

Line 510 [Rule 16.1(b)(3)(E) Note]: The bracketed phrase about Rules 16(a)(5) and 16(c)(2)(I) would be removed, as the Subcommittee has decided to use "resolution" rather than "settlement" in the rule.

Appendix
Draft before Subcommittee
on March 5, 2024

Feb. 29 Meeting Revisions (with Cooper suggestions)

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation ~~orders the~~ transfers of actions, the transferee court should schedule an initial management conference to [begin to] develop an initial management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

(be) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. Unless otherwise ordered by the court, t~~T~~he report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter in Rule 16. The report ~~may~~ also may address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed~~,~~ and, if so, it should also address the timing of the appointment and:

(A) the procedure for selecting leadership counsel ~~them~~ and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) the~~ir~~ role of leadership counsel in any resolution of the MDL proceedings ~~settlement activities~~;

(D) the proposed methods for leadership counsel ~~them~~ to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel.~~;~~

(2) The report also must address:

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

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

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

(D) 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

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

(3) The report also must address the parties' [preliminary] {initial} [early] views on:

(A)~~**(3)** identifying~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

(B)~~**(4)**~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

~~**(5)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;~~

(C) ~~**(6)** a proposed~~ anticipated ~~plan for~~ discovery in the MDL proceedings, including any unique issues that may be presented ~~methods to handle it efficiently~~;

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

~~**(8)** a schedule for additional management conferences with the court;~~

(E)~~**(9)**~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

~~**(10)** how to manage the filing of new actions in the MDL proceedings;~~

~~**(11)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and~~

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

(c~~d~~) Initial MDL Management Order. After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(b~~e~~) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There has been ~~previously was~~ no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the type of management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. 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. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to [begin to] develop a management plan for the MDL proceedings and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b~~e~~) should ~~may~~ be of great value to the transferee judge and the parties.

~~**Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel perhaps more often on the plaintiff than the defendant side – to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference. 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. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL~~

~~proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~

Rule 16.1(be). The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in ~~the court's~~ Rule 16.1(be) ~~order~~ prior to the initial MDL management conference. This should be a single report, but it may reflect the parties' divergent views on these matters, as they may affect different parties differently. Unless otherwise ordered by the court, the report must address all the matters identified in Rule 16.1(b)(1)-(3). The court also may ~~select which matters listed in Rule 16.1(bc) or Rule 16 should be included in the report submitted to the court, and also may~~ include any other matter, whether or not listed in Rule 16.1(b) or in Rule 16~~those rules~~. Rules 16.1(be) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to [begin to] develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(be)(1)-(3~~1~~2) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

Oftentimes, counsel are able to organize in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

Rule 16.1(be)(1). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel is often an early action, and court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) ~~This provision~~ calls attention to several ~~a number of~~ topics the court might [should] consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly [represent their clients~~plaintiffs~~,] {discharge their leadership obligations} keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

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. For example, in some 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 differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. ~~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 16.1(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).~~

The rule also calls for advising ~~a report to~~ the court ~~on~~ whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding. [Transferee courts have found that appointment for a term – sometimes one year – is useful as a management tool for the court to monitor progress in the MDL proceedings.]

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

Subparagraph (C) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, cross-cutting motions, bellwether trials, and settlement negotiations. ~~, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that – a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions~~

~~about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or~~

~~all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.~~

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(c~~d~~). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDLs, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Particularly before class certification is resolved, there is no across-the-board rule on handling such issues.

Rule 16.1(b~~e~~)(2) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) are generally of an administrative nature, and often call for early action by the court. The matters identified by Rule 16(b)(3), by contrast, are generally of a more substantive nature and, thus, in the absence of appointment of leadership counsel should appointment be recommended, the parties only may be able to provide their [preliminary] {initial} [early] views on these matters.

Rule 16.1(be)(2)(A). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts

from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

Rule 16.1(b)(2)(B). The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(C). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate ~~transferor~~ district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.

Rule 16.1(b)(2)(D). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems [(e.g., California and New Jersey)] have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding ~~may~~ becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, coordinating ~~avoiding~~ overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(b)(2)(E). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule

56. ~~As noted above,~~ [The Rules of Civil Procedure] {Rules 8, 9, and 12} continue to apply in MDL proceedings. Not only must each claim or defense satisfy Rule 11(b), each claim [or defense] must also satisfy Rule 8(a)(2) [or Rule 8(b)] even though presented by a short form complaint [or answer] that relies in part on the allegations of the master complaint [or answer]. 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. 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).

Rule 16.1(b)(3). Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

Rule 16.1(be)(3)(A)~~(3)~~. 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 discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(be)(3)(B)~~(4)~~. In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims [and defenses] have been asserted without the inquiry called for by Rule 11(b). Experience has shown that ~~in MDL proceedings~~ an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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. The methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. ~~Whether~~ Eearly exchanges ~~should occur~~ may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as ~~whether~~ motions to dismiss or other early matters and their impact on the early ~~might render the effort needed to~~ exchange of information ~~unwarranted~~. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). As noted above, there should be no doubt that – as in all actions – [the Rules of Civil Procedure] {Rules 8,9, 11 and 12} apply in MDL proceedings. An important part of the court's management of the MDL proceeding may include implementing the requirements of those rules. [Under some circumstances, {– after taking account of whether the party whose claim or defense is involved has reasonable access to needed information –} the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.]

~~**Rule 16.1(be)(2)(D)(5).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. 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. 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).~~

Rule 16.1(be)(3)(C)~~(6)~~. 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. Some issues relating to discovery the court may want to address include the suitability of early preservation and service-of-process orders.

Rule 16.1(be)(3)(D)~~(7)~~. Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

~~**Rule 16.1(be)(2)(G)(8).** The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.~~

Rule 16.1(be)(3)(E)~~(9)~~. Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution ~~settlement~~ of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be made by the parties. But [as recognized in Rule 16(a)(5) and 16(c)(2)(I),][1] the court may assist the parties in ~~settlement~~ efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution ~~settlement~~.

[1] If we are avoiding use of the word "settlement," the bracketed references might better be removed. Rule 16(a)(5) refers to "facilitating settlement." Rule 16(c)(2)(I) is more general: "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." The latter does use "resolution" as well as "settlement," but is limited to procedures "authorized by statute or local rule," which might introduce some perplexities.

~~**Rule 16.1(bc)(2)((I)(10).** Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.~~

~~When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.~~

~~**Rule 16.1(bc)(2)(J)(11).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.~~

~~The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.~~

Rule 16.1(bc)(3)(F)~~(12)~~. MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(cd). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is ~~were~~ appointed after the initial management conference under Rule 16.1(a).

Notes of MDL Subcommittee Meeting
Feb. 23, 2024

On Feb. 23, 2024, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Those participating included Judge David Proctor (Chair), Judge Robin Rosenberg (Advisory Committee Chair); Judge Hannah Lauck, Ariana Tadler, Helen Witt, Joseph Sellers, and David Burman. Additional participants included Emery Lee of the FJC, Allison Bruff and Zachary Hawari of the Rules Committee Staff, and Professors Richard Marcus and Andrew Bradt, as Reporters.

Before the meeting, Prof. Marcus had circulated two sketches of post-public-comment revisions of the published proposal to adopt a Rule 16.1. These sketches, which were referred to as Version 1 (dated Feb. 19) and Version 2 (dated Feb. 22 and circulated the evening before this meeting), appear as appendices to these notes of the meeting.

The meeting began with an overview of the main differences between Version 1 and Version 2. Both versions eliminate the position of "coordinating counsel," to which there had been many objections during the public comment period. In addition, as written Version 1 required the parties to include in their reports to the court only those matters the court had directed them to include, while Version 2 directed them to address every matter identified in Rule 16.1(b) unless the court ordered otherwise.

Both versions separate appointment of leadership counsel from other matters. The public comment period emphasized the importance of addressing appointment of leadership up front. But on other topics preliminary views may be all the court needs.

The two versions also different in how they treated issues other than leadership counsel. Both versions directed the parties to address appointment of leadership counsel. In Version 2, however, the other topics identified in Rule 16.1(b) were divided into two "tiers." The first [Rule 16.1(b)(2)] consisted of matters that were largely administrative and often needed prompt action by the court. The second [Rule 16.1(b)(3)] addressed other matters that were more "substantive" and might often be addressed most effectively after appointment of leadership counsel and, sometimes, after more experience with the evolution of the MDL proceedings.

So a basic question was whether to follow the Version 1 or Version 2 approach to topics other than leadership counsel. As the discussion developed, the consensus was to use Version 2.

One member began the discussion by explaining that Version 2 represents an effort to accommodate two sets of concerns. For one thing, many witnesses who appeared in the public hearings stressed that – at least from the plaintiff side – it would often be true that many of the matters included on the list in the rule would depend on familiarity with the cases that counsel did not yet fully possess. And this problem would be magnified if leadership counsel were to be appointed but had not yet been appointed.

At the same time, there were several matters that called for fairly immediate attention. A good example of that would be the possibility that scheduling or other orders entered before the cases were transferred by the Panel calling for actions that would not fit the overall management

of the MDL proceedings. These concerns prompted a desire to postpone action on these topics until later.

Balanced against this uncertainty, particularly among some on the plaintiff side, there was also an understandable desire among judges to get some basic information about the various topics listed in Rule 16.1(b) in addition to appointment of leadership counsel.

The division between 16.1(b)(2) and (3) sought to address these topics by "frontloading" the ones on which immediate action might be important [16.1(b)(2)] and calling only for "preliminary views" on the other topics.

A judge suggested that this approach could enable lawyers not ultimately selected for leadership to provide their views, and also present the court with a variety of views rather than (perhaps) only the views of the self-selected "leadership" emerging from "private ordering" within the plaintiff bar. Put differently, the concern was that "non-repeat players" be heard.

Another judge observed that the idea of "coordinating counsel" was conceived as assisting the court in part by enabling divergent views to come to the court's attention. That was not meant to give greater weight to the views of coordinating counsel. Instead, as was emphasized during the public comment period, the plaintiff lawyers self-organize pretty frequently.

A lawyer expressed concern about addressing several of the matters on the rule's list before appointment of leadership counsel. "We walk into court, and somebody goes up the podium and starts telling the judge things." It can be dangerous to have people talking to the transferee judge about factual and legal issues. "It's like a hand has been shown before it should be shown." Too often important decisions – even about the basic issues raised in the case – ought not be addressed until leadership counsel are appointed. This is a serious concern. People who presume they will be in leadership may prove to be mistaken about that, and it should be up to leadership to make the strategic decisions about which issues to push, and how.

At the same time, several of the matters included in 16.1(b)(2) in Version 2 could be helpfully addressed in the initial management conference.

But premature action on several of the matters in 16.1(b)(3) could have dangerous consequences. For example, requiring the plaintiff side to discuss the "principal factual and legal issues" or a "plan for discovery" could produce unfavorable consequences. "The problem is with the 'musts' in these redrafts." The transferee judge is hearing what might be regarded as unvetted views of only one or only a few lawyers on that side.

These comments drew the reaction that the command "must" had been in the published rule proposal, so long as the court directed the parties to discuss a given matter.

A judge noted that it could be desirable for lawyers not in leadership to be able to present their views to the court. That drew the response that it was important sort out potential positions before statements are made on the record before the court. Moreover, it is rare that individual attorneys appear at management hearings.

Another attorney shared these concerns. True, the judge benefits from having information about the views of the parties on a range of issues. And it's also true that in appointing leadership counsel courts should and have stressed getting a variety of views represented. This focus is carefully explained in the Committee Note.

A judge commented that it seemed odd that it might be too early to get "preliminary views" from counsel. For one thing, those preliminary views might properly affect the judge's selection of leadership counsel. For another, it stands to reason to expect defense counsel to address several of those matters, so it seems to make sense to prompt plaintiffs to address them also. Another judge noted that courts often require position statements.

An attorney reacted to the "preliminary views" terminology. If this had gone out for public comment with that term in it, there likely would have been comment that it was not defined. A response was to ask whether it would be more palatable without the word "preliminary" – "the parties views on" the various matters. Adding "preliminary" seems to stress that these are not binding views.

A different point was raised. Version 2 shows consolidated pleadings as a topic on which only preliminary views need be presented. That might sensibly be moved into 16.1(b)(2) rather than (3). But other things in (3) – for example the factual and legal issues likely to be presented, or a plan for discovery – ought not be the topic of a binding management order at this early point. Particularly as to leadership counsel appointed later, there is a risk they would be "handcuffed" by such an order.

A judge responded that judges need to hear about these issues early on, and that judges can be judicious about what provision for them ought to be included in the initial management order.

Discussion turned to the directive in Version 2 that all listed topics in 16.1(b) must be addressed unless excluded from the court's order. Proposed 16.1(b)(3) is watered down, and only seeks "preliminary views." What reason would a judge have for leaving things on that list out, particularly since the parties can tell the judge that it is premature to take action on them.

Another judge suggested that the Committee Note might make the point that the positions taken on these matters are "non-binding." And it was noted that the draft Committee Note seems already to say that in new language added after public comment:

> Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(8) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it."

A judge recognized that there could be a risk that premature comments by some counsel might mislead the judge, but noted also that the rule could serve as an "information-forcing" device that prompted counsel to provide the judge with insights and an array of views that would improve management of the MDL proceedings. Having only one voice on the plaintiff side could cause

problems. Perhaps an example is the common benefit order entered by Judge Chhabria in the Roundup litigation. Had he heard, for example, from lawyers with cases pending in state courts who challenged his authority to "tax" their settlements to pay leadership counsel in the federal MDL, he might have been better equipped to address the issue.

Another judge noted that "This rule is not just for judges." Instead, it's designed to unify what's going to happen in the litigation. "There are *always* multiple discovery plans." The judges and lawyers can handle these things appropriately.

Discussion turned to the 16.1(b)(3) item regarding a possible discovery plan. The consensus was that the alternative language would be preferable: "an overview of anticipated discovery in the MDL [proceedings], including any unique issues that may be presented."

A lawyer proposed moving what Version 2 presented as 16.1(b)(3)(C) (on consolidated pleadings) into the "frontloaded" category of 16.1(b)(2). That prompted a question about whether direct filing should be addressed so soon. A response was that this is really about tagalongs. Dealing with those up front can be important. Another reaction was that direct filings should receive early scrutiny. It is important that direct filing orders take account of possible choice of law complications. It was noted, however, that the Committee Note already addressed this concern:

> When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and *how choice of law issues should be addressed* (emphasis added).

A different view of direct filings was presented. Including that in the rule could seem to create a presumption that this is a legitimate practice. From a defense viewpoint, that is far from a unanimous view. But another participant noted that the cases cited in a challenge to direct filing orders (usually by stipulation) showed that they do not exceed the transferee judge's powers.

As the meeting was ending, there was an effort to recap. The next step would be for Prof. Marcus to provide a new draft reflecting the discussion during this meeting. Version 2 would be the starting point, with the following changes:

> Line 7: the added phrase "consider appointment of leadership counsel and" would be removed.
>
> Line 23: "address" would be moved after "must."
>
> Lines 25-26: the reference to Rule 16 would be restored.
>
> Lines 31-32: The brackets would be removed around "the timing of such appointment."

Lines 62-63: The verb would be changed to "address" and alternatives to "preliminary" would be offered, probably "initial" or "early."

Lines 72-74: 16.1(b)(3)(C) (on consolidated pleadings) would be moved into 16.1(b)(2).

Lines 76-78: This would be changed to "an overview of anticipated discovery in the MDL [proceedings], including any unique issues that may be presented."

Professor Marcus would try to circulate a revised rule draft promptly. Ideally, the Subcommittee could try to meet again on March 1 or March 4. The latter date looked more workable to some Subcommittee members. The "official" due date for agenda book materials is March 15.

APPENDIX
Drafts before Subcommittee on
Feb. 23, 2024

Version 1
(draft of Feb. 19)

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to consider {address} appointment of leadership counsel and develop an initial {interim} management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

(be) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address whether leadership counsel should be appointed and any other matter designated by the court, which may include any matter identified in Rule 16.1(b)(1) and (2) ~~listed below~~ or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

(1) If the report recommends appointment of ~~whether~~ leadership counsel, it should address [the timing of such appointment and] ~~be appointed, and if so~~:

(A) the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) their role in [the] {any} resolution of the MDL proceedings ~~settlement activities~~;

(D) proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel;

(2) The [report] {agenda} must also provide {the parties'} views on:

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

(B)~~(3) identifying~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

(C)~~(4)~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

(D)~~(5)~~ whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(E)~~(6)~~ a proposed [an overview of a] plan for discovery, including methods to handle it efficiently;

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

(G)~~(8)~~ a schedule for additional management conferences with the court;

(H)~~(9)~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

(I)~~(10)~~ how to manage the filing of new actions in the MDL proceedings;

(J)~~(11)~~ whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

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

(c~~d~~) **Initial MDL Management Order.** After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel would be appointed, and an initial [a tentative] {an interim} management plan for the matters designated under Rule 16.1(b~~e~~) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Version 2
(Draft of Feb. 22)

Rule 16.1. Multidistrict Litigation

(a) **Initial MDL Management Conference.** After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to consider appointment of leadership counsel and develop an initial management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

(be) **Preparing a Report for the Conference.** The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must, unless otherwise directed by the court, address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court~~, which may include any matter in Rule 16~~. The report may also address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed. If the report recommends appointment of leadership counsel, it should address [the timing of such appointment and]:

(A) the procedure for selecting leadership counsel ~~them~~ and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) the~~ir~~ role of leadership counsel in any resolution of the MDL proceedings ~~settlement activities~~;

(D) the proposed methods for leadership counsel ~~them~~ to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel;

(2) The report must also address:

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

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

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

(D) 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.

