ADVISORY COMMITTEE ON CIVIL RULES

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

February 6, 2024

Please note that all times are Eastern. Timing is approximate and subject to change.

Tab No.	Time Slot (estimated)	Name	Organization
1	9:35–9:45	Kelly Hyman	Hyman Law Firm
2	9:45–9:55	Seth Carroll	Commonwealth Law Group
3	9:55–10:05	Bill Rossbach	Rossbach Law
4	10:05–10:15	Lexi Hazam	Lieff Cabraser
5	10:15–10:25	Jonathan Orent	Motley Rice
6	10:25–10:35	Amy Zeman	Gibbs Law Group
7	10:35–10:45	Mark Lanier	Lanier Law Firm
8	10:45–10:55	Mark Abramowitz	Dicello Levitt
Morning Break (estimated)			
9	11:10–11:20	Ellen Relkin	Weitz & Luxenberg, P.C.
10	11:20–11:30	Jennie Lee Anderson	Andrus Anderson
11	11:30–11:40	Andre Mura	Gibbs Law Group
12	11:40–11:50	Adam Polk	Girard Sharp
13	11:50–12:00	Ashleigh Raso	Nigh Goldenberg Raso & Vaughn
14	12:00–12:10	Kate Baxter-Kauf	Lockridge Grindal Nauen PLLP
15	12:10–12:20	Yvonne Flaherty	Lockridge Grindal Nauen PLLP
16	12:20–12:30	Seth Katz	BurgSimpson
Lunch Break (estimated)			
17	1:30–1:40	Larry Taylor	The Cochran Firm
18	1:40–1:50	Adam Evans	Dickerson Oxton
19	1:50–2:00	Roger Mandel	Jeeves Mandell Law Group
20	2:00–2:10	Lauren Barnes	Hagens Berman Sobol Shapiro LLP
21	2:10–2:20	Anthony Mosquera	Johnson & Johnson
22	2:20–2:30	Kellie Lerner	Robins Kaplan LLP
23	2:30–2:40	Robert Levy	Exxon Mobil Corporation
24	2:40–2:50	Aaron Marks	Cohen Milstein Sellers & Toll PLLC
25	2:50–3:00	Pearl Robertson	Irpino Avin Hawkins Law Firm

ADVISORY COMMITTEE ON CIVIL RULES

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

February 6, 2024

Please note that all times are Eastern. Timing is approximate and subject to change.

Tab No.	Time Slot (estimated)	Name	Organization
Afternoon Break (estimated)			
26	3:20–3:30	David Cooner	Product Liability Advisory Council
27	3:30–3:40	William Cash	Levin, Papantonio, Rafferty, Proctor, Buchanan, O'Brien, Barr, & Mougey, P.A.
28	3:40–3:50	Max Heerman	Medtronic
29	3:50–4:00	Maria Salacuse	Equal Employment Opportunity Commission
30	4:00–4:10	Brian Clark	Lockridge Grindal Nauen PLLP
31	4:10–4:20	Jessica Glitz	Johnson Law Group
32	4:20–4:30	Amber Schubert	Schubert Jonckheer & Kolbe
33	4:30–4:40	Christopher Seeger	Seeger Weiss

TAB 1

THE HYMAN
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January 25, 2024

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

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

RE: Proposed Rule 16.1 – Multidistrict Litigation

Dear Committee Members:

Thank you for the opportunity to address the Committee. My name is Kelly Hyman, and I am the founding and managing partner of The Hyman Law Firm, P.A. I have been licensed to practice law for over nineteen years, with the last ten-plus years focusing on representing Plaintiff in mass torts and class actions. I have represented clients and served on the discovery committee in a pending tobacco marketing and sales practice class action against American Spirit, which the JPML consolidated in the U.S. District Court for the District of New Mexico. I have also represented clients in various class actions involving data breaches and privacy violations against some of the largest U.S. technology companies, including Facebook, Inc. and Google, LLC. Additionally, I have extensive experience in mass tort litigation, having represented hundreds of claimants in individual actions filed in federal courts involving transvaginal mesh and bladder slings.

I write to provide my perspective as a solo plaintiff-side practitioner in mass torts and class actions and to offer comments on Proposed Rule 16.1 (Multidistrict Litigation). While this rule could be helpful to the court in clarifying initial objectives of parties, as it stands, the current draft will result in creating redundancies and potentially even more complications and expenses during the initial formation of the MDL.

The inclusion of a provision for appointment of "coordinating counsel" raises concerns for practitioners like me because the proposed rule text and Committee Note, as written, do not provide clear criteria for who should be selected to serve in this role. Rather, the Committee Note provides that "performance in that role may support consideration of coordinating counsel for a leadership position." Therefore, without clear guidance otherwise, courts are likely to appoint repeat players from prior leadership slates to this pre-leadership role; larger firms with more notoriety and familiarity will typically be favored, while smaller firms and solo practitioners will not be given the same leadership opportunities. Without clarification, this vagueness changes the position of "coordinating counsel" from an administrator for the court to an automatic leadership appointment—the former relying on efficiency, and the latter requiring a broader scope of consideration. This framework will ultimately create a secondary fight for leadership and an unnecessary repetition of work that will be detrimental to the litigation by taking away valuable

resources needed to serve clients, which could in turn further inhibit other qualified, small firm attorneys from being able to take on leadership roles.

Moreover, the current draft does not require the court to appoint a lawyer with a stake in the litigation to the coordinating counsel position, which may indicate that courts should treat the role as a special master. This does not favor efficiency or cost-consciousness. Each MDL is different because of its distinct and complex claims, injuries, products, and parties involved. Thus, a neutral appointee would be subject to a steep learning curve, and the associated costs and time could dilute the ultimate compensation available to plaintiffs.

In agreement with testimony from attorney Jose M. Rojas, who testified on January 16, 2024, I support proposed changes to 16.1 which allow for "broadening the leadership committee" in effort to "better represent the interests of the entire client pool and serve to educate and empower committed trial lawyers who care deeply about the litigation's outcome as well as its processes." Rather than rely on repeat players from larger firms, it is in the best interest of all parties to consider attorneys familiar with the litigation from smaller firms who could bring practiced experiences and real-world insights to the position.

In summary, the discretionary appointment of a "coordinating counsel" limits diversification of practitioners with specialized interest and experience in the litigation to assume leadership roles. Unless the language is amended to specify the distinction between "coordinating counsel" and criteria for a leadership role in the litigation, my recommendation would be to eliminate this section of the ruling completely, as it unnecessarily leads to more questions and potential conflicts of interest for all involved. I thank the committee for the opportunity to comment.

Kelly Hyman

TAB 2

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TESTIMONY OF SETH R. CARROLL, COMMONWEALTH LAW GROUP
REGARDING PROPOSED AMENDMENTS TO CIVIL RULES 16 AND 26
*Presented at the February 6, 2024 hearing on Proposed Amendments to Civil Rule*s

My name is Seth Carroll and I am a plaintiff civil rights lawyer. I bring claims on behalf of individuals who suffer constitutional deprivations at the hands of municipalities, law enforcement officers, correctional officers, correctional health care providers, and government contractors.

I believe the proposed textual amendments to Rules 16 and 26 will ensure flexibility for parties in civil litigation to adjust to privilege concerns based on the circumstances of each case, and will likely help avoid unnecessarily specific or rigid application that may not meet the varying needs of discovery.

REASONABLE FLEXIBILITY, WITH JUDICIAL OVERSIGHT, IS CRITICAL TO FACILITATING EFFICIENT AND BALANCED DISCOVERY FROM CASE TO CASE.

Already baked into Rule 26(f) are requirements that the parties to civil litigation meet and confer early and come to agreement on the scope and parameters of discovery. In particular, privilege claims have a unique ability to contribute to discovery delays if the parties disagree on the basic framework for how to identify and resolve claims of privilege. The proposed amendments recognize the reality that agreement amongst the parties will likely reduce discovery disputes, promote judicial efficiency and strike reasonable balance of countervailing interests in each case.

This sort of flexibility is particularly important in accomplishing broad, meaningful application of the Rules. The civil rights arena in which I practice provides helpful illustrations of how different the scope of discovery might shape up from case to case.

For example, in a straightforward excessive force case against a single officer, both parties will likely have relatively few documents and corresponding claims of privilege are often limited to standard attorney-client and work product concerns. In such cases, the burden on the parties to identify specifically the individual documents being withheld is relatively low, as is the opportunity for parties to hide-the-ball by obstructing evidence in privilege logs.

On the other end of the spectrum are circumstances arising in a correctional heat-stroke case involving a middle-aged man who suffered a global brain injury after being subjected to multiple days of extreme heat in a facility without air conditioning. In that case, the local municipality was responsible for the physical aspect of the facility, a state official was responsible for personnel and correctional operations within the facility, a medical contractor was responsible for medical operations within the facility, and numerous individuals had various degrees of contact with the plaintiff as his condition worsened. Discovery implicated hundreds of thousands of pages

of documents and a variety of privilege claims, including self-evaluative privilege, joint-defense privilege, and claims involving proprietary information. In such a case, while the costs and expense associated with review and production, on both sides, is significantly greater – so too is the risk that privilege logs can be used to obstruct discovery of relevant evidence.

These opposite ends of the spectrum – and everything in between – reflect the need for flexibility in the Rules that will permit the parties to reach agreement on most, if not all, areas of the timing and form of privilege claims. Beginning this process early on in the Rule 26(f) conference and memorializing it in a court approved discovery plan at the Rule 16 conference will allow discovery to move forward promptly and efficiently with minimal need for piece-meal judicial intervention on privilege related matters.

SPECIFIC CIVIL RIGHTS CONSIDERATIONS MILITATE AGAINST PROPORTIONALITY AND TIERED OR CATEGORICAL LOGS.

The Committee should reject invitations to insert cross-references to "proportionality," and should likewise reject references to "categorical" or "tiered" logs. Civil rights cases offer unique examples of why such invitations should be rejected. For example, in civil rights cases involving "Monell claims" that seek to affix liability on a municipal actor for a municipal policy or custom that becomes the "moving force" behind a constitutional violation[1], such references could facilitate obstructionist discovery tactics. Municipal actors will often use claims of proportionality as an attempt to shield off discovery of information that might tend to reveal systemic deficiencies in training and discipline, or otherwise tend to prove "tacit authorization" in the form of municipal inaction in the face of a known unconstitutional pattern or practice.[2]

In these cases, permitting privilege logs that factor in "proportionality", "tiered" logging or "categorical" descriptions pose very legitimate dangers to the administration of justice. Some municipal and/or corporate actors will attempt to hide probative documents using unilateral "proportionality" concerns as a mechanism to avoid even reviewing certain categories of potentially responsive material, resulting in significant delays in discovery and disruptions of the trial schedule. Similarly, municipal actors often work closely together, increasing the potential that vague categorical work-product, joint-defense, security-related or internal review objections could be used to hide the existence of critical information. There is simply no meaningful value in the vast majority of these cases for tiered and/or categorical logging. In limited cases where there might be value in this approach, it should be left to the parties to make that decision based on the needs of particular cases.

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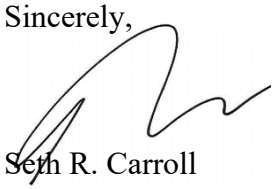
[1] See generally Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1977) (rejecting the concept of vicarious liability against municipalities in § 1983 cases absent a showing that an official policy or custom was the "moving force" behind the constitutional violation.)

[2] See e.g. Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994) (discussing that "tacit authorization" might result from inaction in the face of a pattern of constitutional violations.)

Consequently, it is appropriate that proportionality objections and tiered, categorical logging are not present in the express language of the proposed amendments or notes. To maintain broad, meaningful application, the Committee should avoid cross-references or notes that might serve as anchor points for these concepts to germinate outside of arms-length negotiation amongst the parties in individual cases.

Sincerely,



Seth R. Carroll

TAB 3

RossbachLawPC

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Michelle Netzer, Paralegal

January 29, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States
CourtsOne Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rulemaking on Federal Rules of Procedure 16 and 26
Summary Outline of Testimony for February 6, 2024 Hearing

Dear Members of the Committee on Rules of Practice and Procedure:

Thank you for giving me the opportunity to present my testimony next week. I am a civil trial lawyer with more than 40 years' experience litigating exclusively plaintiffs' cases involving complex medical, scientific, and engineering issues.

I am admitted in six United States District Courts, seven Courts of Appeal and the Supreme Court. I have served on the boards of several national and state trial lawyers' organizations. In 2016 I became a member of the Board of Advisors of IAALS after serving on panels at the IAALS Rule One Symposium on the 2015 federal rule discovery amendments. I have also been nominated and elected by my peers to membership in the American Board of Trial Advocates. My testimony at the hearing is not as a representative of any organization.

I strongly support the proposed amendments that mandate early development of privilege claim principles and information requirements for each case in order to provide timely identification of withheld materials and the information that the drafters of the 1993 contemplated would be sufficient to enable those reviewing the log of withheld materials to determine whether the claims of privilege were valid. Unfortunately, as other witnesses have testified, their experience in large class action and mass torts cases shows there is a large problem with delayed disclosure of privilege logs, over designation of privileged claimed materials, and inadequate descriptions of what has been withheld.

Due to the constraints of time and the presence of other witnesses from the plaintiffs' bar at the this and prior hearings who have described in detail both their personal experience and cited cases describing the need for these amendments, I will limit my testimony to reinforcing particular recommendations made by lawyers such as Mr. McNamera, Ms. Keller, Ms. Andrus, and others who have greater experience than I in the often arduous satellite privilege log litigation that has become endemic in many huge volume document MDL and other mass tort cases. While I have had many individual cases in medical device MDLs I have not had a

leadership role as my colleagues have had in these many-client cases except as lead science lawyer in the Exxon Valdez Oil Spill litigation and in a large environmental class action in Colorado. I therefore defer to them in their description of the problem in the largest of cases.

My practice until recently has focused largely on single or few client cases against usually very large corporate defendants. My perspective then is that since the 1993 amendments, in large document cases such as automobile design and toxic and environmental exposures, my small firm and associated colleagues have to deal with the resource asymmetry between the manpower and resources that corporate defendants can dedicate to litigating privilege claims. With relatively quick trial dates, short discovery deadlines, and delayed privilege logs for an individual case, fighting satellite battles over privilege claims is a resource drain that often has to be foregone while developing the underlying liability case.

I will take the time I have to emphasize a few points made by others and request your consideration of a couple of additional points.

- As others have stated, and as can be inferred from the Committee Note at 121 of 157, the most important and fundamental change to Rule 16 and Rule 26 is the language that makes development of a method for dealing with privilege claims mandatory and at the outset of litigation. I totally concur with the Committee Note that this should go a long way to alleviating many of the problems with privilege claims by forcing early attention by the parties and the court to an agreed to, or if needed, court resolution of how privilege claims will be made, what information will be required, and how disputes handled.
- In my experience, however, what is most problematic in Rule 26(b)(5)(A) and what opens the door to potentially paralyzing disputes on what should be included in a privilege log is the limited guidance to counsel and courts about what information is sufficient to meet subsection (ii):

> describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, *will enable other parties to assess the claim.* [emphasis added]

- Although it is clear and commendable that this Committee wants to promote "maximum flexibility" and does not want to require some "overarching standard" for privilege claims and privilege logs, I believe that it would be extremely helpful to the parties and courts and reduce disputes if the Notes to these amendments had some language from cases or other authority as examples or suggestions for what might be acceptable in specific cases. In particular, citations to cases where privilege logs have been successfully developed or ordered, with detailed language or outlines, would facilitate resolution of disputes. I urge your attention to the many case examples cited in the letter and testimony of Douglas McNamera and in particular his suggested addition to the Notes with the quotation from Judge Grimm *et al* in Paul W. Grimm, Charles S. Fax, & Paul Mark Sandler, *Discovery Problems and Their Solutions*, 62 (2005).

> To properly demonstrate that a privilege exists, the privilege log should contain a brief description or summary of the contents of the document, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met for that document.
>
> *See also Hill v. McHenry*, No. CIV.A. 99-2026-CM, 2002 WL 598331, at *2–3 (D. Kan. Apr. 10, 2002).

- I believe the Committee has otherwise done an excellent job in the Committee Notes, however, I have one other point that is bothersome in the current Note draft for the Rule 26 amendments. The language of the Note in discussing problems with existing privilege claim practice seems unbalanced, suggesting that all the burden falls on the corporate defendants resisting disclosure.

> Compliance with 26 Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log."
>
> …Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens.

- Again referring to Mr. McNamera's testimony and letter, over-designation and inadequate description of the withheld documents is a huge problem that imposes a burden on the parties seeking the discovery. In one example an audit revealed that more than 60% of the documents in the privilege log were improperly designated. When logs are inadequate and designations are untrustworthy a huge resource wasting burden is imposed on the party seeking discovery as well as requiring great expenditure of court time and resources. This time and resource waste delays discovery, trials, and resolution of the claims of often thousands of injured persons. I would recommend consideration of more balanced language that would acknowledge the burdens that are imposed by improper privilege claiming and why document by document privilege logs may be necessary in specific cases. I suggest that the Note could acknowledge the evolution of increasingly sophisticated technologies that will be making the costs of such privilege logs significantly less costly for the volume of documents analyzed. For example:

> Compliance with 26 Rule 26(b)(5)(A) can involve very large costs, often including a document-by-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 this Rule requires.*

> …Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens *on one or both parties and leading to over designation and inadequate privilege descriptions and imposing often untimely resource burdens on both parties in satellite privilege claim litigation.*

- It is notable that some of the burden of corporate document production now is the result of what since 1993 has been previously unimaginable corporate expansion of internal communication with large "cc" lists which likely reduce the validity of a privilege claim. These evolving software applications that corporations now almost universally use to provide detailed networks of internal corporate communication may well have to be reviewed and have greatly complicated document production. For example, just recently the Federal Trade Commission and Department of Justice has been warning companies under investigation not to delete their Slack or Signal chat histories, lest they face potential civil penalties and criminal obstruction charges.

Thank you again for giving me the opportunity to present my comments at the hearing.

Sincerely,

William A. Rossbach

TAB 4

Lieff Cabraser Heimann & Bernstein
Attorneys at Law

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February 5, 2024

Lexi J. Hazam
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VIA EMAIL

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rule 16.1—Multidistrict Litigation

Dear Committee Members:

I appreciate the opportunity to provide this testimony to the Committee regarding proposed Rule 16.1 for Multidistrict Litigation.

I chair Lieff Cabraser Heimann & Bernstein's mass torts practice, and my career has centered on MDLs since its inception over twenty years ago. I have served at all levels of MDL leadership, often with a focus on issues relating to science and experts. I currently serve as Co-Lead Counsel in *In Re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, MDL No. 3047. Other partners at my law firm regularly serve in leadership of major MDLs in all practice areas. I submit this testimony to address two provisions of proposed Rule 16.1

Proposed Rule 16.1(b)—Designation of Coordinating Counsel

While early organization of MDLs has benefits, based on my experience I am concerned that designating Coordinating Counsel prior to the initial case management conference will deprive courts of the chance to conduct more fulsome vetting of potential leadership, while also shortening the time for qualified candidates to come forward. It also may short-circuit attempts by counsel to informally organize in ways that may prove helpful. The upshot may be courts designating counsel with whom they are already familiar, and the loss of an opportunity to select from a wider and more varied leadership pool. These effects may be exacerbated by the fact that the designation of Coordinating Counsel is likely to carry significant weight for the selection of leadership appointed later.

Such an early designation also risks considerable inefficiencies by requiring a transition from one form of leadership to another in the early period of the case, with lines of communication between plaintiffs and the court, between plaintiffs and defendants, and between plaintiffs potentially needing to be redrawn, and initial procedures or strategies revised to suit the needs of a more representative leadership. Avoiding this potential duplication and disruption is especially important given that there are no defined criteria or process for selecting

Coordinating Counsel, and yet such Counsel would be charged with developing the initial case management report, which under proposed 16.1(c) addresses such important and consequential matters as appointment of permanent leadership, identification of the principal factual and legal issues, a discovery plan, and measures to facilitate settlement.

The risks above can be avoided by setting a process for appointing permanent leadership (for example, calling for individual applications) prior to the initial management conference and then addressing leadership at it, with a report akin to that called for in Rule 16.1(c) submitted prior to the next hearing. This is in fact what many MDL courts currently do, including the court overseeing the Social Media MDL, without incurring any delay. Given the availability of such an efficient procedure and its comportment with goals of fairness and diversity in leadership appointments, any potential benefit of proposed 16.1(b) appears significantly offset by the drawbacks noted above.

Proposed Rule 16.1(c)(4)—Exchange of Information about Factual Bases for Claims and Defenses

Proposed Rule 16.1(c)(4), which calls for the initial case management conference report to address "how and when the parties will exchange information about the factual bases for their claims and defenses" raises a separate set of concerns. Given that the exchange of such information already occurs through discovery pursuant to various Federal Rules, and that 16.1(c) already calls for a proposed discovery plan, this provision seems both vague and unnecessary. As the comment notes, mass tort MDLs typically utilize plaintiff fact sheets for streamlined discovery relating to individual plaintiffs, but the provision itself and the reference in the comment to the called-for exchanges being "early" seems to contemplate some unspecified form of early attacks on claims outside of motion practice and discovery under the Federal Rules. The impact of this provision may be to facilitate the erection of new barriers unmoored to discovery rules, rather than to allow courts and parties to design procedures that are fair and efficient for each case. In particular, it may place an undue burden on plaintiffs in cases where defendants may 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 activity which the users themselves cannot access.

While neither provision above is mandatory, their presence in a new Federal Rule is likely to encourage the standardization of such practices in MDLs. For the reasons above, I believe this would be more detrimental than beneficial to MDL practice, and recommend against adoption of these provisions.

Respectfully,

Lexi J. Hazam

TAB 5

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"I will stand for my client's rights.
I am a trial lawyer."
–Ron Motley (1944–2013)

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January 23, 2024

BY EMAIL
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RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rule 16.1—Multidistrict Litigation

Dear Committee Members,

Thank you for providing an opportunity to comment on proposed Rule 16.1 on multidistrict litigation.

My name is Jonathan Orent. I am a member attorney of Motley Rice LLC and submit this testimony on behalf of my firm. Motley Rice attorneys currently are serving as appointed Plaintiffs' Co-Lead Counsel in, among other mass litigations, *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, MDL No. 3047 (N.D. Cal.), and *In re National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Ohio). I currently am serving as appointed Plaintiffs' Lead Counsel of hernia mesh litigation in *In re Atrium Medical Corp. C-QUR Mesh Products Liability Litigation*, MDL No. 2754 (D.N.H.), and have served as Plaintiffs' Co-Lead and Co-Liaison Counsel in various state court mass litigations. I submit this testimony to address two specific provisions of proposed Rule 16.1.

A. Designation of Coordinating Counsel—Proposed Rule 16.1(b)

Respectfully, proposed Rule 16.1(b), providing for designation of coordinating counsel before the initial MDL management conference, should be eliminated. Although styled as a permissive rather than mandatory procedure, setting this forth in a formal rule creates a likelihood that it would become standard practice. And the likely risks of the practice significantly outweigh its potential benefits.

First, by providing for designation of coordinating counsel before the initial MDL management conference and without any criteria for making the designation, the proposed rule makes it likely that courts will base these designations on experience with particular lawyers.

This would adversely affect present and future MDLs by placing familiarity over both qualification and diversity of experience and background in selection of what undoubtedly is a leadership position in the litigation.

Second, the proposed rule also likely will run counter to the objectives of 28 U.S.C. § 1407(a) to provide for the "just and efficient conduct" of MDL proceedings. Courts correctly recognizing that designated coordinating counsel is a leadership position and applying appropriate procedures and criteria for this designation would risk frontloading and/or duplicating the procedures for appointment of formal litigation leadership, which are the subject of proposed Rule 16.1(c)(1) and are to be addressed *after* the proposed appointment of coordinating counsel. In my firm's and my vast MDL and other mass litigation experience, there is no need for this layering or duplication of process. Courts have consistently proven able to receive and process submissions for litigation leadership without the aid of pre-designated coordinating counsel.

In light of our experience, we believe that proposed Rule 16.1(b) is an unwieldy solution to a non-existent problem. Motley Rice respectfully suggests that this proposed provision be discarded.

B. Exchange of Information About Factual Bases for Claims and Defenses—Proposed Rule 16.1(c)(4)

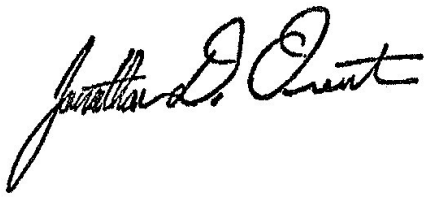
With respect, proposed Rule 16.1(c)(4), providing for the pre-initial management conference report to address how and when the parties exchange information about the factual bases for their claims and defenses, also should be eliminated. Although again styled as a permissive rather than mandatory subject for the parties' pre-initial management conference report, 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.

The Rules of Civil Procedure, Rules 26 to 36, provide the standards and procedures by which plaintiffs plead and prove their claims. Rule 16 provides for the parties and the court to address *these procedures* in an initial case scheduling order. *See, e.g.,* Rule 16(b)(3)(B)(i)-(iii) ("The scheduling order may (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1); (ii) modify the extent of discovery; (iii) provide for disclosure, discovery, or preservation of electronically stored information;"). Proposed Rule 16.1(c)(4), by contrast, is not tied to existing discovery rules. Rather, it encourages defendants to press the court at the initial MDL management conference to force plaintiffs to produce "information about the factual bases for their claims" without the benefit of any discovery. This, too, would be contrary to the objective of 28 U.S.C. § 1407(a) to provide for the "just" conduct of MDL proceedings.

This also is an unfair solution to a rare and readily addressable issue. Existing practices involving use of plaintiffs' fact sheets or plaintiff census procedures at the appropriate time in the particular mass litigation have proven more than sufficient to dispel or else effectively address concerns as to unfounded claims. In my experience in leadership in hernia mesh mass litigation, leadership's active role in vetting and maintaining strict criteria for cases ensured that unfounded claims did not take hold, which leadership was able to verify through our use of negotiated plaintiff fact sheets and plaintiff profile forms.

Thank you again for the opportunity to address the Committee on this proposed rule.

Respectfully submitted,



Jonathan Orent

TAB 6

GibbsLawGroup LLP

Testimony of Amy M. Zeman of Gibbs Law Group LLP Regarding Privilege Logs

For Presentation at the February 6, 2024 Civil Rules Hearing

I appreciate the opportunity to provide feedback regarding the proposed amendments to Federal Rules of Civil Procedure 16(b) and 26(f). I am a partner at Gibbs Law Group LLP, a mid-size law firm based in Oakland, California committed to protecting the rights of our clients who have been harmed by corporate misconduct. The firm practices in state and federal courts nationwide, representing individuals, whistleblowers, employees, and small businesses against the world's largest corporations. I personally handle both class action matters and mass torts and have done so on behalf of plaintiffs since entering the legal profession 13 years ago.

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. I support the proposed changes for appropriately recognizing that there can be no one-size-fits-all edict regarding privilege logs and providing necessary flexibility to design case-specific solutions while ensuring the parties do so early in the litigation. This will encourage a more efficient, collaborative approach to preparing and exchanging privilege logs and avoid last-minute disputes, which can impact case schedules and lead to duplicative discovery efforts to correct missteps.

To the extent I have any reservations about the proposed edits, they are limited to the Committee Note for Rule 26(f). As currently written, the Note places too great an emphasis on the potential cost of preparing a privilege log that is compliant with Rule 26(b)(5)(A) and too little emphasis on the harm inherent in over-designation – that is, the claim of privilege for and withholding of materials that are not in fact privileged. The imbalance inappropriately suggests that a party may withhold material discoverable under Rule 26 on the basis of privilege without providing sufficient information to "enable other parties to assess the claim." And it overlooks the ever-developing role that technology plays in producing privilege logs, document-by-document or otherwise. In fact, once a discoverable document has been evaluated for privilege, it generally now requires just the click of a button to generate a privilege log. Re-adding a previously drafted sentence at the end of the first paragraph would provide some balance:

> 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.

Responding to some other comments made about the proposed amendments, I disagree with those arguing that discussions about privilege logs are premature at the Rule 26(f) stage. The

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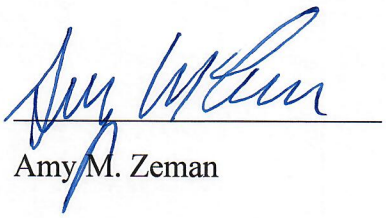
timing and method to comply with Rule 26(b)(5)(A) is a natural component of a discovery plan, and it is disingenuous to suggest that parties would have sufficient information to develop a discovery plan at that stage but be incapable of intelligently contemplating privilege logs as part of that plan. The argument also ignores the ever-dynamic nature of complex litigation and ingenuity of counsel working in good faith to adjust to new or changed information over the course of ongoing litigation.

The proposed Note's nod to rolling productions is well placed and references a common and effective discovery tool I regularly use in my cases. While at least one other commenter has suggested that counsel cannot simultaneously achieve a thorough document review and production and a thorough privilege law production, but must focus on only one or the other at a time, I heartily disagree with the proposition. Complex litigation inherently involves many moving parts, and counsel on both sides of the "v." have regularly shown themselves amply capable of walking and chewing gum at the same time. To the extent oversights materialize, supplemental production and clawbacks provide ready corrective mechanisms.

Some commenters have also advocated for tiered productions and logs. Replacing "rolling" production with "tiered" production would compound the problem of over-designation rather than solving it, while adding opacity to the process. First, if "tiered" versus "rolling" is more than mere semantics, any reference to "tiered" in the Note would need a clear definition. And the comments favoring tiered production and logs describe tiering on the basis of materiality and importance of the materials to be produced – with no explanation of who would make those subjective determinations or how. If a producing party is to be making those subjective determinations and withholding documents on the basis of privilege while at the same time failing to provide fulsome information that would enable other parties to assess the validity of that privilege claim, there is an obvious path to discovery abuse.

In sum, I support the Committee's proposed changes to Rules 16(b) and 26(f). Thank you for the chance to speak with you about the rules.



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January 23, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
Rules Committee Secretary@ao.uscourts.gov

Re: Proposed Rule 16.1 Regarding Multidistrict Litigation

Dear Committee Members,

Thank you for the opportunity to testify regarding Proposed Rule 16.1 regarding multidistrict litigation.

My name is Mark Lanier, and my experience should provide you with practice-based perspective about the proposed rule. Beginning in 1985, I practiced law at Fulbright & Jaworski, now Norton Rose Fulbright, in both trial and appellate work before I founded my own firm in 1990. Since that time, I have represented countless plaintiffs who have been injured by defective products and devices, although I do still represent corporations from time to time.

I have been honored to hold leadership positions in and to try some of the most impactful multidistrict litigations ("MDLs") in recent history. I tried the first talc case in which Johnson & Johnson's baby powder was found to have cancer-causing asbestos and after which the product was removed from the U.S. market. I tried the first opioid case in which big chain pharmacies were all found liable in public nuisance for causing the opioid epidemic. As part of the leadership team in the DePuy metal on metal hip implant litigation, I tried four of those cases successfully as well. Furthermore, I am part of leadership suing the manufacturer of EpiPens for illegally inflating prices of the life-saving product. And the list goes on.

Suffice it here to say that, in total, I and members of my firm have participated in leadership in more than 30 MDLs. My commentary on Proposed Rule 16.1 is informed by all of that experience.

I. PROPOSED RULE 16.1 NEEDS ADJUSTMENT

The foundational question with respect to Proposed Rule 16.1 is: What problem are we trying to solve? In proposing the rule, the Advisory Committee stated that 1) "MDLs account for a large portion of the federal docket" and 2) some transferee judges perceive "they lack clear, explicit authority necessary to manage an MDL."[1]

[1] Agenda, Meeting of the Advisory Committee on Civil Rules at Page 38-39 of 570 (Oct. 17, 2023), available at https://www.uscourts.gov/file/76890/download.

Thus, Rule 16.1's purpose would seem simply to be: Provide guidance to judges with a big job. The proposed rule was *not* prompted because something is broken, and nothing needs to be fixed. Yet, the proposed rule goes further than mere guidance to judges.

As drafted, Rule 16.1 adds complexity and reduces both efficiency and justice, the twin goals of the MDL statute and the heart of Rule 1 of the Federal Rules of Civil Procedure. To achieve its ends, Rule 16.1 needs to be reworked.

a. Coordinating Counsel Would Reduce Efficiency and Justice; Instead, Leadership Should be Appointed and First Thing.

Respectfully, neither judges nor defendants have the ability to appreciate the incredible effort that goes into making plaintiffs' leadership structures work and work well. Only plaintiffs' counsel has that experience-based insight. Here, the testimony from most plaintiffs' counsel before this committee has been that the appointment of an MDL "coordinating counsel" will raise many issues and solve none.

I agree, and I propose that paragraph (b) regarding coordinating counsel should be stricken in its entirety. Further, paragraph (a) should be amended to state that the goal of the initial conference is to appoint leadership; the addressing of items (c)(2)-(12) should be made very clearly discretionary and should be addressed at a second conference, after leadership is appointed.

Entire law review articles could be written about why the appointment of coordinating counsel would reduce both efficiency and justice. Here, suffice it to summarize a few clear reasons why coordinating counsel creates inefficiency and injustice.

First, the appointment of coordinating counsel adds an unnecessary layer of complexity to a process that the committee is striving to simplify. Under the proposed rule, a court must, with or without guidance, make an additional decision about who to appoint as coordinating counsel and before even hearing from attorneys about what is sure to be a complex case. Then, coordinating counsel must take substantive positions on behalf of plaintiffs, for example, what the factual and legal issues in the case will be. Even the notes to the proposed rule acknowledge that there is often "tension between the approach[es]" that plaintiffs' counsel will take in the MDL, and that is an understatement. How is a court to know whether coordinating counsel is at odds – either on a point of law, strategy, or politics – with the attorneys who will ultimately comprise leadership in the MDL? How is a court to know whether coordinating counsel will disrupt the process of leadership formation? How is a court to know whether coordinating counsel is accurately representing all plaintiffs' positions? How can a court be sure that positions taken by coordinating counsel will not have to be rescinded once leadership is appointed? How can a court be sure that coordinating counsel's positions will not prejudice plaintiffs? And does this all raise due process concerns?

Second, thankfully, the appointment of plaintiffs' leadership, which almost inevitably must happen in an MDL, sidesteps all those concerns (and more).

Third, without leadership in place, requiring coordinating counsel to take substantive positions in court – as items (c)(2)-(12) do – 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. In that MDL, there were competing

leadership slates, and each had a different view of the relevant issues and case strategy. Importantly, exposing those differences to defendants risked prejudicing plaintiffs' cases. The differences complicated the meet and confers with defendants and the drafting of the joint report, which is an arduous task even once leadership is appointed. The lack of one clear plaintiffs' voice caused unnecessary frustration, loss of time, and expense for the parties. It left the court, whether it realized it or not, with either vague or questionable answers from plaintiffs' counsel. Although plaintiffs' counsel in the MDL narrowly escaped prejudicing their clients, other counsel might not be so lucky, and a more useful joint report could have been provided to the court with less expenditure of resources if leadership had been in place.

For these reasons, appointment of leadership first, and not the appointment of coordinating counsel, best serves efficiency and justice. Items (c)(2)-(12) should be addressed, flexibly, at a second conference.

II. CERTAIN RECOMMENDED ADDITIONS TO PROPOSED RULE 16.1 ARE "SOLUTIONS" IN SEARCH OF A PROBLEM.

Counsel representing defendants and corporate interests speciously recommended as a way to manage "overwhelming" MDLs the addition to Proposed Rule 16.1 of mandatory, early proof of claims and mandatory sanctions. But both the data and experience prove that their unsubstantiated premise as to why MDLs are "clogging the courts" is inaccurate, making their recommend solutions unhelpful at best. At worst, their recommendations seek to toss perfectly operational Federal Rules by the wayside.

a. Data Shows that the Increasing Number of Individual MDL Cases on the Federal Dockets Is Caused by Defendants' Actions, Not Unsubstantiated Claims.

In testimony before this committee, Deirdre Kole, assistant general counsel at Johnson and Johnson, stated that "the chief problem that [defendants] face in MDLs are the number of claims. . . ."[2] Without any supporting data, she testified that the number of claims filed is due to so-called bogus claims being filed by plaintiffs' lawyers. Specifically, she stated that "unprecedented numbers of unsubstantiated claims . . . are clogging the courts and overwhelming the MDLs."[3]

She is wrong, and there *is* data to support that. Bloomberg Law conducts a yearly MDL Litigation Statistics Series ("Bloomberg MDL Statistics"), which is a data-driven analysis of claims filed in the federal courts.[4] The Bloomberg MDL Statistics, combined with our experience, reveal a few key points:

1. **First**, the number of pending MDLs has steadily declined in the past decade,[5] and "only 1 in 10 pending MDL cases involve more than 1,000 actions."[6]

[2] Kole Oral Testimony, Hearing of the Committee on Rules of Practice and Procedure at 251:24-252:1 (Oct. 16, 2023), available at www.uscourts.gov/file/76799/download.
[3] *Id.* at 237:1-2.
[4] Exhibit A, Bloomberg MDL Statistics.
[5] *Id.* at 11.
[6] *Id.* at 7.

2. **Second**, although the number of pending *individual* cases within MDLs has increased in recent years, "the numbers overall likely reflect the *length of time* that complex MDL actions pend, rather than a swell in MDL filings."[7] This is unsurprising since defendants are finding new and creative ways to prolong litigation and avoid settlement.

3. **Third**, the reason that individual MDL cases currently comprise more than 50% of the federal case-load is because of a single case – 3M. In this litigation, repeated plaintiff verdicts were rendered in favor of veterans who were injured during their service by a product that a company knew to be defective.[8] The 3M case comprises hundreds of thousands of individual cases and nearly 40% of the federal docket.[9]

4. **Finally**, the vast majority of 3M claims are valid and are being settled. Plaintiffs' leadership, of which I was a part, has already testified that over 300,000 claims were identified in a census and over 270,000 of those claims have been qualified for settlement (by identifying use of the product and injury).[10] Of claims that did fall out of the census, it is entirely *normal* for claims to fall out of a census, as unfiled claims are still being investigated by the plaintiffs' firms. Moreover, many who fell out of the settlement were clients who hired more than one lawyer.[11]

In sum, the solution to reduce the federal MDL caseload is not for plaintiffs' counsel to help fewer injured people; it is for corporations to injure fewer people, and to stop the procedural gamesmanship of the MDL system that keeps MDLs running longer.

b. The Suggestions of Mandatory Early Verification and Mandatory Sanctions Ignore the Federal Rules Already in Place.

Knowing full well that defendants may be the ones with proof of product use, the corporate bar has suggested that plaintiffs should have to produce proof of use within 30 days of filing a complaint – which can be impossible.[12] For example, in the NEC MDL, premature babies developed necrotizing enterocolitis when they were fed at the hospital with contaminated baby formula manufactured by Mead Johnson. Evidence that Mead's contaminated formula was used by a particular baby at the hospital was often not found in the baby's medical records. But Mead had exclusive contracts with some hospitals during certain timeframes, and so Mead was the gatekeeper of proof of use. The NEC case does not stand alone. For example, other lawyers have already testified to this committee that the Hair Relaxer MDL and the Paraquat MDL faced similar issues.[13]

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[7] *Id.* at 5 (emphasis added).
[8] *Id.*at 6, 18.
[9] *Id.*
[10] Hoekstra Testimony Outline & Comment, Hearing of the Committee on Rules of Practice and Procedure at 103-04 of 198 (Jan. 16, 2024), available at www.uscourts.gov/file/77279/download.
[11] Hoekstra Oral Testimony, Hearing of the Committee on Rules of Practice and Procedure (Jan. 16, 2024), transcript in production.
[12] Exhibit B, NEC Order.
[13] Debrosse Testimony Outline & Comment, Hearing of the Committee on Rules of Practice and Procedure at 53 of 198 (Jan. 16, 2024), available at www.uscourts.gov/file/77279/download.

Cases like these are the very reason why the Federal Rules of Civil Procedure *do not* require a plaintiff to prove their case upon filing a complaint. Discovery is for finding proof; complaints need only give fair notice of a plausible claim based on information and belief. Obviously, in cases like NEC, mandatory sanctions for failure to provide proof of use would be unwarranted and unjust since Rule 11 already provides a mechanism for sanctions in appropriate cases. It is the defense bar, not the plaintiffs' bar that wants to ignore the Federal Rules.

Finally, even if defendants were correct about the filing of bogus claims – and we have shown that they are not – what problem would these measures allegedly solve? What do defendants actually have to do to "defend" against a so-called bogus claim that they are not already doing for the MDL? Not much. Their proposal is a solution in search of a problem.

III. CONCLUSION

Again, thank you to the committee for taking the time to review my testimony. With the above changes to Proposed Rule 16.1, it can become a useful tool for the courts, the parties, and their counsel, promoting both efficiency and justice.

Sincerely,

W. Mark Lanier

Encl
WML/st
Cc: Dara Hegar
Sadie Turner

EXHIBIT A

2023 Litigation Statistics Series:

Multidistrict Litigation

Bloomberg Law

Introduction

This Litigation Statistics Series report provides data-driven analysis of claims filed in federal district courts that are considered for consolidation into multidistrict litigation (MDL), and of the MDL process itself.

Section 1 provides an **overview of multidistrict litigation** and the case management procedures, which are crucial for practitioners to understand as they navigate the MDL process. Data in this section include judicial analytics for the members of the panel overseeing the process.

Section 2 explores **MDLs' place in the courts**—that is, the prominence and impact of multidistrict litigation on federal dockets. Data in this section address not only the largest MDL cases, but the smaller ones that actually comprise the majority of MDLs' judicial footprint.

Section 3 dives into **trends in consolidation motions** with charts on the Judicial Panel on Multidistrict Litigation's (JPML's) record in granting and denying filers' motions for consolidation of cases into MDLs. Results are broken down by who files the motions: plaintiffs or defendants.

Section 4 turns to the courts to illustrate **trends in pending dockets** with several charts depicting how many cases are currently in the system, which districts are seeing the most transfers, and which types of cases are dominating the MDL landscape.

Section 5 spotlights **MDLs' biggest cases**, from those commanding the most attention due to their sheer size to one with the potential to result in an even bigger settlement.

Finally, Section 6 shifts the focus from currently pending cases to **potential changes and next steps** for MDL in the future—in particular, a new judicial rule in the works that could alter the way practitioners approach the MDL process.

Methodology

The information in this report comes from multiple public and Bloomberg Law resources. These include search results from **Bloomberg Law Dockets**, as of Aug. 15, 2023, and Bloomberg Law's **Litigation Analytics** tool, as of Aug. 31, 2023.

The report primarily draws on publicly available statistical and case management data from the US federal court system. Many graphics reflect data on pending multidistrict litigation cases that are regularly maintained and published by the Judicial Panel on Multidistrict Litigation, updated as of Aug. 15, 2023, and on annual statistical data from the JPML.

The report also relies on case management and judicial load statistics maintained and published by the Administrative Office of the United States Courts.

Bloomberg Law's Dockets obtains data from PACER. As court dockets may be updated after the data collection for the report, some filings may not be fully represented in the analysis, including case dismissals and transfers. PACER includes duplicate entries in certain cases, such as intra-district transfers or changes in judge assignment. We have sought to eliminate duplicates from the tabulations.

Bloomberg Law's Litigation Analytics tool provides data-driven analytical information about federal district courts, federal district court judges, companies, law firms, and lawyers. Appeal outcomes for judges are drawn from Bloomberg Law's opinions database to derive the analytics, not the entire universe of motions or appeals that may have been filed. Thus, the analytics are a good indicator of how often a judge is affirmed in relation to other judges, but they may not include the entire universe of the judge's decisions or appeals.

Section 1

Overview of Multidistrict Litigation

Multidistrict litigation currently constitutes about a third of all pending cases in the federal system, and fully half of all pending civil cases.

But the great bulk of these actions are wrapped up into a few large products liability multidistrict cases, or MDLs. And the big-headline numbers involved with these cases conceal a general downward trend in parties seeking consolidation and in new MDLs being consolidated.

Most MDLs (74%) contain fewer than 100 actions, and almost 30% of MDL dockets contain 10 actions or fewer. In contrast, 97% of the consolidated actions currently pending can be found in only the largest 10% of MDL dockets.

In short, the MDL ecosystem contains a couple of whales and a lot of minnows. But the reach and importance of these actions—both the large ones and the small—are substantial.

For a huge number of litigants, this specialized pretrial procedure will be their only experience with the American judicial system and will determine to a large degree whether they are compensated for their alleged loss.

For many defendants, of course, MDL will manage the critical pre-trial phase of litigation against them, and likely will be where viability and settlement value of claims are determined.

Indeed, JPML statistics indicate that only about 1.5% of MDL actions get remanded for trial.

That makes the management of MDL proceedings the most important feature of products liability litigation in federal court, and critical to understanding the litigation outcomes in several other types of litigation subject to consolidation.

Procedural Framework

Multidistrict litigation consolidates or coordinates lawsuits that have been filed in disparate federal courts, and share a factual basis, before a single court. Pursuant to **28 U.S.C. § 1407**, that court—the "transferee court"—handles pretrial proceedings in all of the consolidated actions, and will remand each case back to the federal court where it originated for trial.

Panel Profile: Karen K. Caldwell, Chair

Judge Caldwell serves in the US District Court for the **Eastern District of Kentucky**. She was nominated by President George W. Bush on Sept. 4, 2001 to fill a seat vacated by Henry Wilhoit Jr. Caldwell was confirmed by the US Senate on Oct. 23, 2001, and received her commission the following day. She **served** as chief judge of the district from 2012 to 2019.

Judge Caldwell was born in 1957 in Stanford, KY. She received a bachelor's degree from Transylvania University in 1977, and a JD from the University of Kentucky College of Law in 1980. She spent the bulk of her career in private practice before assuming the bench, but served as US attorney for the Eastern District of Kentucky, 1991-1993.

She was appointed to the JPML in October 2018, and has served as the chair since 2019.

She announced on June 22, 2022, that she will take senior status at an unspecified time.

Consolidation is decided and transfer initiated by the US Judicial Panel on Multidistrict Litigation.

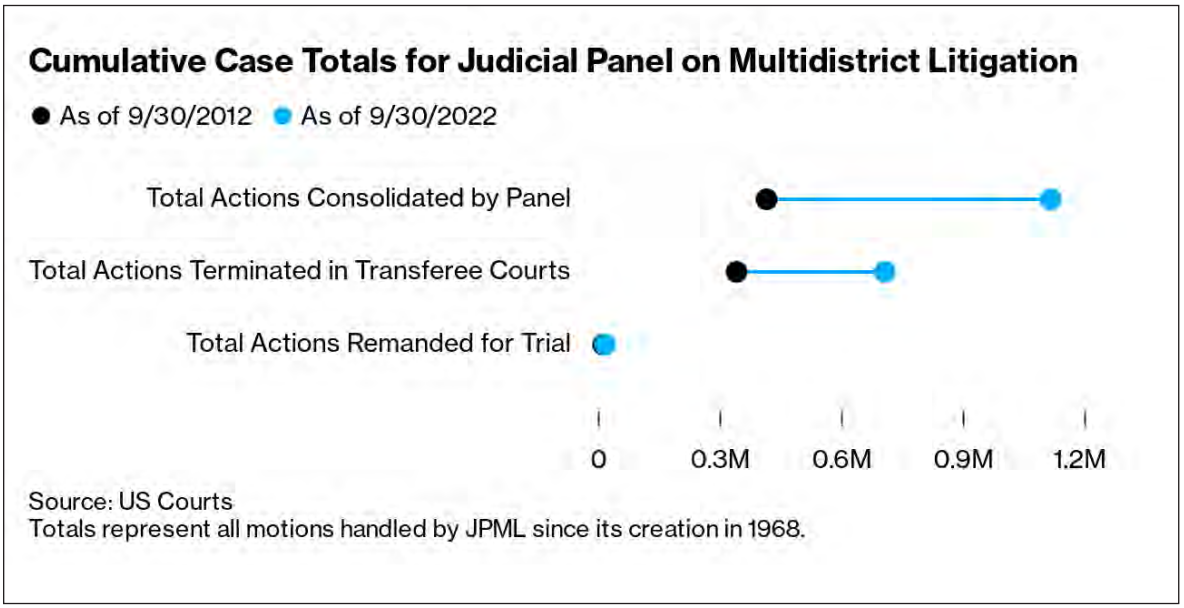
The JPML may consolidate actions on its own initiative or on the motion of any party to an action. Upon a determination that actions filed in different federal districts share common facts, the JPML **determines** whether consolidation would promote convenience and efficiency. When the panel considers consolidation, it gives notice to all parties in the affected actions and provides the time and date for a hearing that will consider whether consolidation is appropriate.

The panel meets **six times** per year to hear motions to consolidate, and produces **statistics** regarding pending actions on a rolling basis during the year. It also produces annual **statistical summaries** of its decisions.

Since the panel was created in 1968, it has consolidated more than 1.1 million separate actions into MDLs, according to US Courts data. That cumulative total has more than doubled in just the past 10 years—mostly due to the presence of the "whales" dominating multidistrict litigation.

The total number of actions terminated by transferee courts has more than doubled during that time as well, from just under 350,000 to more than 707,000 terminations.

The number of actions remanded for trial, on the other hand, has increased only slightly, from 13,065 in 2012 to 17,374 in 2022.



Once the JPML makes a decision, there is limited ability to appeal from that order under **28 U.S.C. 1407(e)**. If the panel declines to consolidate, there is no appeal from that decision. Appeal from a consolidation order is only by means of extraordinary writ pursuant to **28 U.S.C. 1651**.

Panel Members

The JPML is composed of seven sitting federal judges, who are appointed to serve on the panel by the Chief Justice of the United States. The multidistrict litigation statute provides that no two panel members may be from the same federal judicial circuit.

The current panel members have all been appointed by Chief Justice John Roberts between October 2018 and October 2021.

Judicial Panel on Multidistrict Litigation: Current Members

Member	On Panel Since	Federal District	On Bench Since	Nominated By	Affirm Rate on Appeal*	Product Liability Cases 2007-13
Chair Karen K. Caldwell	2018	E.D. Ky.	2001	G.W. Bush	74.4%	89
Nathaniel M. Gorton	2018	D. Mass.	1992	G.H.W. Bush	73.3%	87
Matthew F. Kennelly	2019	N.D. Ill.	1999	Clinton	68.5%	2,079
David C. Norton	2019	D.S.C.	1990	G.H.W. Bush	77%	457
Roger T. Benitez	2019	S.D. Cal.	2004	G.W. Bush	60.5%	34
Dale A. Kimball	2020	D. Utah	1997	Clinton	62.5%	75
Madeline Cox Arleo	2021	D.N.J.	2014	Obama	88.1%	59

Source: JPML
*Affirm rates do not include opinions that were affirmed in part and reversed in part.

Further details about the panel's members are featured in boxes throughout this report.

MDLs and Class Actions

An MDL is not the same as a class action, although it may contain class actions if the presiding judge certifies a class among the MDL plaintiffs. Still, the two procedures serve different purposes and adhere to different rules.

To be certified as a class action pursuant to **Federal Rule of Civil Procedure 23**, a class' claims and injuries must be very similar, and issues common among the class members must predominate over individual ones. MDL plaintiffs, on the other hand, need not have the same claims, and may be suing for various injuries under different laws.

Federal courts have tightened restrictions on class actions during the past 20 years, leading (according to some scholars) to an increased use of MDLs for mass torts. It's a trend worth watching in federal litigation.

Idiosyncratic Management

Despite their prominence in the federal court system, MDLs aren't currently governed by the same rules and procedures that govern other federal civil suits.

Once consolidated by the JPML, actions are subject to management that transferee court judges often improvise to fit the circumstances of the case. Features that distinguish MDL management include:

- Cases may or may not involve a consolidated complaint by groups of plaintiffs with similar claims.
- Cases may or may not have assigned lead or liaison counsel coordinating among groups of plaintiffs and/or defendants.
- Cases may or may not be designated for trial as "bellwether" cases of specific types to provide both sides with a better idea of the settlement potential and value of claims.
- Cases may or may not involve filing of master complaints.
- Discovery may be uniform among various plaintiffs (e.g., utilizing form discovery or fact sheets).
- Cases may be bifurcated into dual management streams for discovery/motions practice and bellwether trials on the one hand, and settlement discussions (possibly under distinct leadership) on the other.

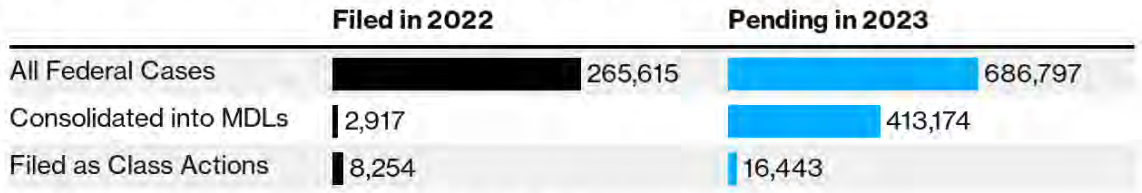
Judges in transferee courts have great latitude in establishing procedures to fit what they consider to be the needs of each case.

Section 2

MDLs' Place in The Courts

As of Aug 15, 2023, there were 413,174 actions pending in 174 open multidistrict litigation matters in the US federal district court system, according to JPML data. (For comparison, Bloomberg Law dockets show that there were 16,443 open class actions in federal court on that date.)

Federal Docket Footprint of MDLs and Class Actions



Source: US Courts, JPML, Bloomberg Law dockets.
2023 totals for pending MDLs and class actions are as of Aug. 15, 2023. The 2023 total for all pending cases is as of March 31, 2023. Criminal cases are not included in the 2022 filing total for all federal cases, but are included in the 2023 pending total.

Because reporting periods from different organizations don't line up, it's difficult to compare those numbers to those reported by federal courts overall. But the US Courts reports that 686,797 cases of all types were pending in federal court as of March 31, 2023. So, it's safe to estimate that roughly 60% of all pending cases in federal courts are wrapped up in MDLs.

But the numbers overall likely reflect the length of time that complex MDL actions pend, rather than a swell in MDL filings.

A total of 265,615 civil cases were filed in US district courts during 2022. In that same year, the JPML granted just 22 motions for consolidation, which resulted in a total of 2,917 actions being consolidated during the year. (Meanwhile, 8,254 federal class actions were filed in 2022.)

That means that only about 1% of all civil actions that were filed in federal court during 2022 were consolidated into MDLs. So how can MDLs be accounting for the majority of all pending actions at the same time?

The answer can be found in a single case.

Panel Profile: Nathaniel M. Gorton

Judge Gorton serves in the US District Court for the District of Massachusetts. George H.W. Bush nominated Gorton on April 28, 1992, to a new seat. The Senate confirmed him on Sept. 23, 1992, and he received his commission the following day.

Judge Gorton was born in 1938 in Evanston, Ill. He earned an A.B. from Dartmouth College in 1960, and his LL.B. from Columbia Law School in 1966. Judge Gorton spent more than 25 years in private practice in Boston before assuming the bench.

Judge Gorton has served on the JPML since October 2018.

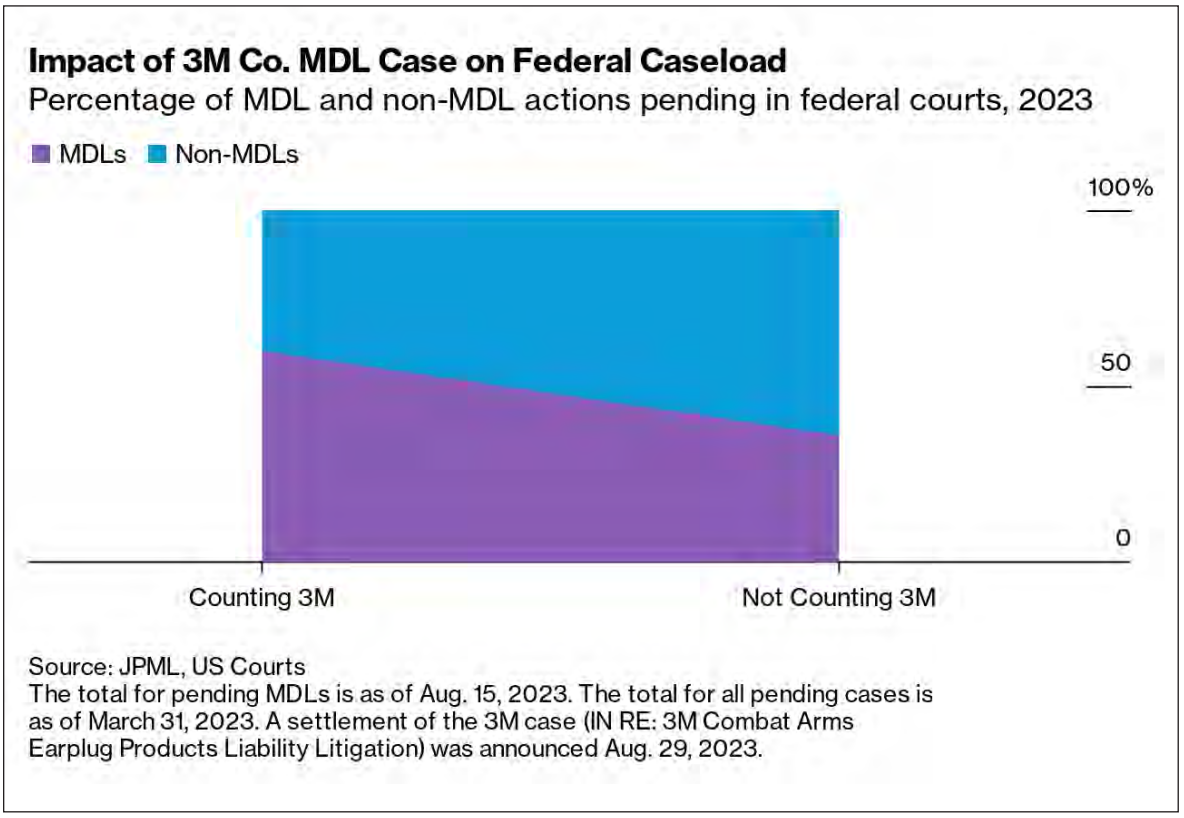
The Impact of 3M

Like a big meal moving slowly through the digestive tract of a snake, the biggest MDL ever consolidated is working its way through the US court system: a 2019 **case** alleging that combat ear plugs manufactured by a corporate subsidiary of **3M Co.** failed to protect service members' hearing.

The 3M combat ear plugs case is 10 times larger than the next-biggest MDL, comprising hundreds of thousands of actions—many involving multiple plaintiffs. Its size skews statistics and makes it more difficult to get an accurate picture of what's happening in MDLs more broadly.

As the 3M case ballooned, for example, MDLs made up around 70% of all pending federal civil cases at the end of fiscal year 2021. But at the end of 2022, as the number of actions in 3M dwindled, MDLs accounted for only around half of all cases.

Even in 2023, if the 3M ear plugs case totals were removed from the docket counts, then the total number of MDL actions pending as of Aug. 15 would amount to only about 36% of all pending federal cases, based on the official US Courts totals as of March 31.



Further details about the 3M ear plugs case, and its August 2023 settlement with plaintiffs, can be found in a case spotlight later in this report.

Smaller MDLs Are the Rule, Not the Exception

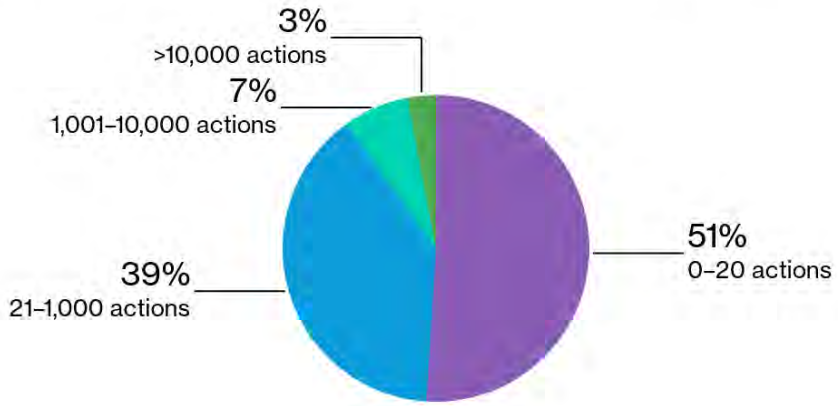
As the 3M case winds down, the actions that make up MDLs should comprise a markedly smaller share of overall federal litigation.

That's because, looking past the dominant presence of the 3M case, the general picture of

MDL activity appears to be a conservative one. Beyond the massive products liability cases that dominate the public's attention (and will be discussed later in this report), the fact is that just over 50% of the 174 consolidated MDL cases that are pending as of Aug. 15 are quite small, containing fewer than 20 actions.

At the other end of the spectrum, only 1 in 10 pending MDL cases involve more than 1,000 actions. (The remaining 39% of cases have between 21 and 1,000 actions pending.)

Size of Consolidated MDL Cases Pending in Federal Court
Number of pending actions per MDL case, as of 8/15/2023



Source: JPML

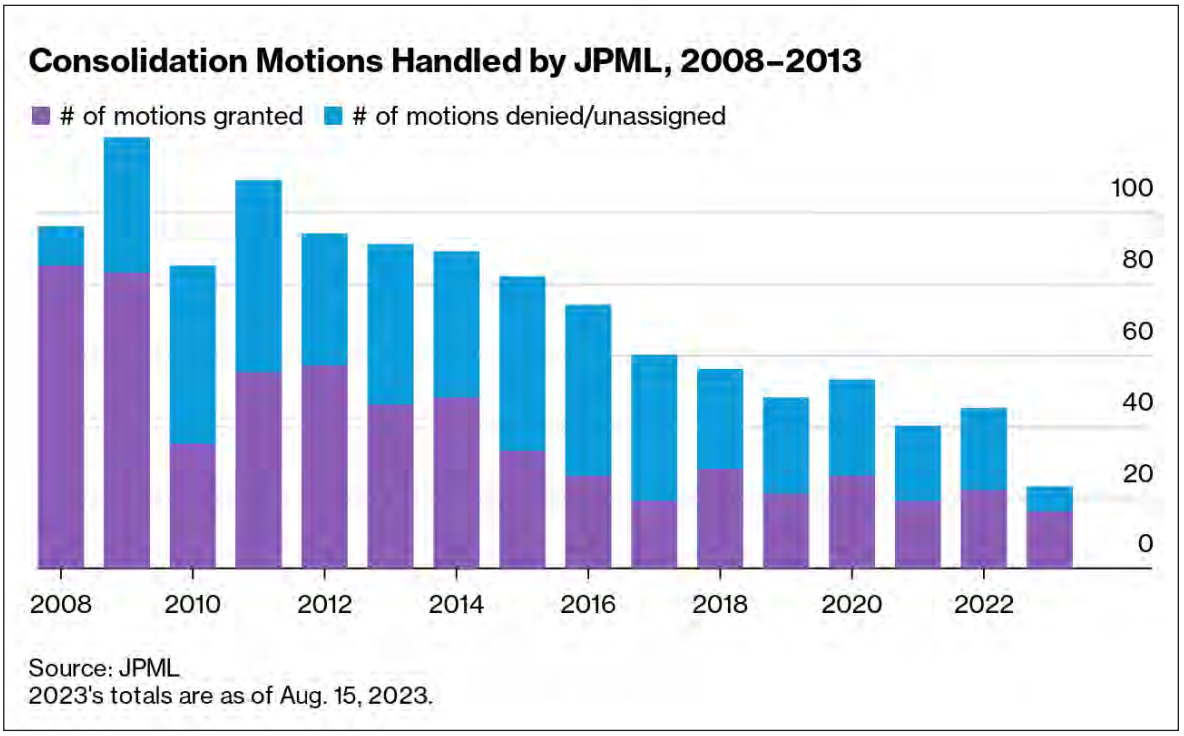
This array of case sizes suggests that MDLs are not entirely about "mass" litigation. The general public's idea of MDLs may be a picture of the giant products liability cases at the top of the size spectrum, but the vast majority of MDLs are smaller dockets.

Section 3

Trends in Consolidation Motions

The JPML granted 22 of the 45 consolidation motions it considered in 2022. This annual total is low compared to consolidations each year during the past decade, and is part of a general downward trend lower over the past 15 years.

In fact, the JPML handled fewer than half as many motions for certification of an MDL in 2022 (45) as it did 10 years earlier (94 in 2012).



So far in 2023, 23 motions to consolidate have been considered by the JPML, and the panel has granted 16 of those motions and denied seven of them.

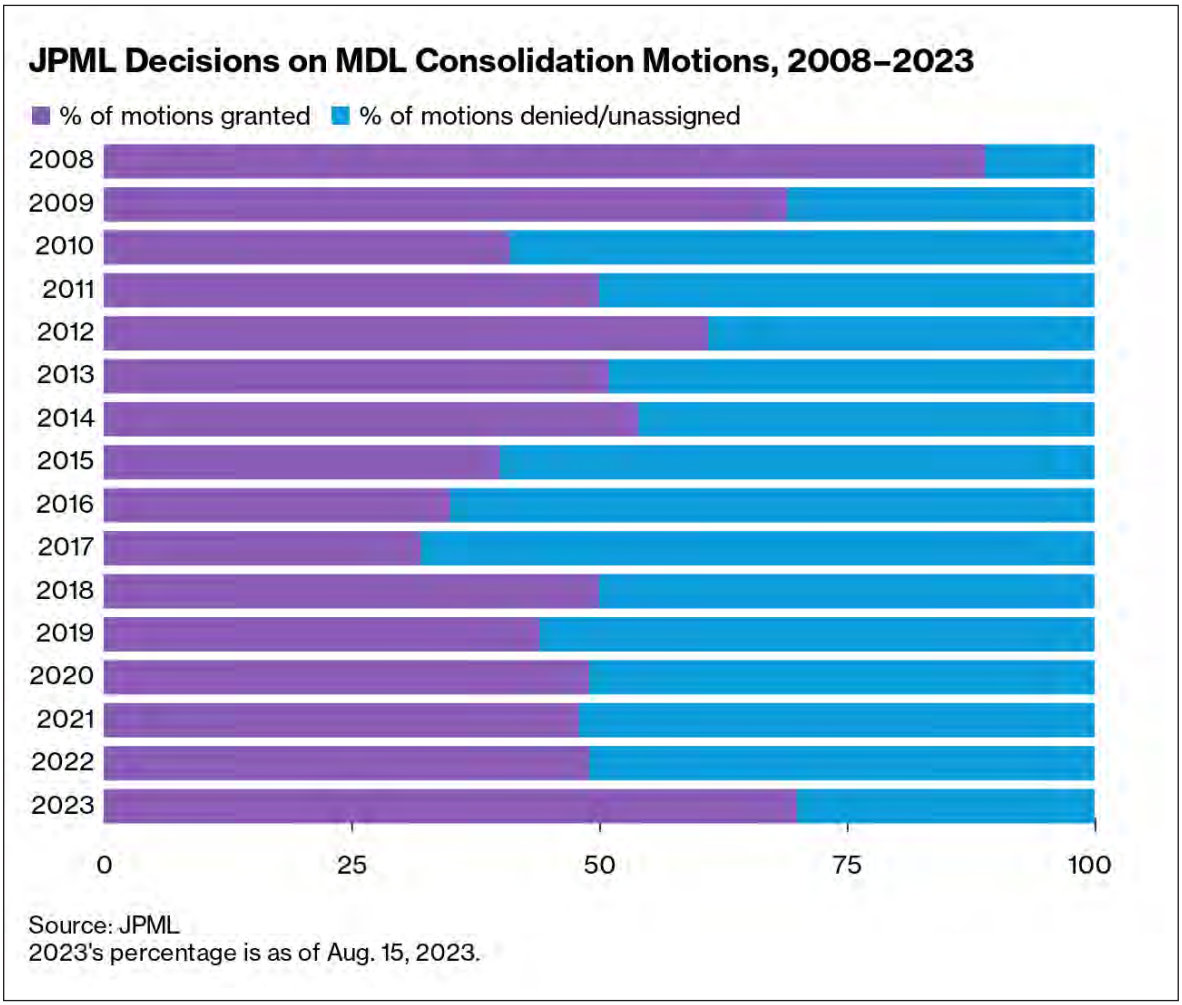
There are two more JPML hearings scheduled for 2023 (September and December). Based on the number of MDLs consolidated to date, as well as pending motions, the JPML in 2023 is on pace to once again consolidate a small number of cases, regardless of whether it finishes this year with the same or a slightly lower number of granted motions as compared to 2022.

Success Rates of JPML Filers

The 22 motions granted in 2022 constituted almost half of the 45 motions filed with the JPML that year.

Over most of the past 15 years, the percentage of motions to consolidate filed with the JPML that are ultimately granted has hovered around 50%. Indeed, the annual mean over the entire 15-year period is 50.66%.

But there was considerable variation over that period. The lowest percentage success rate for motions to consolidate occurred in 2017, when only 19 of 60 motions (32%) were granted. The highest percentage granted occurred in 2008, when the panel granted a whopping 89% of motions to consolidate (85 of 96 filed).



So far, 2023 is shaping up to be the most successful year for filers in more than a decade. The JPML has granted 16 of the 23 motions it has adjudicated this year, as of Aug. 15.

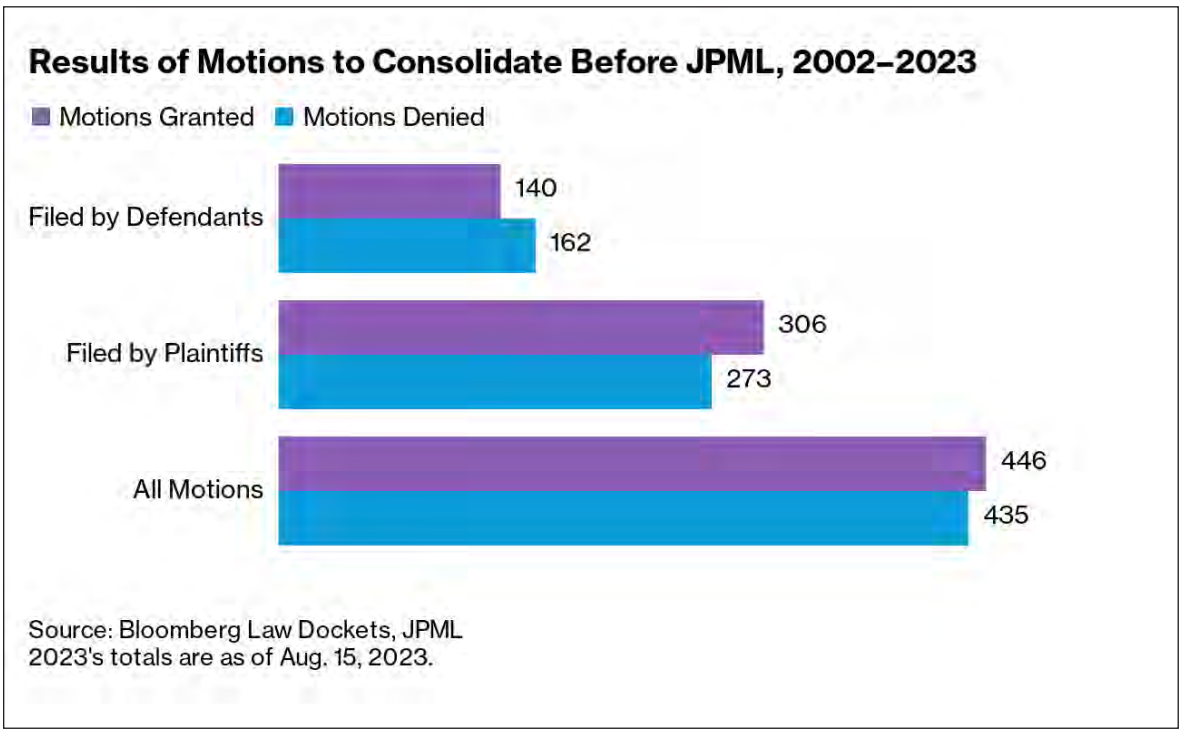
That's a 69.5% success rate for motions so far in 2023, but performance of motions heard in the remaining two JPML hearing dates of the year could alter that outcome.

Still, if the current pace holds up, this will be the first year since 2014 that the panel would have granted more motions than it denied.

Plaintiff Motions vs. Defendant Motions

Which party filed a motion to consolidate—the plaintiff or the defendant—appears to play a role in its outcome.

Among the JPML dockets in Bloomberg Law, spanning 2002 to the present, plaintiffs asked to consolidate cases at nearly twice the rate that defendants did (579 times to defendants' 302 times). Plaintiffs' motions to consolidate were granted 53% of the time, while defendants' motions were granted about 46% of the time.



In other words, the plaintiffs have been, on balance, successful in their consolidation motions before the JPML, while defendants have a losing record. But the numerical difference in their outcomes is only 7 percentage points.

Overall, regardless of who asked for consolidation, the JPML has been remarkably even-handed in its decision-making. Since the beginning of 2002, 446 (50.6%) of the 881 motions for consolidation have been granted, while 435 have been denied.

Looking only at 2023 so far (as of Aug. 15), plaintiffs have had 12 of 17 motions granted, and defendants have had four of six motions granted. So the success rate for each side in 2023 (70% for plaintiffs, and 66% for defendants) is running better than it generally has over the past 20 years.