(3) The report must also include the parties' preliminary views on:

(A)~~**(3) identifying**~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

(B)~~**(4)**~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

(C)~~**(5)**~~ whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(D)~~**(6)**~~ a proposed [an overview of a] plan for discovery, including methods to handle it efficiently;

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

~~**(8)** a schedule for additional management conferences with the court;~~

(F)~~**(9)**~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

~~**(10)** how to manage the filing of new actions in the MDL proceedings;~~

~~**(11)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and~~

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

(c~~**d**~~**)** **Initial MDL Management Order.** After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel would be appointed, and an initial management plan for the matters designated under Rule 16.1(b~~e~~) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Summary of Public Comment Period Testimony and Written Comments

This memo summarizes the testimony and written comments about the Rule 16.1 proposal. When possible, it gathers together comments from the same source, including both testimony and separate written submissions. On occasion, the summary of testimony includes the written testimony submitted by witnesses.

The written submissions are identified with only their last four digits. The full description of each of them is USC-Rules-CV-2023-0001, etc. This summary will use only the 0001 designation for that comment.

The summaries attempt to identify matters of interest by topics. For some of the initial topics there may not have been comments or testimony. If none are received on those topics they will be removed from the final summary. The topics are as follows:

Rule 16.1

General
Rule 16.1(b) – Coordinating Counsel
Rule 16.1(c)(1) – Leadership Counsel
Rule 16.1(c)(2) – Previously Entered Orders
Rule 16.1(c)(3) – Identifying Principal Issues
Rule 16.1(c)(4) – Exchange of Factual Basis of Claims
Rule 16.1(c)(5) – Consolidated Pleadings
Rule 16.1(c)(6) – Discovery Plan
Rule 16.1(c)(8) – Additional Management Conferences
Rule 16.1(c)(9) – Facilitate Settlement
Rule 16.1(c)(10) – Manage New Filings
Rule 16.1(c)(11) – Actions in Other Courts
Rule 16.1(c)(12) – Reference to Master/Magistrate Judge
Rule 16.1(d) – Initial Management Order

Oct. 16, 2023, Washington, D.C. Hearing

General

Mary Massaron: The biggest problem is the presence of meritless claims. Early MDL practice was like the wild west. An overwhelming proportion of the claims submitted turned out to have no foundation. Winnowing those claims should be job 1. Timing should be imposed by rule. Ad hoc approaches to this vetting process will not work. For individual cases, we have bright line rules to weed out groundless claims up front. But in large MDL proceedings that is not happening. In large MDL proceedings, however, Rule 12(b)(6) does not work.

Alex Dahl (LCJ) & 0004: Proposed 16.1 contains no requirements; to call it a "rule" is aspirational. At the same time, the Committee Note merely offers advice. Moreover, those suggestions include topics that are not suitable for rulemaking because they are either unsettled

matters of law or disallowed by (or in serious tension with) existing rule provisions. Not every topic that comes up in court is appropriate for incorporation into the rules. The 16.1 proposal should be revised to provide rules guidance to ensure claim sufficiency and to remove the subsections that could do more harm than good by enshrining into the rules concepts that raise complicated or undecided questions about existing rule or statutory provisions. For example, it is far from clear that MDL courts have authority to appoint leadership counsel or to supplant an MDL plaintiff's own lawyer, so it would be imprudent to include this ill-defined concept in the rules.

Kaspar Stoffelmayr & 0008): Promulgating a rule for MDL proceedings is long overdue. The current reality in MDL proceedings is ad hoc rulemaking. "I can't tell the client what to expect." Although ensuring the MDL transferee judges have broad latitude in managing transferred cases is important, the current proposal falls short of what is needed because it includes no mandatory language. This current reality contributes to the proliferation of unsubstantiated claims and inadequately restricts the judge's discretion with respect to what are essentially non-reviewable orders. Altogether, these circumstances have contributed to the lack of confidence among both plaintiffs and defendants in MDLs as a means to fairly adjudicate disputes. I agree with the LCJ comments. "The unpredictability inherent in ad hoc rulemaking contributes to the unsubstantiated claims problem that has become the defining characteristic of modern MDLs," prompting "cut and paste complaints on behalf of hundreds or thousands of plaintiffs." Not every judge will be equally adept at MDL case management, so "there is much to be said for restricting a lone MDL judge's discretion in favor of considered rules of procedure." Only the insiders know how to play the game. The proposed rule should be amended as suggested by LCJ to remove the unnecessary invitation to engage in ad hoc rulemaking. In short, though there is a crying need for rules to solve these problems, this rule will not do so. There is great need to insist that claimants show that their claims have substance up front.

John Beisner: I generally agree with the LCJ comments.

Chris Campbell: We need a rule amendment providing firm positions on MDL management. But the current draft conflicts with existing rules, advisory notes, and existing law. The 1926 Senate Judiciary Committee Report on the Rules Enabling Act stated that the goals of the national rules were to make process "uniform," and also aimed at "simplicity." But the current reality is that, in the absence of rules accessible to the entire legal community, repeat players thrive while others face confusion and delay. Instead of solving this problem, the draft invites increased process ad hockery. This is not a real rule.

James Shepherd: We need MDL rules that are specific. Although 16.1 is a good start, it has flaws.

Fred Haston (Int'l Assoc. of Defense Counsel): Based on 20 years of involvement in major MDL proceedings, I endorse the LCJ comments. The reality of the practice has been ever expanding dockets of MDL cases. This is not a healthy situation. Rule changes should recognize the need for structure, predictability and uniformity. That permits litigants to know what's coming, and promises more efficient outcomes.

John Guttmann: My views are generally in line with the DRI comments on proposed 16.1. There has been an exponential growth in the number of actions transferred to MDL courts. But the 16.1(c)(4) provisions do not adequately address this upsurge in filings with meaningful methods to screen out unsupportable claims. The rule should require each plaintiff to provide support for the claim asserted, and the Note should outline the reason for the rule's adoption – the proliferation of unfounded claims in MDL proceedings. With such a requirement, "failure to supply the required information makes their dismissal almost a ministerial task rather than calling for the more resource-intensive motion practice required under the existing rules."

Harley Ratliff: Based on 20 years of experience with MDL proceedings, I can report that the current system is broken. It imposes on the courts the burden of dealing with thousands of largely un-vetted claims. The presence of those claims devalues the claims of real plaintiffs who have real claims. Rule 16.1 is a start toward dealing with the disfunction of MDL today, and much of what it proposes already takes place frequently in large MDLs. Although the draft rule therefore may be helpful to entirely uninitiated MDL judges, it does not address the underlying problems. "To fix the current situation, we must go beyond Rule 16.1 and begin to address the real problems with our MDL system."

Sherman Joyce (President, American Tort Reform Assoc.): The preliminary draft is insufficient. An industry has developed around MDL litigation. "Hundreds of millions of dollars are spent on generating claims for a single mass tort." The total amount spent on such ad campaigns is $7 billion. This spending supports advertising campaigns and the filing of speculative litigation. Because screening is minimal, clams are filed *en masse*. As a consequence, the MDL docket has surged; as of the end of the 2022 fiscal year it reached an astounding 73% of pending actions. But a significant proportion of these claims – as high as 40% or 50% – are not viable. What is needed is a rule that (1) responds to the extraordinary surge of mass tort litigation, (2) requires that cases be carefully screened and provides a mechanism for courts to dismiss speculative claims at an early stage, and (3) encourages courts to rule on dispositive legal issues, such as t novel theories of liability, general causation, preemption, or statutes of limitation, as soon as practicable.

Deirdre Kole (Johnson & Johnson): I applaud the Committee's efforts to bring much needed change to the governance of MDL proceedings. There is undoubtedly a great need for amending the rules to address these issues. The federal judiciary is struggling under the current rules to deal with ever-growing MDLs. Tens of thousands of claims are being submitted without basic factual or legal support, and the judiciary is besieged as a result. Some plaintiff attorneys engage in "stockpiling of claims" because FRCP safeguards that ordinarily prevent the initiation of baseless lawsuits are not utilized or do not function in the MDL context. These groundless claims disappear when real vetting begins. But they should never have been filed in the first place. In some litigations, as many as 45% have dropped out at that point. But the current draft does not solve this problem.

Leigh O'Dell: Based on extensive experience representing plaintiffs in MDL proceedings, I support efforts to improve the MDL process. 16.1 is valuable in encouraging the MDL court to schedule an initial management conference soon after the creation of an MDL proceeding. And it could be very helpful for the court then to address several of the matters specified in 16.1(c) – (1) appointment of leadership counsel; (2) identifying orders that might appropriately be vacated or

modified; (3) identifying the principal factual basis for the case and legal issues to be presented, to the degree known and without prejudice to leadership after appointment (language we think should be added to (c)(3), (10) managing the filing of new actions, and (11) whether related actions have been or will be filed in other courts. This shortened list of topics will enable the court to address preliminary matters needing attention at the outset. On the other hand, it would be premature for the court at this early stage (and before leadership counsel are appointed) to address the other items listed in 16.1(c): (4) exchange of information; (5) consolidated pleadings; (6) a plan for discovery; (7) likely pretrial motions; (8) schedule for further management conferences; (9) measures to facilitate settlement; and (12) whether matters should be referred to a magistrate judge or a master. Before decisions are made about these matters, leadership counsel should be in place and able to evaluate these issues. There is a risk that the process could become "an ill-informed box-checking exercise." We favor a more limited rule with an initial management conference limited to the matters suitable for consideration at that point.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: We always try to talk with opposing counsel early in the case, and also talk with other counsel on our side. But opposing counsel often does not want to have discussions. But this rule should not apply to all MDL proceedings. The Committee's entire focus has been on mass tort MDLs. But most MDLs are not mass torts. MDLs that are not mass torts implicate different case-management issues. For that reason, application in such MDLs could disrupt and delay other MDLs. For example, when there are class actions included ordinarily the first step is appointment of leadership counsel, and those class counsel are authorized by court order to act on behalf of the entire class. For example, there simply are not bellwether trials in class actions. This is not a distinction based on the nature of the substantive claims asserted (securities or antitrust v. mass torts), but the distinctive features of class actions.

Mark Chalos: Not two MDLs are exactly alike. The needs of each MDL are different, so the management plans need to be tailored to the given MDL. I think the last sentence of the first paragraph of the Note should be changed to insert the word "flexible" before "framework": "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 . . ." In addition, at the beginning of the second paragraph of the Note I would add the following sentence: "Because MDLs vary significantly, some or all of the provisions of Rule 16.1 may not apply in a particular MDL." The amendment should also say somewhere whether the initial management conference supplants the Rule 26(f) requirement to develop a discovery plan.

Tobi Milrood: There is a risk that this rule would inject unintended ambiguity or uncertainty into complex litigation. For example, the LCJ recommended additions are purely focused on product liability MDLs and ignore the vast array of complex litigation before transferee judges. "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. * * * [E]xperience foretells that defendants in an MDL will urge the transferee judge to address all listed topics." This is the "initial management conference," but there is no provision for additional conferences. Using this conference to lock the plaintiff side into a schedule would be harmful. How about instead saying

it is an "early" management conference. "The rule cannot be a substitute for training new judges or for Manual on Complex Litigation, which is still a beacon for MDL courts."

Alyson Oliver: The coordinating counsel should be somebody who has a substantial stake in the litigation. If you get an outsider, considerable time (and expense) will be involved in getting that person up to speed. This concern is not about allowing the court to supervise the conduct of the litigation, but instead to foster efficiency.

James Bilsborrow: I am encouraged that proposed 16.1 embraces a flexible approach to the initial MDL management conference. "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." There are no parameters in the rule about qualifications to be coordinating counsel. By way of comparison, interim class counsel under Rule 23(g) must have a client. Without this interlocutor, there may be competing reports. If the court designates somebody as coordinating counsel, the parties will treat that person as de facto lead counsel because the court "has blessed this individual." This effect could stifle divergent views. In one toxics MDL, for example, the court received two competing reports and ended up establishing separate tracks for claims of different sorts. The worse case scenario haunts this proposal.

Diandra Debrosse: I am not part of the "old boys network," and that is the likely source for this early appointment. So including this provision will impede new entrants. Inevitably this person will hold great power even though the judge has not explicitly granted that power.

Dena Sharp: "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." But Rule 16.1(c) has too many topics on its list. Instead of frontloading all those topics, the court should be urged to hold periodic status conferences. One approach would be to add this to the introductory text of Rule 16.1(c): "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 to the needs of the MDL, and consistent with Rule 16.1(d)."

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: This proposed rule is particularly gratifying to me because it fulfills my own decade-long crusade championing a rule amendment to address MDLs. "I urge the Committee to stay the course." I was the first to compare the statistics maintained by JPML staff with those of the A.O. and found then that MDLs included more than 40% of pending civil cases, and that percentage has recently jumped to more than 60%, largely due to the 3M Combat Earplug MDL. I offer 43 style and formatting suggestions. More generally, the Committee Note overreaches when suggesting that its recommendations might also be suitable for other multiparty litigations. The draft goes too far, and ventures into areas far afield. The Manual for Complex Litigation is a more suitable guide for such litigation. In addition, the Committee Note at lines 132-43 should be revised to add the following:

> 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. Those other topics are described in the Manual for Complex Litigation, which contains more comprehensive lists of topics that may be useful.

There is actually little consensus on what topics should be addressed up front. Focusing on a select prescribed list of topics is not likely to be useful. "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.

Frederick Longer (0019): I commend the Committee for its efforts to provide some structure for modern MDL practice, but many of the rule's fixes amount to solutions to problems that do not exist or are matters best left to practice guides. LCJ, for example, said that the rule is "aspirational," and not really a rule. The rule is not necessary. The problems cited in 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." I believe that benign neglect is the best course. If the Committee insists on proceeding, some Note mistakes should be fixed. A leading example is that the Note compares class actions (with commonality requirements) to MDLs. But in a data breach MDL consisting solely of consolidated class actions, that's too broad a brush and the Note could haunt class counsel. I think that sentence should be removed. In addition, it could be beneficial to remove the word "initial" from the description of the management conference called for by 16.1(a); this should be an iterative process.

Norman Siegel: There is a facial disconnect between proposed 16.1 and the MDL cases my firm typically handles, which are class actions. The disconnect is evident throughout the entire rule, which fails to take account of the reality that many MDLs are made up of class actions. The "coordinating counsel" position, for example, could be counterproductive in class actions. In MDLs consisting of multiple class actions, the first order of business should be a schedule of motions for appointment of interim class counsel. And Rule 23(g)(3) on interim class counsel already exists. I propose three solutions: (1) Exclude MDLs consisting solely of class actions from the rule; (2) As to "hybrid MDLs" (consisting of class actions and individual actions), the rule should be clear that nothing in 16.1 supersedes Rule 23(g); and (3) if "coordinating counsel" is retained, the rule should make it clear that this position is limited to purely ministerial duties pending the appointment of interim class counsel.

Jennifer Hoekstra: There is no urgency about adopting a rule. MDL counsel and transferee judges are not attempting to circumvent the FRCP. "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 [my] comments." There are already more than enough sources of guidance for handling MDLs, including the Manual for Complex Litigation and the Annotated Manual for Complex Litigation. If the rule goes

forward, 16.1(c) should be limited to (1) (leadership counsel); (2) (scheduling order identification); (3) (identifying factual and legal issues, though without prejudice to later revision); (10) (managing new filings); and (11) (whether related actions have been filed in other courts. As to the other matters, there is a significant disadvantage for plaintiff counsel and the rest should be stricken from the rule.

Patrick Luff: I share the concern of an Advisory Committee member about "mission creep." "A seemingly innocuous rule providing mere suggestions for early management could quickly become an unwieldy leviathan." On that, recall the length of the Manual for Complex Litigation. On the particular issue of "claim insufficiency," the Committee might wisely not try to devise a rule for MDL proceedings; "the matter would better be dealt with through an amendment of Fed. R. Civ. P. 23 that allows class certification of individuals injured by corporate misconduct." "The solution is simple. Amend Rule 23 to relax certification requirements and allow for class treatment of personal injury and consumer protection claims."

Emily Acosta (testimony & 0020): From a mass torts plaintiff-side background, I believe some of the proposed changes strike an appropriate balance, but others raise serious concerns. I generally support the idea of an MDL management conference. But I disagree with several specific proposals. Most of the items in 16.1(c) should be removed, or at least no "formal, written report" to the court should be required. Instead, 16.1(c) should only say that counsel should "be prepared to address" the enumerated topics.

A.J. de Bartolomeo: At the earliest stages of the cases, the plaintiffs (unlike the defendants, who have fewer organizational problems) are often not really in a position to deal with most of the issues listed in Rule 16.1(c). Only after formal leadership is appointed would it be timely to address those issues.

Lise Gorshe: As a plaintiff lawyer, I support the proposed rule as a method to provide guidance to courts and parties. But in the mass tort context, I find some provisions troubling. The coordinating counsel provision in 16.1(b) is not a good idea. "In fact, appointing first a coordinating counsel that is later replaced by leadership counsel may slow the process when continuity is lacking." And the list of topics in 16.11(c) includes many that should not be addressed until leadership has been appointed. This applies to topics (4), (5), (6), (7), (9), and (12). Scheduled status conferences will provide occasions for the judge to monitor and supervise these topics.

Rachel Hampton: From the perspective of a young lawyer, it still seems like much of this material deals with "inside baseball" issues. It would be useful to have a road map for MDLs, since currently they are not mentioned in the FRCP.

Jennifer Scullion: The best way to achieve efficient management of MDL proceedings is through early and continuing management. But the proposed rule tries to do too much, too soon. Combining both the selection of leadership counsel and many topics that leadership will have to address at the same time is not sensible. Often it will not be possible early on for plaintiffs to identify the principal factual and legal issues. And the draft seems to invite attention to "early discovery" based on that forecast. The potential for phasing, bifurcation, etc., is often one of the most hotly contested issues in litigation. Similarly, modification of existing scheduling orders, the

possibilities of consolidated pleadings, the timing and nature of motions to dismiss and for class certification and a proposed discovery plan are all matters the parties should have more time to consider. And settlement is among the most important issues in many cases. "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." At least the rule should be softened to say that the initial conference is to allow the court to "consider and take appropriate action" on the leadership and imminent scheduling matters set forth in 16.1(c)((1) and (2). The coordinating counsel idea should be removed. And 16.1(c) should not call for a report, but only that counsel be prepared to discuss specified issues with the court at the initial management conference.