Panel Profile: Matthew F. Kennelly

Judge Kennelly serves in the US District Court for the Northern District of Illinois. William J. Clinton nominated Kennelly on Jan. 26, 1999, to a seat vacated by Paul E. Plunkett. The Senate confirmed him on April 15, 1999, and he received his commission on April 22, 1999 Judge Kennelly assumed senior status on Oct. 7, 2021.

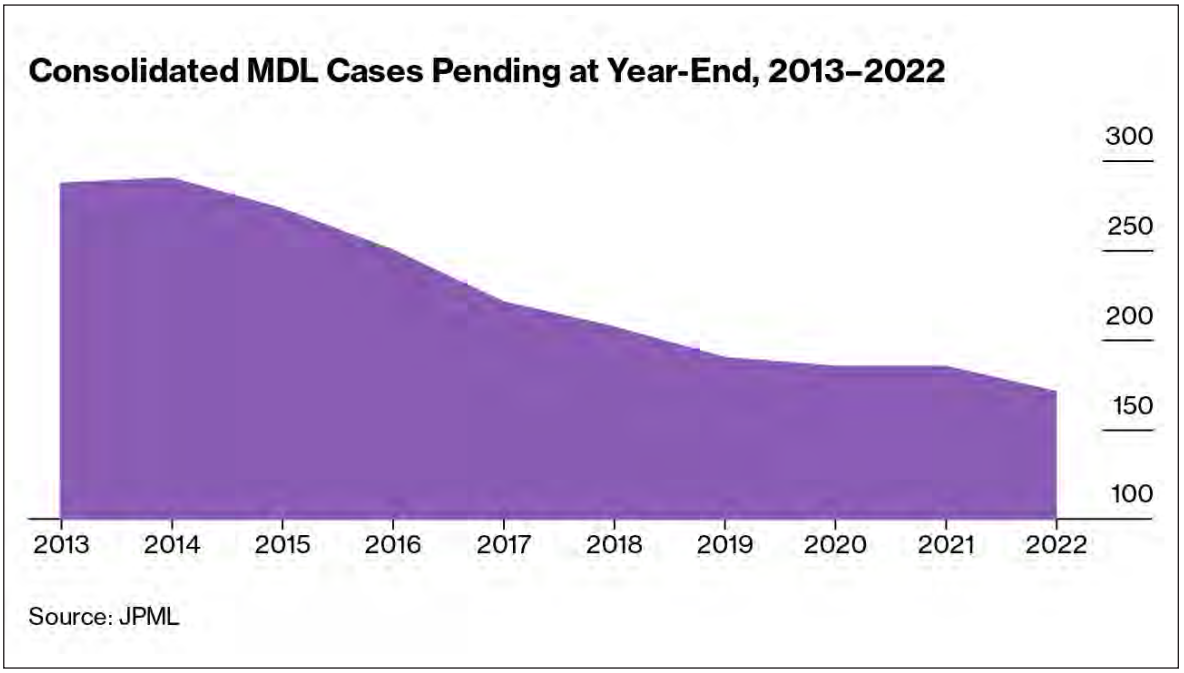
Born 1956 in Marion, Ind., Kennelly received a B.A. from the University of Notre Dame in 1978, and earned his J.D. from Harvard Law School in 1981. He clerked for Judge Prentice Marshall in the N.D. Ill. for two years, and otherwise spent his professional life, before assuming the bench, in private practice in Chicago.

Judge Kennelly joined the JPML in 2019.

Section 4

Trends in Pending Dockets

Overall, the number of consolidated MDL cases that are pending in federal courts has steadily declined in the past decade, from 287 MDLs pending at the end of 2013 to 171 pending at the end of 2022. (As of Aug. 15, 2023, there are 174 MDLs pending.)



2022 marks the eighth straight year that the federal court system has seen a decline in pending MDL cases.

As for 2023, there have been only 14 MDL dockets terminated as of Aug. 15, according to JPML records.

The longest-pending of these cases was consolidated and transferred in 2009, while only one case on the list was transferred as recently as 2022.

Panel Profile: David C. Norton

Judge Norton serves in the US District Court for the District of South Carolina. George H.W. Bush nominated Norton on April 18, 1990, to a seat vacated by Solomon Blatt, Jr. The Senate confirmed him on June 28, 1990, and he received his commission on July 12, 1990. He served as chief judge of the district between 2007-2012.

Judge Norton was born in 1946 in Washington, D.C. He earned a B.A. from the University of the South in 1968, and a J.D. from the University of South Carolina School of Law in 1975. He served as assistant deputy solicitor for the Ninth Judicial Circuit of South Carolina from 1977 to 1980, and as a city attorney for Isle of Palms, South Carolina, in 1980-1985. The remainder of his professional career was spent in private practice in Charleston.

Judge Norton joined the JPML in October 2019.

MDLs Terminated in Transferee Courts in 2023

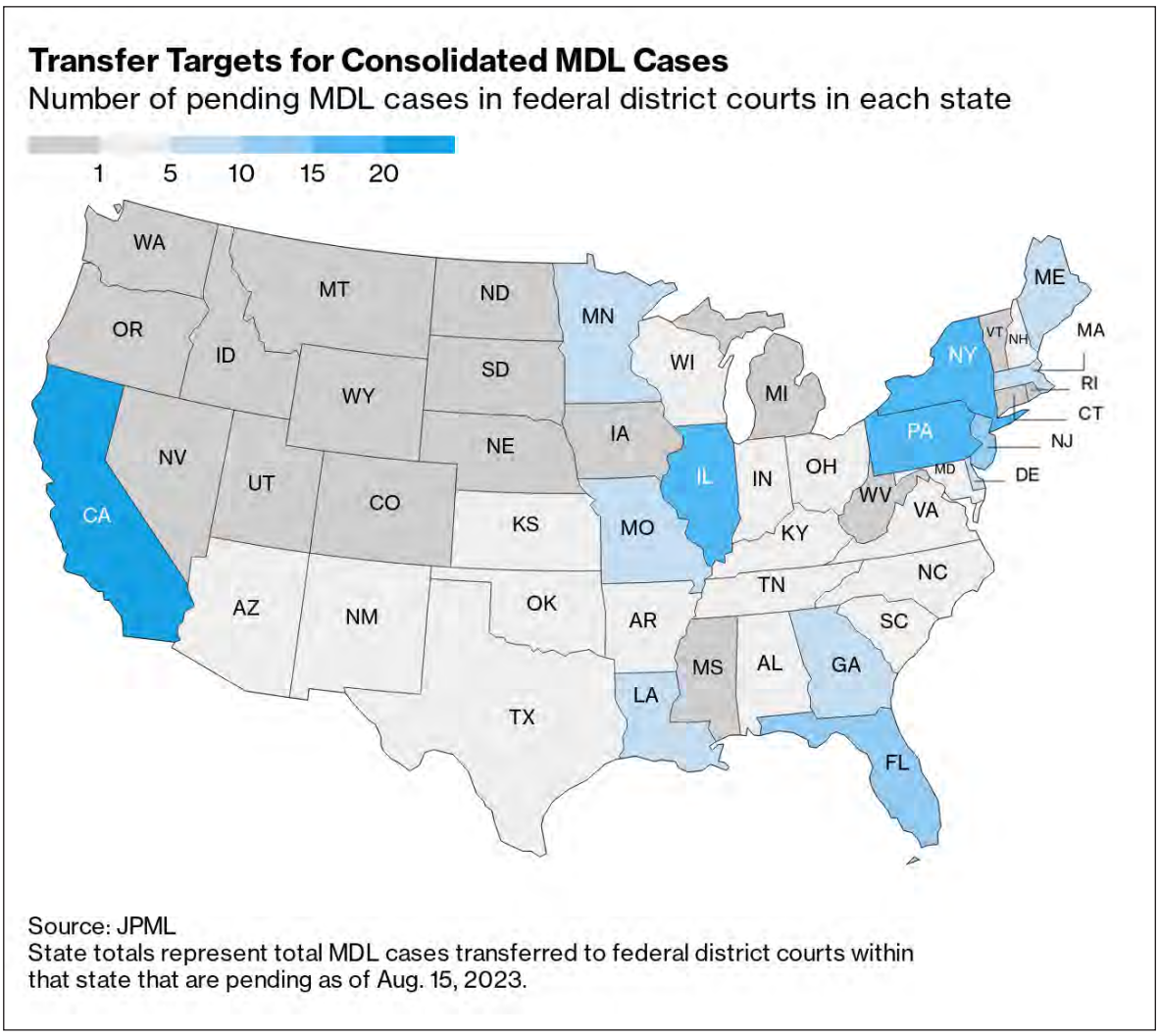
Docket	Case Type	District	Months to Close
IN RE: Blood Reagents	Antitrust	E.D. Pa.	164
IN RE: Portfolio Recovery Associates, LLC	TCPA (Miscellaneous)	S.D. Cal.	139
IN RE: Emerson Electric Co. Wet/Dry Vac	Sales Practices	E.D. Mo.	131
IN RE: Propecia (Finasteride)	Products Liability	E.D.N.Y.	129
IN RE: General Motors LLC Ignition Switch	Products Liability	S.D.N.Y.	109
IN RE: London Silver Fixing, Ltd.	Antitrust	S.D.N.Y.	105
IN RE: Invokana (Canagliflozin)	Products Liability	D.N.J.	76
IN RE: Capital One Consumer Data	Security Breach (Miscellaneous)	E.D. Va.	44
IN RE: Sitagliptin Phosphate ('708 & '921)	Intellectual Property	D. Del.	42
IN RE: Generali COVID-19 Travel Insurance	Miscellaneous	S.D.N.Y.	32
IN RE: Lowe's Companies, Inc.	Employment Practices	W.D.N.C.	29
IN RE: T-Mobile Customer Data	Security Breach (Miscellaneous)	W.D. Mo.	20
IN RE: Johnson & Johnson Sunscreen	Sales Practices/ Products Liability	S.D. Fla.	18
IN RE: Procter & Gamble Aerosol Products	Sales Practices/ Products Liability	S.D. Ohio	15

Source: JPML
List is current as of Aug. 15, 2023.

With 16 cases consolidated into MDLs by the JPML so far this year, and only 14 MDL cases fully resolved by transferee courts, 2023 could end as the first year since 2014 to register an uptick in the number of cases pending.

Where Cases Landed

The 174 consolidated cases that are currently pending in the federal court system are spread between 46 transferee districts and 145 judges (including chief judges of districts, district judges, and senior judges).



Two federal district courts are currently handling the largest number of cases: There are 17 pending MDLs in the US District Court for the **Northern District of Illinois**, and the same number pending in the US District Court for the **Northern District of California**.

However, Northern California may have the heavier workload: The 17 cases pending in that district comprise a total of 10,686 pending actions, while the number of pending actions in Northern Illinois is a relatively more manageable 1,383.

Other big targets for transferee cases are the **Southern District of New York** (13 cases, containing 1,330 pending actions), and the **District of New Jersey** (12 cases and 55,011 pending actions). **The Southern District of Florida** and the **Eastern District of Pennsylvania** each have nine pending MDLs, with Southern Florida having the heavier caseload (15,053 total actions, compared to Eastern Pennsylvania's 1,417).

(Strictly in terms of total actions in MDL cases, the district with the most to manage is the **Northern District of Florida**, whose only case transferred by the JPML is the mammoth 3M docket and its 239,388 pending actions.)

A closer look at the six districts with the most pending MDLs reveals several similarities between them.

Caseload Profiles of Top MDL Transferee Courts

	MDL Dockets Pending	Total MDL Actions Pending	Number of Judgeships	Vacancies on Bench (x Months)	Avg. Time to Disposition (Months)	Pending Cases per Judgeship
N.D. Cal.	17	10,686	14	25.4	7.1	989
N.D. Ill.	17	1,383	22	24.5	6.5	564
S.D.N.Y.	13	1,330	28	21.0	6.0	626
D.N.J.	12	55,011	17	25.8	10.8	3,732
S.D. Fla.	9	15,053	18	35.5	0	313
E.D. Pa.	9	1,417	22	57.0	7.7	371
National Mean	**4**	**8,982**	**7**	**8.1**	**14.7**	**594**
National Median	**2**	**97**	**5**	**0**	**9.6**	**459**

Source: JPML, US Courts
MDL-specific data are current as of Aug. 15, 2023; general data cover the 12 months ending June 30, 2023. "Avg. Time to Disposition" is for all civil cases completed in that district. "Pending Cases per Judgeship" includes all pending civil and criminal cases. National means and medians are for only the 46 courts with pending MDLs; the other 48 courts were not included.

In a nutshell, the districts that receive the most MDLs appear to be those that are well-equipped to handle them. All six of the most popular transferee districts have the largest benches in their circuits, in terms of judgeships—except for New Jersey (which is second to fellow list-topper Southern New York) and Northern California (which is second to Central California, also a top-10 MDL transferee court). It makes sense for the JPML to send cases where there are judicial resources available to manage them.

In fact, these top six transferee districts include three of the four district courts with the highest judgeship totals in the country. And all six of them have benches much larger than the nationwide average of seven per district.

On the other hand, all six top MDL courts have experienced serious staffing issues in the past year, with bench vacancy rates much higher than the nationwide average of 8.1 months of total judge vacancies in the 12 months ending June 30, 2023. Most districts in the country, in fact, have had no months of vacancies in the past 12 months.

Five of the 10 districts in the federal court system with the highest vacancy rates are also among the top six transferee courts for MDL cases. (The sixth, Southern New York, is still in the top 20.) If these staffing problems persist, they might begin to impact the JPML's decisions on transfer.

Another common factor among the top transferee districts is speed. Among all federal court districts, the average number of months they take to get from filing to disposition of a civil case was 14.7 in the year ending June 30, 2023. But all of the top MDL courts have track records better

than that (not including an average of zero months for civil cases at Southern Florida, according to US Courts records).

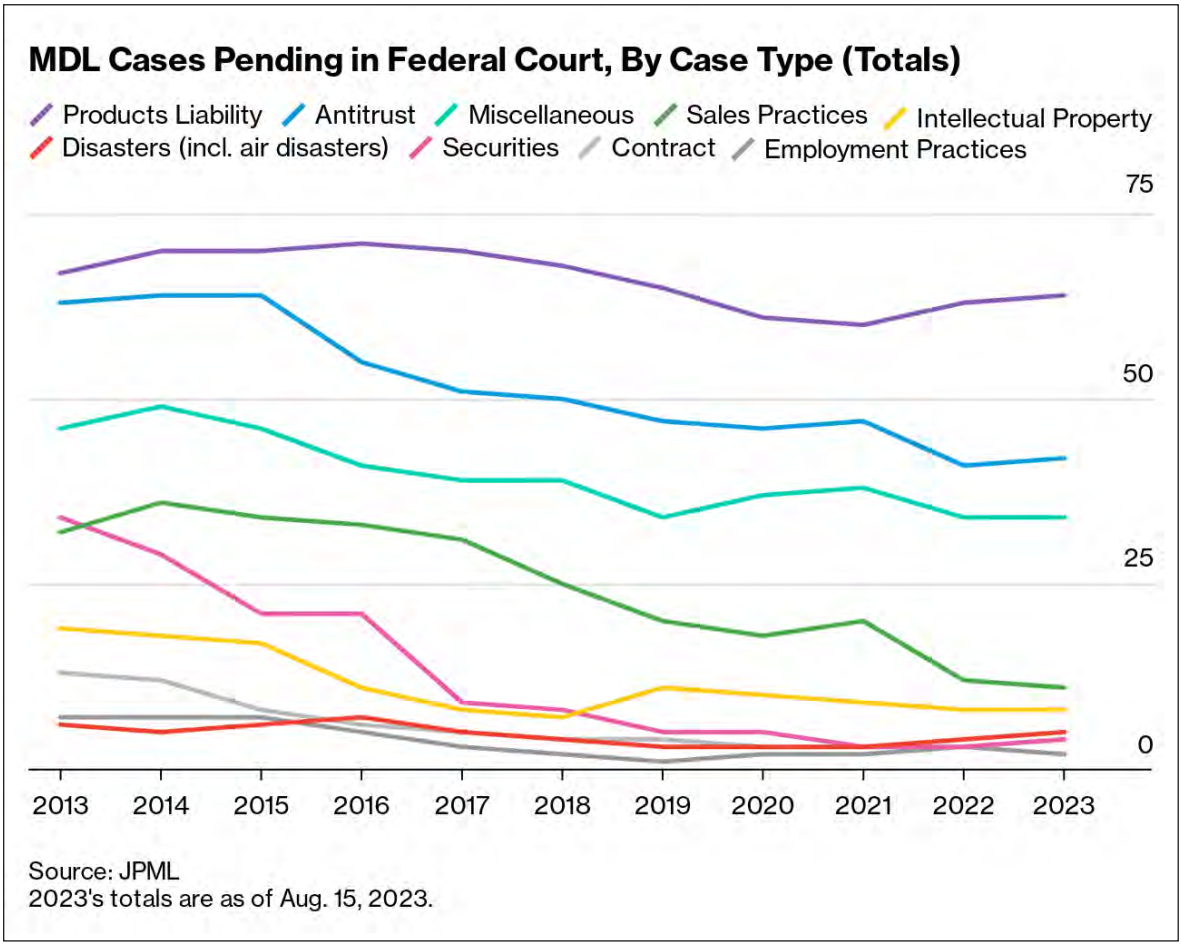
Finally, note that the top transferee districts do not have low per-judge caseloads in common. In fact, there is more variation among the top transferee districts' per-judge caseload than in the other metrics.

The number of pending cases (civil and criminal) per judgeship among the top six ranges from about 300 in Southern Florida to more than 3,000 in New Jersey. The nationwide average for this time period was 594 cases per judgeship. Again, if judicial staffing problems persist, caseloads may begin to factor more explicitly into transfer decisions.

One final note of interest about which cases are being sent where: They are not being sent to Texas. The four districts in Texas comprise a total of 52 judgeships—two of which have no vacancies at all—with case resolution speeds well below the nationwide average. And yet between all four districts, there are only three MDL dockets pending, totaling just 32 total actions.

Case Types of Pending MDLs

Products liability cases have consistently constituted the biggest single group of MDLs pending during the past decade. And that's not even taking into account the large number of actions that these types of cases typically involve. Looking only at pending dockets—not total actions—the number of pending products liability MDLs has still been remarkably stable during a decade that has seen most other types of MDLs fall off in popularity.



The total number of pending products liability MDLs has stayed between 60 and 71 each year since 2013 (it's currently at 66 cases this year), and the distance between the number of products liability MDLs and the next most common case type—antitrust—has never been higher than it is in 2023.

Speaking of antitrust cases, MDLs of this type are also not as plentiful as they used to be. The annual number of pending antitrust MDLs has fallen from 63 in 2013 to only 41 in 2022. (There are currently 42 pending antitrust MDLs in 2023.)

The fact is that every single case type has experienced a dropoff in the past decade, from a slight dip in pending products liability MDLs to steep plummets in sales practices and securities cases.

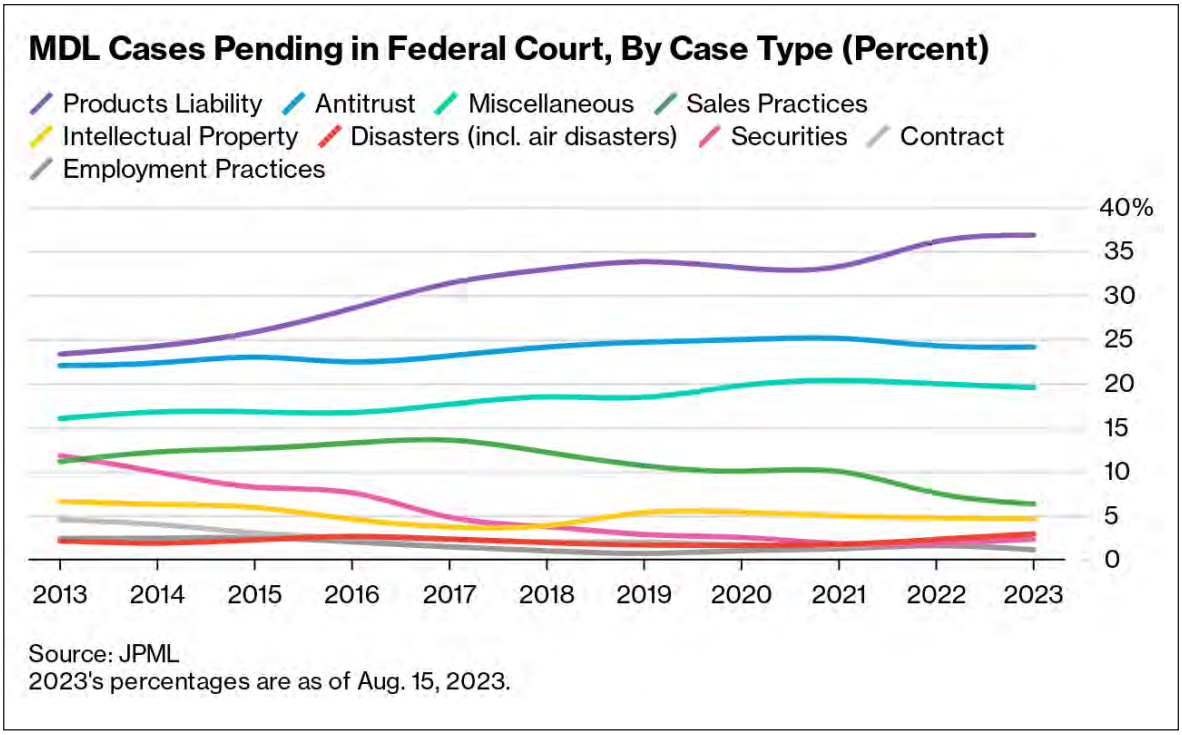
In the case of sales practices cases, many of them incorporate products liability claims and are therefore classified by the JPML as products liability cases.

But parties in securities disputes appear to have largely stopped seeking consolidation during the past decade. There are currently one-eighth as many securities MDLs pending as there were in 2013. In 2017, the number of pending securities MDLs dropped by half, and has been consistently in single digits since. In 2013, there were 34 securities MDLs pending; today there are four. One case, *IN RE: FTX Cryptocurrency Exchange Collapse Litigation* (**MDL 3076**), was consolidated in 2023; the second-newest securities MDL, *IN RE: SunEdison Inc. Securities Litigation* (**MDL 2742**), was consolidated in 2016.

There are about 40% as many IP MDLs pending as there were in 2013, but the current number of pending IP MDLs—eight—doesn't constitute the dramatic decrease over the past decade that other types have seen.

Sales practices MDLs have seen a steady decline during the past decade, from 32 pending actions in 2013 to 11 pending as of August 2023.

Percentage-wise, with so many types of MDLs in decline over the years, products liability cases have assumed a larger and larger share of the MDL docket and, due primarily to 3M's combat ear plugs case, of the federal docket overall.



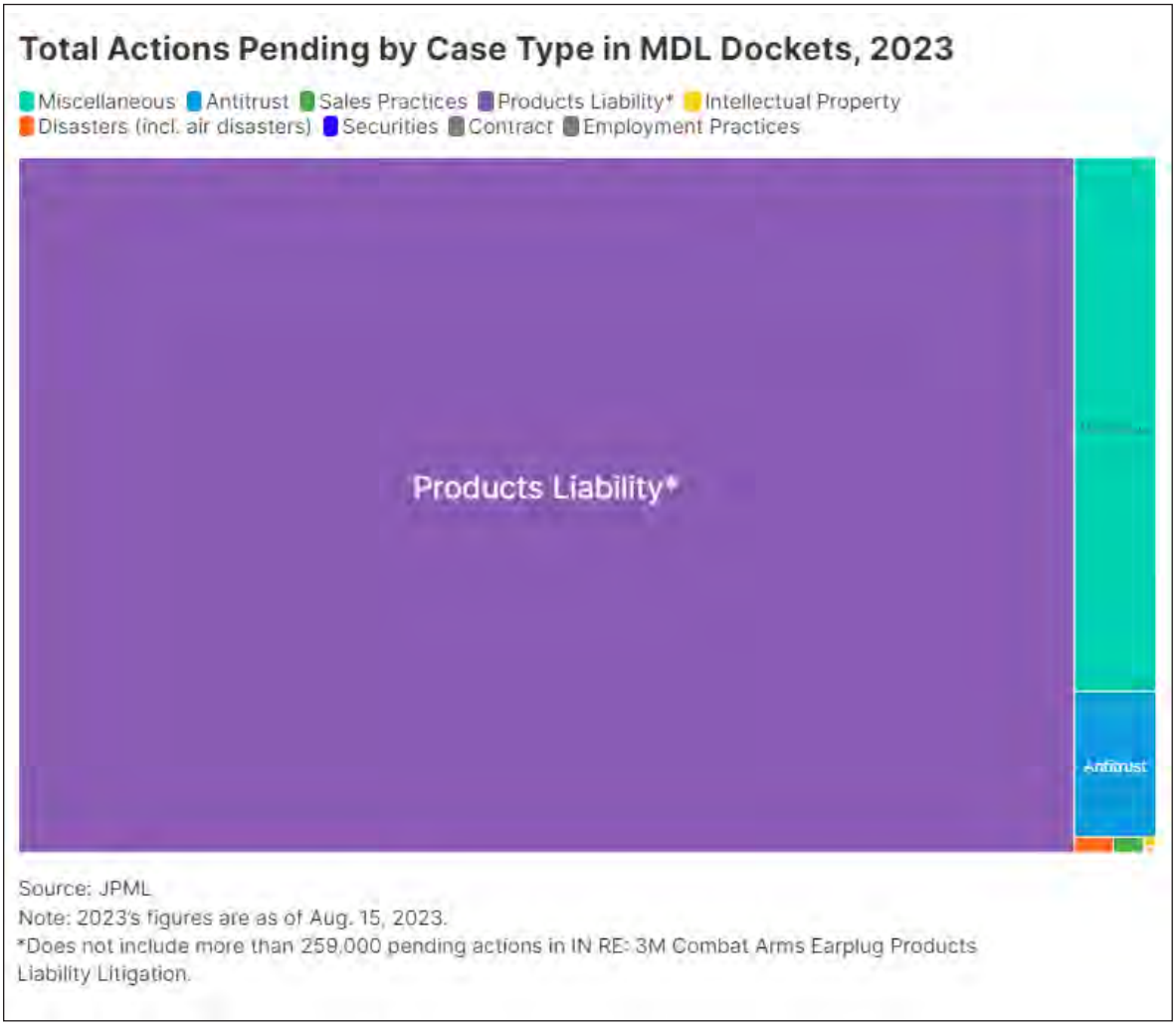
Since 2017, products liability has been the only case type with more than 30% of MDLs pending. (Between 2013 and 2016, roughly 25% of pending MDLs were classified as products liability actions.)

Products liability actions aren't unique in that regard: Despite drawing fewer cases, antitrust, miscellaneous, and disaster-related cases have maintained a relatively stable percentage of overall pending MDLs during the decade between 2013 and 2023.

Even so, there is clearly an imbalance between products liability litigation and all other types of consolidated cases.

Products liability's 66 pending cases make up more than one-third of the 174 consolidated cases still open in the courts (38%) as of Aug. 15, 2023. Antitrust is second, with almost one-quarter of all pending cases (24%), while cases categorized as "miscellaneous" account for one-fifth (20%). The remaining 18% of the dockets are shared by every other case type.

When all actions that are part of MDL cases are considered, the typically large size of products liability consolidations turns an imbalance into a colossal mismatch.



Pending actions in products liability cases currently account for more than 90% of all actions pending across the MDL landscape. And that is without counting the 259,000-plus actions that are wrapped up in the 3M ear plugs MDL, which, had they been added to this statistical analysis, would have rendered the graphic almost completely purple.

Section 5

Multidistrict Litigation's Biggest Cases

Product liability cases account for all 13 of the largest pending MDLs, and 20 of the largest 21. (The only outlier is *IN RE: National Prescription Opiate Litigation*, at No. 14, which is categorized as "miscellaneous.")

Below are details about the two largest pending product liability actions, as well as the largest pending actions in the miscellaneous, antitrust, and sales practices categories.

Largest MDL: 3M Combat Earplugs Litigation

IN RE: 3M Combat Arms Earplug Products Liability Litigation (**19-md-2885**), pending in the US District Court for the Northern District of Florida (**Judge M. Casey Rodgers** presiding), is the largest mass tort action in US history.

It has included up to 339,510 claimants historically and includes more than 259,000 actions as of Aug. 15, 2023. The cases comprising the 3M Combat Earplugs MDL constitute close to 40 percent of all pending cases in the federal court system in 2023.

Needless to say, 3M dwarfs all other MDLs.

Case History: Hundreds of thousands of former military personnel who were exposed to dangerous noise levels in combat or military training between 2003 and 2015 allege that **3M** earplugs failed to protect them and left them with hearing loss or tinnitus. The JPML consolidated the lawsuits in April 2019 before Judge Rodgers in Pensacola, Fla.

Judge Rodgers has appointed "bellwether" cases to help the parties establish a realistic idea of the value of claims and the success of defenses. She **ordered** mediation in June 2022, after 16 bellwether trials and 19 verdicts, and again in September 2022. Mediation was **unsuccessful**.

The bellwether cases resulted in 10 wins for the plaintiffs and six for the defendants, with total **damages** against 3M (after post-trial reductions) of $260.2 million. Individual plaintiff awards in the bellwether cases in which plaintiffs prevailed ranged from $1 million to $15 million in compensatory damages. The highest punitive damages award was $72 million.

in July 2022, **Aearo Technologies** (the 3M subsidiary responsible for manufacturing the ear plugs at issue) voluntarily initiated chapter 11 proceedings under the US Bankruptcy Code seeking court supervision to establish a trust, funded by 3M, to satisfy all product claims. In July 2023, the Bankruptcy Court dismissed Aearo's bankruptcy case, holding that the fully funded trust means Aearo does not face an imminent threat of failure. 3M has appealed that decision to the US Court of Appeals for the Seventh Circuit.

3M also has **appeals** of plaintiffs' verdicts in the bellwether cases pending in the US Court of Appeals for the Eleventh Circuit. In May 2023, Rodgers identified 31 cases that will serve as the first actions remanded from the MDL to their original filing courts for trial.

Settlement: On Aug. 29, 2023, 3M **announced** that it has reached a universal **settlement** of the litigation. 3M will contribute a total amount of $6.01 billion between 2023 and 2029, which is structured under the settlement to include $5.01 billion in cash consideration and $1 billion in 3M common stock.

There are really three agreements:

- a master combat arms settlement **agreement**,
- a settlement **agreement** with the verdict plaintiffs (those who went to trial against 3M and obtained a favorable verdict–14 are listed in the agreement), and
- a settlement **agreement** with the "wave plaintiffs," which are cases that the court previously identified for pretrial discovery during the litigation. (While the "wave cases" are listed in the agreement, the list has been redacted in public filings.)

It's important to note that the actual amount, payment terms, and dates of payment are subject to satisfaction of participation thresholds claimants must meet, including that at least 98% of individuals with actual or potential litigation claims must have enrolled in the settlement and released all claims involving the subject combat earplugs. 3M can also walk away if the equity portion of the settlement runs into regulatory roadblocks, or if the stock fails to sell.

Based on deadlines set in the settlement agreement, the settlement would either succeed or fail at about the end of the first quarter or early second quarter of 2024.

A 98% participation rate is a fairly high threshold, particularly considering the numbers of individual plaintiffs involved in this "opt in" agreement.

It's difficult to gauge how that settlement, if completed, will rank among past MDL settlements because many are confidential, or comprised of contributions from many defendants that went to disparate plaintiffs groups. But compared to recent settlements in the ***IN RE: National Prescription Opiate Litigation*** MDL (around **$26 billion** total) and the ***IN RE: Roundup Products Liability Litigation*** MDL (roughly **$10 billion** to date, with an additional $1.5 billion set aside by Bayer for the litigation), the 3M settlement is not historically large.

Before the 3M case, the previous largest MDL in US history was *IN RE: Asbestos Products Litigation* (**MDL 875**), which included more than 3,000 actions when consolidated in the US District Court for the District of Pennsylvania in 1991. At its **height**, the case contained 192,100 actions.

Panel Profile: Roger Benitez

Judge Benitez serves on the US District Court for the **Southern District of California**. George W. Bush **nominated** Benitez to a new seat on May 1, 2003. Confirmed by the Senate on June 17, 2004, he received his commission on June 21, 2004.

Judge Benitez was born in 1950 in Havana, Cuba. He received his A.A. degree from Imperial Valley College in 1971, and his B.A. from San Diego State University in 1974. He earned a J.D. from Western State University College of Law (now the Thomas Jefferson School of Law) in 1978.

After almost 20 years in private practice in Imperial County, Cal., Judge Benitez served as a judge in the Superior Court of California in Imperial County from 1997 to 2001. He served as a magistrate judge in the US District Court for the Southern District of California in 2001-2004 before his appointment to the Article III bench.

He assumed senior status on Dec. 31, 2017, and has served on the JPML since October 2020.

Second-Largest Products Liability MDL: Johnson & Johnson Talcum Powder Litigation

IN RE: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation (**16-md-2738**) was consolidated in October 2016 in the US District Court for the District of New Jersey (**Judge Michael A. Shipp** presiding). From a height of 38,644 actions in the consolidated case, the MDL is down to 37,770 actions pending as of Aug. 15, 2023. The case includes about 60,000 claimants, but J&J has estimated that it may face as many as 100,000 claims in total.

The cases allege that **Johnson & Johnson** knew that its talc products—particularly its baby powder—were contaminated with asbestos, and did nothing to warn consumers. The plaintiffs allege that the presence of asbestos in those products caused cancer.

In March 2023, the US Court of Appeals for the Third Circuit rejected J&J's attempts to pass its liability for the talc suits on to a subsidiary, **LTL Management LLC**, and then declare the subsidiary bankrupt.

As part of that process, J&J floated a settlement offer of $8.9 billion to settle all outstanding cases, which split plaintiffs.

The appeals court concluded that J&J did not access bankruptcy proceedings in good faith. LTL refiled, and the US Bankruptcy Court for the District of New Jersey **dismissed the petition** in keeping with the Third Circuit's decision.

With the company's bankruptcy strategy to end the litigation rejected by the court, the settlement is presumably off the table.

Largest Antitrust MDL: Generic Pharmaceuticals

IN RE: Generic Pharmaceuticals Pricing Antitrust Litigation (**16-md-2724**) was consolidated on Aug. 15, 2016, in US District Court for the Eastern District of Pennsylvania (**Judge Cynthia M. Rufe** presiding). The MDL currently contains only 131 cases pending, down from a high of 201, but the plaintiffs include attorneys general from 47 states, Puerto Rico, and the District of Columbia, along with classes of private plaintiffs suing 20 generic drug companies for allegedly agreeing to fix the prices of more than 300 drugs.

Rufe has **trimmed** the case since consolidation, dismissing claims against drug distributors and dismissing the states' claims for disgorgement under federal antitrust law. But she has so far resisted attempts to restrict damages theories, including "overarching conspiracy" claims that assert an industry-wide conspiracy.

Direct purchasers have settled with **Sun Pharmaceutical Industries Inc.** (and subsidiaries **Caraco Pharmaceutical Laboratories Ltd.**, Mutual Pharmaceutical Company Inc., and **URL Pharma Inc.**) and **Taro Pharmaceuticals USA Inc.** for $85 million (subject to provisions that could change the amount based on claims filed).

Largest Miscellaneous MDL: National Prescription Opiate Litigation

IN RE: National Prescription Opiate Litigation (**17-md-2804**) was consolidated on Dec. 12, 2017, in the US District Court for the Northern District of Ohio (**Judge Dan A. Polster** presiding). The plaintiffs in 46 actions moved to consolidate.

These cases allege improper marketing and distribution of opiate medications, leading to widespread addiction to these medications, and causing injury and death. Plaintiffs allege that the makers and marketers of opioids systematically overstated the benefits and downplayed the risks of their product, and ignored distribution patterns indicative of end-user abuse.

After five years of active MDL litigation, cases are progressing. Judge Polster tracked cases to advance as bellwethers. Extensive settlement talks have taken place, which included the US as a friend of the court in some instances. Some districts and groups have settled with some defendants. For example, **Allergan Inc.** reached a **settlement** with Ohio's Cuyahoga and Summit counties in August 2019.

There are currently 3,378 actions pending in the opiate MDL, down from a high of 3,523.

Largest Sales Practices MDL: SoClean Inc. Marketing Sales Practices

IN RE: SoClean, Inc., Marketing, Sales Practices and Products Liability Litigation (**22-mc-00152**) was consolidated on Feb. 2, 2022, before the US District Court for the Western District of Pennsylvania (**Judge Joy Flowers Conti** presiding). Plaintiffs moved to consolidate. The lawsuits arise from a 2020 FDA safety warning stating that devices marketed to clean Continuous Positive Airway Pressure (CPAP) machines and similar devices with ozone may expose users to excessive levels of ozone. On that basis, the plaintiffs allege that ozone sanitizing devices by **SoClean Inc.** pose potential health hazards to users and damage components of CPAP machines.