Feb. 6, 2024, Online Hearing

Mark Lanier: What problem is this rule trying to solve? It seems designed to provide guidance to judges because they will have a big job handling an MDL. The rule was not proposed because something is broken, but the rule goes further than mere guidance to judges. As drafted, it will add complexity to MDL proceedings and reduce both efficiency and justice. The fact that the number of actions subject to an MDL transfer order has increased is not a problem, and not due to the growth in unsubstantiated claims. Indeed, the number of MDLs has declined int he past decade, and only 10% of those MDLs involved more than 1,000 actions. The growing total number of actions in MDL proceedings is largely a function of the length of time it takes to resolve a complex MDL. And just now, the main reason the MDL actions are such a large portion of the federal civil docket is the 3M earplug MDL. The vast majority of those claims are valid and are being settled.

Jessica Glitz: MDLs are so varied that there is no "magic formula" for handling them. And though a small number of MDLs include the great variety of all individual actions within MDL proceedings, actually only a small proportion of MDLs approach this dimension. At present, nearly 60% of the MDLs have fewer than 100 cases.

Ellen Relkin: Based on decades of experience in MDLs, I can report that they have functioned well for decades. Relatively recently, there has been a concerted campaign by the defense bar to obtain legislation or, when that did not work, rule changes to erect barriers to product liability MDLs. The current proposal is not necessary, though it may be slightly helpful to some new MDL judges in the initial handling of a new MDL assignment.

Jennie Anderson: The proposed changes appear mainly directed toward mass tort MDLs, and not those comprised mainly or entirely of class actions. Rule 23 already exists to govern class actions, and Rule 23(g) provides criteria of interim class counsel. The rule should only apply to mass tort MDLs.

Seth Katz: Based on extensive experience in MDLs, I see some components of the proposed rule that will improve or "codify" what is being done by many transferee courts. But other components, though drafted with good intentions, are likely in practice to create less efficiency or result in confusion. Specifically, in terms of the items listed in 16.1(c) it is useful to

focus on (1) appointment of leadership counsel; (2) identifying scheduling orders that might be vacated or modified; (3) identifying the primary factual and legal issues to the extent known; and (4) managing the filing of new actions. This shortened list focuses on what should be addressed up front. But discussion of the remaining topics in 16.1(c) would be premature because they all require substantive decision-making about the case itself, which is not possible until leadership is appointed. There is a risk that this list will become an ill-informed box-checking exercise.

Roger Mandel: There should be a two-tiered approach to initial organization of an MDL, with most of the topics listed in 16.1(c) deferred until leadership counsel are in place. I attach a proposed rewrite of the proposed rule and Note to implement these suggestions. Among other things, the revision addresses the reality that leadership in class actions (if included in the MDL) must be appointed differently from plaintiff leadership counsel. I see nothing in the testimony on this proposal – from either side of the v. – arguing against deferring attention to most of the issues until after appointment of leadership counsel. Taking this approach will alleviate major stakeholder concerns.

Lauren Barnes: Most of my MDL experience is with class actions, and they are not really suited to this rule. I think the rule should exclude MDL proceedings made up primarily or exclusively of class actions. Alternatively, an explicit cross-reference to Rule 23(g) in Rule 16.1(b) and 16.1(c)(1)(B) should be added. The rule should also state that the role of coordinating counsel is purely ministerial pending appointment of class counsel. I addition, the reference to consolidated pleadings should acknowledge that under Rule 23 it may be that a consolidated class action complaint is all that is needed, and is usually provided now without the need for this new rule.

Kellie Lerner (President, Committee to Support the Antitrust Laws): Although mass tort MDLs represented hundreds of thousands of individual actions, most MDLs are not mass torts. So a rule for all MDLs must consider the diverse range of cases that are subject to transfer under § 1407 and whether a rule animated by just one kind of MDL should apply to others that do not implicate the same issues.

William Cash: It is essential that any rule ensure that MDL judges retain their traditional flexibility to handle the MDLs assigned to them. "I have never seen an MDL judge who did not approach MDL procedure as the unique animal that it can be." But the proponents of this rule seem to think there is too much variation from judge to judge, so that a uniform format should be prescribed. I do not understand this to be a problem worth solving. So the directive in 16.1(c) that the judge may select appropriate topics for the report, but 16.1(d) then says that the judge "should" enter an order afterwards. The implication is that every one of the factors set out in 16.1(c) must be the focus of the court's order, even if not particularly relevant to this MDL. The problem is that "suggestions" in rules "sometimes have a way of calcining by practice into mandatory inflexible 'musts' later." The Rule and Note should be modified to emphasize that the court retains flexibility. The Note or Rule should be amended to make clear that it may not apply to every MDL.

Max Heerman (Medtronic): MDL proceedings impose huge costs on defendants. "Every dollar that Medtronic and other Life Sciences companies unnecessarily spends on MDL litigation could be used far more productively to provide more jobs, return money to shareholders, and – most importantly – improve healthcare for patients." I focus my concerns on (c)(4).

Jessica Glitz: It is notable that nearly 60% of the currently active MDLs have fewer than 100 cases in them. For decades, these MDL proceedings have used the FRCP, and there is no urgent need for an additional rule in the average MDL. I agree that some features of it might be of use, such as initially addressing selection of leadership counsel, providing a schedule for additional management conferences, providing for management of newly-filed actions, and management of related actions, many other issues should not be addressed until leadership counsel are appointed.

Seth Katz: Don't "fix" what is not broken. Though some aspects of proposed 16.1 may improve MDL practice, others are problematical. The coordinating counsel proposal could cause confusion or even chaos. If this is to be a neutral, that seems to usurp the position of the magistrate judge. The proposal is unclear about where this person's powers start and end. Only a few of the topics in proposed 16.1(c) are suitable for discussion prior to appointment of leadership counsel. What would be better than this proposal is a much more limited rule that calls for a very early management conference addressing only a short list of subjects.

Dimitri Dube: Proposed 16.1(b) will automatically stifle diversity. The plaintiffs' bar can self-organize and give appropriate weight to diversity. The Note to 16.1(c)(1) does take a balanced approach to leadership counsel appointments. But the 16.1(b) appointment happens too soon.

Written Comments

Andrew Straw (0012 & 0013): We need a national standard for how to implement state court rules applied to an MDL. Whenever an MDL court decides an issue of state law, that court should be required to certify those question of state law to the relevant state supreme court, and to be bound by the answers. In MDL 2218, the MDL court said one thing about state law and the state supreme court adopted a different interpretation. In addition, it should be required that if the court of appeals having jurisdiction over the MDL court makes a decision interpreting state law, that interpretation should be binding after return of the case to the originating court. In addition, to avoid the problem of "alien circuits" deciding the meaning of state law for states outside their circuit, MDLs should be created in the same circuit where the injury actually occurred.

Prof. Charles Silver (0015): This comment attaches copies of the following articles: Charles Silver & Geoffrey Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 Vand. L. Rev. 107-77 (2010); and Robert Pushaw & Charles Silver, The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations, 48 BYU L. Rev. 1869-1959 (2023).

James Beck (0017): In this century, the MDL procedure has had an effect opposite to what Congress wanted in 1968. Instead of promoting judicial efficiency, it has had the opposite effect, at least in mass-tort MDLs. These developments have led to a wholesale abandonment of the Federal Rules. Against this background, proposed 16.1 falls far short of addressing the real problems. Nearly 80% of pending federal civil cases are in MDLs, but the rules do not address the unique adjudicatory and administrative problems these agglomerations cause. The rules were crafted decades before MDL proceedings arose, so it is not surprising that they do not address these problems. Without uniform rules, there is no predictability in MDL proceedings. The rules regularly neutered in MDL proceedings include the following:

Rule 3: This rule is circumvented in MDL proceedings that use filing alternatives like an "MDL census" or "census registry." These provisions do not require claimants to state a claim, but only to "register" their claims with a third party claims administrator. These claimants are relieved of the need to pay a filing fee, as are ordinary plaintiffs. And this has been used in at least three large MDLs – 3M Earplugs, Zantac, and Juul Labs. "MDL courts' refusal to follow Rule 3 effectively eliminates any barriers to asserting claims. * * * The lack of a Rule 3 complaint essentially freezes each MDL claimant's suit, since the filing of a complaint is what triggers the application of other FRCP."

Rule 7: Repeatedly, MDL courts have departed from Rule 7 by allowing "master" complaints. Some excuse their failure to follow the rules by characterizing these submissions as "administrative tools." The predictable result is that large numbers of unvetted plaintiffs remain in the MDLs for years. A rules change could fix this problem. Many MDLs feature pleadings that do not exist under Rule 7.

Rule 8: Under the Supreme Court's *Twombly* and *Iqbal* decisions, MDL courts preclude individualized motions that are routine in individual civil actions and critical to policing insufficiently pleaded claims. "Refusal to apply Rule 8 to MDLs is only getting worse." In one case, a master nullified Rule 8 altogether by treating fact sheets as a substitute.

Rule 12: "Despite Rule 12(b)'s critical gatekeeping role, MDL courts have postponed or even refused to consider defendants' Rule 12(b) motions, despite the Rule not providing for postponements or rejections, in either MDL proceedings or any other civil litigation."

Rule 16: The *Opiates* litigation pushed Rule 16 "right to the edge."

Rule 26: In MDLs, plaintiffs are often excused from making required initial disclosures. In addition, some courts reorient the "proportionality" requirement of Rule 26 to look not to the proportionality with regard to the individual claim, but instead with regard to the overall MDL proceeding.

Rule 56: In some MDL proceedings, courts permit a postponement under Rule 56(d) without requiring what the rule says must be supplied – an affidavit supporting postponement of the court's decision.

Proposed Rule 16.1 does nothing to prevent MDL transferee judges from failing to follow these rules. "Given the enormity of the problem * * * it is questionable whether proposed Rule 16.1 * * * is worth the effort."

Federal Magistrate Judges Association (0018): "The FMJA Rules Committee members fully endorse the new rule and its flexible approach."

Maria Diamond (0029): I question the purpose behind the rule proposal. What problem are we trying to solve? The rule goes much farther than providing mere guidance to judges, and would add unnecessary complexity of an already complex process. For example, the coordinating counsel idea will mainly add complexity. Defense representations that MDLs are "overwhelming" the courts are wrong.

Hon. Charles Breyer (N.D. Cal.) (0031): I have conducted more than a dozen MDL proceedings. I am a "recent convert to the rules process directed to Multidistrict Litigation." My case management decisions in MDL proceedings have always been guided by the Federal Rules of Civil Procedure. Proposed Rule 16.1 addresses the goal that litigation be "just and efficient" by providing the parties with a checklist of options that, in any given case, may achieve efficiency and a just result. I was an early skeptic about rulemaking in this area, but am now a convert in light of the "precatory, as distinct from mandatory" nature of this rule proposal. "I urge adoption of proposed Rule 16.1."

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. We believe "the Rule is a good idea and orients judges and counsel to the court case management principles that effective case management requires." In particular, early vetting, two-way discovery, and coordination with overlapping litigation in state court will help move along meritorious claims while eliminating meritless ones.

Laura Yaeger (0033): This rule reflects steps MDL transferee judges are already taking to address preliminary matters. But it broadens the scope of matters typically covered at the initial management conference. In particular, I think it would be premature then to address exchange of information about the basis for claims asserted, whether consolidated pleadings should be prepared, a plan for discovery, likely pretrial motions, measures to facilitate settlement, and whether to refer matters to a magistrate judge or a master. Each of those topics requires substantive knowledge of the case and would be better addressed after the judge appoints leadership counsel.

Minnesota State Bar Association (0034): The MSBA has voted to support these rule changes. It believes they will foster increased transparency and possibly efficiency between parties and the court.

John Rosenthal and Jeff Wilkerson (0035): Without changing the draft on the subject of early vetting, we think that LCJ is right that it would be better to have no rule than the current draft. Though it is true that early management is key, the "endless barrage of advertising for personal-injury claims on television, radio, and social media" calls for more vigorous vetting. The current draft functions largely as a checklist of things the courts *may* address in an early case management conference. This does not serve the ordinary function of a "rule," since it provides suggestions rather than instructions.

American Ass'n for Justice (0043): The proposed rule provides the flexibility that judges and parties require. MDLs come in many sizes, and too much rigidity is unnecessary for small MDLs, hampering and delaying the resolution of claims. AAJ appreciates the consideration the Advisory Committee has given to class action MDLs, mass action MDLs, and MDLs based on non-product liability claims. AAJ's major concerns are that the coordinating counsel position should be removed and that it would be premature to focus on many of the topics identified in Rule 16.1(c) at the initial management conference. "If the rule lists multiple topics, then discussion of those listed topics will become the default even if the parties need to focus on the basic structure

of the MDL early in the litigation. A judge who insists that the parties address each of these topics will often produce a waste of time and resources. The rule tries to do too much, too soon.

A. Layne Stackhouse (0046): Some of the provisions of Rule 16.1 make sense, but several of the topics listed in 16.1(c) will not be ripe of action at the initial management conference. These matters should be addressed only after leadership counsel are appointed.

Warren Burns, Daniel Charest & Korey Nelson (0048): One important matter was left off the 16.1(c) list – motions to remand cases transferred by the Panel. At least for cases originally filed in state court, the rule should state that the court ought to act promptly to resolve motions to remand the state courts from which they were removed when plaintiffs challenge that removal. Removal weakens state sovereignty. And the federal courts' have a duty to determine whether they actually have subject matter jurisdiction of removed cases. Of particular concern is the possibility that Rule 16.1 might encourage the development of early assessment of the merits of claims presented. MDL courts must not address the merits of cases in the MDL until they verify that they have jurisdiction over those cases. Therefore, 16.1(c) should add the following:

> (13) how and when the court will rule on any pending motions to remand matters to state court.

John Yanchunis (0049): This rule is not suitable for MDLs that consist solely or mainly of class actions. For one thing, interim class counsel under Rule 23(g) would make coordinating counsel under proposed Rule 16.1(b) unnecessary. And Rule 23(g) enumerates the factors to govern appointment of class counsel, but Rule 16.1(b) falls woefully short in that regard. Accordingly, if only class actions are centralized, they should be excluded from this rule. With hybrid MDL proceedings – including class actions and individual actions – it should be made clear that nothing in 16.1 supersedes Rule 23(g). Finally, if coordinating counsel is retained it should be made clear that such a person's role is limited to purely ministerial duties until class counsel are appointed.

Pamela Gilbert (COSAL) (0051): COSAL requests that the Note be amended to clarify that other rules and statutes apply when class actions are included in an MDL proceeding. It should be made clear that this rule does not supplant Rule 16.1 or the PLSRA.

Nardeen Billan (0052): As a law student, I offer a comment on the use of the word "should" in the draft rule. "The word 'should' is prickly. It is a modal verb, used as a recommendation or suggestion. Initial management of MDL cases allows for appreciation on both sides of the 'v.' Overall, its malleability allows for more of a reach than having a limiting effect."

Amy Keller (0053 and 0068): "It is important when considering a rule that would apply to *all* MDLs that the Committee not treat the rule as a 'one-size-fits-all' *requirement* (which may be the case, even if language like 'may consider' is used)." It is also important to take note of the PSLRA, which has a statutory direction how the lead plaintiff is to be selected in many securities fraud class actions.

Lawyers for Civil Justice (0053): There is only one "rules problem" identified in the comment on Rule 16.1 that can be addressed via the rules without creating harm. That is the problem of insufficient claims aggregated into an MDL. There are no "rules problems" regarding appointment of leadership counsel, facilitating settlement, managing direct filing, appointing special masters or preparing pleadings that are not allowed by Rule 7. Rulemaking on these topics would produce substantial negative consequences.

In-house counsel at 33 corporations (0056): Enforcement of the requirements of FRCP 3, 7, 8, 9, 10, 11 and 12 can ensure that the constitutional requirements of Article III standing are satisfied. But these rules are ineffective in mass tort MDLs.

Mary Beth Gibson (0059): My extensive experience with MDL practice persuades me that the procedure for appointment of leadership works in its current form. Only after that appointment occurs should the court's attention turn to the many matters identified in draft 16.1(c)(2)-(12). There is a risk that this rule could upend the natural and existing process. In particular, the idea of "coordinating counsel" under 16.1(b) is unwise.

Ilyas Sayeg (0062): The implication in the draft Note that the rise in number of cases in MDLs presents a problem is mis-directed. Defense side claims that rising numbers show there is a problem are simply not true. The draft's seemingly inflexible insistence on discussion of all items listed in 16.1(c) at the initial management conference could prompt a new MDL judge to force the litigants to spend needless time and energy on a premature discussion of issues that should be addressed later. I think that proposed 16.1(c)2), (3), (8), (10), and (11) are appropriately included in the list. But items (4)-(7), (9), and (12) should not be on the list for the initial conference.

16.1(b) – Coordinating Counsel

Oct. 16, 2023, Washington, D.C. Hearing

Leigh O'Dell: To expect "coordinating counsel" to provide adequate information on many of the topics listed in 16.1(c) is unworkable. The rule does not require that this person have any stake in the litigation. In some instances, there may be competing theories of the case and different slates of attorneys vying for leadership. In such instances, the court must make a leadership appointment before addressing substantive issues in the proceeding. The appointment of leadership is an issue that affects almost exclusively the plaintiffs' side. It is extremely important for plaintiff lawyers to have leadership appointed quickly. The use of coordinating counsel inserts a two step process into the selection of leadership without establishing any criteria for the vetting process for coordinating counsel. Under this setup, the court will have to undertake a second process of appointing more permanent leadership.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: In MDLs including class actions, this proposed rule is out of place. What is needed is appointment of interim counsel under Rule 23(g). "I am not aware of any class action MDL where interim class counsel has not been appointed." The bench and bar would be better

served by a rule limited to mass torts, or at least that specifies that the rule is not designed for "simple MDLs."