As of Aug. 15, 2023, IN RE: SoClean includes 41 pending actions, down from a high of 62. The parties have agreed to stay discovery pending mediation in an attempt to reach settlement.

Largest Potential Settlement Value: Aqueous Film-Forming Foams Products Liability Litigation

This MDL is just one subset of cases concerning ubiquitous contamination with per- and polyfluoroalkyl substances, or PFAS for short—cases that together have the potential to be the costliest mass tort litigation in history.

The MDL case, **18-mn-2873**, was consolidated Dec. 7., 2018, before the US District Court for the District of South Carolina (**Judge Richard M. Gergel** presiding). Defendants moved to consolidate.

These cases concern exposure to per-fluorooctanesulfonate (PFOS) and/or per-fluorooctanoicacid (PFOA), either through direct contact with aqueous film-forming foam (AFFF) in various industrial, military, or fire-fighting applications, or by exposure to contaminated water. These substances allegedly cause cancer and other health impacts.

Panel Profile: Dale A. Kimball

Judge Kimball serves on the US District Court for the **District of Utah**. William J. Clinton **nominated** Kimball on Sept. 4, 1997, to a seat vacated by David Keith Winder. Confirmed by the Senate on Oct. 21, 1997, he received his commission on Oct. 24, 1997.

Judge Kimball was born in 1939 in Provo, Utah. He earned a B.A. from Brigham Young University in 1964 and received his J.D. from the University of Utah College of Law (now S.J. Quinney College of Law) in 1967. He spent more than 20 years in private practice in Salt Lake City, and also taught at Brigham Young Law School in the 1970s.

He assumed senior status on Nov. 30, 2009. He has been a member of the panel since October 2020.

Defendant 3M attempted to consolidate cases involving non-AFFF PFAS chemicals into the MDL, but the JPML **denied** its motion. A considerable number of cases involving different chemicals and means of exposure are pending around the country, brought by states and municipalities with contaminated water or by individuals allegedly suffering impacts from exposure.

As of Aug. 15, 2023, the case was the eighth-largest pending MDL by number of actions pending with 5,614 actions (down from a historical high of 6,113). Yet the potential exposure is substantial: Estimates indicate that 600,000 service members may have been exposed to PFOS/PFOA-contaminated drinking water on US military bases alone.

3M **settled** with a class of municipalities with impacted water systems in the AFFF MDL in July 2023 for $12.5 billion. **The Chemours Co.**, **DuPont de Nemours Inc.**, and **Corteva Inc.**, three more defendants, reached a preliminary settlement with municipal water systems for a collective **$1.185 billion** in June 2023.

Because PFAS, also known as "forever chemicals," are estimated to be present in essentially every person and animal in the US, observers contend that the size of the potential exposure dwarfs the largest mass tort settlement in US history, the 1998 Tobacco Master Settlement Agreement for $206 billion.

Section 6

Potential Changes and Next Steps

MDLs have benefits in administration: less risk of inconsistent outcomes, for example, or less threat that a huge group of cases, spread throughout the federal system, will clog courts and slow down access to justice more broadly.

But there are also shortcomings to the procedure. First and foremost, the size and scope of MDLs make it more difficult for parties and the court to evaluate claims, and dispense with meritless claims, efficiently. Because MDLs are subject to idiosyncratic management, and because of their size and administrative load, some contend that MDLs often contain a high percentage of meritless cases—meaning, for example, products liability cases brought by plaintiffs who cannot demonstrate that they purchased or used the product, or that they have suffered the injury allegedly caused by the product.

Because of their size and complexity, MDLs can also result in the slow movement of cases through the justice system. Cases caught up in an MDL may languish for a considerable time while bellwethers are tried and complex discovery coordinated among many plaintiffs, for example, when any individual case could have been dealt with expediently in its transferor district.

Proposed Rules

A subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure has been working for years on potential additions to the Federal Rules of Civil Procedure to govern MDLs—which are, shockingly, currently mentioned nowhere in the FRCP.

Initially, the committee considered amendments to existing rules **16** and **26**, which govern pretrial scheduling/management and disclosures/discovery in civil litigation, to address MDLs. After comment and consideration, however, they decided to draft a new subrule, FRCP 16.1, unique to these proceedings.

In March 2023, the committee published a proposed **draft** rule for MDLs, which emphasizes in the Draft Committee Note a need to formalize "a framework for the initial management of MDL proceedings." However, the rule does not require procedures that "must" be instituted to manage an MDL; instead, it consists of a series of suggestions that "may" be used. The proposed rule amounts to a suggested set of best practices, while leaving great discretion in managing MDLs in the hands of the transferee court.

That's an unusual approach for the FRCP, which generally requires specific procedures in given circumstances. However, it makes sense for a set of proceedings that vary as much as MDLs can. Some MDLs, with only a few very similar cases involving plaintiffs who are injured in the same way by common conduct, may not require much early intervention from the court to administer them efficiently. Others, involving thousands of actions and tens of thousands of plaintiffs in varying relationships to the defendants, will require more intervention early in the process from the court and more administration.

Key Provisions

The proposed rule 16.1 recommends the following:

Potential Changes to Post-Consolidation MDL Workflow
Details of proposed Subrule 16.1 of Federal Rules of Civil Procedure

Step	Actor	Action	Details	Section
1	Transferee court	Designation of coordinating counsel	The transferee court may designate coordinating counsel to meet and confer and submit a report for the initial MDL management conference.	16.1(b)
2	Coordinating counsel	Preparation of pre-conference report	The court should order the parties to meet and confer to prepare and submit a report to the court prior to the initial MDL management conference.	16.1(c)
3	Court and parties	Initial MDL management conference	The court should schedule an initial management conference to develop a management plan for the proceedings.	16.1(a)
4	Transferee court	Initial MDL management order	The court should enter an initial MDL management order addressing the matters designated under the report and addressed in the conference, and any other matters in the court's discretion. This order controls the course of the MDL proceedings unless and until the court modifies it.	16.1(d)

Source: Judicial Conference Committee on Rules of Practice and Procedure

The proposed rule's highest level of detail centers on the report, called for in section 16.1(c). The committee envisions a report that addresses several key matters, including:

- Identifying the key factual and legal issues likely to be presented by the MDL;
- Suggesting how and when the parties will exchange information about the factual bases for claims and defenses;
- Proposing a discovery plan;
- Recommending whether leadership counsel should be appointed and, if so, how it will operate and be paid;
- Identifying the principal factual and legal issues likely to be presented in the MDL;
- Whether consolidated pleadings should be prepared;
- Whether the court should consider facilitating settlement, such as through ordering alternative dispute resolution;
- If matters should be referred to a magistrate or master; and
- Other issues, like evaluating existing scheduling orders and other orders, proposing other scheduling conferences, and management of new filings.

Potential Impact

Although the rule amounts to suggested practices, it could have an important impact on how MDLs are conducted. First, ordering the early exchange of factual information (for example, through "fact sheets" that outline basic information about each claimant and list or attach key documents like product receipts or diagnoses) would force more early due diligence on claimants and potentially efficiently sort out unfounded claims early in the MDL process.

That is important because defendants frequently complain that big MDLs contain a high percentage of claimants who have no actual evidence to support their entitlement to recover. Because of the structure and pace of big MDLs, those claims not only gum up the works and hamper processing and adjudication of meritorious claims, but also cloud a realistic understanding of settlement potential and litigation risk.

More information will also likely improve choosing bellwether cases and sorting claimants into functional groups for improved administration. MDLs, unlike class actions, don't require that common issues of fact or law "predominate" among the plaintiffs. Accordingly, an MDL may include subgroups that have very different claims and damages with some nexus. Identifying those patterns early has many potential benefits.

The proposed rule may also have greater impact among rookie MDL transferees. While some courts have adjudicated multiple MDLs and have developed administrative procedures that work for them, new jurists may benefit from a basic toolbox of proposed first steps.

The public comment period is open until **February 16, 2024**. Following the comment period, the subcommittee will consider the public's responses and potentially redraft the rule. The final proposed rule must be adopted by the Judicial Conference's Committee on Rules of Practice and Procedure, then the Judicial Conference itself, and finally the Supreme Court. As a result, the final rule may feature important differences from the current proposal and, depending on any changes, may not enter into force for years.

Panel Profile: Madeline Cox Arleo

Judge Arleo, the newest member of the JPML, serves on the US District Court for the District of New Jersey.

Barack Obama nominated Arleo on June 26, 2014, to a seat vacated by Dennis M. Cavanaugh. The Senate confirmed her on Nov. 20, 2014, and she received her commission on the following day.

Judge Arleo was born in 1963 in Jersey City, New Jersey. She received a B.A. at Rutgers College in 1985 and an M.A. in 1986. She earned her J.D. from Seton Hall University School of Law in 1989.

Judge Arleo clerked for New Jersey Supreme Court Justice Marie L. Garibaldi in 1989–90. Following 10 years in private practice in Newark, N.J., Judge Arleo served 14 years as a magistrate judge in the US District Court for the District of New Jersey from 2000 to 2014.

She joined the panel in October 2021.

About The Authors

Eleanor Tyler is a Principal Legal Analyst at Bloomberg Industry Group, with a focus on antitrust and general litigation. Before joining Bloomberg Law, Eleanor practiced law for six years, primarily as a litigation associate at Locke Lord LLP. She clerked for the Hon. Simeon Lake in the US District Court for the Southern District of Texas. She holds a JD from Georgetown University Law Center, an MA in international affairs from Johns Hopkins SAIS, and a BA from Texas Christian University.

Robert Combs is the manager of Bloomberg Law's Analysis Channel. In more than 20 years at Bloomberg Law, Robert has provided legal analysis on labor and employment issues, headed the company's knowledge services and customized research teams, and edited employment and payroll publications. Robert has an M.S. in journalism from Scripps School of Journalism at Ohio University and graduated with a B.A. in English from Denison University.

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EXHIBIT B

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

Shannon E. Hall, et al.
Plaintiff,

v.

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

Abbott Laboratories, et al.
Defendant.

NOTIFICATION OF DOCKET ENTRY

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

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

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

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

TAB 8

No testimony outline or comment was submitted
by January 23, 2024.

TAB 9

W E I T Z

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L U X E N B E R G

A P R O F E S S I O N A L C O R P O R A T I O N

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ΔΔ Also admitted in CA, TX, MO
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January 25, 2023

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

Re: *Proposed Federal Rule of Civil Procedure 16.1 Comment*

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

I am a partner at Weitz & Luxenberg PC where I have practiced for twenty-seven years following my decade long practice in this field at other NYC and New Jersey law firms. I have been handling pharmaceutical, medical device and toxic tort work before the term "mass tort" was coined. In addition to my MDL experience serving as co-lead counsel in numerous litigations (*In Re: Exactech Polyethylene Orthopedic Products Liability Litigation* MDL 3044; *In Re: JUUL Labs, Marketing Sales Practices, and Products Liability Litigation*, MDL 2913; *In Re: Farxiga Products Liability Litigation MDL 2776; In Re: DePuy Orthopaedics ASR Hip Implant Products* MDL 2197), I also have served as lead counsel in numerous parallel and coordinated litigations called Multi-County (MCL) litigations in New Jersey.[1]

[1] More details on my background can be seen in the attached abbreviated CV.

It is my experience that most MDL's have functioned well for decades, providing a cost-effective vehicle for the parties and the courts to adjudicate complex multi-party and often geographically disparate disputes. Relatively recently, seemingly spurred by a few very large and anomalous litigations, often involving over-the-counter products, there has been a concerted campaign by the defense bar to obtain legislation, and when stymied legislatively, rule changes, to erect barriers to limit or impose challenges to product liability plaintiffs. The full Congress did not enact the proposed legislation HR 985, and this Committee wisely rejected the most aggressive proposed rule changes that sought to alter the ordinary course of discovery. The present Rule 16.1, in my opinion, is not necessary, although it may be slightly helpful to some new MDL judges in the initial handling of a new MDL assignment. That being said, there are some provisions I believe are both unnecessary and can be counter-productive.

First it bears repeating comments by my colleagues that MDL's involve many different cases that are not necessarily product liability or toxic tort claims. This one size fits all approach of the proposed rule change is not appropriate and could steer a new MDL judge to mechanically follow items on a checklist that are just not appropriate for their particular MDL case.

Of concern is the provision suggesting the initial appointment of "coordinating counsel." It is not explained how the judge would go about making an appropriate temporary appointment at the inception of the litigation. To have a temporary coordinating counsel who may not be sufficiently familiar with the cases, just because the court may happen to recognize a counsel name on the list, or select a local lawyer with whom he or she is familiar, can result in the submission of agenda items and discovery suggestions that are not appropriate because the individual selected is not as engaged in the issues as those who initiated the litigation. Certainly discussion of items 16.1 (c) 3-4 should not be addressed by a temporarily appointed attorney who may not be the right person to discuss at that early juncture the key factual and legal issues to be presented, and the timing and method of information exchange.

Instead, in every litigation in which I have been involved, there has been an organic process whereby those lawyers who are most engaged are presumed or accepted by consensus to be the spokesperson. That person or persons consulted with experts, drafted detailed complaints and filed the earliest cases, and or filed the JPML petition and presented at the JPML hearing and are the likely person to speak at the initial hearing. To create this new "coordinating counsel" position is a distraction from the more important task of a process and schedule for prompt appointment of permanent leadership counsel and this appointment could supplant the person(s) for whom there is already a consensus as the appropriate speaker at the initial conference just by virtue of selection as coordinating counsel. This extra coordinating counsel step can be counterproductive.

In the rare case where there is an immediate need for counsel to address an urgent matter, such as in the *In Re: CPAP MDL* when the Court appointed several interim counsel to deal exclusively with preservation of device issues following the defendant writing to the court of their plan to repair and recycle recalled devices, that appointment can be done without the need for a rule. The way leadership formation is done in many MDLs usually works. Invariably when there is a JPML hearing, the various lawyers who have cases at that juncture and are engaged enough to attend the hearing, meet the day before the hearing to confer, discuss the hearing and litigation strategy and establish an email and phone list for ongoing communications. Thus, 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, with some exceptions when there are contested slates of candidates.

It is important that new MDL judges be instructed to set the hearing as soon as practicable after the MDL is created so time is not lost on these preliminary matters and leadership gets resolved expeditiously, within weeks (and not months) of the MDL formation. Thus, this proposed "coordinating counsel" distraction should be avoided and instead the focus should be on promptly setting up a method for the selection of leadership counsel.

The second matter that I think should be excised from any rule promulgation is section 16.1(c)(1)(C) regarding discussion at the initial conference of "the role of leadership counsel regarding any settlement activities." Certainly, until the actual leadership is appointed, to have a stopgap "coordinating counsel" tackle that subject is premature. Further, along the same lines, I strongly believe that MDL judges should not, in leadership orders, designate specific settlement counsel. The co-lead counsel for the litigation needs to be leading -- which includes being in charge of settlement discussions or selection of the appropriate designees for that task. To have a court task others with that role, especially at the outset without fully understanding the personnel and case dynamics, can undermine the authority of the lead counsel and has the potential to do mischief and create dissension within the leadership team. It is the lead counsel who should either run any settlement discussions or delegate who on the executive committee should be involved.

I agree with some comments from the defense and plaintiffs' bar that this initial discussion in open court of settlement is premature and can be counterproductive, sending the wrong message to novices in the field, that settlement is in progress when that could be far from reality. Some neophytes, marketers and internet content providers will then publish articles potentially exaggerating the import of this checklist discussion resulting in the filing of more cases, based upon a misapprehension that settlement is in the works. The Rules do not acknowledge that many seasoned MDL judges may make settlement inquiries in chamber conversations with lead counsel at the appropriate juncture. Instead, the proposed rule results in broadcasting prematurely the most sensitive of subjects which generally would not facilitate, but instead, may impede settlement.

I look forward to the opportunity to speak with the Committee on February 6.

Respectfully submitted,

Ellen Relkin

WEITZ & LUXENBERG

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Ellen Relkin is a partner at Weitz & Luxenberg, P.C. in New York City. She is certified by the New Jersey Supreme Court as a Certified Civil Trial Attorney. She has been elected as a "Super Lawyer" of New Jersey and New York. She is licensed to practice in NY, NJ, PA, and the District of Columbia.

Ms. Relkin is an elected member of the American Law Institute where she serves as an Advisor to the Restatement of the Law Third, Torts: Miscellaneous Provisions. She serves on the Board of Governors of the New Jersey Association for Justice and is Co-Chair of its Mass Torts Section. She is a former chair of the Toxic, Environmental and Pharmaceutical Torts Section of the American Association of Justice. She is an invited member of the American Bar Foundation and serves as an Advisory Board Member of the RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation. She is former President of the National Civil Justice Institute.

Ms. Relkin was most recently appointed as co-lead counsel to the MDL *In Re: Exactech Polyethylene Orthopedic Products Liability Litigation* – MDL 3044 (E.D.N.Y.). She is co-lead counsel in the recently settled MDL *In Re: JUUL Labs, Marketing Sales Practices, and Products Liability Litigation*, N.D.Cal. She was appointed to the Executive Committee in the Multi-

District Litigation, *In Re: National Prescription Opiate Litigation*, N.D. Ohio in 2017. She served as co-lead counsel, in the since resolved *In Re: Farxiga (Dapagliflozin) Products Liability* Litigation (S.D.N.Y.). She was appointed as State Liaison Counsel and to the Plaintiffs' Executive Committee in the *In Re: Stryker LFit V 40 Femoral Head Products Liability Litigation* in the District of Massachusetts as well as lead/liaison counsel in the New Jersey parallel Multi-County Litigation, *In Re: Stryker LFit CoCr V40 Femoral Heads Litigation*, Case No. 624. She served on the Plaintiffs' Executive Committee of *In Re: Invokana Products Liability Litigation*, (D.N.J.) and on the PSC of *In Re: Xarelto Products Liability Litigation*, (E.D. La.).

Her involvement in orthopedic litigation dates back to 2010 serving as co-lead counsel in MDL 2197, DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation (N.D. Ohio) where she played a key role in negotiating a $2.5 billion settlement for 8,000 victims of the failed hip implant. As cobalt chrome hips continued to fail, she became court-appointed lead counsel in the New Jersey *In Re: Stryker Rejuvenate/ABG II Modular Hip Litigation* where she helped create the first "bellwether mediation" and was a member of the negotiating team for a $ billion plus settlement ultimately compensating more than 3,000 victims.

TAB 10

ANDRUS ANDERSON LLP

January 23, 2024

Via Email

Advisory Committee on Civil Rules
Administrative Office of the United States Court
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: ***Statement of Jennie Lee Anderson on Proposed Federal Rule of Civil Procedure 16.1***

Thank you for the opportunity to comment on the proposed amendments to Rule 16 of the Federal Rules of Civil Procedure presently under consideration.

I am a founding partner of the San Francisco law firm Andrus Anderson LLP. I have more than 20 years of experience representing plaintiffs in complex litigation, including class actions and mass torts in both state and federal courts. I have held leadership positions in multiple state and national litigations over the years, and I am currently liaison counsel in *In re Social Media Adolescent Addiction/ Personal Injury Product Liability Litigation*, MDL 3047 ("*Social Media*"), pending in the Northern District of California.

I have testified previously before this Committee regarding proposed changes to Rules 26 and 23, and I believe that the public comment period is a critical stage of the rulemaking process. Importantly, it is an opportunity for practitioners to share their views on how the proposed changes will impact their clients and cases, and offer feedback on whether the proposed changes will, indeed, advance Rule 1's goal of securing "the just, speedy, and inexpensive determination of every action and proceeding" or not.

Proposed Rule 16.1 "Multidistrict Litigation"

As a preliminary matter, the proposed additions to Rule 16.1 and the accompanying Committee Note appear largely aimed at ***mass tort MDLs*** and not MDLs involving exclusively class actions. Rule 23, of course, governs class actions, and does so quite well. Specifically, Rule 23(g) already sets forth the criteria for appointment of interim class counsel. Clarifying where the proposed amendments are applicable to only mass tort MDLs (i.e., cases where individual plaintiffs' cases have been transferred and coordinated for pretrial purposes) would eliminate confusion.

Proposed Rule 16.1(b): The Creation of "Coordinating Counsel"

While the proposed rule's goal of advancing the meet and confer process has merit, the creation of an additional layer coined "Coordinating Counsel" to "work with plaintiffs or with defendants" ***before*** the appointment of plaintiffs' leadership would be inefficient and potentially damaging, particularly for plaintiffs. Under the proposed amendment, plaintiffs could find

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themselves essentially unrepresented at a mandatory meet and confer where Coordinating Counsel has been authorized to negotiate with defendants prior to plaintiffs' leadership being appointed.[1] Indeed, Coordinating Counsel is not defined, and it appears one could be appointed and act on plaintiffs' behalf without representing any plaintiffs in the case or having any MDL experience. And yet, the proposed amendment appears to hand that same counsel broad authority to meet and confer on far reaching topics—everything from discovery to settlement, and even the appointment of plaintiffs' leadership. As a result, agreements made may need to be revisited and perhaps renegotiated entirely upon the appointment of leadership, thereby causing delay rather than preventing it. Appointing leadership is not unduly time-consuming and yet critically important for consistency and should be the court's first order of business.

The proposed Committee Note indicating that Coordinating Counsel may later seek a plaintiff leadership position is also problematic. Under such circumstances, the Coordinating Counsel appointment may serve as an end-run around the leadership application process and give the Coordinating Counsel an undeserved advantage. The process of accepting and considering individual applications for leadership, at the same time, has become increasingly popular with federal judges managing MDLs and has drastically improved diversity and broadened the leadership pipeline in mass torts (and class actions) by putting applicants on more level playing field. The proposed rule provides no guidelines for selecting Coordinating Counsel, and if an application process is needed to ensure that Coordinating Counsel is properly qualified, then no time savings are achieved by the appointment to begin with.

For these reasons, I respectfully suggest eliminating proposed Rule 16.1(b) altogether.

Proposed Rule 16.1(c)(1) – Conferring on Plaintiffs' Leadership

The issues covered in proposed Rule 16.1(c)(1) relating to the responsibilities of plaintiffs' leadership are the concern of counsel for plaintiffs and the court alone and should not be the subject of negotiations with defense counsel. Indeed, it makes sense that the plaintiffs be allowed to organize themselves (under the supervision of the judge, as appropriate), and that the process not be interfered with or controlled by opposing counsel. For example, in *Social Media*, Judge Gonzalez Rogers appointed leadership first, and, thereafter, it was plaintiffs' leadership who submitted a proposed order setting forth the duties and responsibilities of counsel for the court to adjust as it saw fit and enter. Further, in my experience, defense counsel are generally in agreement and have not taken the position in my cases that they should be allowed to influence the plaintiffs' leadership structure or duties. If the Rule 16.1(c)(1) factors are to be included in any proposed rule, they should be issues for the judge and plaintiffs' leadership to consider only.

[1] The proposed Committee Note acknowledges that the court may designate Coordinating Counsel "perhaps more often on the plaintiff side that the defendant side" but considering that the hiring of defense counsel is not subject to court approval, it is difficult to imagine a situation where Coordinating Counsel would supplant defendants' chosen counsel for any purpose.

Proposed Rule 16.1(c)(2)-(12) – Suggested Meet and Confer Topics

So long as plaintiffs are represented by appointed counsel, these suggested topics for consideration at the outset of the case do not pose a problem in my view. While some topics may prove to be premature, such as settlement, or inapplicable depending on the case, including them on a list for the parties to consider early on may be useful and beneficial.

Respectfully submitted,

/s/ Jennie Lee Anderson

TAB 11

GibbsLawGroup LLP

January 29, 2024

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

Re: Proposed Rule 16.1 – Multidistrict Litigation

Members of the Advisory Committee on Civil Rules:

I am a partner at Gibbs Law Group LLP in Oakland, California, and represent plaintiffs in complex proceedings with a focus on class and mass actions. Before joining Gibbs Law Group, I was an appellate lawyer at the Center for Constitutional Litigation in Washington, DC.

My recent court appointments include *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, MDL No. 3047 ("*Social Media*"), where I serve on the plaintiffs' steering committee leadership; *In re: Taxotere (Docetaxel) Products Liability Litigation*, MDL No. 2740, where I serve on the plaintiffs' steering committee; and *In re: 3M Combat Arms Earplug Products Liability Litigation*, MDL No. 2885 ("*3M*"), where I was appointed to the law-and-briefing subcommittee.

The proposed rule gives relatively little guidance to judges about one of the more important choices that the judge will have to face very early on in the case: appointment of case leadership. Although a one-size-fits-all approach would be ill-tailored to the reality of MDL practice, it would be preferable to provide courts with more examples about how more experienced judges have chosen to approach initial conferences and leadership appointments. Rule 16.1(c)(A)'s list of considerations for appointing leadership counsel is a welcome addition, but the Committee Notes do not adequately inform courts about the process for appointing leadership counsel and their respective strengths and weaknesses. A judge who has not already established her own preferred process may look to the Committee Notes for guidance, and find only the following:

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

This guidance could be more helpful and descriptive of processes that are currently commonly employed.

In my experience, 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 plaintiffs' counsel endeavor to self-organize into committees of counsel, which the court can then review and/or modify, while others are reluctant or unwilling to consider proposed slates.

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In *Social Media*, for example, Judge Gonzalez Rogers in the Northern District of California required each leadership applicant to file an individual application including information on the applicant's experience, willingness to work cooperatively on time-consuming litigation, and contact information for judges who had appointed the applicant to leadership positions. *See Social Media*, No. 4:22-md-03047-YGR, ECF No. 2 at 7. The court also permitted, but did not require, applicants to "include an attachment indicating the names of other counsel who have filed cases in this MDL litigation and support the applicant's appointment as lead counsel or a [plaintiffs' steering committee] member." *Id.* The applications and attachments of endorsements were both to be filed on the public docket. Then, at the initial conference, which was open to all counsel, Judge Gonzalez Rogers further requested that leadership applicants write down up to three names of attorneys that they would like to work with and recommend that the court appoint.

By contrast, in *3M*, Judge Rodgers in the Northern District of Florida required counsel to email their leadership applications to chambers for confidential, *in camera* review by a court-appointed panel, which included her, Magistrate Judge Gary Jones, and two experts. In a pretrial order, the court explained the leadership structure, which would include lead counsel, liaison counsel, an executive committee, a steering committee, and several topic specific subcommittees. *See 3M*, No. 3:19-md-02885-MCR-GRJ, ECF No. 76. The court also designed a form application that asked each applicant to explain, among other things, which positions she was applying for, her experience in various facets anticipated to be important in the litigation, and whether there was anyone else the applicant felt would be "especially effective in a particular leadership role" with a request to explain such a designation. *Id.* Judge Rodgers chose to hold oral interviews by invitation rather than holding a hearing open to all applicants. Ultimately, Judge Rodgers invited over 50 attorneys to interview.

To be sure, no one approach would be best for every MDL. Nor are the examples described here the only sensible approaches—there is much room for judicial creativity in this space. That said, an essential purpose of the leadership appointment process is to give the court better insight into the attorneys to whom it will entrust the litigation for a number of years. If the Committee seeks to offer guidance to judges and practitioners unfamiliar with MDL proceedings, or even those looking for options to revise their current practices, more specific examples would be instructive and helpful. With that in mind, I offer four suggestions for revision to the Committee's notes.

First, courts gain valuable insight from plaintiffs' attorneys when they ask which other applicants counsel would recommend to the court. Courts can discern many relevant qualifications from applications and interviews, including geographic location, years of experience, familiarity with MDL proceedings, number of cases in the MDL, and personal demographic characteristics. But less discernable from an application or ten-minute interview are whether a person is particularly hardworking, insightful, responsive, or collaborative—all key qualities in effective leadership counsel. While not all leadership applicants will have that type of insight about all of their peers, some will, and that information is important and useful to a court as it considers its leadership appointments. The Committee should recommend that the MDL court seek input from counsel when appointing leadership.

Second, such information is best submitted *in camera* or *ex parte*. Public filings of endorsements or recommendations can be less effective as their authors know that their recommendations (or omissions) will be public and accessible to anyone with a PACER account in perpetuity. The Committee should include in the note that courts sometimes

seek input from counsel on the public docket or confidentially via *ex parte* recommendations.

Third, unless there is some case-specific reason to do so, courts should not delay the leadership appointment process—however the court prefers to conduct it—as the Rule currently contemplates. It makes little sense to prepare a report recommending a procedure for appointing leadership that would be discussed at the initial case conference because, as discussed above, many courts unilaterally decide whether and how they will appoint leadership *in advance* of the initial conference. And this process works well: in both cases discussed above, leadership was appointed with little delay—two days after the initial conference in *Social Media*, and the day after oral interviews in *3M*. The same holds true for many other administrative matters—in my experience, courts feel comfortable issuing preliminary orders governing service, direct filing procedures, and interim preservation orders, which may be revised or amended at a later time. The Committee should add a note that differentiates between the topics courts typically address *sua sponte* and those which often require counsel's input. Moreover, these latter topics are more appropriate for the court to address with appointed leadership than with all of plaintiffs' counsel or a designated interim coordinating counsel.

Finally, courts regularly use a reapplication process to adjust leadership appointments and committee assignments as the case progresses. This ensures that there is a predictable hierarchy and assignment of duties at any given point, while allowing more attorneys the opportunity to serve at some point during the litigation and assisting the court in adapting leadership appointments as the needs of case change. Reappointment also works as a safety valve for the court to make changes to leadership to ensure the case is being managed appropriately and that diverse and younger attorneys get substantive work. Additionally, when it becomes apparent that attorneys other than those the court appointed are in reality doing the bulk of the work, courts have the ability to recognize those attorneys with a formal appointment. In this way the court can support diversifying the MDL bar and advancing quality attorneys' careers. There is presently no indication of the possibility for reappointment in the proposed rule or the committee notes. The Committee should include in the note that courts periodically reassess leadership appointments in light of the needs of the case, particularly as the MDL moves closer to trial.

Thank you for considering these suggestions.

Sincerely,

Andre M. Mura

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TAB 12

GIRARD SHARP

TO: Advisory Committee on Civil Rules
FROM: Adam E. Polk
RE: Proposed Amendments to Civil Rules 16 and 26
DATE: January 24, 2024

Members of the Advisory Committee on Civil Rules:

My name is Adam Polk. I am a partner with Girard Sharp LLP, a San Francisco-based law firm that represents plaintiffs in class actions and other complex cases nationwide. I have served as co-lead counsel in class and mass actions in a variety of practice areas, most frequently securities and consumer protection/privacy class actions.

Over my years of practice, I have navigated countless privilege logging protocols and privilege disputes. Privilege negotiations prove to be the one area of discovery that most requires the parties to engage early and think flexibly about how to approach logging. Each negotiation raises different considerations, but, in line with the proposed amendments, require the parties to be flexible in their approach to privilege assertions.

The animating principle from my perspective is that the assertion of privilege must be made in such a way that "enable[s] other parties to assess the claim" consistent with Rule 26(b)(5).

Accordingly, I support the amendments that align with best practices—(1) engage early; (2) produce privilege logs on a rolling basis to streamline later logs and avoid new issues being

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raised at the close of discovery; and (3) exercise flexibility when it comes to logging over the life of a case.

Below, I address several issues raised in the draft committee notes by reference to real world examples.

I. Timing of discussion regarding compliance with Rule 26(b)(5)(A)

Undergirding the proposed amendments to both rules is the need to frontload discussions regarding compliance with Rule 26(b)(5). My practice has borne out the effectiveness of addressing privilege issues early. Many of the cases that have been most efficiently litigated have involved judges with privilege logging requirements incorporated into their standing orders.

As an example, during one long running case involving the destruction of a tank holding cryopreserved human eggs and embryos, the judge overseeing the case included the following provision in her standing order:

> **Privilege Logs.** If a party withholds material as privileged under Federal Rule 26(b)(5) or 45(d)(2)(A), it must produce a privilege log as quickly as possible, but no later than fourteen days after its disclosures or discovery responses are due, unless the parties stipulate to or the Court sets another date. Privilege logs must contain the following: (a) the subject matter or general nature of the document (without disclosing its contents); (b) the identity and position of its author; (c) the date it was communicated; (d) the identity and position of all addressees and recipients of the communication; (e) the document's present location; and (f) the specific privilege and a brief summary of any supporting facts. Failure to furnish this information promptly may be deemed a waiver of the privilege or protection.[1]

That provision served as a starting point for discussions concerning compliance with Rule 26(b)(5) and streamlined those discussions in the case.

[1] https://www.cand.uscourts.gov/wp-content/uploads/judges/corley-jsc/JSC-Standing-Order-Feb-17-2023-docx.pdf.

Conversely, cases that feature no such provision often also feature resistance to early privilege discussions. The failure to develop "rules of the road" early in those cases has led to more protracted disputes concerning privilege assertions that have drawn out and languished until close to the end of discovery, which at best strips both sides of the ability to use discoverable material over the course of the case, and often results in further protracted proceedings that are ultimately inconsistent with the objectives of Rule 1.

II. "Rolling production of materials and the nature of the withheld material."

The draft committee note to proposed amended Rule 26(f)(3)(D) correctly notes that "[p]roduction of a privilege log near the close of the discovery period can create serious problems." As a matter of timing, if the first log is produced close to the close of discovery, the receiving party is necessarily delayed in identifying documents that may have been improperly withheld, which in turn delays the parties' ability to raise disputes for resolution. The alternatives in that scenario—to continue discovery to take informed depositions or conduct follow up to prepare for trial, or accepting the record as limited by the sequencing of privilege assertion—are usually both unappealing.

In my experience, well-litigated privilege disputes often require a judge to make determinations on what is and what is not privileged, given the relevant circumstances. Sampling or preliminary rulings from the court will often inform the parties' negotiations, and streamline further privilege disputes. Only periodic production of privilege logs over the course of discovery, however, allows the parties to timely raise those disputes, often on an iterative basis which involves some early resolutions that will inform later disputes, potentially reducing

logging burdens by providing the parties with guidance that they can factor into their decisions whether or not to assert privilege.

As one example, the defense in the fertility case referenced above withheld communications between lawyers and public relations firms concerning the tank failure as privileged. We disagreed with the assertion of privilege, as we believed there was an overriding business reason for the public relations efforts—to continue to sell fertility services and retain existing customers. Because the presiding judge had a 14-day deadline to produce privilege logs after any production (also referenced above), this issue was timely raised, and the court's ruling directed the defense to produce what proved to be key evidence in the case. And, more importantly for this discussion, the court's early ruling on a central privilege assertion gave the parties important information as to what was and what was not appropriately withheld as privilege.

III. "Maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials."

Privilege logging in civil litigation is not one size fits all but, like so many things in litigation, must be tailored to specific cases. The proposed amendments to both Rule 16(b)(3)(B)(iv) and Rule 26(f)(3)(D) acknowledge the need for flexibility in asserting privilege, and my experience is consistent with that focus.

Some mix of logging conventions, whether document-by-document or categorical, within a single case may also make sense under certain circumstances. The model order governing electronically stored information in the Northern District of California, for example, provides that "[c]ommunications involving trial counsel that post-date the filing of the complaint need not

be placed on a privilege log." Corporate defendants frequently seek an expansion on that provision to include all communications involving in-house counsel. One possible solution is to agree to some form of categorical logging for communications involving in-house counsel related to the litigation that post-date the complaint, which other categories of withheld materials are subject to document-by-document logging. While an approach along these lines may not be suitable in every case, it provides a practical example of the type of flexibility that is needed and should be encouraged for the parties to arrive on an appropriate logging protocol up front.

* * *

I want to thank the Advisory Committee for the opportunity to be heard, and for the considerable effort the Committee has devoted to the important objective of creating a frontloaded, flexible framework for privilege logging.

TAB 13

NIGH GOLDENBERG RASO & VAUGHN

Mr. T. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United State Courts
One Columbus Circle, NE
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01/22/2024

Thank you for allowing me to testify on this very important issue. My name is Ashleigh Raso and I am a founding partner at Nigh Goldenberg Raso & Vaughn, a six-attorney law firm with locations across the country. I am located in Minneapolis, Minnesota.

My colleagues' comments on the hard work this committee has done and the genuine interest in making MDLs more organized and efficient bears repeating. Thank you for taking the time to make complex litigation more organized, while educating new MDL judges on the best way to proceed.

I currently serve on five leadership positions, including the Plaintiffs' Executive Committee and the Plaintiffs' Steering Committee of coordinated actions[1]. I also have the privilege to serve as acting[2] liaison counsel in three of those litigations. The liaison counsel position gives me a unique perspective into coordinating and organizing MDLs. Based on my experience as liaison counsel I will speak primarily on the issue of designating "coordinating counsel".