Mark Chalos: Including this provision carries unnecessary risks. The rule does not explicitly give the court space to implement a process to consider applicants for this position in advance of this designation. So this will worsen the "repeat player" problem. Without a prescribed selection process, the court potentially will be inclined to base this designation only or mostly on the court's experience with the lawyer, or other such things. Moreover, it seems likely that coordinating counsel will have the inside track on being appointed to leadership, exacerbating the "repeat player" concern. Moreover, this is unnecessary. Without such a designation, on the plaintiffs' side counsel will work their differences and arrive at a consensus, or present them to the court to sort out in due course. I favor eliminating 16.1(b), though something of the sort might be mentioned in the Note.

Tobi Milrood: AAJ (of which I was president a few years ago) has deep reservations about this provision. "Concerns about early organization can be addressed without a rules-mandated appointment that may lead to unintended consequences." For one thing, "a formal rule-based title could be seen as the logical stepping-stone to permanent leadership." If this provision is retained, it would be better to use the term "interim." Permanent leadership, not temporary leadership, should decide what discovery should be pursued, what pretrial motions to make, whether the court should consider measures to facilitate settlement and whether matters should be referred to a magistrate judge or master. Instead of this rule provision, a 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."

Alyson Oliver: From a plaintiff perspective, my view is that if the coordinating counsel remains in the rule it should remain as flexible as possible. But I think adding such a step is not necessary and therefore that this provision should be eliminated in whole. Otherwise, it will substantially increase the costs of litigation. Without a vetting process to select coordinating counsel, the court will be left with no input from the lawyers who have a stake in the litigation. As a consequence, for a designated coordinating counsel it may involve a considerable amount of work to get up to speed. Surmounting that learning curve is not free. Moreover, to the extent the views of this court-appointed lawyer are given importance by the court, the effect will be to slow the proceedings down.

Dena Sharp: In recent MDL proceedings the term used for this sort of position has been "interim" counsel. That should be considered.

Jose Rojas: The rule does not provide explicit criteria on who should be selected or whether serving in this position would preclude later participation in leadership counsel. Absent extraordinary circumstances, transition from coordinating counsel to leadership should be discouraged absent evidence that the person selected as coordinating counsel satisfied my proposed changes to the leadership counsel provision (presented below). Perhaps prominent MDL practitioners who often are appointed to leadership would be sensible choices for the coordinating counsel position, but the rule should be amended to add the following: "Designation as

coordinating counsel does not presuppose a subsequent leadership role in the MDL proceedings." And the Committee Note language at lines 184-92 should be replaced with the following:

> 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.

James Bilsborrow: The coordinating counsel idea could have negative effects. The rule provides no parameters for this appointment and, given the early stage in the litigation, the transferee court is likely to choose lawyers familiar to the court rather than those most familiar with and best positioned to successfully litigate the cases. In my experience, transferee judges encourage plaintiffs' counsel to informally coordinate in addressing a set of issues identified in an initial order. This approach allows for the various stakeholders to be heard. In the dicamba herbicides MDL, on which I worked, this sort of arrangement permitted two groups of plaintiffs' counsel to submit reports to the court, and the court ultimately appointed members of both groups to leadership and set a separate litigation track for certain sorts of claims. "Had the court appointed coordinating counsel, this minority proposal might not have made it into the Rule 16.1(c) report." There is little lost in permitting multiple reports to the court, but the rule will likely curtail presentation of diverse plaintiff viewpoints. The rule should ensure that coordinating counsel do not make substantive decisions that bind leadership counsel.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: In the Committee Note, lines 122-26 should be deleted because they restate what is already stated at lines 118-21. In addition, the Note uses the confusing phrase "facilitate the management of the action." What does that mean? Regarding lines 126-27, they should be rewritten: "After the initial management conference, 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 refer only to appointing coordinating counsel before the initial conference and before appointing leadership, or is it intended to apply to an appointment that continues after the initial management conference?

Dena Sharp: The Committee should consider using the term "interim counsel" rather than "coordinating counsel." This nomenclature has already been adopted by some MDL transferee judges. Possibly the Note should refer to Rule 23(g), though leadership considerations in MDLs differ from class actions. On that score, the Note should be rewritten: "MDL proceedings in non-class cases may ~~do~~ not have the same commonality requirements as class actions, . . . "

Frederick Longer: So far as I know, this "coordinating counsel" position has never before existed. The newly minted designee is not well described in the proposed rule or the Note. Adding new layers of counsel could spur contest within the plaintiffs' bar for an interim, undefined position that is unnecessary if the court were instead to address appointment of leadership counsel.

Jennifer Hoekstra: This provision is redundant and duplicative; it might even curtail judicial discretion in selecting leadership. It is silent about the requirements or experience required of such persons. "Would someone who was involved in the Talc litigation be appointed to coordinating counsel in an antitrust litigation?" "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." Moreover, this coordinating counsel position appears duplicative of the magistrate judge or master appointment. Why add another layer to an already complicated system?

Emily Acosta (testimony & 0020): There is little need for this kind of rule. And this rule proposal does not even contain a requirement that the attorney selected actually have a stake in the litigation, such as representing a claimant. This targets an issue that is almost exclusively about the plaintiff side. But this person can't really do much. "[B]oth 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." The Committee should remove (b) because it would "disrupt the natural coordination that already occurs and, as written, is ambiguous and does not provide the court with appropriate guidance."

A.J. Bartolomeo: I request that the Committee provide more clarity as to the role and responsibility of Coordinating Counsel. As things presently stand, this addition may create more complications in MDL proceedings. Guidance can be found in § 10.221 of the Manual for Complex Litigation. Moreover, 16.1(c) "requires that the transferee court 'should order the parties to meet and prepare a report'" on twelve topics. But that should not happen until leadership counsel is appointed. If the Committee wishes to proceed, it should adopt a new 16.1(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 these matters are not already addressed by Rule 26(f):

This should be followed by what are now in 16.1(2)-(12). Otherwise, the rule could inadvertently put the plaintiffs and their counsel at a disadvantage when discussing the items now listed in 16.1(c).

Michael McGlamry: While defendants come to an MDL with their chosen counsel in place and prepared to move forward, that is not true on the plaintiff side. So the court has a responsibility to decide how best to structure the plaintiff leadership. Given the importance of that project, there seems no reason to hurry things as this provision appears to dictate. "[W]hy not take 30-60 days up front to appoint a complete, diverse, and appropriate Plaintiffs' leadership team?" The rule does not answer that question; to the contrary "there is no criterion, no process, no direction, and no structure" for the choice of coordinating counsel. But "until Plaintiff's Leadership is put in place, constant and intense pressure, manipulation, negotiations, and alliance building will occur behind the scenes." Moreover, it's not fair for coordinating counsel to make the decisions about many of the matters listed in proposed Rule 16.1(c). "[P]roposed Rule 16.1 empowers coordinating counsel, who are selected absent any criteria, process, direction, or structure, to bind all plaintiffs for all time."

Norman Siegel: It would be all right to have somebody like this to handle "ministerial" tasks, but most of the things listed in 16.1(c) go well beyond that. A discovery plan, for example, is extremely important to the entire litigation.

Jayne Conroy: From a mass tort context, I am opposed to this concept. It mainly adds another layer and is potentially harmful to both sides. In particular, it is a potential step backwards for diversity. MDL transferee judges have made a real effort to diversify leadership and they have succeeded. But adopting a coordinating counsel provision could blunt this worthy effort. The topics listed in 16.1(c) are too important to be handled by this person.

Feb. 6, 2024, Online Hearing

Kelly Hyman: As a solo plaintiff-side mass tort practitioner, this provision raises concerns for me. Neither the rule nor the note provides clear criteria for who should be selected. Courts are likely to appoint repeat players. This vagueness makes the coordinating counsel position an automatic leadership appointment. It will lead to unnecessary repetition of work and a secondary fight for leadership. The draft does not even require the court to appoint a lawyer with a stake in the litigation, suggesting that the court should consider the role like a special master, but a neutral appointee would be subject to a steep learning curve. I agree with Jose Rojas, who supported "broadening the leadership committee." This provision "limits diversification of practitioners with specialized interest and experience in the litigation. I think this provision should be eliminated unless language is added to specify the distinction between this position and leadership counsel. Often the plaintiff side can self-organize; this provision is not needed, and its vagueness is troubling. Using the term liaison counsel might be more familiar and less troubling.

Jonathan Orent: The coordinating counsel provision should be eliminated; it would probably become standard practice and it would create significant risks. Since the rule provides no criteria, the rule makes it likely that courts will base these designation on experience with particular lawyers. That would place familiarity over qualification and diversity of experience and background in selection of what would undoubtedly be a leadership position in the litigation. Moreover, this provision would result in duplication of judicial effort. There is no need for this layering or duplication of process. There very often is a local liaison counsel to facilitate dealing with the court in a manner that the court ordinarily uses, a sort of "administrative liaison."

Mark Lanier & Rebecca Phillips: Only plaintiff's counsel has the experience-based insight necessary to make leadership structures work and work well. This provision should be stricken, and 16.1(a) should be amended to state that the main goal of the initial management conference is to Appoint leadership counsel, with all other "prompts" in the rule made discretionary. Under the proposal, the court must – without guidance – make an important decision, and coordinating counsel "must take substantive positions on behalf of plaintiffs" with regard to the other matters listed in 16.1(c). How can the court know whether the selected lawyer is at odds with the other lawyers? How can the court know whether this lawyer is accurately representing the positions of other plaintiff lawyers? Permitting this lawyer to make important decisions for the plaintiff side risks prejudicing plaintiffs. "My firm has already had a negative experience with a protocol similar to that contained in Proposed Rule 16.1, requiring the submission of a joint report before leadership is appointed." There were significant differences among counsel about how to proceed. In terms of early presentation of evidence, it is important to keep in mind that defendants are the ones with proof of product use. That reality is central to the decision in the Federal Rules not to require plaintiffs to prove their cases at the outset.

Jessica Glitz: Since most MDLs have fewer than 100 plaintiffs, designating coordinating counsel would be obsolete. Ordinarily a small group of attorneys have organized themselves prior to the initial MDL management conference. In my experience, that's even true with MDLs with more than 1,000 claims. Appointing coordinating counsel would only lead to complications down the road. And sometimes coordinating counsel may be needed in the defense side. In the hair relaxer litigation, for example, there are more than 21 defendants. The right approach is to set up strict timelines for appointment of leadership counsel.

Ellen Relkin: There is no explanation how the judge would go about making the appropriate temporary appointment at the inception of the litigation. Providing for such an appointment may result in the submission of agenda items or discovery suggestions that are not appropriate because the individual selected in not as engaged in the issues as those who initiated the litigation. Certainly the discussion of the issues in 16.1(c)(3) or (4) should not be addressed by such a temporary appointee. Instead, my experience is that is always involving "an organize process whereby those lawyers who are most engaged are presumed or accepted by consensus to be the spokesperson." Creating this new position is a distraction. There has been one instance involving an immediate need for action in which the court appointed several interim counsel. But that is not the norm. "The plaintiffs' bar has its own mechanism to coordinate in advance of the first hearing held by the selected MDL court and generally reach a consensus."

Jennie Anderson: Creating this new position to be appointed before appointment of leadership would be inefficient and potentially damaging, particularly for plaintiffs. It could leave plaintiffs essentially unrepresented at a mandatory meet and confer at which coordinating counsel has been authorized to negotiate with defendants prior to appointment of plaintiffs' leadership counsel. "[T]he proposed amendment appears to hand that same counsel broad authority to meet and confer on far reaching topics." These difficulties are compounded by the Committee Note that says coordinating counsel may later seek a leadership position. That could enable an end run around the leadership application process and give the selected lawyer an undeserved advantage. The proposed rule provides no guidelines for selecting coordinating counsel, and an application process is required to assure that such lawyers are properly qualified. But providing that process will mean that no time savings are achieved by the appointment.

Ashleigh Raso: I believe the best way to organize an MDL is to appoint *qualified* liaison counsel. When I have had that role, sometimes my tasks go beyond basic communications with lawyers. The additional tasks have included putting together digestible case criteria to ensure that meritorious cases are filed, working with defense counsel on test practices of serving complaints and discovery, working with the court's clerk to create a "Case Filing Master Manual," publishing a plaintiffs-only website where all court orders are posted. "It is crucial to appoint a liaison counsel who is most qualified and actually wants a position that involves high levels of organization and communication. Premature appointment to this position could engender conflicts among attorneys on the plaintiff side, a rush to select leadership that could exclude good candidates, confusion regarding authority, and a lack of diverse candidates being appointed.

Seth Katz: This provision is unclear and unnecessary. For one thing, it's not clear whether this will be one of the counsel or a neutral, how the counsel will be selected, and where this person's powers will start and where they will end. There is a potential for newly appointed

transferee judges to consider this "suggestion" mandatory. There is also the unaddressed issue of how this person will be compensated.

Adam Evans: The main problem with this provision is the timing. Partly for that reason, this proposal is unmoored to diversity, capability, leadership potential and other things that are important. There's no context for making this appointment, and the proposal will "hamstring the judges." It will also have an unfortunate effect on the incentives for the plaintiffs' bar, who will pursue this early appointment as the route to permanent appointment to leadership. This early decision will necessarily be made by a judge who is to some extent myopic. It will also incentivize filing of many unvetted claims because having lots of claims on file will be the ticket to appointment as coordinating counsel.

Kellie Lerner (President, Committee to Support the Antitrust Laws): This provision would cause unnecessary delay in class actions. At present, the transferee court selects interim class counsel using a clear set of criteria set forth in Rule 23(g). Otherwise, the time required to appoint leadership counsel is usually not great. Data from the last ten antitrust MDL cases (on which I focus) shows that appointment happens within about 90 days of Panel transfer. Under these circumstances, adding an additional layer of leadership is not warranted. Moreover, the proposed rule does not provide specific criteria for coordinating counsel, which will create confusion in class actions. It is not even clear who appoints this person. Are the various class counsel designated under this rule chosen through private ordering or is the role filled by the court prior to appointment of interim class counsel? And the responsibilities of the role are undefined. Is it an "administrative" role or a "substantive" role? Given that only interim class counsel (or the court) can bind the class, what role is there for this person? In any event, this addition could produce much waste effort. In addition, this provision could impose additional costs and burdens on defendants, who prefer to discuss and negotiate case schedules only with interim class counsel who have the authority to make decisions about these matters.

Roger Mandell: There should be a two-tier approach, with selection of leadership counsel the first step. At the same time, the court should stay all the actions and suspend all scheduling orders, etc. Only "ministerial" considerations should be taken up at the outset. Until formal appointment of leadership counsel, the plaintiff lawyers can self-organize. The key is a deliberative process from the outset; the coordinating counsel provision just lets the judge appoint somebody she knows. Keep in mind the defense perspective; defense lawyers don't want to negotiate with somebody who may soon be out of the case, or at least not in leadership. This rule creates a risk that at least some judges will treat its proposals as "gospel." This position is not analogous to interim class counsel under Rule 23(g). Rule 23(g) was modeled on long judicial experience with appointment of class counsel before it was formally added to Rule 23, and judges used that experience to guide selection of interim counsel also.

William Cash: This provision is confusing and needs better elaboration, if not outright elimination. Among the problems:

(1) There is no mechanism to determine how coordinating counsel should be appointed, which is dangerous because every plaintiff's lawyer who applies for a leadership position will cite appointment as coordinating counsel as a reason for appointment to leadership.

> (2) The rule is not clear on whether coordinating counsel are even drawn from the ranks of the lawyers representing the parties. Saying that coordinating counsel may "work with plaintiffs or with defendants" suggests that the appointed person might come from neither side.
>
> (3) In MDLs where plaintiffs are not yet organized, no one person or team can speak for all. There is a risk that defendants would be in a position of choosing their opponents. Moreover, there is a risk that reports will come with "dissents" or competing arguments from different groups. How would that work?
>
> (4) The selection of plaintiff leadership and manner of organization of leadership are not issues on which defendants should have much input. Plaintiffs have no right to tell defendants what lawyers to hire, how they should be compensated, etc.
>
> (5) Many of the other topics in 16.1(c) should be addressed only after leadership counsel are appointed. True, some may say the court will appreciate that initial positions are "just preliminary." Plaintiffs should be allowed to get organized before consequential topics are resolved by the court. Defendants always start with an advantage because they know more. Though that is in some ways unavoidable, adding the coordinating counsel provision puts the cart before the horse.

Jessica Glitz: Because most MDLs have fewer than 100 plaintiffs, the designation of coordinating counsel seems obsolete. With only 100 plaintiffs, there are far fewer attorneys in the room. And in my experience, that is also true in MDLs with over 1,000 claims. "Plaintiffs have become organized, utiliz[ing] platforms and databases to share information when a new tort is on the horizon. Therefore, the designation of a separate counsel to help coordinate the initial conference would only lead to complications down the road. And the proposal raises more questions than it answers. How long is the appointment to last? Can such lawyers be considered for leadership appointments? Can another coordinating counsel be appointed later in the MDL? The better solution is to set strict timelines and guidelines as to how and when leadership counsel will be appointed. I propose that the rule be changed to say:

> The transferee court should order the parties to meet and be prepared to address, in particular, the appointment of leadership under subsection (1) and its scope. Additionally, the parties should be ready to address any matter designated by the Court, which may include any matter addressed in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

Ashleigh Raso (testimony & no. 0050): Early organization and coordination is critical, and the best way to do that is to appoint qualified liaison counsel. I have held that post, and sometimes my tasks went beyond basic communication with lawyers. The person selected for this role must be well organized. But this provision could prompt a premature fight to obtain this designation, and the rule proposal is confusing on the responsibilities and authorities of such persons. Though acting rapidly has desirable features, rushing to make this appointment may exclude good leadership candidates.

Amber Schubert: I believe 16.1(b) should be removed. This is an entirely new position. "Coordinating counsel" is not a term commonly used in MDLs or other complex litigation. It is not defined, and is not well understood by practicing attorneys. In class actions, in which I work, we already have the term "interim counsel." The two-step process of appointing coordinating counsel before the initial management conference and then leadership counsel after it would create inefficiencies and confusion. And it may be unnecessary, as the Note acknowledges. "In my experience, self-ordering among plaintiffs' counsel prior to an initial case management conference is *the rule* in class actions, not the exception." Retaining this provision would exacerbate the repeat player problem in MDL leadership. The Note discussion of leadership counsel provides guidance about that selection, but the Note to 16.1(b) does not do the same. "In my experience, without adequate guidance, transferee judges often select attorneys for these roles who they have previously appointed in prior cases and are most familiar with." This provision "would hinder diversity and encourage implicit bias in MDL leadership."

Christopher Seeger: Many of the topics identified in 16.1(c) are not suitable for resolution before appointment of formal leadership. In its current form, the rule risks either giving coordinating counsel an outsized role in making critical strategic decisions or producing a report that is not very useful to the court. I am skeptical there is a real need for this rule; there have not been significant problems with initial conferences under the current rules.

Lexi Hazam: Designating coordinating counsel prior to the initial case management conference may deprive courts of the chance to conduct more fulsome vetting of potential leadership, and also shorten the time for qualified candidates to come forward. It might also short circuit attempts by counsel to informally organize in ways that may prove helpful. In addition, an early designation may produce inefficiencies by requiring a transition from one form of leadership to another in the early period of the case. Avoiding this duplication of effort is especially important given that there are no defined criteria or process for selecting coordinating counsel. The solution should be to appoint permanent leadership prior to the initial management conference, and then calling for a report like the one called for by Rule 16.1(c) before the next management hearing.

Written Comments

Federal Magistrate Judges Association (0018): "[t]he explicit recognition that a court may appoint 'coordinating' counsel prior to appointment of any leadership counsel is a helpful management tool. Indeed, appointment of coordinating counsel will assist the court and parties to prepare for the initial conference and map out a preliminary plan, including preliminary issues such as extensions of time to answer and discovery stays. Appointment of coordinating counsel allows additional time to ensure the court has a full appreciation of any differences between and among plaintiffs and the different strengths and skill sets of potential leadership counsel."

Fred Thompson (0041): Creating this new position is not a wise move. "It smells of creating a special guild of professional coordinating counsel who doubtless will see themselves as somehow expert in MDL formation. * * * I can see special masters seeing this slot as a desirable appointment if it is lucrative." It would be better to convene an immediate first hearing of all interested parties to devise methods for appointing leadership, liaison and steering committee members.

American Ass'n for Justice (0043): AAJ has deep reservations about the creation of this new position. One alternative, it seems, might be to call this "liaison" counsel, but that change of name does not address the reality that the rule is not clear about who would be eligible or what criteria should guide the court's selection. Although the appointment of coordinating counsel is optional, a rule providing that the option may make it more likely than not that a coordinating counsel is designated by the transferee judge.

A. Layne Stackhouse (0046): This provision would cause more confusion than it would aid in the efficient and fair litigation of an MDL. The rule contemplates early designation of lead counsel for both sides, which is par for the course already. This new position is ill defined.

Charles Siegel (0060): Adding "coordinating counsel" will not measurably aid any MDL judge, but instead will introduce another layer of needless bureaucracy and complexity.

Gerson Smoger (0069): The coordinating counsel provision should be eliminated even though it is styled as permissive and not mandatory. Though the Note acknowledges that counsel are often able to organize themselves, adopting this rule will likely have adverse consequences. "Once set forth in a formal rule, experience is that it will soon become standard practice even when not expressly mandated." This provision addresses a "problem" that does not really exist.

16.1(c)(1) – Leadership Counsel

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: The concept of leadership counsel should not be inserted into the rules because it is too fraught with legal uncertainty. The leadership orders of MDL transferee judges have exhibited "the most extreme level of 'ad hockery.'" Many contain no directions for the appointed counsel. Some seem to allow leadership counsel to self-define their own roles. Reportedly, such court orders appointing leadership counsel lacked any limits on the activities of non-leadership counsel in some 22% of MDL proceedings. (See study by Prof. Noll.) But there is no obvious authority for courts to assign leadership counsel the duty to represent clients of other lawyers. Yet (c)(1) seems to embrace this dubious practice. Although appointment of leadership counsel is mentioned in the Manual for Complex Litigation, there is no identified source for this authority. 16.1 certainly does not flow from the MDL statute. The Committee should not enshrine the notion of overriding clients' choice of counsel when doing so is unsupported by law, contradicts state ethics rules, and is not consistent with the Rules Enabling Act. Directing leadership counsel to consult with other attorneys, as ordered by some MDL courts, does not resolve the ethical dilemmas. And such efforts blur the ethical responsibility to keep clients apprised of developments in the litigation. For example, suppose leadership counsel insist on using a particular science expert but other counsel believe another expert would be better equipped to prove plaintiffs' case. How can a court resolve such disputes? Must they be addressed in open court with defense counsel present?

John Beisner: In recent years, there has been a substantial change in MDLs. Until recently, the plaintiff attorneys organized themselves. The court did not have a hand in this activity. But recently the courts have migrated to using an application process to make leadership selections.

The biggest concern is the displacement of individually retained plaintiff lawyers. Their clients have hired them to prosecute their cases, yet this rule seems to say the court can tell those lawyers to stand back and leave everything to the leadership counsel selected by the judge. There is not even a rule that requires leadership counsel to consult with the other lawyers. Though one might say this is not the defendant's problem, in reality it is. There is an abiding fear that the excluded counsel will argue that due process requires that their clients get to be represented by the lawyers they selected, not by the ones picked by the judge.

Chris Campbell: Suggesting that the court promptly consider whether leadership counsel should be appointed is undesirable. No definition of leadership counsel is provided in the rule, so including this provision is confusing. The 2020 study by Prof. Noll shows that MDL leadership appointment orders are insufficient. Only about half enumerate the duties and responsibilities of leadership counsel. Additionally, suggesting that the court consider limits on the activities of nonleadership counsel is inappropriate as it asks lawyers who are not selected for leadership to stand down and neglect their client obligations. Though it is true that appointment of leadership is very common, it is also true that we need a specific and clear process.

Leigh O'Dell: From the plaintiff side, defense side worries about encroachment on plaintiff counsel, whether in leadership or not, are new to me. These are, after all, defense counsel, and they surely do not represent the many claimants gathered together in an MDL proceeding. Leadership counsel understandably focus mainly on the central liability issues and not individual causation issues. When I "can't find my client," too often it's because the client has died or is too ill (as a consequence of using defendant's product) to respond to my inquiries. That does not mean I made an unsupported claim, but only that getting that support sometimes take considerable time due to the harms suffered by my clients.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: 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 a judgment at trial. And Rule 23(h) provides standards for such awards of fees.

Tobi Milrood: Consideration of several topics listed in 16.1(c) is untimely and imprudent before true leadership counsel are appointed. This could empower MDL courts to go beyond their charge of managing only the pretrial stage of these proceedings.

Jose Rojas: Leadership appointments in many MDLs have become a revolving door, with repeat players dominating the scene. That gives the court reassurance that the lawyers managing the MDL have the needed experience, financial resources and structural resources to advance the litigation. Those are all legitimate considerations. But "an over-emphasis on prior MDL experience often results in appointments that fail to be representative of the plaintiffs * * * and fails to ensure diversity of experience and background." To address these concerns, the following should be added to proposed Rule 16.1(c)(1)(A):

> 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.

Diandra Debrosse: The rule should expressly include diversity as a factor in leadership appointments.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: Rule 16.1(c)(1)(F) should be amended to read "whether and, if so, when to establish a means for compensating ~~leadership~~ counsel for common benefit work." The proposed text is ambiguous and does not reflect existing practice in large MDLs. The Note should be revised to recognize that 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." This revision clarifies the scope of the rule provision. On the other hand, the Note at lines 170-75 (referring to the commonality requirements of class actions) should be changed because that language introduces the concept of mass-tort MDLs as quasi-class actions and may add confusion. The Note should also recognize the potential utility of "consensus-selection proposing a slate of candidates." In many situations, the slate-selection method is the most appropriate. Subparagraph (c) should acknowledge that court involvement in settlement should occur only when the timing is appropriate. At line 226, the Note should endorse using "a dynamic, online central-exchange platform" as a shared document tool. The Note does not mention technology tools, but they are becoming indispensable. Finally, the sentence at lines 245-47 should more explicitly suggest that the court defer deciding the percentage to be deposited into a common benefit fund, but not defer directing that there be such a fund. It would also be good to say that the fund provision may be adjusted as the proceeding continues.

Dena Sharp: The Committee should consider encouraging the court to use its initial MDL order to expedite leadership proceedings and provide guidance on the court's expectations and preferences in the leadership application process. For example, it might invite the court to state whether it is receptive to "slates" or prefers individual applications. Another useful specific would be whether the court wishes the parties to provide contact information for other judges before whom the applicants have appeared. Because there are often class actions included in MDLs, it would also be important to cross-reference Rule 23(g), or somehow explain how its criteria compare to those for leadership counsel under Rule 16.1.

Alan Rothman: What we need is something like the ticket- taker at a baseball game. The ticket-taker looks only to whether your ticket is to this stadium and shows this day's date. Once you are inside the stadium you need to get to the right seat, etc. What we don't have in MDLs (to draw on the Field of Dreams metaphor) is something like that. We need a quick and very early method to make sure these plaintiffs are in the right litigation stadium. This should require very limited information, but insisting on this admission ticket will greatly benefit the MDL process.

Feb. 6, 2024, Online Hearing

Ellen Relkin: 16.1(c)(1)(C) should be excised. For one thing, to have the stopgap "coordinating counsel" address settlement would be wrong. "I strongly believe that MDL judges

should not, in leadership orders, designate specific settlement counsel." Settlement is a responsibility of leadership counsel, not somebody else chosen by the judge. "I agree with some comments from the defense and plaintiffs' bar that this initial discussion i open court of settlement is premature and can be counterproductive, sending the wrong message to novices in the field." This provision could lead to the filing of more cases, based on a misapprehension that a settlement is in the works. On the other hand, the emphasis by some on the problems that flow from having "repeat players" involved undervalue the experience they can add to the proceeding. Certainly one would want an experienced surgeon for an important operation. So also with leadership counsel. In addition, the financial commitment leadership lawyers must make would present a major obstacle to new entrants and young lawyers.

Andre Mura: I think more specific guidance about methods of selecting leadership counsel should be added. A judge without a preferred method will not find much guidance in the Note, which merely mentions that various methods have been used. Some courts require applications to be filed publicly on the docket, while others request applications be sent to chambers for in camera review. Some courts prefer that plaintiff counsel self-organize into committees, which the court can then review and/or modify, while others are reluctant to consider proposed slates. I suggest the following four revisions to the Note:

> (1) Courts gain valuable insights from plaintiffs' attorneys when they ask which other applicants counsel would recommend. Asking this question is a way to gain insight into whether various individuals are hard-working, insightful, responsive, or collaborative.
>
> (2) Such information is best submitted in camera or ex parte.
>
> (3) Ordinarily the court should not defer the appointment of leadership. It makes little sense to prepare a report about how to appoint leadership because many courts have their own preferences and may not be interested in what the lawyers prefer that they do.
>
> (4) Using a reapplication process as the case progresses is a good idea. Among other things, this allows more attorneys to serve at point in the litigation. An annual review is good.

Jennie Anderson: Defense counsel should have no role in selection of counsel to represent plaintiffs, but the rule appears to require negotiations with defense counsel on that subject. Instead, plaintiff counsel should be allowed to organize themselves without interference by opposing counsel. In my experience, defense counsel have not taken the position that they should be allowed to influence the choice of leadership counsel of the structure for leadership counsel to employ. If a proper procedure is used to select counsel to represent plaintiff interests, I see no problem with initial consideration of the other issues in Rule 16.1(c) early in the proceeding.

Written Comments

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. In our experience, the court need not undertake an

active role in the selection of leadership counsel. Instead, the court should sit back and let plaintiff counsel organize themselves. Otherwise, there is a risk that the court may seem to be a kind of guarantor of the adequacy of representation provided by leadership counsel. The Committee Note suggests that the court has some such fiduciary duty, but we doubt that is supported by the law and think that it should not be undertaken without clear justification. We also agree with the caution in the Committee Note that the court take care not to interfere with the responsibilities that non-leadership counsel owe to their clients. We are uncertain about whether the federal court has authority to "tax" settlements in state-court proceedings to create a common fund to pay leadership counsel appointed by the federal court.

John Rosenthal and Jeff Wilkerson (0035): There are important and unanswered questions about the authority of leadership counsel to represent plaintiffs who have not retained them.

Amy Keller (0053): In class action MDLs, the question of an attorney fee award comes up only if the case is successful. Mass torts sometimes need to address common benefit orders, but that's not a concern in class action MDLs, given Rule 23(h).

16.1(c)(2) – Previously Entered Orders

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. We suggest that the rule should state that the transferee judge should stay all transferred actions pending further order of the court at the initial MDL management conference. In particular, undecided motions regarding discovery should be put on hold.

16.1(c)(3) – Identifying Principal Issues

Oct. 16, 2023, Washington, D.C. Hearing

Fred Haston (Int'l Assoc. of Defense Counsel): The emphasis should be on cross-cutting legal and factual issues instead of promoting settlement.

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The rule should specify that a separate document should be used for identifying the principal factual and legal issues. It is important to make clear that the stated positions are not part of the report, because that could cause unwanted problems. Then, lines 260-66 should be deleted, and the following language substituted because it is standard language in large MDLs:

> 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 limited to one such submission for all plaintiffs and one submission for all defendants.

Indeed, since this is separate from the report to the court, it probably should become a new 16.1(d) rather than remaining as part of 16.1(c).

Jan. 16, 2024, Online Hearing

Jeanine Kenney: In class action MDLs, the principal legal and factual issues as to everyone in the class are laid out in a single consolidated complaint and there is no need for a process to identify them.

Feb. 6, 2024, Online Hearing

Robert Johnston & Gary Feldon: The proposed rule has promise, but must go farther by giving more concrete guidance on a modern, merits-driven approach to MDL proceedings. Presently "too many federal courts have conflated efficiency with global settlement and entirely disregarded justice." But what we call the "merits-driven" approach has started to become the prevailing philosophy of MDL case management. Under this approach, transferee judges engage on the key legal and factual issues from the outset. The rule should instruct courts to pursue this approach. The rule should make it clear that, from the outset, the transferee court's obligation is to find ways to efficiently resolve the case inventory. 16.1(c) is not sufficiently directive in this regard. For example, it does not provide enough concrete direction about what constitutes a principal factual or legal issue that can lead to early resolution of claims. One example is general causation; addressing that issue as early as possible promotes merits-driven resolution of plaintiffs' case inventory.

16.1(c)(4) – Exchange of Factual Basis of Claims

Oct. 16, 2023, Washington, D.C. Hearing

Mary Massaron: This provision is too loose to do the job that needs to be done. Something like a 12(b)(6) scrutiny of individual claims at the outset is what is needed, and this provision is too loose. Something like this might be usefully included in the Manual for Complex Litigation as advice, but it does not suffice for the current state of MDL proceedings.

Alex Dahl (LCJ) & 0004: The overriding challenge of MDLs now is claim insufficiency, but this proposal conflates dealing with that problem with discovery. It does not offer a firm response to the Field of Dreams problem. Rule 16.1(c)(4) speaks of "exchange" of information, which connoted discovery. It should be revised as follows:

(4) how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a clam, including establishing the use of any products involved in the MDL proceeding, and the nature and

time frame of each plaintiff's alleged injury ~~about the factual basis for their claims and defenses~~.

The Note should also be significantly revised. It mentions "exchange" five times, and (like the rule) inappropriately includes defenses. It specifically promotes the use of abbreviated discovery methods such as fact sheets and census orders. It also conveys the sense that requiring claims to meet the most basic requirements of standing and stating a claim could be an "undue burden." This language destroys the whole point of (c)(4) by implying that courts should ignore the mass filing of unexamined claims because discovery will take care of that problem. The discovery plan should be addressed in regard to (c)(6) and play no part in (c)(4). That later provision is the place to mention fact sheets and census efforts. The Note should also make clear that the Committee has adopted (c)(4) to counter the filing of large numbers of unsupported claims. it is urgent that the rule make clear that plaintiffs must establish their standing at the outset. It is also worth noting that winnowing unfounded claims can assist the court in making leadership counsel appointments, which may be affected by claim volume.

The recent developments in the 3M earplug cases show the need for more aggressive action. Finally – years down the road – the judge is beginning to winnow the huge field of claims. The plaintiff bar realizes this is an invitation to file meritless claims. Focusing only on cross-cutting issues is not sufficient. For one thing, these can't be proper "actions" unless plaintiffs have standing to pursue the claims asserted on their behalf. It's critical to create an expectation in the plaintiff bar that they will have to satisfy standing up front. A clear barrier to such unfounded claims is needed in the rule itself. Judges cannot be expected to work this up by themselves. Even though the ordinary rules apply in theory, in practice there is no way to apply them if there are 20,000 plaintiffs.

Kaspar Stoffelmayr & 0008: Screening out unfounded claims should be Job 1. I favor the "fact sheet plus" approach, before any other actions are taken in the case.

Chris Campbell: We need a rule that specifically invites an early dispositive motion challenging the inadequate claims. Improper MDL early case management thwarts the ability to assess risks and allows meritless claims to linger. 16.1(c)(4) conflates information sharing and managing discovery without first questioning the plaintiffs' standing and ability to state a claim.

James Shepherd: It is important to provide transferee courts a rule that allows them to vet legally insufficient cases. The way to do that is to require plaintiff attorneys whose cases are included in an MDL to provide proof of use and injury within 30 days of transfer. This measure would help screen out legally insufficient cases. It would not be burdensome to plaintiff lawyers. Under Rule 11, they have a duty to use due diligence before signing a complaint, and that should include gathering the needed information. It is important to disincentivize plaintiff lawyers who might otherwise file such unsupportable cases.