I. Coordinating Counsel

I agree that early organization is paramount to coordinating an MDL and supports the intent of 28 U.S.C. § 1407. I believe the best and most efficient way to organize an MDL is to appoint *qualified* liaison counsel.

[1] *In re Stryker LFIT V40 Femoral Head Prods. Liab. Lit.* (17-MD-2768); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Lit.* (19-MD-2875); *In re Zimmer M/L taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Tech. & Versys Femoral Head Prod. Liab. Lit.* (18-MD-2859); *In re Profemur Hip Implant Prods. Liab. Lit.* (21-MD-2949); Florida Exactech Coordinated Action (2022-CA-00270).

[2] "Acting" liaison counsel because in Stryker LFIT V40 the position was called "Administrative Counsel". In the Zimmer M/L Taper Litigation I served as both PEC and Liaison Counsel. I also serve as state liaison counsel in the Florida Exactech Coordinated Litigation.

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Some of the tasks I have done as liaison counsel that go beyond basic communication with lawyers include: working with experts to put together digestible case criteria to ensure meritorious cases are filed, working with defense counsel on best practices of serving complaints and discovery, working with the court's clerk to create a "Case Filing Master Manual" to ensure that cases are filed to the judge's specifications, publishing a plaintiffs'-only website where all court orders can be found and discovery may be served, helping *pro se* counsel file and communicate with the court, advising the court and the parties about certain data points of the plaintiffs in the litigation (age, jurisdictions involved, etc…), and assisting with many other issues that arise.

It is crucial to appoint a liaison counsel who is most qualified[3] and actually wants a position that involves high levels of organization and communication. If the transferee judge can appoint a position before the litigation even begins, three adverse impacts will be felt: (1) a premature fight to be appointed coordinating counsel, which may not result in the most qualified candidate being appointed; (2) a rush to coordinate leadership excluding potentially good candidates; (3) confusion regarding authority to make decisions on behalf of the litigation; and (4) a lack of diverse candidates being appointed.

1. Premature Fight to be Appointed Coordinating Counsel

Should the judge choose a designated counsel, it is possible that the coordinated counsel will be an attorney in close proximity to the courthouse[4], not the most qualified person. If the goal is to increase the organization of an MDL and aid first-time MDL judges, appointing a qualified, experienced liaison counsel *after* the first hearing is more important than appointing a coordinating counsel *before* the first hearing. While I am located in Minnesota, my appointments for acting liaison counsel have been in Massachusetts, New

[3] Qualified counsel should be highly organized and able to communicate efficiently at all levels. Many tasks assigned to liaison counsel are not glamorous and are often overlooked, but the liaison counsel position is a vital position to keep the MDL organized. Organization becomes even more important when there are a large number of defendants and claimants.

[4] Historically the liaison counsel practiced in the jurisdiction of the courthouse, however, even before COVID-19, liaison counsels were increasingly being appointed from around the country based on their skill, not their location. Online tools and virtual hearings have increased the ability to organize from different locations and to involve qualified attorneys from all areas of the country.

York, and Florida. I'd like to believe I was appointed, and in some cases chosen by my colleagues, for my qualifications as liaison counsel, not for my address.

There are times when coordinating counsel should be selected very carefully. I have been contacted numerous times by *pro se* clients. There may be litigations, like the recent Uber Passenger Sexual Assault Litigation, or a coordinated clergy sexual abuse litigation, where *pro se* litigants may reach out to the coordinating counsel in the early days of litigation. There are circumstances where special consideration should be given to trauma-informed counsel. Likewise, many products impact women or women of color, like in the recent hair relaxer litigation or the previous transvaginal mesh litigation. Special consideration may be given to appointing the right person to interact with *pro se* litigants in those cases.

2. Rushing to Coordinate May Exclude Good Leadership Candidates

In line 127 of the advisory committee notes it state, "In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that designation of coordinating counsel may not be necessary." (Advisory Committee notes Lines 127-131). While informal organization often occurs, the potential leadership will have no indication of *when* the court may appoint coordinating counsel. The result will be a rush to organize and coordinate amongst themselves before the transferee judge *sua sponte* appoints coordinating counsel. The rush to coordinate quickly may exclude excellent attorneys who may otherwise be unknown to the potential leadership and unknown to the court before the first hearing.

3. Confusion on Who Has Authority to Make Decisions

Section 16.1(c) includes a variety of topics to cover in the first hearing. In order to speak on these issues, there will need to be a discussion across the "V". The coordinating counsel may not be ultimately chosen to lead the litigation or may not be on leadership at all. Agreeing on issues such as "how and when the parties will exchange information about the factual bases for their claims and defenses," or a "proposed plan for discovery," or "pretrial motions" or any number of the other items listed in 16.1.(c) will not carry any weight, resulting in wasted time and confusion.

This is particularly true if coordinating counsel is at odds with the attorneys seeking ultimate leadership in the litigation. In fact, if the coordinating counsel is not in agreement

with a group seeking leadership, defendants may refuse to have these discussions at all until a leadership group is appointed.

This lack of actual authority is equally true for defendants. For example, in a case like *In Re: Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Lit*. where there are over thirty defendants, coordinating counsel may be chosen for defendants as well, resulting in chaos between the many different law firms representing defendants who may have conflicting views on discovery for their clients. This will result in further confusion on who has the authority to speak on the issues listed in Rule 16.1(c), wasting the time of the court and the parties.

4. Lack of Diverse Leadership

In order for the judicial system to be trusted, it is important that the counsel leading the litigation look like the plaintiffs and represent a broad array of experiences. Under this current proposed rule there is only one appointment that is made before the very first hearing. Whether it is intended or not, there will be a fight for that one position. As a result of that fight, highly involved and well-known law firms may seek that position, potentially resulting in diverse and highly qualified candidates being passed over.

This is further amplified if the coordinating counsel has any authority or persuasion over who is ultimately appointed to leadership. If the coordinating counsel has any say over who is appointed to leadership, this will be the most highly sought-after position, resulting in premature fights, disorganization, and confusion.

As those who testified before me have pointed out, although there is nothing in this rule that suggests that coordinating counsel will serve as leadership going forward, that will be the impact felt. There will be a *de facto* presumption that coordinating counsel will be in leadership.

II. Rule 16.1(c)

Rule 16.1(c) contains many important topics to cover early in the litigation, however, the first status conference is too soon for many of these topics. Additionally, there is a logistical obstacle as there will be questions regarding who has the authority to speak and negotiate on these issues, as discussed above. Any attempt at organizing these items and

speaking on them with authority could result in conflicting agreements and ultimately achieve the exact opposite of what this rule intends to do.

Instead, if this rule is necessary, I believe it should be centered around the judge's authority and preferences. For example,

"Before the initial case management conference the transferee judge may enter an agenda on the subjects to be covered at the first status conference. The agenda may include the following topics:

(1) Whether leadership structure is necessary, how it should be structured, and the duties of leadership, including whether leadership has been agreed upon or whether there will be conflicting leadership positions, and if so the judge's preference for appointing potential leadership (applications, motions, and/or interviews);
(2) Whether the court will stay the pending deadlines in individual actions;
(3) The handling of the direct filing and *pro hac vice* status;
(4) Filing procedures in the MDL, including filing on the master dockets versus individual case filings;
(5) Whether certain matters will require a Magistrate judge's involvement;
(6) Practice pointers the Judge would like to discuss;
(7) Scheduling of future case management conferences; and
(8) Procedures for scheduling or contacting the court."

This list is preliminary and may not be necessary, but will help guide the parties and the Court on the most pressing issues for the first case management conference. Thank you for taking the time to consider my thoughts and I look forward to speaking with you.

Thank you,
Ashleigh Raso

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TAB 14

Testimony of Kate M. Baxter-Kauf, Partner at Lockridge Grindal Nauen P.L.L.P., Regarding Privilege Logs

Presented at the February 6, 2024 Civil Rules Hearing

Good morning. I appreciate the opportunity to offer my perspective regarding the proposed amendments to Fed. R. Civ. P. 26(f) and 16(b), and to provide any insight that I can for the benefit of the committee. My name is Kate Baxter-Kauf, and I am a partner at Lockridge Grindal Nauen P.L.L.P., based in Minneapolis, Minnesota. My practice is primarily focused on plaintiffs'-side data breach, privacy, and consumer class actions in state and federal courts across the country. I currently serve as co-lead counsel in multiple data breach and privacy cases and have worked as counsel in dozens of other similar cases, which often involve forensic reports and complicated issues related to attorney-client privilege and work product protection. I also currently serve on the steering committee of the Sedona Conference Working Group 11 related to Data Security and Privacy Liability. As part of my work with the Sedona Conference, I chair a drafting group that is updating the previously-published *Commentary on Application of Attorney-Client Privilege and Work-Product Protection to Documents and Communications Generated in the Cybersecurity Context*, in which I have worked diligently with attorneys from multiple perspectives to attempt to achieve consensus on tough issues related to privilege waiver, when work product is completed in anticipation of litigation, and privilege in the case of dual purpose documents and communications.

Practice Context for My Comments

The primary context in which I deal with issues related to attorney-client privilege, work-product protection, or other privileges (the bank examination privilege, for example) in my practice is in large data beach, privacy, or cybersecurity litigation in which a breached entity (and defendant in the lawsuit) has completed forensic investigations, either internally or externally, as part of incident response or amelioration of the breach, that that entity then seeks to withhold from production, along with related communications or topics. These cases are almost entirely brought in federal court based on diversity jurisdiction, meaning that the substantive privilege claim is evaluated under state law, while work product follows federal common law, and the case procedurally operates under the Federal Rules. In my experience, when there are disputes between the parties regarding whether particular documents or communications are privileged or otherwise subject to protection from disclosure, they usually involve multiple layers, including: (1) whether forensic or diagnostic reports related to how the breach occurred or the previous security practices of the breached entity are privileged or work product because a lawyer was involved in overseeing incident response or report drafting; (2) whether communications with internal non-attorney employees (for incident response, remediation, regulatory responses, public communications, or compliance, for example) serve a legal or business purpose, and what the predominant purpose is, if the answer is "both;" (3) whether an entity waives the privilege or protection when a forensic report is completed by a third party or the information is provided to law enforcement or another government agency; and (4) the extent to which the information being sought is factual and cannot

be reproduced or otherwise be made available (when withheld on work-product grounds) because incident response and computer systems are often ephemeral and otherwise protected documents may be the only way for plaintiffs to get necessary evidence to support their factual claims about the breach underlying the litigation. The answers to these questions are often highly factually intensive and complicated for courts to decide; they also may range from 1-2 privilege log entries (for the forensic report itself) to tens or hundreds of thousands of documents withheld (for communications related to the public relations decisions surrounding a data breach). 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, and courts are often highly and rightfully invested in requiring the parties to narrow disputes as much as possible, given the amount of work needed to evaluate a thousands of document privilege dispute on a document-by-document basis *in camera*.

Amending the Text of Rules 26(f) and 16(b)

The proposed amendments to the language of Rules 26(f) and 16(b) are helpful and likely to aid the parties in discussing privilege log completion and in frontloading any disputes about the format or timing of logs to be produced. Especially in the types of cases I litigate, the contours of what types of forensic documents are permitted to be withheld can be fundamental to the parties' understanding of the scope of discovery in the case, so discussing and resolving issues early contributes to judicial efficiency and can lower costs and time for all parties. For example, if a defendant who contracted with an outside vendor to complete a forensic report determines that it believes that the report may be withheld on the basis of attorney-client privilege or work-product protection, the parties and the court are best served by teeing up that dispute early, as its resolution may inform the resolution of whether downstream documents (such as communications with vendors or non-attorney employees, for example) may also be properly withheld. I do have some concerns with the proposed Committee Note for Rule 26(f), which I discuss below. But separate from the value of planning for e-discovery early, which benefits all parties and streamlines and may eliminate disputes, early discussions of logging documents and communications to be withheld on the basis of privilege or another protection is exceptionally helpful as a way to encourage discussion of types of documents, such as the forensic reports and communications discussed above, for which a dispute may be already ripe and meet and confers to narrow any dispute should commence immediately.

The Proposed Committee Note

While I support the amendments to Rules 26(f) and 16(b), the proposed Committee Note to Rule 26(f) is concerning. I outline my concern and suggest some revisions to the text of the Committee Note below.

As an initial matter, the Committee Note for Rule 16(b) accurately captures and highlights the value of process and early discussion of issues related to privilege logs and how they fit into an overall case management and e-discovery strategy, as discussed in my previous comments. Describing "rolling" log production is exceptionally helpful to the parties; I have seen comments suggesting the Committee adopt a "tiered" approach that would be much less helpful. The idea behind "tiered" logging appears to be that the parties should assess the "importance" of the documents being withheld or produced and then log the most important ones first. This sounds

potentially appealing in theory but would not work in practice. As further explained below, the party seeking the documents has no way of assessing which documents are the "most important," because they cannot see the documents and do not know which ones are being withheld until after a log is produced. This means that the producing party is left to assess "importance" alone, or which sources are the "most material," which is inappropriate, given that the requesting party may have a different assessment of what issues are most material in the case and is entitled to prioritize discovery based on their own strategy and not that of the producing party. This has the potential both 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. In addition, "tiered" logging seems to contemplate that almost all documents will be reviewed by the producing party before either documents or a privilege log is produced, which is likely to exacerbate delay and push disputes later in the litigation, rather than achieving the goals outlined by the Committee.

In terms of the draft Committee Note for Rule 26(f), I believe that the Note as drafted may unintentionally overemphasize the burdens of completing a compliant privilege log while failing to adequately mention the need for the party evaluating a privilege claim to be able to fully understand why a document or communication is being withheld. The reason why 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, is because the entry must "describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that . . . will enable other parties to assess the claim." The party seeking documents to be produced does not have the benefit of looking at the face of the document to assess a privilege or protection claim. In order to assess whether to dispute the withholding of a particularly communication, complete information at the outset – without multiple back and forth conversations about facial rule or content compliance – is critical to avoiding disputes and decreasing the cost, duration, and need for court intervention in privilege disputes.

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 for the parties, making it harder for the parties to narrow or eliminate disputes and requiring court intervention in more instances. When the parties *first* have to litigate whether the log itself is facially compliant with Rule 26(b)(5)(A) so that the party assessing the claim can even determine whether a document is privileged or protected and *then* determine whether the documents being withheld are actually subject to a substantive privilege or protection claim, the process for dispute resolution is lengthy, tremendously expensive, and incentivizes gaming the system. They also have the same concerns as highlighted for tiered logs – namely, that the parties will need to identify what the categories of documents being withheld *are* before determining the format of any log, which the responding party cannot do effectively since it cannot review the documents being withheld, and which incentivizes pushing logging until much later in discovery when the categories of documents to be produced are complete or nearly complete and also may involve redoing logs if the parties determine the categories are incomplete or incorrect.

Two cases I worked on highlight my concern in this area. The first, *In re Premera Blue Cross Customer Data Security Breach Litigation*, Case No. 3:15-md-2633-SI (D. Or.), involved two separate court decisions a year and a half apart evaluating privilege and work-product claims related to forensic reports and related communications stemming from a data breach and incident

response. *See* 2019 WL 464963, at *7 (D. Or. Feb. 6, 2019); 296 F. Supp. 3d 1230 (D. Or. 2017). The parties spent at least a year prior to the first decision meeting and conferring, discussing facially compliant logs, and then discussing the proper categories of documents that may be withheld for a valid privilege or work-product claim. After each round of meet and confers, documents were removed from the log and produced, And after each court decision, thousands of documents were de-designated and produced, pushing discovery in the case out farther and reducing judicial efficiency while increasing burdens and costs to the parties. This process would have only been made worse and more lengthy and expensive by categorical logging, since the plaintiffs (the requesting party in this instance) would have had even *less* information to evaluate the defendant's privilege claim, and the parties would have added an additional layer to a dispute process that spanned multiple years.

Second, the parties litigated multiple disputes arising from logs in *In re: Capital One Customer Data Security Breach Litigation*, Case No. 1:19-md-02915-AJT (E.D. Va.). There are numerous useful lessons arising from that litigation, but one that dovetails with the Committee Note is as follows: in addition to withholding information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, Capital One also maintained that the information was subject to being withheld on the basis of other privileges, one of which was the bank examination privilege. When additional bases for withholding documents are claimed, complete and document-by-document logs are crucial to assessing the propriety of the clam, and of providing a check against overdesignation. Categorical or tiered logging would have made the already-complicated privilege discussions worse by making it even harder for plaintiffs to assess the rationale for withholding documents, and would have delayed discovery or made compliance with discovery deadlines impossible.

Finally, the examples identified as issues that the parties ought to discuss related to a categorical approach—date ranges for beginning logging or whether communications with particular counsel may be excluded—are, in my mind, separate from whether a categorical log that fails to provide a listing of each individual document withheld is the default. The Committee is correct that these issues may be useful ones for discussion in the context of case management, but these issues are best addressed in conjunction with a document-by-document log for those documents being withheld for other reasons.

As a result, I would suggest editing the Draft Committee Note for Rule 26(f) as follows:

DRAFT COMMITTEE NOTE

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) ~~can involve very large costs,~~ often includ~~esing~~ 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 and sometimes failing to allow parties to properly assess why a particular document or communication has been withheld and the propriety of its withholding.

This amendment directs the parties to address the question 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.

This amendment also seeks to 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. The parties should discuss mechanisms for streamlining logs, such as whether communications between a party and outside litigation counsel could be excluded from the listing, or whether, in some cases, a date range might be a suitable method of excluding some materials from the listing requirement. All parties should endavor to reduce the burden and increase the effectiveness of all parties in complying with Rule 26(b)(5)(A).

~~In many 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. 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.

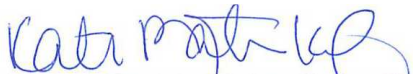
Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency of claims that producing parties have over-designated responsive materials. Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials 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.

* * * * * * * * * *

I believe that the edits proposed would capture the sentiment expressed by the Committee and also ensure attention to the burdens on a requesting party in assessing privilege and protection

claims. Thank you for the opportunity to provide this testimony to the Committee. I am happy to answer any questions the committee might have.

Sincerely,



Kate M. Baxter-Kauf

TAB 15

No testimony outline or comment was submitted
by January 23, 2024.

TAB 16

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January 22, 2024

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

Re: ***Proposed New Rule 16.1 on MDL Proceedings***

Dear Mr. Secretary and Committee Members:

I am a Shareholder at Burg Simpson Eldredge Hersh & Jardine, P.C. and am the Practice Group Leader for our Mass Tort and Class Action practice. I focus my practice on complex litigation and have been actively involved in many MDL litigations over the last two decades. I want to start by thanking the Advisory Committee on Civil Rules for the opportunity to comment on Proposed New Rule 16.1 on multidistrict litigation ("MDL").

My firm and I have represented plaintiffs and served as Co-Lead Counsel, members of Plaintiffs' Executive Committees, and members of Plaintiffs' Steering Committees in numerous MDLs. I had the honor of being appointed as Co-Lead Counsel in the *In re: Pradaxa (Dabigatran Etexilate) Products Liability Litigation,* MDL No. 2385, as well as several Executive Committee Positions in other MDLs. I currently am one of the Co-Lead and Interim Class Counsel in the consolidated cases that make up the *In re: East Palestine Train Derailment* (No. 4:23-cv-00242) pending in the Northern District of Ohio, which while not an MDL shares many issues relating to complex litigation in the management and oversight of the litigation.

An MDL is a powerful and effective tool, particularly in the setting of mass tort products liability litigation, to create efficiencies for plaintiffs and defendants, as well as for the federal court system. While no system that is designed to address so many vastly different types of cases will be perfect, the current system is extremely efficient for all involved. That said, I do appreciate any attempts to improve on the system in which so much of my practice is focused and I understand that proposed Rule 16.1 is an attempt at improvement. I do see some components of proposed Rule 16.1 that likely will either improve or "codify" what is being done by many transferee courts in using their judicial discretion to oversee discovery in an action pending for them. I also, however, see certain components of proposed Rule 16.1 that while drafted with good intentions, in practice – I respectfully submit – miss the mark or may create less efficiency or confusion because the MDL process involves so many different kinds of cases that one size simply cannot fit all. Any new rule should not be drafted in such a way that would curtail the transferee court's discretion in managing discovery just because a case is an MDL instead of a case involving only one plaintiff and one defendant.

Provisions within Proposed Rule 16.1 likely to enhance efficiency.

There are aspects of the proposed new rule that do seem as if they will improve the MDL process. As outlined in proposed Rule 16.1(a), having a transferee court schedule an initial management conference soon after the creation of an MDL should be encouraged. A management conference shortly after establishment of an MDL, in my experience, has been a very helpful step in moving an MDL forward and beginning the process of developing a preliminary case management plan that will carry through the litigation. This holds true regardless of what kind of case the MDL involves.

In relation to proposed Rule 16.1(c), the following sub-sections could be very helpful for the transferee court by requiring the parties to meet and confer and provide the court with a report on the following topics:

- (1) whether leadership counsel should be appointed, leadership structure, and the appropriate procedure and timeline for appointing leadership[1];
- (2) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;
- (3) identifying the principal factual basis of the case and legal issues to be presented in the MDL proceedings, to the degree known and without prejudice to leadership counsel after their appointment;[2] and
- (10) how to manage the filing of new actions in the MDL proceedings; and

This shortened list of topics focuses the court on the initial matters that should be addressed at the beginning of the case and addressing them shortly after transfer should lead to efficiencies. Appointment of leadership is a necessary first step to address – and accomplish – before many of the remaining issues that will need to be dealt with in any MDL can realistically be addressed. Addressing substantive issues, that will shape the direction and future of any MDL before the appointment of leadership, will likely cause undue delay and confusion. This limited set of topics also allows the court to be informed of the general facts and legal issues that will be addressed during the litigation as they are then known to the parties.

"Coordinating Counsel" Is Unclear and Unnecessary.

The appointment of a "Coordinating Counsel" to assist the Court or work with the parties is likely to cause confusion and perhaps even chaos. For starters, it is unclear from the current draft of the proposed rule if that "Coordinating Counsel" will be one of the counsel for the parties

[1] The appointment of leadership is an issue that should be purely between the transferee judge and the party whose leadership is at issue – in the vast majority of MDLs, leadership appointments only relate to the plaintiffs as the defendant has selected and hired its chosen counsel. Thus, the selection and appointment of plaintiffs' leadership should be an issue addressed between the transferee judge and the various plaintiffs' counsel. Even in multi-defendant MDLs the appointment of leadership on the defense is typically left to defense counsel.

[2] I respectfully recommend that language like that in red be added to the rule. As we all have experienced, what is known during the first few months of the case can change during discovery and evolve as the case progresses.

or a neutral (both will create issues such as creation of a redundancy in later appointing leadership counsel or for a neutral getting "up to speed" prior to the conference), how that counsel will be selected, and where that "Coordinating Counsel's" powers will start and where they will end. While the proposed rule is drafted in the permissive by utilizing "may" there is the potential for newly appointed transferee judges to be considered as mandatory or a "strong suggestion" by the Committee. There is also an un-addressed issue of how that "Coordinating Counsel" will be compensated – thereby potentially increasing litigation costs for both plaintiffs and defendants.

With regard to the selection if a "Coordinating Counsel," if the intent is for the position to one of a neutral, that seems to usurp the role that a magistrate judge can often fill for a district court judge. Alternatively, if the intent is for the appointment of a person to serve as a special master, the Federal Rules already contain provisions for the appointment of a special master. Under either scenario, proposed Rule 16.1(b) appears unnecessary.

Based on these concerns, I respectfully recommend that proposed Rule 16.1(b) be deleted from the proposed rule.

The Remaining Sub-Sections of the Rule 10.1(c) are Premature for an Initial Conference.

Many of the provisions listed in proposed Rule 16.1(c) are premature to address and decide on at an initial conference. In fact, in practice they are best addressed ***after*** the MDL transferee judge appoints leadership counsel. In some instances, there may be competing theories of the case and different groups of attorneys vying for leadership. In these instances, the court must make a leadership appointment before other substantive recommendations regarding the litigation can be provided to the court. For other sub-provisions, the issue of who is speaking or negotiating with the authority to bind a party is needed and that cannot be known until the court has made the appointment of leadership.

The following topics listed under proposed Rule 16.1(c) are premature to discuss prior to the appointment of leadership counsel:

- (4) how and when the parties will exchange information about the factual bases for their claims and defenses;
- (5) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;
- (6) a proposed plan for discovery, including methods to handle it efficiently;
- (7) any likely pretrial motions and a plan for addressing them;
- (8) a schedule for additional management conferences with the court:
- (9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);
- (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.

Virtually all of these provisions require substantive decision-making about the case itself, which will not be possible in any MDL that requires a leadership appointment until after leadership is appointed. In fact, beginning to negotiate many of these provisions before the appointment of leadership will inject confusion, delay and prevent any agreements from being reached.

The proposed Rule 16.1(c) provisions, while meant to be a set of guidelines (not mandates) for newly appointed transferee court judges, can easily become an ill-informed box-checking exercise regardless of their applicability to the case before the transferee judge. This may result in a report to the transferee judge that is not accurate and not useful. Worse, it could end up shaping an MDL that in reality is not the MDL that the transferee judge will oversee.

With all due respect, a much more limited rule where the initial management conference (a) occurs shortly after the initial transfer of the MDL and (b) focuses on those limited items that need to be prior to appointment of leadership be done first would aid in the efficiency of the MDL process. This will ensure that what is created is appropriate for that MDL. As articulated above, and bears repeating, not all MDLs are the same and they certainly should not be governed by a "one-size-fits-all" approach to case management, especially at the very early stages. Promulgating a rule as wide-ranging as the current proposal will not serve what I can only assume is the intended goal of enhancing efficiencies for the transferee judge and the litigants.

As noted above, I wholeheartedly support efforts to improve the MDL process. Further, I want to thank the Committee for its considerable time and efforts to create a rule intended to assist judges as they preside over the early stages of an MDL and for the opportunity to address the Committee on February 6, 2024. I look forward to answering any questions that members of the Committee might have.

Respectfully submitted,

Seth A. Katz

TAB 17

No testimony outline or comment was submitted
by January 23, 2024.

TAB 18

No testimony outline or comment was submitted
by January 23, 2024.

TAB 19

January 23, 2024

VIA EMAIL TO:

RulesCommittee_Secretary@ao.uscourts.gov

Statement of Roger L. Mandel
Partner, Jeeves Mandel Law Group, P.C.
Before the Committee on Rules of Practice and Procedure

February 6, 2024

Thank you for providing me this opportunity to testify before the Committee regarding the proposed Rule 16.1 addressing Multidistrict Litigation. My name is Roger Mandel, and I am partner at Jeeves Mandel Law Group, P.C., a four-lawyer firm with offices in Tampa-St. Petersburg, Florida, and Fort Worth, Texas. I have practiced complex litigation for my entire almost 37-year career, with an emphasis on Plaintiffs' class action work for over 30 years. My testimony is informed by my class action experience, including acting as lead and participating counsel in class action only MDLs and participating in hybrid class actions involving both class action and individual cases. My testimony is also informed by my recent experience at the beginning of the ongoing *In re Phillips CPAP MDL*.

The Committee and the MDL Subcommittee have engaged in a long and careful process of preparing multiple drafts of and soliciting extensive commentary from stakeholders regarding proposed Rule 16.1. This reflects a commendable intent to adopt an MDL rule that implements the purpose of aiding judges in better handling the complexities of MDL proceedings while accommodating as much as possible stakeholder concerns.

After participating in extensive discussions with other plaintiff-side practitioners and multiple meetings with Subcommittee members and reporters and reviewing both plaintiff and defense-side comments and testimony, I believe that a revised version of the currently proposed Rule 16.1 and Committee Note can achieve the purposes of the proposed rule while ameliorating most stakeholder concerns. I thus offer a draft of a revised version which is attached hereto as Exhibit A.

On the plaintiff's side, the concerns overwhelmingly focus on three aspects of the current version of the Rule and Committee Note. First, plaintiff's' counsel believe that most of the topics the Rule suggests should be addressed in an initial management conference before the appointment of leadership counsel should await discussion until after leadership counsel have been appointed and can offer their

input on those issues.[1] Second, Plaintiff's counsel believe that the appointment of coordinating counsel with undefined powers and responsibilities who have not been demonstrated through any deliberative process to have the expertise to well represent plaintiffs may lead to increased costs and premature and/or ill-advised orders by courts.[2] Third, Plaintiffs' counsel believe that the currently proposed Rule and Committee Note focuses overwhelmingly on product liability MDLs with huge numbers of individual plaintiffs, such that it does not sufficiently address the many permutations of MDLs, particularly those involving class actions which are necessarily subject to Fed. R. Civ. P. 23.[3]

As some Plaintiffs' side testimony has indicated, these objections could largely be resolved by a two-tiered approach to early management conferences. Both administrative and urgent issues, along with the procedures for appointment of leadership counsel, can be addressed in a preliminary conference. However, most issues that a transferee court will address in a comprehensive management order can wait until after the appointment of leadership counsel and a comprehensive management conference in which leadership counsel take the lead for the parties they represent.

To that end, the attached proposed revised rule and committee note provides for a preliminary management conference and a subsequent comprehensive management conference. At the preliminary management conference, the parties and the court will address only objective information about the size, scope, and nature of the claims and defenses involved in the MDL and any issues that cannot await consideration by the court at the subsequent comprehensive management conference. At the comprehensive management conference, the parties (by and through any appointed leadership counsel) will address all the issues necessary for issuance of a comprehensive management order.

Notably, I have not read anything in the draft Committee Note or heard any comments by any members or reporters of the Committee or Subcommittee or read any witness testimony explaining why a transferee court cannot wait to enter a comprehensive management order until after the appointment of leadership counsel. If the transferee court moves expeditiously to appoint leadership counsel, it can conduct the comprehensive management conference within a few months after the preliminary management conference. In an MDL that will almost undoubtedly last multiple years, waiting a few months for entry of a well thought out, comprehensive MDL management order is entirely reasonable.

---

[1] *See, e.g.,* Testimony of P. Leigh O'Dell (October 6, 2023); Testimony of A.J. de Bartolomeo (January 2, 2024); Testimony of Jennifer Scullion (January 2, 2024).

[2] *See, e.g.,* Testimony of Jennifer Hoekstra (January 2, 2024); Testimony of Tobi L. Millrod (January 14, 2024).

[3] *See, e.g.,* Testimony of Tobi L. Millrod (January 14, 2024); Testimony of Dena C. Sharp (January 2, 2024); Testimony of Norman E. Siegel (January 2, 2024).

The proposed revised rule changes the name of the counsel who may be appointed to aid in preparation for the preliminary management conference from "coordinating counsel" to "administrative counsel." It also sets forth the limited circumstances in which they should be appointed and the very limited number of topics they will address. This emphasizes the very limited, almost ministerial role they will play in the MDL. This serves the purpose of preventing temporary counsel appointed on an ad hoc basis from usurping the functions of leadership counsel duly appointed after a thoughtful and thorough selection process and, in the case of interim class counsel, appointed in compliance with Rule 23(g). These changes should address the concerns of most Plaintiffs' counsel regarding the appointment and role of temporary counsel in connection with the first management conference.

The proposed revised rule also lists several topics for possible discussion at the preliminary management conference not included in the currently proposed version, including two which seem fundamental. For example, the current version does not ask for the parties to provide the court with an objective comprehensive survey of the cases composing the MDL proceedings or to discuss whether the transferred cases should be stayed, in whole or in part, pending entry by the court of a comprehensive management order. Further, the current version does not suggest a discussion of the possible need for interim evidence preservation orders or for orders regarding service of process, particularly regarding foreign defendants. The proposed revised rule does list these topics for possible discussion at the preliminary management conference.

The proposed revised committee note addresses the applicability of the proposed Rule to the many different types of MDLs, including to MDLs involving class actions. Significantly, it instructs that different counsel will likely need to lead the class actions from those that lead the individual actions in hybrid MDLs and that the selection of interim class counsel must comply with Rule 23(g).

The defense side comments I have reviewed fixate primarily on one issue: the supposed need for the transferee court to address early in the MDL the alleged problem of "unsupportable claims."[4] I am not aware of any defense comments or testimony arguing that a transferee court should not wait until after its appointment of leadership counsel to enter a comprehensive management order. Nor do I believe defense counsel would object to inclusion of the additional topics for possible discussion at the preliminary management conference added in the proposed revised rule.

Adopting a two-tiered approach will achieve the goals of the proposed Rule 16.1 while alleviating major stakeholder concerns. The attached proposed revised rule and committee note will undoubtedly require significant editing, but I believe using it as

[4] *See, e.g.,* Comment of DRI (October 11, 2023); Comment of LCJ (September 18, 2023).

a new starting point will result in a Rule and Committee Note almost everyone can live with and even support.

Thank you for your work on the proposed Rule, and I look forward to addressing any questions you may have.

Sincerely,

Roger L. Mandel

Roger L. Mandel

EXHIBIT A

EXHIBIT A

PROPOSED REVISED RULE 16.1

The following proposed revised Rule 16.1 is not intended to be a finished product. Undoubtedly, careful consideration will result in editing which will improve its readability and clarity. However, this draft should serve to make clear the two-tiered conference structure proposed and the distinctions between them and provide a starting point for drafting a revised version of the proposed rule.

Rule 16.1. Multidistrict Litigation

(a) ~~**Initial**~~ **MDL Management Conference**s**.** After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule ~~an initial~~early management conference**s** to develop a management plan for orderly pretrial activity in the MDL proceedings. The preliminary MDL management conference should be held for the court to familiarize itself with the size, scope, and nature of the claims and defenses involved in the MDL and to address any issues the consideration of which should not await the subsequent comprehensive MDL management conference. The comprehensive MDL management conference should be held to develop a comprehensive management plan for orderly pretrial activity in the MDL proceedings.

(b) **Designation Of** ~~**Coordinating**~~**Administrative Counsel For The** ~~**–**~~**Preliminary MDL Management Conference.** If the number of attorneys on one or both sides make it unlikely the parties can confer ~~The~~productively without such a designation, the transferee court may designate ~~coordinating~~administrative counsel to:

(1) assist the court with the preliminary MDL management conference; and

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

(c) **Preparing A Report For The** ~~**Initial MDL**~~**Preliminary MDL Management 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 consistent with the limited purposes of the preliminary MDL management conference, which may include any matter addressed in the list below ~~or in Rule 16~~. The report may also address any other matter the parties believe cannot await entry of the comprehensive MDL management order and thus 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;

Commented [RM1]: The change of title from "Coordinating Counsel" to "Administrative Counsel' is to address concerns that these temporary counsel will have excessive authority and an unfair advantage in obtaining leadership positions. It also emphasizes the limited nature of their duties.

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

(C) their role in settlement activities;

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

(E) any limits on activity by non-leadership counsel.~~; and~~

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

(2) identifying the number and the types (class or individual) of cases transferred, estimating the number of additional cases likely to be filed and transferred to the transferee court, identifying all cases in state courts with which the MDL may need to be coordinated, summarizing the claims made in the cases, and summarizing the likely defenses;

(~~2~~3) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

(4) whether interim orders regarding the preservation of electronically stored information and other potentially relevant evidence are necessary, and if so, what they should provide;

(5) whether any defendants will be contesting personal jurisdiction and/or whether service of process on any foreign defendants would need to be made pursuant to the Hague Convention or similar process and whether an order should be entered requiring defense counsel to accept service of process but providing that doing so will not waive any personal jurisdiction or other defenses;

(6) whether the transferred cases and subsequently transferred cases should be stayed, including the obligation of defendants to respond to complaints and discovery requests, until the entry of a comprehensive MDL management order; and

(7) Any other matters that may require action by the court before the entry of a comprehensive MDL management order.

~~**(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;~~

Commented [RM2]: This topic is eliminated because it is premature to address at a very early stage before the Court has a full understanding of the nature of the proceeding and before appointment of leadership counsel who have had a chance to confer with non-leadership counsel and potentially reach an agreement on this topic.

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Commented [RM3]: Note these are all objective facts necessary for the court to know that do not require Administrative Counsel to take any position on them that may differ from the later, controlling position of leadership counsel.

~~(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~~ Preliminary ~~MDL~~MDL Management Order. After~~the conference~~ the preliminary MDL management conference, the~~-~~ transferee court should enter a~~n~~ ~~initial MDL management order~~ preliminary MDL management order addressing the issues covered at the preliminary MDL management conference ~~matters designated under Rule 16.1(c)~~---and any other matters in the court's discretion which it believes should not await the entry of a comprehensive MDL management order. This order controls the course of the MDL proceedings until entry of the comprehensive MDL management order ~~the court modifies it~~.

(e) Preparing A Report For The Comprehensive MDL Management Conference. After its appointment of leadership counsel or decision not to appoint leadership counsel, the transferee court should order the parties (by and through any appointed leadership counsel) to meet and prepare a report to be submitted to the court before the comprehensive MDL management conference begins. The report must address any matter designated by the court, which may include any matter addressed in the list below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

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

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

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

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

Commented [RM4]: Consideration should be given to re-ordering these topics in a more logical order to go from more basic early litigation topics to more complicated later litigation topics.