Christopher Guth: This provision should be strengthened. It is not reasonable to expect the judge to handle thousands of motions to dismiss. As things stand now, these proceedings create chaos. The rule should include language regarding (i) when each plaintiff should provide information establishing standing and the facts necessary to state a claim, and (ii) the type of

information that must be provided, such a use of the product involved and the nature of their alleged injury. Plaintiff fact sheets do not do this job. They are more of a discovery mechanism, and have been adopted only because plaintiffs do not include necessary information in their complaints. And even fact sheets are employed only at advanced stages of MDL proceedings. They are really only a sort of discovery vehicle and insufficient to adequately address the issue of claim sufficiency. My experience in a number of product liability MDLs is that early and specific attention to the above matters expedites proceedings and focuses the court and the parties on the core issues of liability. The PFS process now ingrained in MDLs takes a lot of time and effort. Judges are too lenient with claimants who don't supply the information they are ordered to supply. In one MDL, the judge permitted plaintiffs in default on this need eight opportunities to cure. Meanwhile, the theoretical possibility of discovery by the defendant is not a real option given the number of claims. But until the groundless claims are squeezed out of the system defendants will not settle. Indeed, the good plaintiff lawyers agree that the presence of lots of unfounded claims complicates and delays the process, and harms their clients. The rule must require vigorous judicial scrutiny of individual claims up front. To take one recent MDL, the negotiation of the PFS took 17 steps. And there should be a stay on all other litigation activity until this initial screening is completed.

Fred Haston (Int'l Assoc. of Defense Counsel): The cause of docket escalation is the ease of "park and ride" filings. There has been an exponential growth in unwarranted filings. The solution is early scrutiny of claims – early scrutiny of individual claims. We endorse the LCJ position. The emphasize should be on pleading sufficiency. Judge Rodgers' 2021 article points up the need for screening. The MDL vehicle has made it too easy to get into court, and some plaintiff-side lawyers (not all of them) are exploiting this feature of the process.

Markham Leventhal: This provision raises serious constitutional issues respecting Article III subject matter jurisdiction over claims that are consolidated in large MDLs. There is no Article III exception for MDL proceedings, and the Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez* applies to such cases. Unfortunately, in many MDL proceedings, particularly with large numbers of plaintiffs and cases, the judges are not provided with essential information necessary to ensure that all plaintiffs have the necessary standing. Standing must, under *TransUnion*, be established for each plaintiff. So facts must be provided up front in MDL proceedings. Moreover, it cannot be argued that providing basic, essential facts to establish "injury in fact" and "traceability" to a particular defendant is an undue burden. The court must have sufficient information from each plaintiff to evaluate and establish that plaintiff's standing. But the rule does not require that the plaintiff satisfy this threshold. Accordingly, (c)(4) should be revised to include, at a minimum, that the report must address the following:

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

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

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

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

John Guttmann: The upsurge in groundless claims has at least three causes: (1) careless "harvesting" of claims relying on TV ads and the like: (2) the incentive to file as many claims as possible to get onto the leadership team; and (3) the likelihood that the number of clients a lawyer has will increase the size of the settlement pot from which the lawyer extracts a percentage fee. All of these conspire to neuter the ordinary requirements of Rule 11(b). (c)(4) offers only nonbinding guidance. But the problem of groundless claims is increasing and the situation will improve only with a clear, rule-based approach. "Unsupportable claims are relatively easy to weed out in mine-run litigation where there is little if any incentive, for example to file a claim against a pharmaceutical manufacturer where the claimant did not actually use the drug." But in MDL proceedings the problem of unsupportable claims creates asymmetrical issues of scaling. The rule should be amended to **require** specifically that the report include a **mandatory** proposal for addressing the supportability of claims. It would be desirable for the Note to make clear that the rule is designed to counter the upsurge of groundless claims. Treating this concern as relating to an "exchange of information" implies shifting to discovery, and this sort of filtering should occur before discovery begins. Even the AAJ Working Group's submission in 2018 candidly acknowledged that grounds claims can be a serious problem. At a minimum, each plaintiff must demonstrate standing to sue. In sum, there must be a "mandatory provision of information at the outset of the information necessary to establish each MDL plaintiff's Article III standing.

Harley Ratliff: To move the ball forward, there needs to be serious attention to addressing the viability of these lawsuits at the front end, not after years of expensive and potentially unnecessary litigation. Therefore, plaintiffs should be held to the standards that apply in an individual lawsuit. "For example, does the plaintiff actually have proof that they used the product in question (proof of use)? Does the plaintiff have proof that they used Defendant's products vs. some other, similar, product (product identification)? Have they been diagnosed with or, at the very least, have some basic medical corroboration that they have the injury they allege (proof of injury)?" Addressing these issues first, rather than last, will streamline proceedings. As things now stand, MDLs are treated by many filing attorneys as little more than part of their diversified investment portfolio. "File hundreds of cases, let the sit in the MDL, and hope for a return at a later time."

Deirdre Kole (Johnson & Johnson): It is important to make clear that the normal pleading rules are not somehow suspended in MDL proceedings. Instead, the rule should provide clear instructions for the early vetting of cases to ensure that claims in an MDL have at least a minimal factual basis. Requiring such information up front is not burdensome. Plaintiff counsel should obtain it as part of counsel's intake process. Moreover, Rule 11 requires lawyers to do such background work before filing suit. "Today, aggrieved plaintiffs do not seek out lawyers to achieve justice. Lawyers develop a tort theory, recruit investors, and use their money to advertise for plaintiffs and, in many situations, hire marketing firms to generate leads. Lawsuit ads are then

blasted on television, the internet, and billboards, instructing consumers to call, click, fill out forms, and their claims will quickly be filed." In ordinary individual lawsuits, the rules would permit defendants to challenge such claims, but that ordinary process does not work in MDL proceedings. For example, in an MDL involving Ethicon Pelvic Mesh devices, 46,511 cases were filed, but 24,695 – more than half – were dismissed for basic factual shortcomings or the inability to establish a cognizable injury. So the rule should have a Rule 11 analogue and require sanctions on lawyers who violate the rule. Within 30 days of filing or transfer to an MDL, plaintiff must be required to produce evidence such as medical records identifying the product used and documenting the injury involved. If that evidence is not forthcoming, the rule should direct the MDL court to dismiss the case with prejudice, impose sanctions on the plaintiff or the plaintiff lawyer and allow the defendant to recover its costs and attorneys fees incurred in defending that claim. "Only after these extraneous cases are removed and the core issues in the litigation are decided can the parties evaluate the merits of the litigation."

Leigh O'Dell: The use of master complaints and short-form complaints does not suspend the normal rules of pleading sufficiency. From the plaintiff side, she is certainly not advocating the lawyers not comply with Rule 11. But the eventual failure of individual claims – whether on pleading motions or at the summary judgment stage or at the settlement stage – does not show that it was improper to file them in the first place. I am not against sensible vetting of claims, and not in favor of robocall outreach to drum up claims.

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Jeanine Kenney: This process – the "plaintiff fact sheet" process – is applicable only to mass torts MDLs. In class actions, ordinarily there are only a handful of class representatives on the class complaint. The Note should say that this issue-identification process should only be employed in mass torts.

James Bilsborrow: Any early census or procedures to screen "unsupportable" claims are likely to vary significantly based on the claims and entities involved. "This is not a job for coordinating counsel and it is not a role that should be emphasized 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."

Diandra Debrosse: This rule would wrongly limit the rights of millions of injured people and restrict their rightful access to the court. Already, such people "face a rigorous gauntlet of high-powered corporate defense machinations and challenging legal hurdles." They are "facing multinational, billion-dollar, lobbyist-protected Goliaths hiding behind the country's wealthiest defense firms." The "proof of product use" that is sought is not a fixed and defined term. Moreover, in many instances, the defendants or third parties are the gatekeepers of product use information. Indeed, in some MDLs the court has ordered defendants to produce core produce identification information. A rule change that would "require that plaintiffs prove key elements of their claims prior to discovery would do harm to plaintiffs.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The Committee note at lines 270-73 should be revised to recognize the screening function of fact sheets by saying that they are used not only to plan and organize the proceeding but also for "identifying unsupportable claims." There is a virtual consensus that large MDLs have unsupportable claims, and growing numbers of cases involve considerable efforts to remove these claims from the mix. "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."

Jennifer Hoekstra: There is no prohibition against 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." "[T]he MDL process remains one of the only mechanisms in our country for consumers to hold companies accountable for their dangerous and defective products."

Emily Acosta (testimony & 0020): The "unsupportable claims" defined by the MDL Subcommittee should not be the focus of rulemaking. Identifying such claims is often difficult. For example, "compensable injuries" often evolve with litigation. And "time-barred" is often litigated, not clean-cut. It can happen that during the course of the MDL proceeding new scientific discoveries change the shape or direction of the claims being asserted. If the concern is that some lawyers don't do their homework before filing suit, we already have a solution – Rule 11. The fact the number of claims in MDL proceedings has risen is not inherently nefarious, but the result of broader distribution of consumer products. Moreover, the fact that there are lots of claims does not make the proceeding inherently unmanageable.

Lee Mickus: The rule should establish a disclosure requirement to eliminate claims that are not viable. Several judges who have handled proceedings with many groundless claims have recognized that this is needed. Moreover, including possible settlement as an initial topic of discussion worsens the problem by providing an incentive for plaintiff lawyers to file even more groundless claims. Though the proposed rule could permit defense counsel to persuade the judge to require something of the sort, it should not be necessary for them to do that. It should be automatic.

Scott Partridge: What is needed is a method of removing the meritless claims, and including settlement up front goes in the wrong direction. Particularly for a publicly traded defendant, the volume of meritless claims creates major headaches. What should e reported in quarterly and annual securities filings? What financial exposure should be disclosed? It is critical to develop a rule that takes account of the realities of corporate decision-making. If one wants to foster settlement, for example, one must appreciate that corporate counsel must consider an array of things, including fallout with regulators or shareholder, disclosures to insurers, information to be provided to customers, what reserve to create for settlement, and how or whether to borrow funds to complete a settlement, to name a few considerations.

Lise Gorshe: Exchanging some of the information Mr. Partridge (the prior witness) wants early on would be fine with me. But this information is often very difficult for the plaintiff lawyer to obtain. Any method that does not permit that information-gathering to be completed would be unfair to plaintiffs.

Alan Rothman: In 2021, I published an article entitled Early Vetting: A Simple Plan to Shed MDL Docket Bloat in volume 89 of the UMKC L. Rev. (The article is attached to the submission.) I believe that screening claimants would produce efficiencies, and that it can be done by obtaining limited information at an early stage of the proceeding. A copy of the article is attached.

Toyja Kelley (former president of DRI): I support the DRI proposals on screening out unjustified claims up front. The court must assure itself that the claimants before it have standing. Rule 11 recognizes that lawyers must vet their cases, and this rule also. In every case (not only mass torts) the court should require a Rule 11 type of affirmation.

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Jonathan Orent: This provision should be eliminated; "setting forth this subject in a formal rule creates a strong likelihood that it would become standard practice for MDL defendants to try to use this as an opportunity to extinguish plaintiffs' claims before they can gain access to essential information through discovery." This provision "is not tied to existing discovery rules." Enabling defendants to press for early production of information about individual claims would be contrary to the objective of § 1407 to provide for the "just" conduct of litigation. Existing practices using plaintiff facts sheets have proven more than sufficient to address concerns about unfounded claims. This rule might force a court to adopt a rigid procedure unsuited to the MDL before it. MDL judges are very creative; this rule should not get in their way. Existing "big tent" practice ensures non-leadership participation.

Jessica Glitz: "Regardless of what has been presented, most MDLs are made up of Plaintiffs whose cases have been thoroughly reviewed and researched by Plaintiffs' counsel before filing." Sometimes the statute of limitations compels plaintiff counsel to file an action before full research has been completed. And Rule 11 already provides the court with a substantial amount of power to deal with groundless claims.

David Cooner (Sr. V.P., Becton Dickinson; on behalf of Product Liability Advisory Council) (testimony and no. 0047): We believe the MDL process is broken in many respects. The primary one is the proliferation of non-meritorious claims. I see lawyers boast of claim inventories, larding the MDL with cases that have little or no vetting. I have seen countless cases that would never have been filed were it not for the ease of aggregation and, worse, "protection within the MDL system." From the perspective of plaintiff counsel, the volume of cases escalates one's profile in an inevitable settlement program and improves the prospects of being appointed to leadership. But (c)(4) is more aspirational than compulsory. It does not describe the information that must be presented, or say when exactly it should be provided. Because it has no teeth, it will not "change the flaws that lard out courts with meritless cases, siphon costs, and delay justice for meritorious claimants." As things now stand, we on the defense side have no means to accurately assess the magnitude of the risk. PLAC agrees with the LCJ proposal. Rule 26(a)(1) disclosure is not a substitute for this sort of vetting process. But it would be a good step for the Note to stress obligations under rule 11(b). It's not enough that this rule would permit the defendants to request early and rigorous disclosure by plaintiffs, the rule should make that mandatory. Although precise data on unwarranted claims is difficult to obtain, but there are decisions that illustrate the problem.

Max Heerman (Medtronic): This rule is inadequate. For one thing, it is discretionary, and requires nothing. It treats the problem of non-cognizable claims as though it were the result of lack of adequate discovery. That is not the source of the problem. Instead, the problem is that (1) as a practical matter, the MDL system accepts the logic that "where there's smoke there's fire," and (2) an MDL can become "too big to fail." Plaintiff counsel create a lot of "smoke" by bringing as many claims as possible. This activity distorts the constitutional and statutory role of the federal court system. Claims that cannot be substantiated must be dismissed early in the life of the MDL. I agree with LCJ's suggestion that the new rule require each plaintiff to provide information to establish standing. For example, in one recent litigation, once the defense was able to challenge individual claims 60% were found unsupported.

Christopher Seeger: I believe firmly that the plaintiffs' bar has a responsibility to carefully vet cases before filing, in MDLs as in any other case. "The plaintiffs' bar can and should do better in meeting that responsibility." But the defense bar argument that the growth in MDL claims is driven in substantial party by frivolous cases is simply untrue. Though there are many cases filed in MDLs that would not be filed as stand-alone individual cases, but that does not mean they are groundless. For one thing, the public attention given MDLs means that the public is more aware of these cases, and more injured people learn of their possible rights to relief in court. The amendment proposal is appropriately careful to avoid any language that would demean the legitimacy of those ordinary people's claims. And there is no reason to try to force transferee judges to prioritize individual case screening over cross-cutting issues. I have worked collaboratively with plaintiffs' lawyers, defense counsel, and courts to resolve this problem in specific cases. The resulting solutions are driven by the specifics of the given MDLs. Those solutions are better than the sort of rigid limitations the defense bar endorses.

Lexi Hazam: Given that the exchange of such information already occurs through discovery, and that 16.1(c) already calls for a discovery plan, this provision seems both vague and unnecessary. The proposal seems to call for some unspecified form of early attacks on claims outside of motion practice and discovery. The consequence may be erect new barriers unmoored to discovery rules, rather than allowing courts and parties to design procedures that are fair and efficient for each case. It may place an undue burden on plaintiffs in cases where defendants have far more information regarding key components of plaintiff-specific evidence, such as in the Social Media MDL, where defendants possess reams of data about their young users' accounts and activities which the users themselves cannot access. Although this provision is not mandatory, its presence in a new Federal Rule is likely to encourage the standardization of such practices in MDLs. This would be a detrimental development.

Written Comments

DRI Center for Law and Public Policy (0010): Rule 16.1(c)(4) should be strengthened "to **require** specifically that the report called for by proposed Rule 16.1(c) include a **mandatory** proposal for addressing the supportability of claims pending or transferred into the MDL." Otherwise, the judiciary must bear the burden. The Panel must initially decide whether a given case is a tagalong. (DRI does not endorse the concept of "direct filing" orders.) Then the MDL transferee judge has the large burden of deciding whether individual claims are supportable. A rules-based solution is necessary to overcome these problems.

Bayer U.S. LLC (0011): The proposed rule does not address "the core problem with MDLs today" – that a significant number of claimants turn out eventually not to have supportable claims. Plaintiff Fact Sheets do not deter such claims. The are discovery tools, not an early vetting method. In the *Mirena* MDL, the PFS process required Bayer to interact with an unsupportable case eleven times, on average, to obtain final dismissal. This process could take 180 days for each claim, and it occurred 650 times in that MDL proceeding. In another MDL, one attorney filed a complaint on behalf of 127 plaintiffs, but 117 of them did not comply with the PFS order – 92% of those in a single complaint. Despite the PFS requirement, plaintiffs' lawyers still file such claims *en masse*. Bayer therefore supports LCJ's proposal, which would require the MDL transferee court and the parties to identify how and when "sufficient information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim." This requirement would permit the claims to be tested under Rules 8(a), 9(b), and 11. To make that clear, the Committee Note should say that this requirement is essential to establish the "constitutional minimum of standing."

Robert Johnston & Gary Feldon (0028): This rule does not go far enough to cull meritless cases. PFS practice and census practice is really just discovery. Though discovery helps the parties develop valid claims, there should be a showing up front that the claims before the court are indeed valid. This sort of showing in a products case should require preliminary proof of (1) use of the specific product; (2) alleged injuries due to use of the product; (3) the date of plaintiff's injury and the date on which plaintiff had notice of defendant's allegedly wrongful conduct; and (4) releases authorizing defendant to collect relevant records from third parties.

Washington Legal Foundation (0030): The rule should require early vetting of claims." Data shows that between 30% and 50% of all claims in MDLs are unsupportable." There is little cost to plaintiffs in filing claims, but defendants must pay for discovery and other costs. Often they also must report the existence of these claims to the Food and Drug Administration and to their shareholders. The rule should provide a tool to end this activity.

Hon. Charles Breyer (N.D. Cal.) (0031): I have conducted more than a dozen MDL proceedings. A "one size fits all" approach to MDL proceedings is inefficient and unjust. "For example, it may be appropriate in one case to address jurisdictional concerns at the outset, before additional resources are expended; in another case, a court may wish to address the legal sufficiency of the claims, or statute of limitations issues, in advance of costly merits litigation. In non-MDL cases, judges routinely balance these concerns. There is no reason to dictate to judges the order, or necessity, of adjudicating these concerns in MDL cases."

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. "The Rule might suggest that the transferee judge in mass tort personal injury cases require attorneys to go further than basic Rule 11(b)(3) representations to the court and to certify within a short period of time post-filing that counsel has undertaken a diligent review of the plaintiff's available medical records, exposure information, and information about the use of the item or drug. The goal of such order is to eliminate baseless claims derived from mass marketing. The Rule should prompt judges to consider adopting initial mandatory discovery disclosures before party-driven discovery." The transferee judge may

identify non-meritorious claim early in the litigation's life-cycle using plaintiff fact sheets and may require certification of pre-filing due diligence.

John Rosenthal and Jeff Wilkerson (0035): "There is consensus – among judges, defense practitioners, and even many plaintiffs' lawyers – that mass filing of unexamined claims is occurring in large MDLs." In the Roundup litigation, Judge Chhabria established a "wave" process to move cases through the MDL. But despite that many cases were moved into later and later waves, and then eventually voluntarily dismissed, often because plaintiffs' counsel did not have any ability to show that these plaintiffs had the relevant medical diagnosis or any meaningful exposure to this product. "The existence of such unvetted claims increases the cost, and slows the pace, of discovery." It also hampers the ability of both sides to assess the potential exposure and thus renders settlement more difficult. The mass filing of claims "can make the traditional Rule 12 process impractical and prohibitively expensive." But the rule not only fails to set forth required procedures to deal with these problems, it does not even provide guidance about the nature of the problem. Many will read the Committee Note as suggesting nothing more than bilateral discovery. We urge that the draft be changed to stress that this provision is not merely about discovery, but early vetting of claims.

Judge Casey Rodgers (N.D. Fla.) (0036): Based on my experience with the 3M Combat Arms Earplug MDL, the largest MDL in history, I oppose any mandatory rule governing the vetting of claims in an MDL.

> While it is true that mass filings of unvetted clams plague many MDLs, in my view, mandatory rules governing how and when to address the issue would not be an effective solution. Beyond that, a mandatory rule in general is unnecessary and would have negative, albeit unintended, consequences.

In the 3M MDL, an early vetting rule would have been impossible to comply with or enforce. Nearly 99% of the needed records were in the possession and control of the Department of Defense and/or the V.A. In the view of those agencies, a "filed action" was required to obtain such records. We eventually were able to devise an administrative docket for nearly 300,000 claimants, and with that in place the needed information could be obtained. Using that information led to dismissal of more than 90,000 claims. "This could not have happened 'early' in the litigation. And, importantly, the 3M experience demonstrates that proper and effective vetting can – and does – occur in the absence of a mandatory rule, even with unprecedented numbers." A rule mandating early vetting cannot account for critical variables in different MDL proceedings. Such a rule "would only serve to frustrate and stifle creative case management in the very litigation needing it most."

New York City Bar (0037): "Proposed Rule 16.1(c)(4) provides a valuable mechanism to ensure early exchange of information to prevent insufficient claims and defenses from clogging the MDL. The proposed rule reflects the current practice in many MDLs and is designed to protect all parties and the court from the burden of insufficient claims and defenses." But we believe it should be made clear in the Note that this provision is not itself designed to weed out insufficient claims, and instead clarify that this is a form of early discovery. The rule should not implicitly or explicitly alter the pleading or dismissal standards. "Such a substantive change should not be buried in a case management rule and should not be unique to MDLs." "As currently proposed,

Rule 16.1(c)(4) does not appear to alter either pleading or dismissal standards, and the City Bar supports that aspect of the provision."

Melissa Payne (0042): This proposal adds an extra burden on plaintiffs. "Often faced with filing deadlines, plaintiffs would be faced with the added expense of expediting orders for medical records to meet the early discovery rule."

American Ass'n for Justice (0043): The defense bar's push to include a provision addressing claim insufficiency should be rejected. The Advisory Committee has already considered and rejected the requirement of fact sheets at the outset of every MDL. LCJ's proposal to amend (c)(4) to address "claim sufficiency," is a step backwards. this issue is highly contentious, and the term is often featured in so-called tort reform proposals pushed by the defense bar. The rule should instead set the framework for managing the entire MDL. Consolidation can occur very quickly, while proof of product use takes time. It is impracticable – if not impossible – to require proof of product use up front.

A. Layne Stackhouse (0046): The suggestion that the court should address "unsupportable claims" is unwarranted. For one thing, statutes of limitation mean that attorneys sometimes have to file before the complete a full workup of a case. And determining which claims are not supportable is difficult or impossible before discovery. And there are already effective tools available: "Plaintiffs' counsel can voluntarily dismiss these claims, defense counsel can move to have them dismissed, and Rule 11 already provides the court with the requisite power to deal with bad actors and to deter inappropriate behavior."

Warren Burns, Daniel Charest & Korey Nelson (0048): Adding an early bout of fact discovery about the proof available for individual plaintiffs' claims will mainly create additional paperwork burdens. The better way to proceed is to select some cases for bellwether trials and work up those cases with case-specific discovery. This way defendants will receive the individual information they say the need. "Plaintiffs who cannot provide that basis as part of discovery will either dismiss their cases or have them dismissed. If a case settles before discovery reaches that point, plaintiffs will have to provide that information as part of the claims process." And implications that the presence of some claims for plaintiffs who do not qualify for an award suggests inadequate pre-filing investigation is simply wrong. The challenge of obtaining health care records, even on behalf of the patient, is quite daunting and time-consuming.

Lawyers for Civil Justice (0053): "Empirical data demonstrate that insufficient claims are prevalent in mass-tort MDLs." This should be "the bullseye of the Committee's rulemaking effort." But proposed (c)(4) is not a solution, or even an improvement over the status quo. It may even be a step backward. A few modest changes to the rule would solve the problem. "Despite the general consensus of the problem, data regarding insufficient claims are hard to find." We propose that dismissals of claims asserted in MDLs be used as data to prove the existence and extent of the problem. At pp. 3-6, the submission cites 7 specific federal MDLs (and one California consolidated proceeding and a bankruptcy court proceeding) in which the percentage of dismissals (some after summary judgment rulings) ranged from 15% to 75%. But (c)(4) is "written as a flexible menu rather than a mandatory rule." The current proposal is inadequate because it uses "exchange" and refers to "defenses" as well as claims. It should be rewritten as follows:

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

In addition, the Committee Note should state that Rules 8(a) and 9(b) apply in MDL proceedings, as does Rule 11. These revisions would make dismissal a ministerial task and obviate motion practice.

In-house counsel at 33 corporations (0056): Enforcement of the requirements of FRCP 3, 7, 8, 9, 10, 11 and 12 can ensure that the constitutional requirements of Article III standing are satisfied. But these rules are ineffective in mass tort MDLs. The solution is to revise (c)(4) as follows:

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

This language would not require a claim-by-claim compliance process, but requiring a discussion of the disclosure process would provide assurance that judges and parties will secure better information for making early case management decisions.

Andrew Trask (0066): The testimony and written comments "have conclusively demonstrated the widespread existence of unsupported claims * * * and the availability of simple, appropriate solutions." Any suggestion that this is not a problem unless proved by empirical study ignores the reports from federal judges who have identified these problems in their MDLs. Usually the information needed to show that the plaintiff has a genuine claim is in the plaintiff's hands, not the defendant's hands. But mass tort lawyers do not vet their cases. If there really is a timing problem for plaintiff's lawyer to obtain such information, the lawyer can seek a good faith extension of time. "[B]ecause the mass filing of unsupported claims is a creation of the MDL process it is bet addressed by changes to the rules governing MDLs."

16.1(c)(5) – Consolidated Pleadings

Alex Dahl (LCJ) & 0004: The rules should not invite "pleadings" that are not authorized by Rule 7(a). As evidenced by the 2007 amendment to Rule 7(a), the Committee views this rule strictly. Rule 7(a) only contemplates judicial authority to require one additional pleading besides those the rules require – a reply to an answer if ordered by the court. But the use of the word "pleadings" in (c)(5) creates the presumption that the word has the same meaning as in other rules. If the notion of "consolidated pleadings" is introduced into the rules, that is certain to generate litigation about its meaning. In Gelboim v. Bank of America, 574 U.S. 405, 413 n.3 (2015), the Court expressly questioned the legal effect of such documents; they should not be installed in the rules.

Kaspar Stoffelmayr & 0008: This is my no. 2 concern (after aggressive vetting of claims). The rules say there are not pleadings beyond those listed in Rule 7(a). So when an MDL transferee court endorses a "master complaint" there is nothing to explain what that is or how the defendants can challenge it. Rule 12(b)(6) is nullified because nobody can realistically move to dismiss. And "short form" complaints usually contain almost no facts or particulars about the given plaintiff.

Chris Campbell: 16.1(c)(5) conflicts with Rule 7(a), which does not mention "consolidated pleadings" and says that the only permitted pleadings are those listed in 7(a).

Gregory Halperin: At a minimum, the Note should emphasize that when there is a master complaint and short-form complaints, the two together must satisfy Rule 8(a)(2) [and perhaps Rule 9], and that the defendant can challenge their adequacy using Rue 12(b)(6). The Note must make it clear that (c)(5) does not excuse compliance with these basic requirements in every case. Large MDL proceedings often substitute a "master complaint" and "short-form complaints" with allegations about each plaintiff. This process undoubtedly introduces efficiencies, as plaintiffs need not draft full individualized complaints and defendants are absolved of the need to serve individualized answers. But there is no "MDL exception" to the Federal Rules, and a complaint is not a mere box-checking exercise. There must be an opportunity for the defendants, before they undergo costly or burdensome discovery, to challenge the legal sufficiency of the claims. The Committee Note should explain that if a master complaint is employed, together with the short-form complaints it provides the information defendants need to make motions to dismiss. Otherwise the master complaint process is fundamentally at odds with the pleading rules. But some courts have permitted plaintiffs pleading fraud (covered by Rule 9(b)) to make extremely vague allegations. For example, in the J&J Talcum Powder MDL plaintiffs needed only aver that they experienced "a talcum powder product(s) injury" without specifying what that injury was. It is important that the Committee Note say that using master complaints and short-form complaints must satisfy Rule 7(a)(1) requirements for complaints. "If the Federal Rules are going to encourage consideration of 'consolidated pleadings,' the Advisory Committee Notes should clarify that those consolidated pleadings are not immune from challenge under Rule 12(b)(6) or subject to a standard of review that is different from any other complaint filed in federal court."

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Jeanine Kenney: In class actions, this is provision risks confusion. The issue is in mass tort cases, not class actions. Suggesting a "consolidated complaint" in a class action MDL is worrisome. Indeed, neither the Note nor the proposed rule provides any guidance on what types of MDLs present the sort of management challenges that call for employing its provisions.

Dena Sharp: This provision would not fit a class action, where the class action complaint "serves the critical purpose of aggregating all the class's claims into a single pleading." The master complaint in a mass tort MDL, by contrast, often serves the distinct purpose of providing a single complaint defendants may move against through "cross-cutting" Rule 12 motions. I would add the following to the Note: "Cases proceeding under Rule 23 may, for example, require only a consolidated complaint which supersedes individual class action complaints failing with the class or classes defined in the consolidated complaint."

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Kellie Lerner (President, Committee to Support the Antitrust Laws): In a class action, the consolidated complaint often is the work of interim class counsel, who selects the factual allegations, causes of action, and class representatives that are included in the consolidated amended complaint, which becomes the single operative pleading for the MDL. "Only interim class counsel is empowered to make decisions for the class and litigate the action."

Written Comments

Amy Keller (0053): The idea of a "consolidated complaint" has little application in class action MDLs. Instead, in those proceedings what matters is a "superseding" complaint, setting forth (among other things) the proposed class representatives who would satisfy the adequacy requirement of Rule 23(a)(4).

16.1(c)(6) – Discovery Plan

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The Note should be fortified with the following: "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; (vi) necessary early protective orders; and (vii) procedures to handle privilege disputes."

16.1(c)(7) – Likely Pretrial Motions

Written Comments

Robert Johnston & Gary Feldon (0028): This rule fails to provide genuine guidance to transferee courts. These courts should not abuse their discretion over the remand decision by having cases sit, warehoused in the MDL, when efficient remand for trial is possible. Instead, the court and parties should be focused from the outset on setting a schedule for efficiently pushing cases toward resolution by motion or trial.

16.1(c)(8) – Additional Management Conferences

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: At lines 313-14, the Note should mention that courts often conduct management conferences online so that counsel from around the country can participate. Highlighting this possibility could be useful.

16.1(c)(9) – Facilitate Settlement

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: Tips for facilitating settlement do not belong in the rules because good litigation management is the key to success, not settlement promotion. The draft "escalates settlement into a top priority in MDLs." The words "settle" and "settlement" appear 12 times in the draft rule and note. The draft Note says that "[i]t is often important that the court be regularly apprised of developments regarding potential settlement," but many federal judges would disagree with that assertion. The over-emphasis on settlement is inappropriate because it fosters a presumption of liability, conveys that the judge has an agenda, is inconsistent with the MDL statute' focus on pre-trial preparation and puts the cart of settlement before the horse of litigating the claims. The proposal "furthers the misperception that an MDL is primarily a vehicle for paying – rather than adjudicating – claims." Suggesting that MDL courts immediately focus on settlement at the initial management conference does not encourage sound management of such proceedings. Instead, settlements are usually the by-product of case management focused on resolving merits issues.

Chris Campbell: 16.1(c)(9) improperly promotes settlement as a top priority. It is noted 12 times on the draft, and the rule even suggests that the MDL court provide "measures to facilitate settlement."

James Shepherd: Early consideration of settlement is a bad idea. The purpose of the MDL statute is to coordinate pretrial proceedings, not to resolve litigations via settlement. This attitude presupposes liability and hinders the real purpose of MDL combination.

Fred Haston (Int'l Assoc. of Defense Counsel): The draft overemphasizes MDL as a settlement device. This emphasis exacerbates the docket explosion we have seen. The emphasis should be on procedures for resolving cases on their merits, not on promoting settlement.

Harley Ratliff: MDLs should not be viewed as simply a mechanism for transferring money from the defendant to the attorneys who have filed suit. "In my experience, MDL judges may often view liability as a foregone conclusion and the only (or easiest) solution to the problem is early resolution." This rule provision implies that settlement is the first step in the litigation, not the last. That makes MDLs a magnet for dubious filings.

Jan. 16, 2024, Hearing

Tobi Milrood: "The fact that AAJ agrees with LCJ that topics 16.1(c)(9) and (12) should be removed from the list is a strong indicator that these topics should be excised from the proposed rule.

John Rabiej (Rabiej Litigation Center) (0005) & 0026: The phrase "at the appropriate time" should be added to the Note. Adding this phrase could eliminate unnecessary controversy about whether the MDL serves solely or mainly as a method to obtain overall settlement. It fortifies a point already made – the decision to settle is ultimately an individual one.

Emily Acosta: The rule calls for discussion of settlement too early in the proceeding. That can be harmful to the plaintiffs.

Lee Mickus: Settlement is mentioned frequently in the Committee Note. That topic would ordinarily be premature at the time of the initial management conference. The plaintiff and defendant "sides" are aligned on the proposition that including settlement on the list is risky. But this rule perpetuates the notion that MDL is really a resolution device, not a way to streamline pretrial preparations (which is what Congress intended in 1968). Most of the time, this is a cul-de-sac.

Written Comments

Robert Johnston & Gary Feldon (0028): We agree with other commenters that it is premature to address settlement at the initial management conference.

John Rosenthal and Jeff Wilkerson (0035): The draft places undue emphasis on settlement and could suggest a presumption that settlement is an appropriate or expected outcome of all MDLs.

16.1(c)(10) – Manage New Filings

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: Inserting the idea of "direct filing" orders into the rules could be "a radical decision because direct filing is inconsistent with Rule 3, which 'governs the commencement of all action.'" It also contradicts the MDL statute, which commands that all transfer decisions must be made by the Judicial Panel, not the transferee judge. In addition, several courts have held that MDL courts lack subject-matter jurisdiction over direct-filed actions. Such orders require defendants to waive objections to personal jurisdiction and introduce uncertainty about choice of law questions. The result would be to "set up MDL judges for unrealistic expectations about waivers and unintended complications when claims are not filed in the appropriate venue. (c)(10) should be removed from the proposal.

Kaspar Stoffelmayr & 0008: Direct filing orders are contrary to defendant's rights to insist they cannot be sued in a jurisdiction in which venue is improper or they are not subject to personal jurisdiction with regard to this claim. "We are forced to do this." Direct filing creates severe problems of personal jurisdiction and choice of law. Sometimes we are forced to waive service of process.

Chris Campbell: 16.1(c)(10) prompts consideration of direct filing orders. That would conflict with Rule 3 and contradicts § 1407. It also provokes questions related to personal jurisdiction, venue, and choice of law.

Fred Haston (Int'l Assoc. of Defense Counsel): The rule should not seed direct filings. What you say will be used, and there is no need to mention this possibility. They are contrary to Rule 3 and the MDL statutory framework. Adopting this provision will frustrate the promise of

this new rule. Under Rule 3, cases are supposed to be filed in the correct court. Only the Panel can decide whether to add them to an MDL proceeding.

John Guttmann: Under the statute, the protocol is that the JPML rules of procedure require that counsel notify the Panel of potential tag-along actions, and then the Panel may decide whether to transfer them or not to transfer them. That is not up to the MDL court, but rather a decision by the Panel.

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Center) (0005): The Note should be revised as follows: "identifying the appropriate transfer district for transfer ~~at the end of the pretrial phase~~ on remand . . ." This clarification could be helpful.

16.1(c)(11) – Actions in Other Courts

Jan. 16, 2024, Online Hearing

John Rabiej (Rabiej Litigation Center) (0005): The Note should be revised as follows: "If the court is considering adopting a common benefit fund, it should consider~~ation~~ 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 goal of the current Note is to address Judge Chhabria's concerns about such funds, the language is opaque. The suggested language clarifies the intent.