(5) whether permanent orders regarding the preservation of electronically stored information and other potentially relevant evidence are necessary, and if so, what they should provide;

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

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

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

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

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

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

(f) Comprehensive MDL Management Order. After the comprehensive MDL management conference, the transferee court should enter a comprehensive 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 course of the MDL proceedings until the court modifies it.

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PROPOSED MODIFICATIONS TO THE DRAFT COMMITTEE NOTE

This is not intended to be a comprehensive draft of the Committee Note to the proposed revised Rule 16.1. Drafting of the note to best fit the revised rule will take considerable time and effort. This effort merely attempts to set forth some of the most important necessary changes.

DRAFT 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.

MDL proceedings can vary greatly in nature, although they can generally be divided into three types: proceedings consisting entirely of class actions ("Class MDLs') (e.g., antitrust, data breach, federal statutory consumer causes of actions, and state deceptive trade practices),

proceedings consisting entirely of individual actions ("Individual MDLs") (e.g., defective products allegedly causing personal and/or economic damages), and proceedings consisting of both class and individual actions ("Hybrid MDLs"). They can also vary greatly in size, ranging from less than ten class actions against only one defendant to scores of class actions and tens or even hundreds of thousands of individual claims against multiple defendants.

Consequently, ~~N~~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~~one or more ~~initial~~ MDL management conferences soon after the Judicial Panel transfer occurs to develop a management plan for the MDL proceedings. Th~~at~~ese ~~initial~~early MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding ~~an initial~~early MDL management conferences in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rules 16.1(c) and (e) may be of great value to the transferee judge and the parties.

This rule sets forth a two-tiered approach to MDL management conferences. At the preliminary MDL management conference, the transferee court and the parties should address only provision of information to the court, a possible stay of the transferred actions, the need to address any scheduling orders previously entered in the transferred actions, appointment of leadership counsel, and any other issues that cannot await consideration until the entry of acomprehensive MDL management order. At the comprehensive management conference, the transferee court and the parties should address all issues necessary for entry of a comprehensive management order.

Rule 16.1(b). Rule 16.1(b) recognizes the court may designate ~~coordinating~~ administrative 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 preliminary ~~initial~~ MDL management conference.

While there is no requirement that the court designate ~~coordinating~~administrative counsel, the court should consider whether such a designation could facilitate the organization and management of the ~~action at the initial MDL management conference~~ preliminary MDL management conference. The court may designate ~~coordinating~~administrative counsel to assist the

court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the preliminary MDL management conference ~~initial MDL management conference~~ such that the designation of ~~coordinating~~administrative 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~~ preliminary 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~~,~~ the court or the parties believe cannot await the entry of the comprehensive MDL management order ~~whether or not listed in those rules~~. Rule~~s~~ 16.1(c) ~~and 16~~ provide~~s~~ a series of prompts for the court ~~and~~which 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~~6) are often important to the very early 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 preliminary MDL management conference ~~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~~several 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. In selecting leadership counsel for the class actions in Class and Hybrid MDLs, the court must comply with Federal Rule of Civil Procedure 23(g). In Hybrid MDLs, leadership counsel should typically include both counsel who represent the interests of the class actions and counsel who represent the interests of the individual actions due to the conflicts of interest between the members of the classes and the individual plaintiffs that may potentially arise.

Individual MDLs and the individual cases in Hybrid MDLs ~~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(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 court should not have any presumption in favor of appointing administrative counsel as leadership counsel. The court will typically appoint as administrative counsel attorneys already known to it or recommended to it by other judges or who appear qualified based on online research. Leadership counsel, on the other hand, should be chosen taking into consideration all relevant criteria, including those discussed above, as demonstrated through the selection process ordered by the court. The appointed administrative counsel may not be the counsel most qualified for leadership positions. In the case of Class MDLs and Hybrid MDLs, the appointment of leadership for the class actions is controlled by Federal Rule of Civil Procedure 23(g), which provides for the appointment of interim class counsel to act on behalf of a putative class before the class certification determination and requires, in the case of multiple applicants, appointment by the court of the counsel best able to represent the interests of the class as determined by consideration of specified criteria.

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 constitutes ~~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 non-leadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and non-leadership counsel. In some instances, the court or leadership counsel have created websites that permit non-leadership 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~~f). 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 non-leadership 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 non-leadership counsel. The court should, however, ensure that non-leadership 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). Effective management of a MDL proceeding requires the transferee court to have a detailed understanding of the nature, size, and scope of the proceedings before it and how they are likely to change as the MDL moves forward. Obtaining a report from the parties providing this information at the preliminary MDL management conference will facilitate the court's understanding and ability to effectively manage the MDL.

Rule 16.1(c)(~~2~~3). 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~~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). In complex litigation of the type typically involved in MDLs, the parties often and with good reason will have concerns that other parties will deliberately or inadvertently destroy, alter, or fail to preserve electronically stored information and other potentially relevant evidence. Loss of relevant evidence can potentially have a dramatic negative effect on a party's ability to prosecute or defend an action. Parties typically handle this by sending preservation letters to the other side, but the demands contained in those letters are not binding. Accordingly, where such concerns legitimately exist, binding preservation orders from the court may be necessary, including interim orders very early in the litigation that will govern until leadership counsel have been appointed and the parties have had time to research the preservation issues and formulate reasonable and effective preservation protocols. ~~Experience has shown that in certain 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.[1] 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). In some MDLs questions may exist as to whether the courts from which the cases were transferred had personal jurisdiction over one or more defendants, particularly foreign defendants. Service of process on foreign defendants through the Hague Convention or a similar process may be time consuming, difficult, and expensive. The plaintiffs in many of the transferred cases may still be trying to obtain service on one or more of the defendants and plaintiffs in subsequently filed cases will have to do so. Out of concern for possible waiver of personal jurisdiction or similar defenses, counsel for defendants may be reluctant to accept service on behalf of their clients without a court order providing for non-waiver. An early order in the MDL addressing these issues can often prevent the needless expenditure of significant time and resources merely to achieve service of process.~~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~~

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~~[1] The Standing Committee removed the next sentence, "For example, it is widely agreed that discovery from individual class members is often inappropriate in class actions, but with regard to individual claims in MDL proceedings exchange of individual particulars may be warranted," from the Committee Note.~~

~~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). By the time cases are transferred by the JPML, the deadlines for defendants to respond to complaints in the transferred cases may have already passed or be looming. Discovery may have been served in those cases and response dates may have already passed or be looming. After transfer, parties may wish to aggressively pursue the cases, including proceeding with discovery. Allowing the cases to proceed in whole or part may be appropriate in some instances. In other instances, it may be advisable to stay the transferred cases in whole or in part until the court has entered the comprehensive MDL management order. This issue will almost always need to be addressed as early in the MDL as possible.~~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). This catch-all provision merely makes clear that the items listed in Rule 16.1(c)(1)-(6) are not exclusive and that the court and the parties can and should address any other matters the court or the parties believe may require action by the court before the entry of a comprehensive MDL management order. However, issues that can wait for the entry of a comprehensive MDL management order should not be addressed at the preliminary MDL management conference because such issues should be addressed only by leadership counsel duly appointed by the court.~~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[2] the court has not 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.~~

~~[2] The original phrasing of "Even if" was changed to "Whether or not" by the Standing Committee.~~

~~**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 may benefit from entry of a preliminary MDL management order. This order likely will address whether the transferred actions are stayed, in whole or in part, pending the entry by the court of a comprehensive MDL management order. This order may also provide the procedures and criteria for selection of leadership counsel as well as setting forth the relevant roles and responsibilities of leadership and non-leadership counsel. Because a comprehensive MDL management order must await the appointment and input of leadership counsel, the preliminary MDL management order should provide for the selection process to move as quickly as possible consistent with the selection process and the likely number of applicants for leadership positions. The order should also address any matters which the court believes need resolution before it can enter a comprehensive MDL management order.

Rule 16.1(~~e~~e). 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(~~e~~e) order prior to the ~~initial~~comprehensive 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(~~e~~e) 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(e~~e~~) 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(~~e~~e)(1)-(11~~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 ~~initia~~comprehensive~~l~~ MDL management conference.

Rule 16.1(e~~e~~)(~~3~~1). 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(e~~e~~)(~~4~~2). Experience has shown that in certain 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(e~~e~~)(~~5~~3). 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(ee)(64). 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(e)(5). For the same reasons explained in connection with, Rule 16.1(c)(4) regarding interim orders regarding preservation of electronically stored information and other potentially relevant evidence, the transferee court may need to consider entry of permanent preservation orders.

Rule 16.1(ee)(67). 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(ee)(78). The Rule 16.1(a) conferences isare the initial MDL management conferences. 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 16.1e(c)8(9). Whether or not the court has not 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 the parties reach a settlement is just that — constitutes 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(ec)(910). 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(ee)(101). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number ofseveral state court systems (e.g., California, and New

Jersey and Texas) 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(~~ee~~)(1~~2~~1). 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(~~dd~~f). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A comprehensive management order need not address all matters designated under Rule 16.1(~~ee~~) 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 comprehensive MDL management order ~~in light of~~considering 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).~~

TAB 20

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February 6, 2024

SUBMITTED ELECTRONICALLY
RulesCommittee_Secretary@ao.uscourts.gov

Rules Committee Secretary
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
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Re: Proposed New Federal Rule of Civil Procedure 16.1 – Multidistrict Litigation

Dear Committee Secretary and Members,

My name is Lauren Barnes and I am a Partner in the Boston office of Hagens Berman Sobol Shapiro LLP. I thank the Committee for allowing me to address the proposed creation of FRCP 16.1.[1] I appreciate the hard work that has gone into examining the issues this Rule seeks to address and into preparing the Rule. I write primarily to encourage revisions to address the presence of class cases in MDLs.

My practice for the last nearly twenty years has focused on pharmaceutical marketing and antitrust litigation, alleging unlawful and/or anticompetitive conduct by pharmaceutical manufacturers and seeking recovery on behalf of private and public purchasers in complex litigation. Members of my office and I have served as lead or co-lead counsel in multiple such cases, and they are almost exclusively class actions. Sometimes, these cases are coordinated in an MDL with personal injury and other actions, as in MDL 1596: *In re Zyprexa Products Liability Litigation*; more often, though, these cases, to the extent that they are formally coordinated as an MDL, are brought together with other class cases and opt-outs from the class cases, as in MDL 2966: *In re Xyrem (Sodium Oxybate) Antitrust Litigation.* (And sometimes, these cases are coordinated in a single district without the creation of an MDL, such as in *In re HIV Antitrust Litigation* before Judge Edward Chen in the Northern District of California.)

Most of our cases, even when formally coordinated in MDL proceedings, raise only or primarily class, rather than mass tort, issues. MDL statistics suggest that more than half of MDLs are like this: of the currently pending MDLs, approximately 60% of them have never included more than 100 actions (and approximately 50% have included 50 or fewer total actions).[2]

[1] The views expressed here are my own and not necessarily those of my partners or my firm.

[2] MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending, dated Feb. 1, 2024, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-February-1-2024.pdf.

Class cases have unique procedural and substantive characteristics. For example, Rule 23 requires the appointment of class counsel to "represent the best interests of the class." Fed. R. Civ. P. 23(g) advisory committee's note to 2003 amendments. This "means the primary obligation of counsel is to the class rather than to any individual members of it," which "may be different from the customary obligations of counsel to individual clients." *Id.*[3] Given these heightened duties, Rule 23 provides a specific framework for the selection of class counsel, identifying what a court must consider and what it may consider. There are no such rules governing the selection and duty of leadership in non-class cases, where lawyers continue to owe duties to individual clients.

Newly proposed Rule 16.1 appears aimed at MDLs on the other end of the spectrum from these primarily class cases: those mass tort cases comprising hundreds or thousands of individual, non-class actions. Under the current drafting of proposed Rule 16.1, though, all MDLs would be treated the same. While the new Rule is framed as permissive, we know it is human nature to search for nails when equipped with a hammer.

I encourage the Committee to consider revising the proposed Rule and Note to state that it does not apply to MDL proceedings made up primarily or exclusively of class actions. Alternatively, I propose the following changes to the current text of Rule 16.1 and its Note to turn this hammer into a scalpel.[4]

- Explicitly cross-reference Rule 23(g) in Rule 16.1(b) and (c)(1)(B) and the Note as a means of ensuring courts consider the impact of class actions within an MDL and the different rules and standards that may apply to them.

> Rule 16.1(b):
> 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). Coordinating counsel is not a substitute for class counsel and the requirements of Rule 23.
>
> Note to Rule 16.1(b):
> 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

[3] The Note likewise acknowledges that because of class counsel's duty to the class as a whole, rather than to individual clients, "class representatives do not have an unfettered right to 'fire' class counsel" nor can they "command class counsel to accept or reject a settlement proposal." *Id.*

[4] Some of these suggestions mirror those proposed by Dena Sharp in her January 2, 2024, submission to this Committee.

counsel to assist the court before appointing leadership counsel, though coordinating counsel is not a substitute for class counsel and the requirements of Rule 23, to the extent that Rule 23 applies to one or more cases within the MDL, and thus it may not be appropriate to designate coordinating counsel in MDLs containing multiple and/or primarily class cases. 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)(1)(B):
…the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities, and whether appointment of counsel for the proposed class(es) under Rule 23(g) is warranted.

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

- Specify that as to class cases, the role of coordinating counsel is limited to purely ministerial duties pending appointment of class counsel (interim or final) under Rule 23(g). As such, a report prepared by coordinating counsel should not address the topics identified in Rule 16.1(c)(1), (4)-(9), and (12) as to class cases.

- Clarify the differences between a consolidated class complaint and master MDL pleadings.

Note to Rule 16.1(c)(5):
The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Cases proceeding under Rule 23 may, for example, require only a consolidated complaint which supersedes individual class action complaints falling with the class or classes defined in the consolidated complaint. Decisions

regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in Gelboim v. Bank of America Corp., 574 U.S. 405, 413 n.3 (2015).

Thank you for considering these suggestions.

Sincerely,

Lauren Barnes

LB

TAB 21

No testimony outline or comment was submitted
by January 23, 2024.

TAB 22

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January 24, 2024

VIA EMAIL
RulesCommittee_Secretary@ao.uscourts.gov
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Colombus Circle, NE
Washington, DC 20544

Dear Members of the Advisory Committee,

Thank you for the opportunity to comment on proposed Rule 16.1. I would like to also thank Alexandra S. Epstein, who assisted me with the preparation of this testimony. I am a Partner and Co-Chair of the Antitrust and Trade Regulation Practice Group at Robins Kaplan LLP. Over the last two decades, I have represented clients in numerous antitrust class actions, including in multidistrict litigation ("MDL"). I currently hold leadership positions in various class actions, including *BCBSM, Inc. v. Vyera Pharmaceuticals, LLC et al.,* No. 21-cv-01884 (S.D.N.Y.)*, In re Merck Mumps Vaccine Antitrust Litigation,* No. 12-cv-03555 (E.D. Penn.)*,* and *Sterk, et al. v. The Bank of Nova Scotia, et al*., No. 20-cv-11059 (D.N.J.). Most recently, I was appointed Interim Co-Lead Counsel in both *In Re Axon VieVu Antitrust Litigation*, No. 23-cv-07182 (D.N.J.) and *In re Fragrance End-User Plaintiffs Antitrust Litigation,* No. 23-cv-16127 (D.N.J.). I also currently serve as President of the Committee to Support the Antitrust Laws (COSAL), which promotes and supports the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. My testimony today is on behalf of myself, as a member of the private antitrust bar, as well as in my capacity as COSAL's President.

MDLs provide a forum for the adjudication of a wide variety of claims, which range from products liability to mass torts to price-fixing. Importantly, MDL proceedings encompass actions brought by many individuals based on the same alleged conduct but with different claims (i.e., mass torts involving personal injury claims) on the one hand, and consolidated class actions on the other (along with other types of non-mass-tort actions). Although mass torts may represent hundreds of thousands of individual actions consolidated into a few dozen MDLs, most MDLs

are not mass torts.[1] Thus, any new rule that addresses MDL practice must also consider the diverse range of cases subject to transfer under 28 U.S.C. Section 1407 and whether a new rule animated by just one type of MDL should apply to other types of MDLs that do not implicate the same issues.

Proposed Rule 16.1 attempts to provide guidance on issues that are unique to mass tort MDLs, but applies it to every type of MDL, even those that are relatively straight forward following consolidation, such as class action MDLs. These problems were identified in the January 2, 2024 written comments submitted by COSAL member Jeannine Kenney, which COSAL adopts. COSAL shares the serious concern that Rule 16.1, if applied to class action MDLs, could create serious confusion, conflict, and delay. We ask the Committee to consider, at a minimum, limiting the applicability of the Rule to mass-tort type MDLs to the extent the committee proceeds with the proposed rule.[2]

While, as noted, a number of the provisions of proposed Rule 16.1 are concerning when applied to class action MDLs and should be revisited, my comments focus on one issue that may merit additional discussion. Specifically, the proposal to create a "coordinating counsel" for MDLs threatens to derail the well-established practices that already exist to promote the efficient prosecution of class actions.

Proposed Rule 16.1 Would Create Multiple Layers of Leadership That Would Delay The Prosecution of Class Action MDLs

First, Rule 16.1's proposed appointment of coordinating counsel would likely cause unnecessary delay in class action litigation. Under existing Rules and practice, the MDL transferee court selects interim class counsel using a clear set of criteria set forth in Rule 23(g) of the Federal Rules of Civil Procedure.

In antitrust class action MDLs, courts efficiently work within this framework to select interim lead counsel without delay. To be sure, there is often little time between consolidation following an MDL order, motions for appointment of leadership (and subsequent hearings, if necessary), and the appointment of lead counsel. In one recent antitrust MDL, *In re Harley-Davidson Aftermarket Parts Marketing, Sales Practices and Antitrust Litigation,* MDL No. 3064 (E.D. Wis.), only 35 days passed between the transfer of the JPML and the appointment of interim class counsel. Furthermore, when looking at data from the last ten antitrust MDL cases, the average amount of time between when a JPML was transferred and when leadership was appointed was approximately three months, with a median of 87.5 days. These statistics do not

[1] *See, e.g.*, Alan Rothman, *And Now a Word From the Panel: A One State MDL?* (Sept. 27, 2023), Law360 (finding product liability MDLs account for 37% of the total MDL proceedings, or 65 of 172 MDLs as of Sept. 27, 2023).
[2] COSAL does not take a position on the appropriateness of the proposed Rule for mass-tort MDLs.

account for other antitrust MDLs where interim class counsel was appointed before the MDL was created.

Thus, given the relatively brief time frame between MDL transfer and the appointment of interim lead counsel, adding an additional layer of leadership that requires the appointment of coordinating counsel would only serve to frustrate a process that is already working quite well.

Proposed Rule 16.1 Does Not Provide Specific Criteria and Responsibilities for Coordinating Counsel, Which Will Lead To Confusion in Class Action MDLs

Proposed Rule 16.1 is unclear about how coordinating counsel is selected or appointed. Proposed Rule 16.1 similarly does not define the term "coordinating counsel," which may also cause unnecessary confusion if implemented.

First, it is not clear who appoints coordinating counsel. Do the various class counsel designate this role through private ordering or is the role filled by the court prior to appointment of interim class counsel? Similarly, the responsibilities of the role are undefined, leaving unanswered whether the role is meant to synthesize the many views of plaintiffs' counsel and present them to the court and opposing counsel (i.e., administrative in nature), or whether it involves decision-making authority (substantive in nature). The proposed Rule does not identify if, and if so, when, that role terminates. Does coordinating counsel have any role after the appointment of interim class counsel? And given that only interim class counsel (or the court) can bind the class, what value is their role both prior to and after appointment of interim class counsel?

The difference between an administrative function or a substantive function is a distinction with meaning, Currently, all applicants for interim class counsel in a class action must satisfy the criteria set forth in Rule 23(g). These factors include: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the classes. Fed. R. Civ. P. 23(g)(1)(A)(i-iv). These criteria ensure courts appoint the most qualified lawyers to act as interim lead counsel for the best interests of the class.

Under the current proposal, it is not clear whether coordinating counsel will have to satisfy similar criteria, or altogether different criteria. Moreover, coordinating counsel could undermine the experienced decision-making of interim lead counsel, particularly if coordinating counsel is empowered to make substantive decisions on behalf of the class, before or after class counsel is appointed, as detailed below.

Proposed Rule 16.1 Is Unnecessary in a Class Action MDL and Could Lead To Serious Duplication of Effor

Proposed Rule 16.1's initial case management conference is unnecessary in class action MDLs and could result in significant duplication of effort. In class action MDLs (or class actions

consolidated under Rule 42), a consolidated complaint is filed only after interim class counsel is appointed by the court. Interim class counsel then 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 and subsequent Rule 16 conference. Only interim class counsel is empowered to make decisions for the class and litigate the action. The consolidated complaint supplants all prior actions brought on behalf of the same class. One or more, but generally not all, of the plaintiffs that initially filed class action complaints on behalf of the same class are identified as named representatives in that consolidated class action complaint. Those who are not selected by interim class counsel for a class representative role are no longer putative class representatives and their individual complaints are no longer operative. And counsel who are not appointed as interim class counsel no longer litigate any action at all[3] unless directed by class counsel to assist in the litigation. If enacted, Proposed Rule 16.1 would create inefficiencies by adding additional layers to this tried-and-true process.

For example, if the court convenes an initial conference of all parties prior to the appointment of interim lead counsel, it will convene parties and counsel who may not be involved in the litigation at all after appointment of class counsel. This would not only lead to unnecessary case costs, at the expense of the class, without any ability of interim class counsel to implement cost-control measures, but it would also cause unnecessary delay. That is because once interim class counsel is appointed, the Court must convene another Rule 16 case management conference.

Moreover, there is little reason to incur the costs for coordinating counsel and to delegate decision-making to all attorneys of record on issues that must (and can only be) made by interim class counsel. This redundancy is expressly addressed by the Manual on Complex Litigation, that notes "after section 1407 centralization, the appointment of lead counsel may reduce the need for large numbers of lawyers to travel to the transferee district." Manual for Complex Litigation, Fourth, §22.343. And this inefficient process would repeat itself as plaintiffs' counsel wrestle to arrive at a cohesive set of views on the issues that arise in the report and conference contemplated by Rule 16.1, causing additional delay and expense to the class.

This also will impose unnecessary costs on opposing counsel. Many defendants in a class action (MDL or otherwise) prefer to discuss and negotiate case schedules and discovery issues only with interim class counsel who have the authority to make decisions and bind the class. In many cases, defendants will not engage in these discussions prior to appointment of interim class counsel. New Rule 16.1 will impose on defendants and their counsel the obligation to meet and confer with potentially dozens of counsel and their clients who may ultimately have no authority in the case.

[3] Unless, of course, they opt out of the class.

In short, in addition to other concerns, COSAL has considerable concerns about the inefficiencies and confusion that will be created by Proposed Rule 16.1(a)'s designation of coordinating counsel and an initial case conference prior to the appointment of class counsel.

Class action MDLs already benefit from interim class counsel who are solely authorized to prosecute the action vigorously and efficiently as a fiduciary to the class through trial. The addition of a new duplicative and unnecessary coordinating role and initial pre-appointment conference may confuse and frustrate interim class counsel's efforts at best, and undermine them at worst. For this reason, I recommend the role of coordinating counsel be removed from Proposed Rule 16.1. COSAL also asks that the Committee reconsider the applicability of Proposed Rule 16.1 to class action MDLs given the relatively straight-forward case management process that has long been a feature of class actions, MDL or otherwise.

Thank you again for your time and the opportunity to comment on this important topic.

Sincerely,

Kellie Lerner

Kellie Lerner

TAB 23

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Outline of Proposed Testimony Talking Points to the Federal Civil Rules Advisory Committee

February 6, 2024 Public Hearing on Draft Amendments to Rules 16/26 regarding Privilege Logs

- Introduction – My name is Robert Levy. I am an executive counsel at Exxon Mobil Corporation where I focus on legal policy issues and advise on eDiscovery, Information Governance and Data Privacy.
- Thank you for the opportunity to testify today.
- I am giving a perspective of a party that often spends considerable sums in preparing privilege logs in federal court litigation – and much of the burden and expense is wasteful because it is unnecessary.
- In our cases, the costs of privilege withholding and privilege logging is one of the most time consuming and expensive segments of the pretrial process.
- The rules proposal requires early engagement on privilege log issues – although this engagement is potentially helpful, the rule change does not address the underlying issue which is the presumption applied by many courts that document-by-document logging is required in all cases.
    - It also should be noted that early engagement, while potentially helpful, is generally too early to really tackle the problems associated with privilege withholding. This issue only arises after the discovery process is well underway.
- Privilege logs involve significant costs and due to the large increase in documents and records means that the costs continue to rise even with the advent of technology.
- The rule should say that logs should not be required absent a showing of need for these categories of communications:
    - all communications with outside counsel
    - Communications post suit being filed
- It is important to have the amendment incorporated in Rule 26(b)(5) versus in Rules 16 or 26(f) because this is the rule that governs privilege withholding.
- Rule 45 also should be amended to address the fundamental fairness of burden on third parties to litigation – third parties should not be required to expend costs associated with logging unless specifically required.
- The proposed Committee note should be altered to remove the reference to rolling logs – using the term tiered logs is preferred. Rolling logs do not always work well because document productions are methodical and proceed by custodian.

TAB 24

January 23, 2024

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

Re: Proposed Amendments to Civil Rule 26

Dear Members of the Advisory Committee:

On behalf of the Committee to Support Antitrust Laws ("COSAL" or "the Committee"), the undersigned authors submit this comment regarding the Proposed Amendment to Civil Rule 26 (the "Proposed Amendment"). We appreciate the opportunity to submit this comment, which we provide based upon our many years of practice in federal courts across the nation. This comment (1) describes the authors' relevant background; (2) commends the Proposed Amendment to Rule 26, and identifies what we perceive to be serious concerns with the Proposed Committee Note; (3) shares real litigation examples from the authors' practice evidencing the risks of the Proposed Committee Note; and (4) concludes that the Proposed Amendment to the Rule should be accepted but that certain important edits should be made to the Proposed Committee Note.

Relevant Background. The Committee to Support the Antitrust Laws was established in 1986 to promote and support the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. The Committee, including the undersigned members, practice regularly in federal courts across the nation. The undersigned are attorneys at law firms that primarily represent plaintiffs in federal-court litigation. Our focus as practitioners is on large, complex antitrust cases. We also have experience—both as current practitioners and as former law clerks and fellows to federal judges—applying Rule 26 in cases of many types and sizes.

Many of our cases are pharmaceutical antitrust matters concerning litigation which occurred between brand and generic pharmaceutical companies. Because of the nature of these cases—in which where prior litigation is at the core of the antitrust allegations—they necessarily involve a large number of communications in which lawyers were involved. Privilege disputes in these cases thus go to the core of Rule 26(b)(5) and its practical effect in litigation, and have allowed us to develop an intimate understanding of Rule 26 and its practical effects in litigation. In addition to privilege-intensive cases, the undersigned authors, and members of COSAL generally, also litigate cases whose subject matter is not itself litigation, *i.e.* which are less privilege-intensive. We thus bring to bear an understanding of the implications of the Proposed Amendment across a wide spectrum of cases.

The Proposed Amendment to Rule 26(f)(3)(D) is Well-Balanced and Appropriate

The Proposed Amendment to Rule 26(f)(3)(D) will require parties to, in their Discovery Plan, include their views and proposals for complying with Rule 26(b)(5)(A). This Amendment is modest, balanced, and likely to have salutary effects. One standard step in federal court litigation is that parties discuss and hopefully reach agreement as to the format and process by which they will exchange document-by-document privilege logs. These discussions serve the important purpose of setting expectations about how claims of privilege will be asserted in the first instance. That is an important thing to have mutual understanding on, as Rule 26 requires a withholding party to describe the withheld material "in a manner that . . . will enable other parties to assess the [privilege] claim."

In our experience, parties often engage in discussions about the format and process of their document-by-document privilege logs early in a case. For example, in our cases parties have discussed issues such as: the extent to which each individual e-mail in an e-mail thread requires

its own log entry; the format in which attorney names will be demarcated on the privilege log; the extent to which metadata may be used in generating the privilege log; and the appropriate level of detail in the withholding party's statement describing the purportedly privileged material being withheld from disclosure. In addition to format, the privilege-log process is often subject to discussion as well. For example, parties discuss the timing of when a producing party must produce a privilege log for any documents it proposes to withhold; what the procedures will be for challenging any claim of privilege; and how these procedures will evolve through different stages of the litigation—both during and after the fact discovery period.

These issues are of great significance. The stakes are high when ensuring an appropriate privilege log format and process—an insufficient log can lead to crucial facts being inappropriately withheld from disclosure. These discussions about the format and process of privilege logs thus enable the parties to air their views on what information will be required to "enable [them] to assess the claim" of privilege. Fed. R. Civ. P. 26(b)(5)(A)(ii).

The Amendment to 26(f)(3)(D) will appropriately require parties to engage in these discussions at a set point in the case—when developing their Discovery Plan. Because these types of discussions frequently occur by parties' own choice, the Amendment will not work any convulsive change to litigation process. Rather, the Amendment will affirm the importance of parties engaging in such discussions which have already been occurring informally, and make clear that questions of privilege withholding are of prime importance, as are questions of how parties that would seek to withhold relevant information from disclosure on the basis of claimed privilege intend to provide the information that will "enable other parties to assess the claim."

Problems with the Proposed Committee Note.

While the Proposed Amendment itself strikes an appropriately modest balance that will benefit litigants and courts, the Proposed Committee Note takes what in our view are several needlessly strong substantive positions that run counter to the balanced and flexible approach embraced by the Rule Amendment. For example:

- The only "burden" discussed by the Proposed Committee Note is that of the party preparing a privilege log—both in the first paragraph's reference to "very large costs," and the Note's discussion of "relieve the producing party." As discussed further below, this overlooks the substantial burdens imposed upon requesting parties and courts in appropriately scrutinizing asserted claims of privilege. It also does not account for the law's traditional recognition that "the party invoking a privilege bears the burden of establishing its applicability to the case at hand." *In re Grand Jury Subpoenas*, 318 F.3d 379, 384 (2d Cir. 2003). Consideration should be given primarily to requesting parties and courts—not parties that seek to withhold relevant evidence from disclosure.
- The first paragraph of the Proposed Committee Note would state that traditional, document-by-document logs are "often" associated with "very large costs." This paragraph is likely to be interpreted by courts as expressing a preference against traditional, document-by-document privilege logs. We respectfully submit that this paragraph should be removed from the Proposed Committee Note. By taking such a strong substantive position, the Proposed Committee Note would compromise the appropriately balanced nature of the Proposed Amendment to the Rule itself. Additionally, the notion that traditional, document-by-document logs are "often" associated with "very large costs" is not consistent with our practice. In most cases—

particularly for cases that are not complex, which make up most of the federal docket—creating a document-by-document log entails minimal burden. Moreover, typically, and especially in large cases involving a substantial number of withholdings, the vast majority of the log is created by using automatically generated metadata that is later cleaned up and supplemented to fill gaps; generally only a description needs to be created manually. As discussed below, even in large and complex cases, traditional document-by-document logs minimize the burden on all parties and the Court, because they enable the streamlined assessment of privilege claims and the reasoned presentation of narrow disputes to the Court.

The Proposed Committee Note would in effect discourage the use of traditional, document-by-document logs and likely lead to an increased use alternative log forms (such as so-called "categorical logs"—*i.e.*, privilege logs where withheld documents are lumped into "categories" rather than being individually identified on the log), without an assessment of their utility in permitting courts and parties to assess the claim of the withheld documents. As discussed herein, our experience with so-called alternative logs reveals that such logs suffer from a number of shortcomings, a problem the Committee Note leaves unaddressed, leaving courts with little guidance.

Federal Rule of Civil Procedure 26 starts from the recognition that claims of privilege must be closely scrutinized, based on information that "will enable other parties to assess the claim." Accordingly, parties have traditionally been required to substantiate their privilege withholdings with an explanation for each withheld document. That approach is sensible, given the high stakes in litigation and the corresponding and appropriate burden that is imposed on a party that seeks to withhold otherwise relevant information from disclosure. Several pernicious consequences follow

from the use of alternative logs such as categorical logs. These consequences will multiply if the Proposed Committee Note is not rejected or substantially revised.

Categorical Logs Burden Courts and Litigants. First, categorical logs increase burden by cloaking the nature of the documents being withheld and the basis for each withholding. Against the default backdrop of transparency in federal discovery—and the narrow interpretation of the attorney-client and work-product privileges, *see In re Local TV Advertising Antitrust Litig.*, 2024 WL 165207, at *4 (N.D. Ill. Jan. 16, 2024)—an opaque categorical log inevitably spawns disputes between the parties. These disputes substantially increase judicial workload, and can be avoided by favoring traditional, document-by-document logs.

A threshold dispute which arises is the sufficiency of the categorical log format chosen by the withholding party. Unlike document-by-document logs, there is no historical baseline expectation of what constitutes an appropriate "categorical log." Categorical logs by their nature require determining an appropriate level of abstraction for the categories; an appropriate quantity of documents per category; and the appropriate types and granularity of information to be disclosed for each category. Given the stakes of the task—a categorical log that is not carefully constructed with narrow categories and descriptions can lead to crucial facts being inappropriately withheld from disclosure—parties dispute even these basic structural components of "categorical logs." Resolution of those disputes burdens the Court.

The use of categorical logs also increases the number of disputes between the parties as to the appropriateness of the privilege assertions themselves. Rule 26 requires a description of the withheld information that "will enable other parties to assess the claim." In practice, however, parties frequently force dozens or even hundreds or documents into a single "category." The problem is that any description such a large quantity of documents is necessarily formulated at

such a level of abstraction as to be of little use in "enabl[ing] other parties to assess the claim." Fed. R. Civ. P. 26.(b)(5)(A)(ii). Such logs thus devolve into disputes over whether the withholding party has appropriately withheld documents, and those burdens then fall to the Court for resolution. This is an inherent problem with categorical logs. But the Proposed Committee Note would encourage expansion their use without discussing how to resolve their shortcomings, such as the limited ability to test the claim of privilege for each document withheld in the category.

The time burdens imposed by these disputes are not trivial. Raising and resolving the foregoing disputes can consume dozens or even hundreds of attorney hours in large cases. Attorneys must write letters raising and debating the disputes, hold meet-and-confer sessions to discuss them, brief the disputes for the Court's consideration, and devote time to preparing for and presenting oral argument to the Court. Those tasks translate to tens or even hundreds of thousands of dollars in costs for litigants in individual cases.

Categorical Logs Prevent Cases from Being Resolved on the Merits. The second problem with categorical logs is that they meaningfully increase the likelihood that cases will not be resolved on their merits because litigants will withhold as privileged material which should rightfully be produced to their adversaries. Categorical logs lead to improper withholdings in several ways.

From the producing party's perspective, it is much easier to withhold a document improperly if one is not required to specifically disclose what about the document is protected. That a producing party would improperly withhold a document does not require suggesting that a lawyer would consciously claim privilege over a non-privileged document—although the risk of such misfeasance is real. In practice, document review decisions are often delegated to teams of junior attorneys or contract attorneys. Where these attorneys may be unsure of whether to withhold

a document, they are likely to err on the side of withholding documents—even where the claim of privilege may be questionable at best. Over-withholding is far easier with a categorical log, where the withholding attorney is not forced to affirmatively justify the withholding of each document, and may thus neglect to conduct the document-by-document review necessary under the traditional regime.

From the adversary's perspective, the categorical log frustrates its ability to assess and challenge questionable withholdings. Document-by-document information can be crucial to assessing and challenging privilege claims: for example, the presence on an e-mail thread of a third party or the absence of attorney involvement can be clues to a document's lack of privilege; or the reason given for the assertion of privilege may not withstand scrutiny in light of the timing of the document's creation or the number of non-attorneys on a particular communication. But categorical logs deprive the adversary of this essential information. Categorical logs thus have the effect of shifting the burden to the receiving party. Normally, "the party invoking a privilege bears the burden of establishing its applicability to the case at hand." *In re Grand Jury Subpoenas*, 318 F.3d 379, 384 (2d Cir. 2003). With a categorical log, the receiving party is left trying to divine what is being withheld and why, often without sufficient information to make that determination.

As discussed above, this opacity engenders burdensome disputes, which must ultimately be resolved by courts. But a court's oversight is not a panacea. When parties present privilege disputes under a categorical log, what frequently occurs is the court will be forced to review, *in camera*, a random selection of documents from particular categories of the log. While that is better than no oversight, the court in that scenario is deprived of the benefit of substantive briefing from the challenging party as to the particular documents at issue—despite the adversary being best-positioned to provide this clarity in its briefing. Traditional, document-by-document logs best

enable the parties to brief these issues for the court; and the adversarial process is the most effective way of ensuring that documents not be improperly withheld.

Traditional, Document-by-Document Logs are Superior. If anything, the Committee Note to Rule 26 should move towards—not away from—the primacy of traditional, document-by-document logs. Such logs entail the least overall burden: they avoid the need for the case-specific log format disputes described above; they allow the parties to resolve privilege disputes among themselves; and when a dispute still must be presented to the Court, it can be presented in a narrow way, clarified with the benefit of document-specific briefing rather than wholesale delegation of privilege review to the Court. If the Committee is interested in preserving "maximum flexibility," as the current draft of the Proposed Committee Note states, it would be better not to take a substantive position on any particular form of log—as the current draft does, in claiming that traditional, document-by-document logs "often" are associated with "very large costs"; limiting the usage of traditional, document-by-document logs to "some cases"; and claiming that categorical logs are "effective to relieve the producing party of the need to list many withheld documents."

Proponents of categorical logs tend to focus exclusively on a single burden: that of the party logging its documents. Indeed, this is the only burden explicitly addressed by the Proposed Committee Note, in paragraphs 1 and 7. But any consideration of an appropriate rule must account for the overall burdens on not only producing parties, but also receiving parties and the Court. Due consideration must also be given to where the burden should fall. The law does not require that all burdens be equally shouldered in every instance. In the case of privilege withholding, the Federal Rules and case-law have always recognized that the burden of substantiating a withholding

must fall on the party seeking to withhold the relevant information—not the party which requested it, and not the Court. *See In re Grand Jury Subpoenas*, 318 F.3d 379, 384 (2d Cir. 2003).

Proponents of categorical logs also argue that the traditional approach must yield to the fact that modern discovery involves greater volumes of documents than it historically did. But the claim that modern discovery makes traditional logs unduly burdensome fails on its own terms: if anything, the transition to electronic discovery has enabled litigants to automate almost the entirety of document-by-document log production, as software can auto-populate nearly all fields (e.g., author, custodian, date) with the click of a button. Whereas each field would historically require manual entry using pen and paper, lawyers today in the mine run of cases will need manually type only a single field: the brief statement explaining the basis for the privilege assertion. The resistance to traditional logs thus amounts largely to a resistance to explaining why responsive documents are being withheld from production—and that concern is one which must be considered with a strong dose of skepticism.

Experience Counsels Rejecting the Proposed Committee Note.

The problems we have identified with the Proposed Committee Note—and the increased usage of categorical logs that could result from its adoption—are not only theoretical, but borne out of experience. To take one example, the undersigned authors currently represent the plaintiffs in an antitrust class action pending in the Southern District of New York, *In re Actos Antitrust Litigation*, No. 13-cv-9244-RA-SDA (S.D.N.Y.). In April 2022, the parties submitted competing proposals for privilege logs. The plaintiffs advocated for a document-by-document log, to be populated easily through the use of metadata. (ECF 376.) The defendants proposed a categorical log. (ECF 375.) The Court approved the categorical approach—but had to enumerate the specific fields that would be required. (ECF 377.) The defendants then produced a categorical log with

categories that individually "included hundreds or even thousands of documents, with date ranges spanning 10 years or more." (ECF 395 at 1.)

Plaintiffs disputed many of the defendants' privilege withholdings. Because of the opaque nature of the categorical log, these discussions demanded substantial attorney time which could have been avoided with a document-by-document log. When plaintiffs filed a motion challenging the assertion of privilege in August 2022, they had to do so on a categorical basis—and thus put several-thousand documents at issue before the Court. (ECF 395.) The defendants then sought permission to and did file formal briefing in response—15 pages total, plus exhibits—rather than the standard abbreviated discovery brief. (ECF 398, 403.) The categorical approach thus burdened on the parties and the Court, even before argument on the motion was heard. The Court ordered the defendants to produce certain improperly withheld documents to the plaintiffs. (ECF 412.)

In April 2023, the plaintiffs filed another motion to compel production of improperly withheld documents. (ECF 481.) The Court ordered that approximately 100 documents be produced for *in camera* review in advance of the hearing on the motion. (ECF 502.) Remarkably, just before the hearing, the defendants disclosed that 27 of the documents—roughly a quarter of the entirety—had been improperly withheld in whole or in part. (ECF 506.) The Court accordingly ordered the parties to submit proposals for a protocol by which the defendants would re-review their withheld documents and produce any that had been improperly withheld. (ECF 507, 511.) The Court then entered a re-review protocol and a revised case schedule which delayed the case by several months. (ECF 513.) Notably, the defendants were now required to "produce a metadata privilege log for all documents withheld or redacted." (*Id.* at 4.)

The Court's initial decision to allow a categorical log was understandable in that case, as it was expressly permitted by a local district rule. But the consequences of that categorical

approach, rather than the traditional document-by-document log proposal initially offered by the plaintiffs, led to expensive consequences: multiple motions and *in camera* reviews for the Court to undertake, dozens if not hundreds of hours of attorney time, improperly withheld documents (which, even if inadvertent, are still a problem), and the case being delayed for months while the defendants conducted a wholesale privilege re-review. The great majority of that additional expense and time could have been saved by sticking to a traditional, document-by-document log.

This one example teaches the dangers of reliance on categorical logs. There are many others. For example, in the *Disposable Contact Lens Antitrust Litigation*, No. 15-md-262 (M.D. Fla.), the producing party sought to withhold some 16,000 documents in a categorical log in which categories included "thousands" of documents and "dozens and dozens of recipients"; that party ultimately had to produce a substantial percentage of those documents, after the requesting party challenged the categories, and the court ordered an explanation as to whether each document in the categories had in fact been reviewed for privilege. (ECF Nos. 498 at 2-3; 992.) And in *Maxus Energy Corp. v. YPF, S.A.*, No, 18-cv-50489, 2021 WL 3619900 (Bankr. D. Del. Aug. 16, 2021), a party attempted to lump over 5,600 documents into just three categories; when the court deemed the categories not privileged, the withholding party argued that it "should be permitted to perform a document-by-document analysis"—a review it apparently had not conducted prior to claiming privilege over those documents.

As the experience in these cases shows, the Committee Note should make clear that whatever the form of privilege log is ultimately used, flexibility does not alleviate the producing party's burden to make a document-by-document assessment of the applicability of the privilege. The Committee Note should also be clear that using a "categorical" or a "metadata" log does not permit a party to forgo document-by-document review to ensure all withholdings are legitimate,

nor do those alternative log formats obviate a withholding party's obligation to provide the requesting party with sufficient information to test the assertion of privilege.

Our experience in cases using traditional document-by-document logs is also illuminating. We are currently litigating similar cases in other districts using document-by-document logs. Those logs have enabled the parties to focus their discussions to resolve issues amongst themselves, and present far fewer disputes to the Court—and the disputes are narrower when they do need to be presented. For example, in one recent case, we (representing the plaintiffs) received a document-by-document log, and through the course of productive discussions with the defendants, facilitated by the information included in the log, were able to persuade them to produce several hundred of the documents they had initially withheld. With a categorical log, that substantial dispute would have fallen to the court.

Conclusion.

We appreciate the effort of the drafters in seeking to make balanced amendments to the Civil Rules. The Proposed Amendment to the Rule itself is appropriately balanced. However, the gains made through that beneficial Rule amendment are likely to be substantially lost if the Proposed Committee Note is not edited to remove the language which puts its thumb on the scales in favor of parties that would seek to withhold relevant information from disclosure, considering only their burdens while overlooking the burdens on parties who must assess those claims of privilege, and the courts which must resolve the privilege disputes.

We appreciate the opportunity to submit this Comment and are available to answer any questions that the Committee may have.

Respectfully submitted,

Aaron J. Marks, Cohen Milstein Sellers & Toll PLLC

Sharon K. Robertson, Cohen Milstein Sellers & Toll PLLC

Rishi P. Raithatha, Radice Law Firm

TAB 25

IRPINO AVIN HAWKINS LAW FIRM

Pearl A. Robertson
probertson@irpinolaw.com

January 29, 2024

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

Re: *Proposed Amendment to Civil Rule 26 Replated to Privilege Logs*

Dear Members of the Committee:

I write in response to the proposed amendments to Federal Rules of Civil Procedure 26(f) including the related Committee Notes. Thank you for your thorough consideration of privilege log issues, including today's testimony.

I am a partner at Irpino Avin & Hawkins, a plaintiff firm based in New Orleans, Louisiana, with an office in Chicago, where I am located. My specific practice focuses on mass tort and/or class action litigation, predominated by multi-district litigation cases. Most of my time is spent in the discovery phase of litigation including electronic discovery, confidentiality, and privilege. Experiences relevant to this discussion include co-leading the privilege committee in MDL 2804 *In re National Prescription Opiate Litigation,* which included work on both the producing and the receiving side; and leading the privilege committee in MDL 3014 *Philips Recalled CPAP, BI-LEVEL PAP, and Mechanical Ventilator Products Litigation*. In addition to practice, I have spoken on privilege matters at conferences and within organizations over the past several years.

After reviewing the proposed amendments and draft committee notes, as well as a handful of submissions on the proposed changes to Rule 26, I submit the following response to the proposed changes.

1. I agree that the proposed additional language to Rule 26(f)(3)(D) encourages early cooperation and compliance with Rule 26(b), but caution that future adjustments to early agreed-to protocols may be necessary.
2. Reference to the second sentence of the Draft Committee Note should be omitted.
3. The draft committee note suggestions to categorical logging as an alternative to traditional logging may result in more harm than good.
4. The draft committee note suggestions regarding "rolling" productions is astute guidance that should be adopted.

Early Privilege Protocol Discussions are Necessary, but Litigation also Informs Over the Privilege.

Early coordination and agreement over privilege protocols is necessary, but the parties cannot be handcuffed by early agreements that prove unhelpful. Prior to document production, it behooves the parties in mass actions to negotiate a specific privilege protocol, but discovery also informs over the scope of responsive documents in correlation to the privilege asserted. That said, just like there is not a one-size-fits-all approach to privilege logging, there is also not a one-size-fits-all approach to challenging documents during the course of a given litigation. For example, in MDL 2804, the parties realized one-year after the initially negotiated CMOs that there was a need to negotiate a specific privilege protocol that outlined log format, timing and challenge process; but more importantly, incorporated privilege rulings from the Special Master as additional guidance to the parties.[1] The proposed amendment to Rule 26 is consistent with what litigants should already be doing.

Cost Considerations are not the Purpose of Rule 26(b)(5)(A)

The Draft Committee Notes should not include the second sentence: "Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a documents-by-document 'privilege log.'" In this era of modern tech and growing artificial intelligence, there are many useful tools that the producing party can use to cull the overall initial number of potentially privileged documents. For example, technology can now detect/predict potentially privileged documents to identify and collect inherently privileged documents. (e.g., searches [including use of repeated content analytics on routine disclaimers], domain parsing, and name normalization). Moreover, the exercise of logging documents is largely, if not solely, the product of a metadata[2] export from the document collection program to an excel spreadsheet. The practice of producing privilege logs is becoming more efficient and cost effective, not less. Regardless, 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.

Categorical logging shifts the initial burden to the receiving (non-asserting) party

The Committee should omit reference to, or suggestion that, categorical logs ease any burden or are an acceptable alternative to traditional logging. A categorical log does not provide the amount of information Rule 26(b)(5) requires and only results in the need to meet and confer and dispute the "categories" and [lack] of descriptions. Further, categorical logging often results in the over application or over designation of privilege that the draft committee note expresses concern over. Litigants may already negotiate alternative methods for privilege logging than the "traditional" privilege log. Thus, there is no need for the advisory committee notes to include reference to, or suggestion of, categorical logging. If the Committee is inclined to suggest a "non-traditional"

[1] Attached as Ex. A. to this statement.

[2] Metadata is present in all electronic documents and easily exported to excel spreadsheet, the usual fields include: author, sender, recipient(s), document title, email subject line, attachment name(s), date (sent, received, saved, created), file path, et al.

logging method for certain subsets or types of communications or documents, the better option is a metadata log.

Rolling privilege logs avoid needless disputes and build-in efficiencies

As included in the draft committee note, rolling privilege logs may inform the parties over discovery or production issues, such that related disputes are timely and efficiently resolved. Also, rolling logs are no more burdensome than 'final' or end-of-production logs. Indeed, it may be that the production and review of rolling logs creates less burden on both parties. For example, production of rolling privilege logs may avoid the necessity to re-open depositions on the basis that documents were improperly withheld and therefore unavailable for use with certain witnesses.

Rolling logs also partially cure the potential problem of over-designation of privilege, as a receiving party is informed as to the quantity of privilege claims at various times during the document production phase of discovery, thus allowing a litigant to raise the issue if it presents itself.

* * *

The proposed additional language to Rule 26(f)(3)(d) appropriately reflects the reality that parties need to work together to comply with Rule 26(b)(5), and that the circumstances of each case may dictate differing methods for compliance to achieve optimum efficiency. That said, the Draft Committee Note refences to cost of compliance and categorical logs run the risk of unwinding best-practice principles of privilege logging.

Sincerely,

Pearl Robertson

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	CASE NO. 1:17-MD-2804
	SPECIAL MASTER COHEN
This document applies to All Cases	AGREED ORDER GOVERNING PRIVILEGE

This Order Governing Privilege ("Order") shall govern the treatment of all privileged or work product materials in MDL 2804 going forward. This Order applies equally to all parties, who for the purposes of below shall be designated in their various roles as either the "Designating Party," "Receiving Party," or "Challenging Party." This Order is intended to be consistent with CMO Nos. 1 & 2, as well as the analysis set out in *In re National Prescription Opiate Litig*., 927 F.3d 919 (6th Cir. 20190, and seeks to provide a listing of more specific requirements for the assertion of privilege claims, the production of privilege logs, and the challenges to privilege claims, in MDL 2804. All deadlines and timeframes in this order which reference "days" are referring to calendar days and not business days.

Grounds for Asserting Privilege

The parties agree that federal common law governing privilege applies to privilege claims made in this MDL. Additionally, there are generally accepted legal principles and standards within the Sixth Circuit, and certain rulings have been made in this litigation related to claims of privilege. These rulings made include Discovery Ruling No. 14, Parts 1 through 9. *See* docket nos. 1321, 1353, 1359, 1380, 1387, 1395, 1498, 1593, 1610, & 1666. These rulings and related principles/standards outlined therein shall be taken into consideration when deciding whether to claim privilege over a document or communication.

A. Specific Privilege Log Protocols

1. Privilege Logs shall be produced in Excel format that allows for text searching, sorting, and organization of data, and shall be produced either: (a) in a cumulative manner, so that each subsequent privilege log includes all privilege claims from prior logs; or (b) in installments using a consistent format so that the installments can be merged into a cumulative Excel spreadsheet by the receiving parties.

2. The Designating Party shall produce a privilege log within forty-five (45) days of a production that substantially completes production for a particular custodian or non-custodial source. Stated another way, privilege logs shall be produced on a rolling basis so as not to delay

production of privilege logs. The privilege log shall identify the documents or information redacted or withheld and the basis for any claim of privilege in a manner that, without revealing information itself privileged or protected, will enable the Receiving Parties to assess the applicability of the privilege or protection. When the deposition of a custodian is scheduled for a date following the substantial completion of production of their custodial file, the parties shall make good faith efforts to provide privilege logs involving documents from the deponent's custodial file no fewer than ten (10) days prior to the deposition, unless otherwise negotiated and agreed to between counsel.

3. The Designating Party shall make a good faith effort to identify (in its privilege log cover letter) the primary production volume(s) and/or custodian(s) to which the privilege log relates.

4. With the exception of communications that fall within paragraph 5 below, each log entry should comply with FRCP 26(b)(5), and include:

a. a unique identifying number (separate from any Bates numbering), along with a separate column identifying the Bates number(s) of a document claimed to be privileged if produced in a redacted form;

b. a description of the nature of the document, communication, or tangible thing (over which a privilege is asserted) in a manner that, without revealing information itself privileged or protected, will enable Receiving Parties to assess the claim;

c. the date of the document or communication to the extent it is reasonably ascertainable;

d. the authors and recipients of the document or communication, based on the From (or Author), To, CC, and BCC fields from electronically-generated metadata associated with the document, to the extent applicable and reasonably available. For email chains, the parties will provide information gathered from the metadata for the most recent email in the chain. For email chains where only the most recent email is listed on the privilege log, the log entry will identify the email as an email chain, and whether an email in the chain contains an attachment. Further, if the attorney(s) giving rise to the privilege claim is/are not within the metadata of the most recent email, the Designating Party will include the name(s) of any such attorney(s) within the description;

e. the subject of the document, based on the Subject field (or other similar category) from electronically-generated metadata associated with the document, to the extent applicable and reasonably available, understanding that the Designating Party may eliminate some or all of this information to the extent that it has a good faith belief that it would reveal information which is itself privileged;

f. indication (e.g., with an asterisk) of which individual(s) (authors and recipients) are attorneys (or paralegals or other legal staff carrying out a legal function for an attorney); and

g. the name of or other identifying information as to the produced source file in which the document subject to a privilege claim was found, (and listing of the primary custodian constitutes sufficient identifying information).

5. An exception to certain requirements of Paragraph 4 is that for electronic communications (occurring on or after December 5, 2017) between a Designating Party and its outside counsel advising the Designating Party with regard to litigation, investigation(s) relating to litigation or potential litigation, or other proceedings relating to opioids, said communications are not required to be logged with the information required by Paragraphs 4b and 4e. Additionally: (i) the Designating Party will not be required to disclose the names of outside counsel to be included in the search, except to the extent any of the names appear in the log for those documents captured by the search, (ii) the documents being logged pursuant to this paragraph can be logged separately from other privilege claims, and (iii) the documents being logged pursuant to this paragraph do not need to be reviewed before being logged and withheld from production, or at any time thereafter, unless a Receiving Party asserts a challenge to the designation of such documents.

6. The Designating Party shall provide—either in the log entries or as a list in a separate Excel spreadsheet appendix to the log—the names that appear on the log along with corresponding email addresses or employer information to the extent such information is reasonably available and electronically generated from the metadata. To the extent that Listserv or group email addresses are provided (as a From (or Author), To, CC, or BCC), the Designating Party shall work in good faith to identify, upon request, individuals and/or groups of individuals which make up such Listservs or group emails.

7. As suspicious order monitoring ("SOM") is at the heart of this litigation, a Designating Party claiming attorney-client privilege, work product protection, or any other privilege over a SOM-related document, shall include a separate column on the privilege log which indicates (with a positive or negative marking) that the document being withheld or redacted is SOM-related. Alternative methods for the Designating Party to identify SOM-related privilege claims will be acceptable if said alternative method provides true insight into which privilege claims are SOM-related.

Equally at the heart of this litigation is Plaintiffs' ability to prove their damages and abatement costs. Thus, a Designating Party claiming attorney-client privilege, work product protection, or any other privilege over a document that may shed light on Plaintiffs' damages or abatement costs shall include a separate column on the privilege log which indicates (with a positive or negative marking) that the document being withheld or redacted may impact Plaintiffs' damages or abatement costs. Alternative methods for the Designating Party to identify such privilege claims will be acceptable if said alternative method provides true insight into which privilege claims cover documents that may have an impact on damages or abatement costs.

8. To the extent that a party redacts any document it produces on the basis of attorney-client privilege, work product protection, or any other privilege, it shall be listed on the party's privilege log and produced within forty-five (45) days of production of said document as set forth in paragraphs A.1 through A.6 above). To the extent that a party redacts any document

for any non-privilege related reason (e.g. non-responsiveness, personal identifying information), that party shall either specify the basis of the redaction on the production image itself or produce a separate log of any such redactions within forty-five (45) days of production of said document. If the redacted document is placed on a log, the log shall follow the same format and include the same type of metadata and information as outlined in Paragraph A.4 above. Any redactions (whether based upon any privilege or for any non-privilege related reason) applied to a document shall be made so that they are easily identified by the Receiving Party (e.g., in black blocks, not white blocks).

9. Although the parties shall make good faith efforts to meet the deadlines outlined in paragraph A.2, this paragraph addresses the procedure to implement when certain privilege claims were not made 10 days prior to depositions. Within seven (7) days after a deposition notice is served, the party defending the deposition will notify the requesting party if there are any privileged or redacted documents from the witness's custodial file that have not yet been placed on a privilege or redaction log (which has been served). In addition to the written notice, within ten (10) days after a deposition notice is served, the parties shall meet and confer regarding the timing of providing a complete privilege log for the documents from the witness's custodial file, and shall promptly present any disputes regarding the privilege log (e.g., contents of or timing of production of the log) to the Special Master.

B. Privilege Challenge Protocols

1. The parties shall meet and confer in good faith, and endeavor to resolve any disputes (regarding privilege-related claims or challenges) before submitting such disputes to the Court or Special Master for determination. The following procedure shall constitute satisfaction of the good faith meet-and-confer requirement prior to submitting privilege-related disputes to the Court or Special Master:

a. A party challenging a Designating Party's claims of privilege, privilege redaction, other redaction, or work production protection, shall provide written notification of those challenges, including the bases for the challenges and/or requests for additional clarifying information, to the Designating Party, and offer to meet and confer with the Designating Party regarding same. The offer to meet and confer shall, except in emergent circumstances or as agreed to by the Challenging and Designating Parties or as ordered by the Special Master or the Court, provide the Designating Party with multiple alternatives (dates and times) to meet and confer during the seven (7) day period following the date of the written challenge notification.

b. Failure of the Challenging Party to provide written notification of its challenges or failure of the Challenging Party to offer to meet and confer as outlined above, shall prevent the Challenging Party from submitting its privilege-related challenge to the Court or Special Master.

c. If the Challenging Party provides written notification and an opportunity to meet and confer as outlined in Paragraph B.1.a., the Designating Party shall meet and confer with the Challenging Party within the seven (7) day period following the date of the written challenge notification, and shall provide the Challenging Party with a written

response (providing further information supporting its claims and/or indicating which privilege claims, redactions, etc., the Designating Party maintains and which it withdraws, downgrades or modifies) within ten (10) days following the date of the written challenge notification. These time periods may be modified in emergent circumstances, as agreed to by the Challenging and Designating Parties, or as ordered by the Special Master or the Court.

d. Failure or refusal of the Designating Party to meet and confer with the Challenging Party (as outlined in Paragraph B.1.c above) shall allow the Challenging Party to submit its privilege-related challenge to the Court or Special Master. Failure or refusal of the Designating Party to provide a written response (as outlined in Paragraph B.1.c above) shall allow the Challenging Party to submit its privilege-related challenge to the Court or Special Master.

2. The procedure outlined in Paragraph B.1 may result in the withdrawing or narrowing of privilege claims, privilege redactions, other redactions, or work product claims. To the extent that any such claims or redactions are downgraded, modified, or withdrawn by the Designating Party, as a result of the meet-and-confer process outlined in Paragraph B.1 or on its own accord, the Designating Party shall, within fifteen (15) days, or within a time frame as agreed to by the Challenging and Designating Parties, or as ordered by the Special Master or the Court, apply any such downgrades, modifications, or withdraws to any other similar or emblematic claims or redactions, and provide written notice to the Challenging Party regarding which other privilege claims, privilege redactions, other redactions, or work product claims have been downgraded, modified, or withdrawn by the Designating Party.

3. For any challenges remaining following the above procedure outlined in Paragraphs B.1 and B.2, the Challenging Party can submit its remaining challenges to the Court or Special Master according to the guidelines established above for submission of discovery disputes, or as otherwise agreed to by the Challenging Party and Designating Party.

RESPECTFULLY SUBMITTED,

/s/ David R. Cohen
David R. Cohen
Special Master

Dated: October 29, 2019

TAB 26

STATEMENT OF DAVID COONER

(S.V.P., Chief Counsel – Litigation of Becton Dickinson and Company)

ON BEHALF OF THE PRODUCT LIABILITY ADVISORY COUNCIL

Good Morning.

I am David Cooner, and I am Senior Vice President and Chief Litigation Counsel for Becton Dickinson and Company. Becton Dickinson, or BD as it is called, is one of the largest global medical technology companies in the world. BD and its 75,000 employees are committed to enhancing the safety, and efficiency of clinicians' care delivery process, to enabling laboratory scientists to accurately detect disease and to advancing researchers' capabilities to develop the next generation of diagnostics and therapeutics.

BD is a member of the Product Liability Advisory Council, known as PLAC. PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and the reform of the law in the United States and elsewhere, with an emphasis on the law covering the liability of product manufacturers and related companies. PLAC and its members have a keen interest in the present work of the committee in evaluating a rule amendment to improve the MDL process. A number of PLAC's corporate members -- including my company BD -- are currently the targeted defendants in mass tort MDLs, including some of the largest MDLs pending on the federal docket. Taken together, the MDL cases filed against those manufacturers

number in the thousands, and in all likelihood, comprise more than half of the MDL cases currently active.

PLAC and its members believe that the MDL process -- albeit well-intended -- is "broken" in a number of respects. Today, however, I am here to address what is probably the most serious problem plaguing MDL practice. That is the proliferation of non-meritorious claims in MDL centralized procedures. As the MDL subcommittee has previously acknowledged, there appears to be "fairly widespread agreement" among experienced practitioners and judges that this problem exists in many MDLs. Those meritless claims involve plaintiffs who did not use the product at issue; plaintiffs who have not sustained a legally cognizable injury; and/or claims barred by the statute of limitations.

In my practice, I see lawyers boast of claim inventories, larding the MDL with cases that have little to 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. Frankly, many of the rules of civil procedure intended to establish a case's bona fides are either shelved or given lip service in an MDL, leading lawyers to invest in finding new cases, as opposed to establishing the merits of their cases, knowing that volume is the coin of the realm. And volume escalates one's profile in an inevitable settlement program and burnishes one's reputation, positioning one for assume a leadership role in the next MDL.

PLAC and its corporate members believe that a procedural mechanism is sorely needed to screen claims at an early stage in an MDL. As presently drafted, however, the proposed Rule 16.1 does not adequately address the problem. Subsection (c) (4) of the draft rule is more aspirational than compulsory. It merely invites MDL courts and parties to consider "how and when the parties will exchange information about the factual bases for their claims and defenses." The provision does not prescribe what information should be disclosed. Nor does it prescribe at what point in the proceedings the bases of the claims should be disclosed. For that matter, the draft provision does not actually require anything; it merely suggests an MDL court can consider mandating an exchange of information. Respectfully, it has no teeth and because of that, it will not change the flaws that lard our courts with meritless cases, siphon costs, and delay justice for meritorious claimants.

Many PLAC members and my own company BD have seen firsthand the prejudice that can result in an MDL when a more robust early screening process is not required. Without such information early in the proceedings, defendants have no means to accurately assess the magnitude of the risk, making it difficult to effectively manage that risk and conduct business operations. Absent an early and robust screening mechanism, corporations lack the information necessary to accurately meet their financial reporting obligations. Moreover, the sheer

administrative burden of processing multiple meritless claims greatly increases the cost and burden to both the courts and the parties. And, the proliferation of dubious claims stands as an impediment to settlement in a myriad of ways.

In past comments submitted to the Advisory Committee (including comments dated March 8, 2022 and September 18, 2023), Lawyers for Civil Justice ("LCJ") proposed a more detailed rule requiring plaintiffs (in personal injury actions) to provide documentation of product use or exposure and an alleged injury at an early point in the MDL proceeding. As set forth in its comments to the Advisory Committee, PLAC agrees with the approach advocated by LCJ, and fully endorses that organization's proposal. Only with the routine required disclosure of such information can the courts and the parties meaningfully screen MDL inventories for marginal claims.

Under our judicial system, a plaintiff filing an individual action is required to demonstrate a factual basis for the claim early in the life of the case. This is a cornerstone of the Federal Rules of Civil Procedure. No less should be expected from each plaintiff filing a claim in an MDL. PLAC encourages the Committee to revise Rule 16.1 to include a compulsory provision ensuring that occurs in future MDLs.

TAB 27

LEVIN PAPANTONIO RAFFERTY

Proctor | Buchanan | O'Brien
Barr | Mougey | P.A.

January 23, 2024

William F. Cash III
Direct: 850-435-7059
bcash@levinlaw.com

Advisory Committee on Civil Rules
Administrative Office
One Columbus Circle NE
Washington, D.C. 20544

Re: Proposed new Rule 16.1

Dear Members of the Committee:

I am a fifteen-year veteran of MDL practice, in both mass torts MDLs and MDLs composed of class actions. My firm, Levin Papantonio Rafferty, is a leading firm in both areas of the law, with a particular emphasis on plaintiffs'-side products liability cases—primarily drug and device MDLs. I have served as leadership counsel or as a steering committee member in several MDLs. I have also appeared at the Judicial Panel several times, and I have relevant experience with state-court MDL analogues.

I am grateful for the opportunity to address the Committee on proposed new Rule 16.1. I am here to express a mixture of support for and concern over the proposed Rule.

1. **The Committee should do all it can to retain judges' flexibility to adapt to disparate circumstances.**

I would like to say this: while there are some potentially positive aspects to the Rule, **MDL judges must retain their traditional flexibility to handle the actual work in front of them.** Every MDL judge I have ever encountered has been attuned to the unique management problems that handling an MDL creates. I have never seen an MDL judge who did not approach MDL procedure as the unique animal that it can be. All MDL judges care about getting to an efficient and just result before remand and the termination of the MDL phase of a case.

As I understand the proponents of proposed new Rule 16.1, there is too much variation from judge to judge in how MDLs are structured and it is not easy to predict what path a new MDL might take. I do not understand this to be a problem worth solving. Whatever the Committee ultimately recommends, I hope it will take into account the reality that MDL judges do things differently often because that is what the situation demands. A new Rule should provide guidance, but should not dictate—should not take from judges the range of discretion they currently enjoy.

With that in mind, there are some aspects to the Rule that unduly hamstring judges. For example, proposed Rule 16.1(c) grants flexibility to judges by saying that the initial report to the court "must address any matter designated by the court, which *may include*" any of the topics in proposed Rule 16.1(c)(1)–(3). That is good. But then proposed Rule 16.1(d) takes that flexibility back by saying that the court "*should*" enter an order "addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion." The inference here is that every one of the factors set out in Rule 16.1(c) must be the focus of the court's order, even if those factors are not particularly relevant to that MDL.

Further, the way the proposed Rule is structured, courts generally should not or will not deviate from the set order of operations: they will first (somehow) select the coordinating counsel in Rule 16.1(b), then have them draft the report, then hold the conference, then enter the MDL management order, then (perhaps) appoint leadership counsel. But it may make sense for a court to proceed differently, holding a "beauty contest"-type hearing first to select the coordinating counsel; or to enter an order soliciting written submissions from counsel about the MDL's future management *before* convening the conference. Courts deserve to retain this flexibility.

Finally: while I appreciate that the proposed Rule and its Note do pay great heed to the possibility that some topics may not be appropriate for all MDLs, I also know that "suggestions" in Rules sometimes have a way of calcining by practice into mandatory, inflexible "musts" later. This is all the worse given that no two MDLs are alike (my point on the last page of this testimony).

In sum, the Rule and its Note should be modified to make clear that MDL judges retain flexibility to customize their procedures to fit the needs of the matter at hand. That would be consistent with the liberal and flexible spirit of the Rules overall.

2. The coordinating counsel position is confusing and needs better elaboration, if not outright elimination.

There are a number of practical problems with the notion of the "coordinating counsel" the Rule contemplates. I will list some of them here:

- There is no mechanism to determine how coordinating counsel should be appointed. This is dangerous, because every plaintiff's lawyer who applies for a leadership position will cite his or her presence on the coordinating counsel team as reason why "you should pick me for leadership—because you already picked me as coordinating counsel." So while proposed Rule 16.1 supposedly makes the selection of leadership more transparent—because one of the suggested topics, Rule 16.1(c)(1), is "how might the court appoint *leadership*?"—in reality, it just raises creates a new question: "how might the court appoint the *coordinating counsel*?" Rule 16.1(a) provides no answer.

- Are the coordinating counsel even drawn from the ranks of the lawyers representing the parties? It is not clear, because there is a mismatch between Rule 16.1(b) and (c). Rule 16.1(b) would say that coordinating counsel "may" be designated to "assist the court" and to "work with plaintiffs or with defendants" to prepare the report. That implies that coordinating counsel might come from neither side. Rule 16.1(c) then says "the parties" are to meet and prepare that report.

- In "bread and butter" MDLs of 5,000 plaintiffs vs. 1 defendant, the defendant will naturally have its choice of lawyers to present its views. But in MDLs where plaintiffs are not yet organized, no one person or team is best positioned to speak for all.

  This may actually put defendants in the role of choosing their opponents—choosing which plaintiffs' lawyers they'd most like to deal with in preparing the report. That is not workable.

  Or, reports with fractured plaintiff groupings may actually draw "dissents" or competing arguments from different groups. How would that work? How would the MDL judge be able to use a report that is fractured in this manner to make any decisions?

- The organization and selection of plaintiff leadership is not a question on which defendants should have much input, if any. Plaintiffs have no right to tell defendants which law firms to hire or how they should be structured or compensated. Therefore, it is hard to see why a joint report of the parties, *prior to the selection of plaintiffs' leadership*, should be discussing this topic.

- Many of the other subjects the parties are encouraged to deal with, such as discovery, factual and legal bases for claims, and settlement, are of enormous importance. They demand input from the lawyers *who will actually lead the case*. That cries out for appointing leadership *first*.

  I can anticipate my defense colleagues' response here. They may say, "Well, the court will know that plaintiffs' views here were just preliminary." If that is true, what is the point of seeking plaintiffs' preliminary views? Plaintiffs should be allowed to get organized before charting out their course, or having to tip their hands.

  Defendants always start out with an advantage: they know more than plaintiffs about subjects like: how their clients are organized; where the documents and witnesses are; where the key decisions were made. To some extent, this is unavoidable. But the "coordinating counsel" role puts the cart before the horse.

The tradition of appointing plaintiffs' leadership first, *before* substantive decisions are made or schedules are drawn up, is a sound one. While I appreciate again that Rule 16.1(b) says that coordinating counsel is optional, in practice, MDL judges will likely make that appointment. (Goes double for judges who are new to MDL and don't have the experience or confidence to deviate from the default rule.)

The coordinating counsel role just shifts problems around without solving them. It creates a new layer of paperwork that may well *waste* time and energy, rather than making MDLs more efficient.

3. No two MDLs are alike, but the Rule suggests a one-size-fits-all approach anyway.

As a class action practitioner, I can state that proposed Rule 16.1 appears to be drawn to fit the needs of the "classic" MDL: 5,000 plaintiffs represented by 50 plaintiff firms suing 1 drugmaker. But it ignores the reality that many MDLs are sets of class actions, often with just a single plaintiff group in charge. (Another reason that the "coordinating counsel and then leadership counsel" concept is just duplicative.) It does not necessarily make any sense to discuss topics such as the leadership or compensation of class action attorneys. The way proposed Rule 16.1 would likely be implemented, though, this will slow down and divert the parties and courts into irrelevant or premature areas.

There are also MDLs that really just have 1 plaintiff and 1 real defendant. *E.g.*, *In re Prepared Foods Photos, Inc. Copyright Litig.*, MDL 3075, 2023 WL 3829245 (J.P.M.L. June 5, 2023). The plaintiff in that MDL owns the copyright to photos of pizza. The real defendant in the MDL is a company that runs the back end of web sites for "mom 'n' pop" pizza shops. The plaintiff sued the defendant 40 times in different actions around the country, throwing the pizza shops in as defendants, essentially as collateral damage and jurisdictional anchors to create extra venues and pain for the defendant. In reality, this MDL is just one party suing one other party. The defendant complained to the Panel that it was being harassed through the multiplicity of litigation and sought MDL treatment—and the Panel apparently agreed. Now that the case, and the *just two* lawyers who represent all of the main parties, are in front of one judge, there is no need for any of the complexity of Rule 16.1 in that MDL.

The Committee should add language to Rule 16.1, and its Note, making clearer that it may not apply to every MDL. It should also state that while the goals of efficiency embodied in the Rule are good in a vacuum, in practice observing all parts of the Rule might actually destroy efficiency, so judges should weigh the value of Rule 16.1's procedures against the goals of other Rules, such as Rule 1. The Committee should emphasize judges' traditional discretion to manage their workloads.

* * *

I look forward to appearing at the hearing and answering any of your questions the best I can.

Sincerely,

/s/ William F. Cash III

WILLIAM F. CASH III

TAB 28

Judicial Conference of the United States
Advisory Committees on Appellate, Bankruptcy, and Civil Rules
Public Hearing
February 6, 2024

Comments of Max Heerman, Director-Litigation at Medtronic

I am Max Heerman, Director-Litigation at Medtronic. Medtronic is a leading publicly-traded medical device company, whose devices and therapies alleviate pain, restore health, and extend life, for more than 75 million patients every year. Medtronic invented the battery-operated pacemaker in 1957, responding to a power-outage that created a crisis for pediatric heart patients at the University of Minnesota Hospital, and has been an important contributor to the U.S. health care system ever since.