Frederick Longer (0019): Though the rule is about whether related actions have been filed or are expected, the Note veers into avoiding overlapping discovery and a "fair arrangement" about common benefit funds. I think those tangential and speculative concerns should be removed from the Note.

16.1(c)(12) – Reference to Master/Magistrate Judge

Alex Dahl (LCJ) & 0004: There is little if any utility to suggesting that MDL courts obtain the parties' views on appointment of a magistrate judge or a master. We already have rules dealing with such appointments, and adding (c)(12) to the rules will cause confusion by communicating an explicit endorsement of appointing masters, contrary to the Committee Note for Rule 53. Inserting this provision into 16.1 creates a risk of "perpetuating a misconception that the raison d'etre of an MDL proceeding (almost literally from day one) is to steer the litigation toward settlement."

Chris Campbell: 16.1(c)(12) contradicts Rule 53, which says use of masters should be the "exception not the rule," and that they should be appointed only in "limited circumstances." It raises issues with delaying resolution of cases, lack of transparency in selection of masters, the cost of using masters, and the authority they may wield.

Written Comments

Federal Magistrate Judges Association (0018): "The FMJA Rules Committee members strongly endorse the recognition that Magistrate Judges can be of great assistance with respect to discovery, conduct of bellwether trials and settlement." These judicial officers are selected by District Judges and often provide experience and skills to expedite resolution of MDL proceedings. "Indeed, empirical studies show that MDLs with special masters lasted 66 percent longer than those managed within the court, regardless of size and complexity. * * * Magistrate Judges also comply with the Judicial Code of Ethics such that use of Magistrate Judges obviates any concerns about self-dealing or bias of a privately funded special master, as well as that judicial authority is being unnecessarily delegated. In fact, Federal Rule of Civil Procedure 53, which authorizes appointments of a special master, establishes a presumption in favor of the assignment of a Magistrate Judge to assist with the management of complex cases, including MDLs. Finally, Magistrate Judges enjoy working on complex cases and often come to the court with a background litigating such cases and have a strong knowledge of ediscovery issues."

John Rosenthal and Jeff Wilkerson (0035): We are concerned about the inclusion of this item in the proposed rule. For one thing, there are already rules regarding the appointment and use of special masters, particularly Rule 53. Our experience is that masters have been broadly used in the MDL context, and sometimes assumed broad responsibility for the pretrial conduct of a case. "We believe that the inclusion of this provision could be read as an endorsement for appointing masters, which is contrary to the current Federal Rules." Including masters might erode the presumption in favor of appointing magistrate judges instead. With masters, there is a concern about transparency. "All too often, parties have a special master foisted upon them with little chance to suggest candidates, vet candidates, and/or object to their appointment." The Committee Note should be revised to emphasize (a) that appointment of a master is the exception, not the rule, that a referral to a master should be clearly defined and limited in nature, and that "broad delegation of pretrial proceedings to a master" is not appropriate.

16.1(d) – Initial Management Order

Jan. 16, 2024, Online Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0016: Rule 16.1(d) should be revised as follows: " After the conference, the court should enter and initial ~~MDL~~ management order addressing the matters addressed in the report or at the initial management conference ~~designated under Rule 16.1(c)~~." The present language is ambiguous about whether the lawyers must address all the matters in 16.1(c), or only the ones selected by the judge. And the current version may be read to omit reference to items that the lawyers themselves raise independently. The rule should not be read to exclude matters raised by the lawyers. In addition, the Note should be revised as follows: "Because active judicial management of MDL proceedings must be flexible, the court should ~~be open to~~ anticipate modifying its management order . . . ."

Written Comments

Robert Johnston & Gary Feldon (0028): There is "little point in the Potemkin exercise of creating a rule without content." The draft does not instruct courts to follow the approach contemplated by Rule 16.1. The rule itself should instruct the court to "be open to modifying its initial management order in light of subsequent developments in the MDL proceedings." That appears in the Note, but should be in the rule.

II. ONGOING SUBCOMMITTEE PROJECTS

Due to the effort involved in responding to the public comment on the privilege log amendments and Rule 16.1 proposal, the Advisory Committee had limited time to focus also on other subcommittee matters. Most of these subcommittee efforts have already been presented to the Standing Committee. Each of these ongoing topics was covered in some detail in Advisory Committee agenda book for the April 2024 meeting, which Standing Committee members may access via the link below. As to those topics already presented to the Standing Committee, this report will briefly describe the ongoing work and direct Standing Committee members seeking additional details to the pertinent pages in the agenda book for the Advisory Committee's April 2024 meeting. Additional details can be found in the draft minutes for the Advisory Committee's April 2024 meeting, included in this agenda book.

A. Rule 41(a) Subcommittee

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, continues its work considering amendments that would resolve differing interpretations among the circuits regarding voluntary dismissal. The Subcommittee was formed in October 2022 in response to two submissions (21-CV-O, 22-CV-J) that pointed out a circuit split regarding whether the rule permits unilateral voluntary dismissal of only an entire "action" or something less, such as all claims against a single defendant or one of several claims against a defendant.

After substantial outreach and research, the subcommittee has reached a consensus that the rule should be revised to explicitly increase the flexibility of parties to dismiss one or more claims from the case, whether unilaterally before the filing of an answer or motion for summary judgment, by stipulation, or by court order. The subcommittee believes that such a change would be consistent with both prevailing district-court practice and the policy running throughout the rules in favor of narrowing the issues in the case throughout the litigation. As a result, the subcommittee hopes to present a draft amendment at the Advisory Committee's fall meeting changing the references in Rule 41(a) to "an action" to "a claim," with an explicit statement in the committee note that this language allows voluntary dismissal of one or more claims asserted in the complaint.

The subcommittee is also considering other amendments to the rule, including of the requirement that a stipulation of dismissal be "signed by all parties who have appeared." Most courts have interpreted this language to mean that all parties *currently* in the litigation must sign the stipulation; those who are no longer parties need not sign. But some courts have held that all those who have *ever* been parties to the litigation must sign, even if they are no longer in the case. The subcommittee's tentative view is that this latter interpretation may present undue obstacles to settlement or simplification of the action, and the rule should be amended to make clear that only current parties to a case need to sign a stipulation of dismissal.

The subcommittee expects that it will bring a proposal to the full advisory committee at the upcoming fall meeting.

B. Discovery Subcommittee

Having completed its work on the privilege log amendments listed in Part I, the Discovery Subcommittee continues to work on two items that were included in the Standing Committee agenda book for the January 2024 meeting. Owing to the demands of the public comment period, only limited progress has been made on these matters.

This report will provide a brief description of this ongoing work of the Discovery Subcommittee. For details on the work, Standing Committee members may consult pp. 258-69 of the agenda book for the Advisory Committee's April 2024 meeting via the link provided above.

(1) Manner of service of a subpoena: Rule 45(b)(1) now specifies that "[s]erving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law." There seem to be notable differences in whether this direction is satisfied even though in-person service is not accomplished.

The Subcommittee continues to focus on authorizing service of a subpoena by various methods authorized for service of initial process under Rules 4(d), (e), (f), (h), and (i), and has also begun to focus on the possible logistical difficulties presented by Rule 45's requirement that the witness be tendered the fees for one day's attendance and mileage.

(2) Filing under seal: The Advisory Committee has received a number of submissions – some of them quite long – urging that the rules explicitly recognize that issuance of a protective order under Rule 26(c) invokes a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. There seems to be little dispute about the reality that the standards for protective orders and filing under seal are different, though different circuits have articulated and implemented the standards for filing under seal in somewhat distinct ways. The Subcommittee's current orientation is not to try to displace any of these circuit standards.

As has been presented to the Standing Committee before, amendments to Rules 26(c) and 5(d) could make clear in the rules that a different standard applies to granting a protective order regarding materials exchanged during discovery and authorizing filing under seal in court. Ongoing work focuses on whether and how to provide national directions for procedures regarding filing under seal, including whether motions to file under seal may themselves be filed under seal, whether there should be a waiting period before decision of such motions to seal, the possibility of "provisional" filing under seal pending decision of a motion to file under seal, when the seal would be removed, etc. Some feedback on these procedures has already been obtained from representatives of the Federal Magistrate Judges Association, and reactions for court clerks will be sought via the Advisory Committee's clerk liaison.

C. Rule 7.1 Subcommittee

The Rule 7.1 subcommittee, chaired by Justice Jane N. Bland, has continued its work on the disclosures required of nongovernmental corporations. Currently, the rule requires a

"nongovernmental corporate party or a nongovernmental corporation that seeks to intervene" to disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The goal of the rule is to ensure that district judges can comply with their duty to recuse when they have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). Because the statute requires recusal for both legal ownership and indirect equitable ownership, the current rule does not require that parties disclose sufficient information for judges to evaluate their statutory obligation in all cases.

The subcommittee has been considering whether an expanded disclosure requirement would be feasible and beneficial. Its work is informed by new guidance issued by the Codes of Conduct Committee regarding recusal based on a financial interest. This new guidance focuses on ownership of an interest in an entity that "controls" a party; that is, if the judge has a financial interest in a parent that "controls" a party, that judge has a financial interest requiring recusal. The current rule likely ensures disclosure of most such circumstances, but not all. Therefore, the subcommittee is considering an amendment that would require parties to disclose any beneficial owners or those who in fact exercise control over the party. The subcommittee is also continuing research on other possibilities, including perhaps some alternatives borrowed from state law and local rules. The subcommittee hopes to present draft rule language at the upcoming fall meeting.

D. Cross-Border Subcommittee

At the end of the Advisory Committee's October 2023 meeting, a Cross-Border Discovery Subcommittee was created. The Chair is Judge Shah, and the members are Judge Boal, Professor Clopton, Judge McEwen (liaison to the Bankruptcy Rules Committee), and Joshua Gardner of the DOJ. This topic was presented to the Standing Committee during its January 2024 meeting. Since that time, the Cross-Border Discovery Subcommittee has met and initially concluded to focus first on handling of discovery for use in U.S. litigation and the application of the Hague Convention in some circumstances. Information-gathering outreach is underway with interested bar groups and will continue. Standing Committee members can find details on the current efforts at pp. 296-311 of the agenda book for the Advisory Committee's April 2024 meeting.

III. INFORMATION ITEMS

The Advisory Committee also has ongoing work on a number of other topics that are described below. Standing Committee reactions would be helpful.

A. Random assignment of cases

Over the course of the last year, the advisory committee has received several requests for rulemaking on civil case assignment in cases seeking injunctions against executive action. These requests are motivated by the concern that some plaintiffs are engaged in a precise form of "judge shopping": filing cases in single-judge divisions to ensure assignment of the case to the (presumably favorable) judge in that location. Proponents of rulemaking seek to have such cases randomly assigned among all of the judges in the district.

The advisory committee first discussed this issue at its October 2023 meeting, and the reporters were tasked with considering (1) whether such a rule would be authorized by the Enabling Act, and (2) whether such a rule would require invoking the Act's supersession clause since 28 U.S.C. §137 currently provides that a district's business "shall be divided among the judges as provided by the rules and orders of the court," and that "the chief judge of the district court shall be responsible for the observance of such rules and orders and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe." Arguably, a rule requiring random assignment of some cases would contravene this statutory delegation of the assignment power to the districts themselves. If this interpretation of the statute is correct, then the rule would necessarily have to supersede the statute. Whether such a supersession is contemplated by the Enabling Act is a challenging question, as noted by several members of the Standing Committee when this issue was discussed at the January 2024 meeting. The Department of Justice submitted a detailed letter arguing that supersession would not be necessary.

In any event, shortly before the advisory committee's April 2024 meeting, on March 12, 2024, the Judicial Conference announced a new policy to the districts providing that cases seeking to bar or mandate nationwide enforcement of a federal law be randomly assigned. As the Judicial Conference clarified, however, this policy is only guidance and not mandatory. The policy attracted significant attention from various Senators, some of whom urged districts to follow the policy, and some of whom did not.

The advisory committee discussed these developments at its April 2024 meeting. The general consensus was that this remains an extremely important issue and that the reporters should continue their research efforts. In the meantime, the reporters will also closely monitor the degree to which districts follow the Judicial Conference policy. Because it will surely take some time for receptive districts to implement the policy, the reporters will keep track of any new local rules or orders to report to the Advisory Committee at its October meeting.

B. Use of the word "master" in the rules

This issue is new to the Standing Committee. The American Bar Association has submitted 24-CV-A, proposing that the word "master" be removed from Rule 53 and from any other rule that refers to the possibility of appointing a "master." The ABA suggests substituting "court-appointed neutral." In April, The Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) submitted 24-CV-J, supporting the ABA proposal. It would be helpful to the Advisory Committee to know of any views of Standing Committee members on this proposed change in the use of the word "master," which has been employed in Anglo-American legal systems for centuries.

Besides Rule 53, the term "master" appears in at least six other Civil Rules (and in Rule 16.1, proposed for adoption in the action items above). It is also used by the Supreme Court's rules and in at least one statute (28 U.S.C. § 636(b)(2)). Further work will be needed to determine whether the term also appears in other statutes. In addition, it appears that, without relying on Rule 53, judges use the term when making appointments to assist in the conduct of litigation, particularly complex litigation.

The submissions urge using the term "court-appointed neutral" as a substitute for "master." A variety of other terms has been employed in similar contexts in the past. Whether "neutral" would be a good substitute term could be debated. It might produce ambiguities of its own. To illustrate, at least one district (N.D. Cal.) has for decades had a program involving "early neutral evaluation," relying on experienced lawyers to provide guidance in possible resolution of civil cases. Lawyers who have undergone a training program are appointed to a panel maintained by the court, so using "court-appointed neutrals" might cause confusion in at least this district.

Further information about this topic can be found at pp. 637-43 of the agenda book for the Advisory Committee's April 2024 meeting. It would be helpful to the Advisory Committee to know whether members of the Standing Committee have views on (a) whether it is advisable to discard the longstanding use of the term "master" in the Civil Rules, and (b) if so, what term should be substituted for "master."

C. Remote testimony

This topic is new to the Advisory Committee's agenda. 24-CV-B, from a number of prominent plaintiff-side lawyers, proposes that an amendment be adopted to resolve a split in the courts about the interaction of Rule 45(c)'s limitations on where a witness must appear under subpoena and the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena.

A new Rule 43/45 Subcommittee has been appointed to examine these issues. It is chaired by Judge Hannah Lauck (E.D. Va.) and includes Justice Jane Bland (Texas Supreme Court), Advisory Committee members Joseph Sellers and David Burman, and Bankruptcy Judge Benjamin Kahn (liaison to the Bankruptcy Rules Committee, which has a related proposal before it).

Additional details about these topics can be found at pp. 587-94 of the agenda book for the Advisory Committee's April 2024 meeting.

The Rule 43(a) proposal would significantly relax present limits on the use of remote testimony in trials or hearings:

> **(a) In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal state, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. ~~For good cause in compelling circumstances and with appropriate safeguards,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, must require witnesses to testify ~~may permit testimony~~ in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

The Bankruptcy Rule proposal is less aggressive. It would not apply in adversary proceedings. In other matters, it would remove the requirement that "compelling circumstances" be presented in addition to good cause to justify use of remote means for testimony.

It would be helpful to the new subcommittee to know about views of Standing Committee members about use of remote testimony in trials and hearings.

The Rule 45 proposal was prompted by the decision in In re Kirkland, 75 F.4th 2030 (9th Cir. 2023), that even when Rule 43(a) authorizes remote testimony a subpoena may not be used to compel an unwilling witness to provide such testimony within the range authorized by Rule 45(c). The 2013 amendments to Rule 45 centralized the rule's provisions about where a witness subject to a subpoena could be required to attend and testify, generally limiting that to 100 miles from the residence of the witness or any point within the state of residence of the witness. The Committee Note to the 2013 amendments said that a subpoena could be used for such a purpose, but the Ninth Circuit panel held that a subpoena could not.

D. Jury Demand After Removal – Rule 81(c)

As presented previously to the Standing Committee, it has been proposed that an amendment of Rule 81(c) be pursued because, as restyled in 2007, it could create confusion about whether a jury trial must be demanded after removal from state court if there has not yet been a jury demand in the state court proceedings.

As restyled, Rule 81(c)(3)(A) says that no demand for jury trial need be made after removal "[i]f the state law *did* not require an express demand for a jury trial * * * unless the court orders the parties to do so within a specified time." Though the rule seems to have been intended to excuse post-removal jury demands (absent a court order setting a deadline for making a demand) only after removal from state courts in which there is never a requirement to demand a jury trial, and not in instances of removal from a state court in which a jury demand must be made under state practice, but was not yet required as of the time of removal. In that way, it presumes that lawyers in states in which jury demands are required at some point will realize they need to worry about when that is required in federal court after removal. For those unaccustomed to ever having to demand a jury, the requirement that the court set a deadline for such demands is protective in calling their attention to this federal-court requirement. But that was surely clearer before restyling, when the rule required a jury demand after removal if no such demand had been made before removal "[i]f the state law *does* not require an express demand for a jury trial."

The style change could be read to indicate that the question under the restyled rule is whether *at the time of removal* state court practice already required a jury demand. But it appears that the courts continued to interpret the restyled rule to require a post-removal demand under Rule 38 unless such a demand is never required in the state court from which the case was removed.

Two possible solutions are under review. First, the style change could be reversed, making it clear that a post-removal jury demand is required if none has been made before

removal whenever a jury demand is required under the practice of the pertinent state court. But that could leave some ambiguity about which state court practices excuse a demand absent a court order.

The other possible approach would involve removing the exemption for those state court systems that never require a jury demand and requiring a post-removal demand in every case if none was made before removal. That would remove any ambiguity about whether a given state's practice supported an exemption from the jury demand requirement. But that change might surprise lawyers in states in which no jury demand is required. Research by Rules Law Clerk Zachary Hawari indicates that as many as nine states appear not to require jury demands unless the presiding judge directs the parties to make such demands.

The Advisory Committee has not determined which of these two courses to pursue. More details can be found at pp. 350-57 of the agenda book for the Advisory Committee's April 2024 meeting.