I often attend conferences that include other in-house lawyers for companies in the Life Sciences industry – which includes pharmaceutical, biotech, and medical device companies. At those conferences, I am sometimes told that Medtronic is fortunate, in that it (and its various subsidiaries) has only occasionally been a defendant in federal multidistrict litigation. This always makes me shake my head in disbelief. I know the enormity of the resources required to defend the MDL cases involving Medtronic over the past dozen years, so I can only imagine the time, money, and attention that other Life Sciences companies – not to mention companies in other industries – are committing to MDL litigation. This is extremely regrettable. 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 want to thank the MDL Subcommittee for its work considering ways to amend the federal rules of civil procedure to improve the way MDL's operate. In my view, MDL reform is vital. It may be the most important topic for the various rules committees and subcommittees to address, as MDL cases now make up half – or more – of the federal docket.

I would like to focus my comments to the proposed Rule 16.1(c)(4), which states that a transferee court should order the parties to meet and prepare a report at the outset of a new MDL, and that the report may include "how and when the parties will exchange information about the factual bases for their claims and defenses."

This proposal seems designed to address one of the most serious problems that MDL's present -- the proliferation of non-cognizable claims, *i.e.* the proliferation of claims that lack legitimate "factual bases." Plaintiffs' lawyers collect "claims" through advertising or other means, and then park them in an MDL, often with little to any effort to ascertain whether the claim is valid. Unfortunately, in my view, the proposed Rule 16.1(c)(4) would do little, if anything, to mitigate the problem, for two main reasons.

- First, the rule is discretionary. It requires nothing; it merely identifies an option that the court and the parties can pursue.
- Second, it treats the problem of non-cognizable claims as if it were caused by the lack of adequate discovery, or perhaps the lack of effective *management of* discovery. In my view, that is not the source of the problem.

The source of the problem is that counsel for plaintiffs believe high claim volume is the key to success in MDLs. Borrowing two common idioms, plaintiffs' counsel believe (1) as a practical matter, the MDL system accepts the logic that "where there's smoke there must be fire," and (2) an MDL can become "too big to fail." Guided by these beliefs, plaintiffs' counsel create a lot of "smoke" by bringing as many claims as possible into MDL's regardless of whether those claims are cognizable, and then they, and their partners, the litigation funders, proceed to drive up the costs of MDL litigation for defendants. They feel assured that the litigation's sheer size, and the massive procedural problems that follow from its size, will force defendants to pay big settlements, and they will achieve a handsome return on their investment.

In my view, this distorts the constitutional and statutory role of the federal court system, which is to resolve cases and controversies. To serve this role effectively, the court system should quickly identify matters that are not genuine cases and controversies and discard them. Discarding non-cases and controversies generally happens in the non-MDL context, due to Rule 12(b)(6) and other provisions of the federal rules. As a practical matter, it does not occur in MDLs.

It is not enough for the proposed rule to merely nod toward improving the voluntary "exchange of information" about claims and defenses. Claims that cannot be substantiated must be dismissed early-on in the life of an MDL. Accordingly, I agree with LCJ's suggestion that there should be a new rule calling for each plaintiff to provide information to establish standing, state a claim, show that the plaintiff used or was exposed to the product involved (in a litigation involving use or exposure to a product), and substantiate the nature and timing of the plaintiff's alleged injury.

In short, my view is that Rule 16.1(c)(4) should be a standing, exposure, and injury *rule*, not an exchange of information *suggestion*.

TAB 29

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

January 23, 2024

Via Email Only: RulesCommittee_Secretary@ao.uscourts.gov

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Re: *Proposed Amendments to Civil Rules of Procedure 26(f) and 16(b)*

Dear Members of the Committee:

Thank you for the opportunity to comment on the Committee's proposed amendments to Federal Rules of Civil Procedure 26(f) and 16(b) regarding privilege logs.

As the General Counsel for the Equal Employment Opportunity Commission (EEOC), I am responsible for directing, coordinating, and supervising the EEOC's litigation program. The EEOC enforces six federal employment discrimination statutes: Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, Title II of the Genetic Information Nondiscrimination Act of 2008, and the Pregnant Workers Fairness Act of 2022. Since 1972, EEOC has been a frequent litigant in federal courts across the country. As of January 19, 2024, the EEOC has 205 suits pending in 68 federal district courts throughout the United States. Of these 205, 90 are either systemic[1] or class cases, often requiring the exchange of substantial electronically stored information. Regardless of the size of the case, privilege logs remain an essential tool for EEOC trial attorneys to assess defendants' claims of privilege for withheld or redacted documents.

The EEOC supports the Committee's proposed amendments to require parties to discuss the timing, means and format of privilege logs during the Rule 26(f) conference and to state their views on such in the Rule 16(b) report. Unfortunately, privilege logs are often an afterthought and only supplied upon prompting or threatening of a motion to compel. In some cases, producing parties do not produce privilege logs until after a deposition, thereby preventing the requesting party from deposing individuals about documents that were improperly withheld. We have seen these situations particularly often in our larger class cases in which the parties have agreed upon rolling productions. Making matters worse, even when the

[1] The EEOC defines systemic cases as "pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company or geographic location." *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*,

privilege logs are timely produced, they may not comply with Rule 26(b)(5) in that they do not sufficiently describe the documents in a way that will enable the party to assess the privilege claimed. And in some cases, particularly cases involving a large volume of documents, parties have over designated documents as privileged, leading to unnecessary discovery disputes.

The Committee's proposed amendments appropriately recognize the importance of early discussion and agreement on privilege logs, which will minimize later discovery disputes and ensure the timely and complete production of privilege logs. Coming to early agreement on the timing and form of the privilege log will also allow the parties to ensure that they will timely receive the information needed to assess the withholding party's privilege. In addition, adding the requirement for discussion at the Rule 26(f) stage is particularly appropriate. At that stage, the parties are poised for such a discussion because document review has not yet commenced, and they are often discussing ESI protocols, protective orders, and Federal Rule of Evidence 502(d) Orders. Consistent with provisions made in ESI protocols, the parties could also provide an "escape valve" provision which would allow the parties to revisit the agreed-upon privilege log should the circumstances warrant.

The amendments also provide flexibility to the parties and the Courts regarding the form of a Rule 26(b)(5)(A) privilege log. For example, the parties may find it reasonable to exclude from logging certain categories of documents, certain temporal periods, or certain communications between parties and litigation counsel. The parties may alternatively prefer a metadata log which can be created quickly by exporting the metadata of withheld documents from a discovery review platform. Even within the metadata log, the parties could negotiate the metadata fields to be ultimately produced. The parties could also agree upon the grouping of documents with similar privilege bases in a categorical privilege log. Finally, parties may choose to use a hybrid approach, such as requiring a document-by-document log for a person who has a dual-purpose role but opting for a categorical log for other individuals. The amendments also recognize that the Courts still have the flexibility to insist upon a document-by-document privilege log given their experience with discovery disputes in their jurisdictions.

The EEOC also supports the Committee Notes, which similarly emphasize the importance of early discussion and agreement as well as the need for flexibility. The EEOC, however, notes that there may be an unintended focus on burden on the producing party as the sole basis for the amendments, even though the Comments also acknowledge the issue of over-designation by producing parties. As a result, the EEOC proposes that the following modification be made to the introduction of the Committee Notes:

> Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log." 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 courts and may prevent parties from identifying improperly withheld documents.

> 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 on both producing and receiving parties.

We believe that this modification strikes a necessary balance for both producing and receiving parties who have articulated the burdens associated with privilege logs.

We also note that while the proposed Committee Notes emphasize the need for flexibility, they do not emphasize that ultimately whichever privilege log is agreed upon, it must be sufficient to assess the claim of privilege as the Rule requires. See, e.g., *In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 325 (S.D.N.Y. 2020) (permitting categorical privilege logs does not obviate a party's obligation to provide enough detail); *Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 3:15-CV-01300-JMC, 2016 WL 6539344, at *3 (D.S.C. Nov. 3, 2016) (holding that the court had discretion to limit a party's burden by allowing a categorical log but the categories must be sufficiently articulated); *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. 3:17-CV-01078, 2020 WL 1532323, *5 (M.D. Tenn. Mar. 31, 2020) (finding one-page privilege log with broad categorical claims of privilege inadequate because log must still provide information needed to evaluate claims of privilege). This point is significant as the burden should always remain on the party seeking to invoke the privilege and not the party receiving a deficient privilege log. Accordingly, we propose the following modification to the paragraphs addressing flexibility:

> This amendment also seeks to 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. Whichever 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).
> …
> 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 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).

Finally, the EEOC disagrees with the comments submitted to, and rejected by, the Committee suggesting that the Committee adopt a presumption that non-traditional logs, such as metadata or categorical logs, is appropriate under Rule 26(b)(5) in all cases. As the proposed Committee Notes appropriately state, "[n]o one-size-fits-all approach would actually be suitable in all cases." Indeed, if categories are not described sufficiently, categorical logs can cause discovery disputes, which may lead the Courts to order a traditional privilege log, thereby eliminating any presumed efficiency. As for metadata logs, they too may be insufficient if they contain hard-copy scanned documents that do not contain sufficient metadata to properly assess the claim of privilege. They also may be deficient if the producing party is using email threading in that the involvement of an attorney in a suppressed email would not appear in the metadata. These deficiencies would shift the burden under Rule 26(b)(5) to the receiving party rather than the producing party. Such a presumption would also interfere with the Court's discretion to deem that a document-by-document log should be provided. The EEOC commends the Committee for rejecting such a presumption and taking a more measured approach.

Thank you for considering the EEOC's comments on these important Rules.

Sincerely,

Karla Gilbride

Karla Gilbride
General Counsel

Signature: Karla Gilbride
Karla Gilbride (Jan 23, 2024 17:25 EST)
Email: karla.gilbride@eeoc.gov

Advisory_Committee_EEOC_Comments

Final Audit Report 2024-01-23

Created:	2024-01-23
By:	MARIA SALACUSE (maria.salacuse@eeoc.gov)
Status:	Signed
Transaction ID:	CBJCHBCAABAAAZmKiOGC6Pqs44AboRMN36Q-S1CcHDqf

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TAB 30

Testimony of Brian D. Clark, Lockridge Grindal Nauen P.L.L.P. Regarding Privilege Logs

Presented at the February 5, 2024 Civil Rules Hearing

Thank you for allowing me to speak about the proposed amendments to Federal Rules of Civil Procedure 26(f) and 16(b). My name is Brian Clark, and I am a partner at Lockridge Grindal Nauen P.L.L.P. in Minneapolis, Minnesota. My practice is focused on plaintiff-side antitrust class actions in federal courts across the country. Over the past 15 years, I have served as counsel or lead counsel in dozens of antitrust cases. For example, I am currently involved in many antitrust cases involving agricultural products like chicken, pork, turkey, beef, peanuts, and dairy products. I taught an e-discovery seminar at the University of Minnesota Law School for five years, and I am a past member of the Sedona Conference Working Group 1 Steering Committee. Nine years ago, I also founded the Complex Litigation E-Discovery Forum ("CLEF"), a plaintiff-side e-discovery group that serves as a key resource and strategy organization for plaintiff-side mass tort, complex, and class action attorneys. Problems with over-withholding of non-privileged documents and privilege logs are one of the most common complaints and discussion topics among CLEF's hundreds of members.

Support for the proposed amendments to Rules 26(f) and 16(b)

I support the proposed amendments to the language of Rules 26(f) and 16(b); though, I have concerns with the proposed Committee Note, which will be the focus of my testimony. Early planning for e-discovery, in which I include privilege log logistics, content, and timing, is essential in all cases, but especially the large-document-volume antitrust cases. Such planning has been part of my practice for years, but specifically highlighting this need in the Rules will help all parties see the value in doing so and eliminate any resistance to having a fulsome discussion early on, before a party invests resources in a privilege screening process that is inadequate, untimely, or otherwise problematic. The District of Minnesota has long encouraged such planning (*see https://www.mnd.uscourts.gov/file/ediscovery-guidepdf*), and ensuring the parties together give adequate consideration to these topics before investing time in a privilege review has served litigants very well.

Concern regarding the Proposed Committee Note

While I support the amendments to Rules 26(f) and 16(b), the proposed Committee Notes are concerning. They focus on only a single "burden" of the "very large costs" on the producing party and seem to suggest that categorical or metadata logs should become the new standard for a "privilege log" under the Federal Rules. This is incredibly problematic to me based on my experience for four reasons.

First, larger corporations involved in or expecting to be involved in litigation have been advised by inside and outside counsel to preemptively label any sensitive internal communication as "Attorney-Client Privileged," even when no such colorable claim exists and, at most, inside counsel are being copied to give the appearance of a privileged communication. A categorical log would obscure this practice and hinder the ability to obtain such communications. For example, given the nature of the price-fixing conspiracies we allege, we often seek to uncover facts against recidivist industries that have repeatedly been accused of price-fixing by government enforcers and private litigants. Given this recidivist status, many of these companies have adopted practices of labeling by default any "gray area" email as attorney-client privileged, even when no such privilege could possibly apply. For example, it is now widely known after the *Epic v. Google* trial in the Northern District of California that employees at Google were trained by attorneys to add an "attorney-client privileged" disclaimer and copy inside counsel on a large volume of internal emails that had no colorable claim of privilege, but were instead on sensitive topics relating to competition and antitrust issues. A categorical log that treats all emails copying in-house counsel would have the effect of permitting such tactics to significantly hinder the ability of litigants to understand the truth and facts of a case.

Second, there is a wide range of views on what a "metadata log" means. Many attorneys view their obligations for producing a "metadata log" to merely be automatically populating an excel spreadsheet with whatever metadata happens to exist for a document. In practice, this means receiving thousands of rows of privilege log "entries" that list the author as "User 1", "Laptop 513", etc. with little or no other information such as the basis of the privilege, the date, the name of the attorney involved in the communication, or other critical information. This delays actual analysis of the basis for withholding such documents for months, as the challenging party negotiates and potentially seeks court intervention to ensure the withholding party provides the basic elements of a privilege log (*i.e.*, who/what/when/why).

Third, privilege is simply an area where the incentives to withhold information that is relevant and not privileged are high. Even *with* the current regime in courts across the country that I practice in, the use of a line-by-line privilege log still leads to the vast over-designation of documents as privileged. Two examples from cases I have litigated are:

- *Kleen Prods. LLC v. Int'l Paper.*, No. 10-C-5711, 2014 WL 6475558 (N.D. Ill. Nov. 12, 2014): Dual-role of in-house counsel as attorney and businessperson led to large over-designation of documents as privileged in this case I litigated and for which I argued the motion. As stated by the Court, "the number of documents included in the in camera sampling that do not appear to be privileged is troubling. The Court recognizes that drawing a distinction between business and legal advice is not always easy, particularly in the antitrust context, but it really is difficult to see how there could be any plausible claim of privilege with regard to many of the documents that have been submitted."

- *In re Cattle & Beef Antitrust Litig.*, MDL No. 3031 (D. Minn.): In this price-fixing case against the nation's four largest beef companies, privilege has become an issue and delayed the start of depositions. As stated at a recent hearing in the matter, after challenges regarding row-by-row privilege designations, between 35% and

63% of privilege assertions were withdrawn by the defendants. A categorical log would have made any such challenges to specific documents difficult or impossible.

Fourth, the focus on burden of only the producing party for a privilege log overlooks an inherent choice that is available to any party considering how to invest its resources in litigation. Federal Rule of Evidence 502(d) protects a party from having to perform a complete privilege review of every single document in litigation. This provision allows a producing party to narrowly assert privilege over only the most critical documents, without investing substantial resources in a document-by-document review, while continuing to protect against any waiver of privilege for documents that slip through the cracks. The alternative that defense counsel seems to prefer—a categorical log that provides no detail or ability for a challenging party to seek non-privileged documents swept up in such categories—is no solution at all, for the many reasons discussed above.

As a result of these concerns, I would strike the Draft Committee Note's second sentence that reads as follows: "Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document 'privilege log.'" However, if the Committee decides to keep the sentence regarding "very large costs" in the Committee Note, then the concerns like the ones I have noted above are equally important to include in the Committee Notes, as the impression left is one that is dismissive of the requirement of a document-by-document privilege log, which in my experience is the standard across the country.

Thank you for the opportunity to provide this testimony to the Committee.

Sincerely,

Brian D. Clark

TAB 31

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January 26, 2024

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

Re: Proposed New Rule 16.1 on MDL Proceedings

Dear Committee Members,

Thank you for this opportunity to briefly comment on proposed Rule 16.1 regarding multidistrict litigation.

My name is Jessica Glitz, and I am senior counsel at Johnson Law Group, and submit this testimony on behalf of my firm. I have had the privilege of working in the world of complex litigation for over a decade, where I have had the honor of representing parties on both sides of the aisle. I have been court-appointed to plaintiffs' steering committee positions in state court litigations and have played an integral role in shaping the litigation in several federal court multidistrict litigations ("MDL"), particularly in medical device cases. Below is my perspective, to the Advisory Committee, on proposed rule 16.1.

I. Multi-District Litigation Landscape

The value of the MDL process for individuals claiming personal injuries against a major company or companies is insurmountable. Most men and women who file claims would not have a voice or the means to seek justice for wrongs caused by the negligence and/or blatant disregard due to products, either pharmaceutical or commercial, of multimillion dollar companies with endless resources. Those advocating for the proposed rule tout, it will bring efficiency and a more streamlined process for MDLs going forward, however as Ms. Hoekstra has already quoted Judge Rodgers, "there is no magic formula or recipe for handling an MDL."[1] Additionally, while most discussions over the past three hearings have focused on MDLs with over 1,000 plaintiffs' cases filed, this is not the makeup of the average MDL. As of January 2, 2024, there are 167 active MDLs, 59.8% have had 100 or less cases filed in them. (see chart below)[2]

[1] Jennifer Hoekstra proposed January 16, 2024, testimony pg. 102 of 198
[2] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-January-2-2024.pdf

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-- All Counts Are Based on the Report Filters Selected When Running the Report --				
Docket Count	**Range of the Number of Actions *PENDING* in a Docket**	**Percent of Dockets**	**Action Count**	**Percent of Actions**
46	MDLs with between 0 and 10 Pending Actions	27.54%	218	0.05%
73	MDLs with between 11 and 100 Pending Actions	43.71%	2,266	0.5%
28	MDLs with 101 and 999 Pending Actions	16.77%	9,320	2.04%
20	MDLs with 1,000 or more Pending Actions	11.98%	444,894	97.42%

Docket Count	**Range of the Number of *TOTAL* Actions in a Docket**	**Percent of Dockets**	**Action Count**	**Percent of Actions**
16	MDLs with between 0 and 10 Actions	9.58%	117	0.02%
84	MDLs with between 11 and 100 Actions	50.3%	2,918	0.42%
30	MDLs with 101 and 999 Actions	17.96%	9,299	1.34%
37	MDLs with 1,000 or more Actions	22.16%	680,676	98.22%

This distinction is important as we look at the proposed rule and its effect it could have on the MDL landscape in the future. As discussed in more detail below, the makeup of MDLs, over decades, have utilized the FRCP, therefore there is no urgent need in today's average size MDL for any additional rule.

Additionally, some of these proposed guidelines may hinder instead of help the MDL process. While I agree with many of my colleagues that rule 16.1(c) subsections 1 (appropriateness and scope of leadership appointments), 8 (schedule for additional management conferences), 10 (management of new actions), and 11 (management of related actions) can be easily addressed in most initial case management conferences despite the pending potential appointment of leadership, many others should only be addressed after leadership is appointed (if necessary) or in the case of 16.1(b) is obsolete in a predominant amount of MDLs.

II. Designation of Coordinating Counsel For the Conference

Since most MDLs are made up of less than 100 plaintiffs, the designation of coordinating counsel for the initial conference seems obsolete. The size of an MDL of 100 plaintiffs or less also equates far less attorneys in the room for plaintiffs. There is no distinct role the counsel would play when such a presumably small group of attorneys can and in most cases have organized themselves prior to the initial MDL management conference.

In my experience, this is also true for MDLs with over 1,000 claims filed. Plaintiffs over the past decade have not been naive to the growth of MDLs. Plaintiffs have become organized, utilized and created 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 when leadership is appointed.

16.1(b) also leaves more questions than answers: How long is the coordinating counsel appointed? Is their role only for the initial case management conference? Can they be considered for leadership? Can a coordinating counsel be appointed in the future after the initial conference? Must the counsel be involved directly in the litigation before the initial case management conference? Can a party request a coordinating counsel for an

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opposing party before the initial case management conference? If a court does appoint a coordinating counsel for one party can that party request the court likewise appoint coordinating counsel for the opposing party? For example in the hair relaxer litigation, set in the Northern District of Illinois, there are over 21 defendants named, represented by a myriad of different counsels. If the court had appointed a coordinating counsel for plaintiffs, could plaintiffs have requested the court to appoint a coordinating counsel for defendants? In its essence, the rule creates more inefficiency than its intent.

Instead, the solution should be to set strict timelines and guidelines as to how and when leadership counsel will be appointed. Respectfully, Subsection B is ambiguous, in most MDLs unnecessary, and an MDL court instead could use its time and resources establishing a streamlined process to define the makeup of leadership counsel for the litigation.

III. Propose Rule 16(c) Report for Initial MDL Management Conference

1. As stated above subsection 1 is vital for the early success of an MDL, regardless of its size. Both parties can quickly discuss the merits and needs of leadership counsel and propose a plan. In my experience, the more involved the court is in the leadership structure and in choosing leadership, the fairer and more diverse the process is for plaintiffs' counsel[3]. Regardless of the parameters a court sets in defining how leadership will be appointed, the court must define the attorneys who have decision making authority before many of the subsections in rule 16.1(c) can be addressed.

2. Subsections 2 through 7 can only be efficiently addressed after subsection 1 is complete and leadership is appointed or defined as obsolete. To address these subsections completely the parties, need to define the counsels' roles with the authority to make decisions on behalf of the MDL plaintiffs as a whole. While leadership counsel is not necessary in every MDL, it is important to ensure there is no conflict of the trajectory of the litigation by members of the same party. Counsel for the defense and the plaintiffs may differ with their colleagues on the scope of previously entered scheduling orders, factual or legal issues, the exchange of information between parties, the role of consolidated pleadings, the scope of discovery, and pretrial motions. All of these issues are important and should be addressed early on in the litigation, but counsel needs time for many, if not most of these issues, to define a succinct and agreed upon plan, which may not be possible before the initial or even the first few initial case management conferences and cannot be complete until respective roles are determined.

[3] The court's involvement can look very different for each case. For example, the court can pick between opposing slates, review applications, have an interview process, have set time limits for appointments and request new applications, allow the parties to designate one slate, or do a combination of any of these proposed structures in appointing leadership counsel.

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3. Subsections 9 and 12 on the other hand are premature for an initial case management conference. It is precipitous to know the parameters for settlement or the role of a magistrate judge or master in an MDL until discovery is underway. Again, it is important to first define who can negotiate for both parties regarding these two issues and there is usually not enough information to provide the court with an educated and productive report in advance of the conference to move the litigation along in an efficient manner regarding these two issues. Therefore, these two subsections should be removed from the suggested list of topics deemed important to discuss in the initial case management conference.

4. Accordingly, I humbly suggest the rule instead be revised as follows:
   a. Preparation For Initial MDL Management Conference.
   "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."

This proposed change highlights the importance of determining the scope of leadership counsel and provides the court with the authority to define the scope and perimeters of how it best sees the litigation moving forward efficiently.

IV. Unsupportable Claims Scope

Many have presented to this committee the need for this proposed rule because an *alleged* number of unsupportable claims are being filed in MDLs across the nation. While many of my colleagues have already addressed this issue, I want to make a few quick points.

First, as already noted above, most MDLs are made up of 100 plaintiffs or less. Regardless of what has been presented, most MDLs are made up of Plaintiffs whose cases have been thoroughly reviewed and researched by the Plaintiffs' counsel before filing.

Second, many times plaintiffs' counsel must file a case to protect a plaintiff's claim from being time-barred based on the plaintiffs' representations before specific discovery can be done by the Plaintiffs' counsel before the case can be filed. Oftentimes it is difficult to gather all the facts necessary before the case can be filed regarding exact injury or other possible causes of a plaintiff's injury. Furthermore, whether a case is time-barred is something which most times must be litigated. The court must first determine what law applies to a certain case. Additionally, the court must weigh the specific facts of each case, including but not limited to whether there was an express warranty of use of a product, if the product was recalled, plaintiffs' discovery of the injury, or the causal link of the injury,

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and/or whether the defendant(s) fraudulently concealed any information which deterred the plaintiff from discovering the link between his injuries and the defendant(s)' product. All this cannot be determined before a predominant amount of cases are filed and general discovery and specific discovery are well underway. Therefore, it is presumptuous of any party to determine at the outset that a case time barred before proper discovery is substantially complete.

Third, Rule 11 already provides the court with a substantial amount of power to address and deter inappropriate behavior and the filing of frivolous suits. Courts have the authority to sanction counsel who increases the cost of litigation and file pleadings without proper authority and time. An additional rule does not deter the filing of alleged unsupported claims, instead a court need only enforce the rules already set in place.

Therefore, the data presented does not support the claim that a myriad of unsupported claims are filed over the majority of MDLs, in fact the opposite is true. Additionally, courts already have the tools they need to deter filing *frivolous claims*.

V. Conclusion

I share the sentiments and suggestions of others, who suggest in more detail, the Committee should remove the suggestion of a Coordinating Counsel and limit the scope of rule 16.1(c). I appreciate the opportunity to address the Committee on February 6, 2024, in more detail and look forward to answering any questions the Committee has in store.

Kindest regards,

Jessica Glitz

Jessica Glitz
Senior Counsel

TAB 32

SCHUBERT JONCKHEER & KOLBE LLP
Attorneys at Law

Robert C. Schubert
Willem F. Jonckheer
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January 26, 2024

VIA EMAIL

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed New Federal Rule of Civil Procedure 16.1

Dear Members of the Committee:

Thank you for the opportunity to testify concerning the proposed Rule 16.1 on multidistrict litigation.

I am a partner at Schubert Jonckheer & Kolbe LLP, a small, boutique firm based in San Francisco that has represented plaintiffs in class actions for over forty years. I am Chair of the firm's Consumer and Data Privacy Practice Group, which specializes in class actions involving false advertising, consumer privacy, and data breaches. Over the years, I have participated in numerous large class-action MDLs and am familiar with the many ways they are coordinated and organized.

I very much appreciate the considerable work this Committee has undertaken to draft a new rule specifically for multidistrict litigation. I agree with much of the proposed rule and believe, on the whole, it will benefit transferee judges who are assigned MDLs.

My testimony today is limited to Rule 16.1(b) designating "coordinating counsel." I believe this section may create unintended consequences and suggest it be stricken from the rule.

Proposed Rule 16.1(b) would encourage transferee judges to designate coordinating counsel prior to an initial MDL management conference. Under the proposed rule, coordinating counsel would be responsible for assisting the court with that conference and working with the parties to prepare a pre-conference report addressing the topics specified in Rule 16.1(c), including whether leadership counsel should be appointed.

While I have no doubt that the inclusion of Rule 16.1(b) was well-intentioned to streamline proceedings, in practice it would create new problems and exacerbate old ones. For the following reasons, I suggest the Committee remove in its entirety from the proposed rule.

1. Rule 16.1(b) is ambiguous, inefficient, and unnecessary.

The proposed rule creates an entirely new position called "coordinating counsel," which is not a term commonly used in MDLs or other complex litigation. Coordinating counsel is not defined, and it may not be well-understood by practicing attorneys or transferee judges.

Coordinating counsel is not necessarily the same as "leadership counsel," which the rule separately references in 16.1(c)(1). As the proposed comment to Rule 16.1(b) explains, the court "may designate coordinating counsel to assist the court before appointing leadership counsel." Yet, it is unclear whether coordinating counsel would be a plaintiffs' attorney who has filed a case in the MDL, a neutral plaintiffs' attorney who is otherwise not involved in the MDL, or even a special master. Far from streamlining the process, the rule creates new ambiguities.

In the context of class actions, in which I practice, the new rule would present even further problems because the separate position of "interim counsel" already exists. As Rule 23(g)(3) states, courts may "designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). Is "coordinating counsel" the same as "interim counsel"? Or is "interim counsel" what the rule contemplates by "leadership counsel"? The proposed rule offers no answers.

Moreover, to the extent the proposed rule suggests that courts should first appoint coordinating counsel prior to the initial conference, followed by leadership counsel after the conference, that two-step process would only create inefficiencies and sow confusion. Rule 16.1(b) is silent on the criteria or process courts should use to select coordinating counsel. That could, in turn, create a race to the courthouse, where attorneys seeking appointment as coordinating counsel rush to file applications before the court has issued its first order. Or the court may simply select an attorney with no competitive process at all, furthering the repeat-player problems discussed below.

The appointment of coordinating counsel is also unnecessary. As the comment to Rule 16.1(b) itself acknowledges, "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." But by front-loading the designation of coordinating counsel *prior to* the initial conference, the actual rule would short-circuit any such self-ordering.

In my experience, self-ordering among plaintiffs' counsel prior to an initial case management conference is *the rule* in class actions, not the exception. Even in complex class actions that involve many actions, plaintiffs' attorneys commonly work cooperatively to relate and consolidate the cases before the same judge, negotiate a schedule for initial proceedings, and collaborate on a case management statement. For example, in the *MOVEit* data-breach MDL, which involves over 100 plaintiffs' attorneys and 250 separate actions, plaintiffs' attorneys informally created their own initial organization and worked together to draft a joint initial report—even without the court

appointing "coordinating counsel."[1] If, however, a transferee court selects coordinating counsel at the very outset, it may actually frustrate the self-ordering process.

2. Rule 16.1(b) would exacerbate the repeat-player problem in MDL leadership.

The problem of repeat players is pervasive in MDL leadership. Historically, judges have filled MDL leadership positions with attorneys who have previously been appointed in other MDLs and with whom they were familiar.[2] These same lawyers then collect more experience, making their appointment in subsequent cases even more likely.[3] It is a revolving door.

Studies have found that "application methods for appointment reduce the seniority bottleneck and repeat-player entrenchment by giving talented newer members of the profession a real chance to obtain leadership positions."[4] By contrast, other selection methods can lead to "tit-for-tat reciprocity" among repeat players and perpetuate entrenched roles of a small group of lawyers.[5]

The proposed Rule 16.1(b) would exacerbate these problems. By selecting coordinating counsel prior to selecting leadership counsel (or even a framework or criteria for those appointments), the proposed rule would encourage transferee judges to appoint attorneys without an adequate process. Indeed, it provides judges no guidance at all as to *how* to select coordinating counsel.

By contrast, the proposed committee note to Rule 16.1(c)(1) on *leadership counsel* explains that a 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." Yet, neither Rule 16.1(b) or the accompanying committee note provides any similar instruction for the selection of *coordinating counsel*.

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. For example, in the *Kia Hyundai* false advertising MDL, the court appointed three attorneys as plaintiffs' initial conference counsel with no application process at all.[6] One of those attorneys had served as co-lead counsel in an earlier MDL against Toyota before the same judge.[7] Following a competitive application process for leadership in which twenty other lawyers applied, the court appointed the same three attorneys as leadership counsel. And those attorneys then selected (and the court appointed) the same attorney in the prior Toyota MDL as lead counsel.

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[1] *See In re: MOVEit Customer Data Sec. Breach Litig.*, No. 1:23-md-03083-ADB (D. Mass.).

[2] *See* James F. Humphreys Complex Litig. Ctr., George Wash. Law Sch., *Inclusivity & Excellence: Guidelines & Best Pracs. for Judges Appointing Lawyers to Leadership Positions in MDL & Class-Action Litigation*, at 9 (Mar. 15, 2021).

[3] *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players In Multidistrict Litigation: The Social Network*, 102 Cornell Law Review 1445 (2017).

[4] James F. Humphreys Complex Litig. Ctr., *supra* note 2, at 15.

[5] *Id.* at 16; *see also Elizabeth Chamblee Burch*, Judging Multidistrict Litigation, 90 N.Y.U. L. REV. 71, 93 (2015).

[6] *See In re: Kia Hyundai Vehicle Theft Mktg., Sales Pracs., and Prods. Liab. Litig.* No. 8:22-ML-3052-JVS (C.D. Cal.).

[7] *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 8:10-ml-02151-JVS.

Similarly, in the *Anthem* data breach MDL, the court designated two attorneys with whom it was familiar to coordinate plaintiffs' counsel for the initial conference.[8] Yet, despite noting that these designations were not a precursor of future appointments (and despite numerous other qualified applicants), the court nevertheless appointed those same two attorneys as co-lead counsel.

By encouraging courts to appoint coordinating counsel before soliciting applications for leadership counsel, the proposed Rule 16.1(b) may implicitly favor the attorneys appointed as coordinating counsel for subsequent reappointment as leadership counsel. By short-circuiting a fair, merit-based application process, the rule would only exacerbate this repeat-player problem.

3. Rule 16.1(b) would hinder diversity and encourage implicit bias in MDL leadership.

The lack of diversity in MDL leadership remains a difficult and intractable problem. Appointing diverse counsel to leadership who bring "a broad range of experiences, backgrounds, and perspectives" helps ensure that the diverse interests of victims will be "fairly, adequately, and justly represented."[9] Diversity enhances the quality of the decision-making process and the perceived legitimacy of the results.[10] Those benefits often include "better and more creative decision-making, enriched by new and varied perspectives and experiences" and "a better understanding of the diverse interests the MDL parties and absent class members may have."[11]

That is why the *Duke Guidelines* instruct that transferee judges "should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case."[12] That includes gender, race, national origin, geography, years of practice, age, and other relevant factors.[13]

According to an ABA survey, however, 71% of class actions had no women as lead counsel, and in MDLs, men were three times more likely than women to be appointed lead counsel.[14] In fact, the Bureau of National Affairs reported in 2017 that women made up just 16.5% of all plaintiffs' leadership appointments in MDL cases.[15] And "[p]eople of color, disabled individuals, and LGBTQ lawyers are equally, if not more, underrepresented in these leadership positions."[16]

The proposed Rule 16.1(b) would hinder efforts to make MDL leadership more diverse. As explained earlier, the proposed rule would exacerbate the problems with repeat players being appointed to leadership. These repeat players are "mostly experienced white, male attorneys"

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[8] *See In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK (N.D. Cal.).

[9] James F. Humphreys Complex Litig. Ctr., *supra* note 2, at 6.

[10] *Id.*

[11] *Id.* at 8.

[12] Bolch Judicial Inst., Duke Law School, *Guidelines & Best Pracs. for Large & Mass-Tort MDLs*, at 45 (2nd Ed. 2018).

[13] *See In re Ethicon, Inc., Power Morcellator Prods. Liab. Litig.*, MDL 2652, (D. Kan. Oct. 16, 2015), ECF 2.

[14] James F. Humphreys Complex Litig. Ctr., *supra* note 2, at 3.

[15] *Id.*

[16] *Id.* at iii; 38 n.115.

who have been appointed to MDL leadership positions again and again.[17] This limits opportunities for women, people of color, and LGBTQ lawyers—as well as for younger attorneys with less experience and those who work at small firms. These lawyers frequently have fewer personal connections and are less able to navigate an elongated, two-step leadership process that favors prior experience and appointments over other important factors.

To be clear, the concern is not that judges are intentionally abusing their appointment powers by engaging in favoritism or bias. Rather, the concern is that the implicit practice of appointing repeat players will effectively reduce diversity and exclude other qualified attorneys from appointment.[18] The creation of a new coordinating counsel position—without any criteria or selection process for the appointment—would compound these implicit biases.

* * *

As an attorney from a small firm with fewer prior MDL appointments—who is also a transgender woman and an active member of the LGBTQ community—I am acutely aware of the challenges in securing leadership appointments. I am concerned that the designation of coordinating counsel would introduce a new, unintended barrier to the MDL appointment process. Accordingly, I suggest that the Committee remove section 16.1(b) in its entirety from the proposed rule.

I look forward to answering any questions that the Committee may have.

Respectfully submitted,

Amber L. Schubert
SCHUBERT JONCKHEER & KOLBE LLP

[17] *Id.* at 9.

[18] *Id.* at 7.

TAB 33

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

January 23, 2024

VIA ELECTRONIC MAIL

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

Re: Draft Federal Rule of Civil Procedure 16.1
Written Testimony of Christopher Seeger

To the Advisory Committee on Civil Rules:

Thank you for providing this opportunity to testify concerning proposed Federal Rule of Civil Procedure 16.1.

I am a co-founding partner of Seeger Weiss. My firm exclusively represents plaintiffs in complex litigation, including MDLs and class actions. I received more MDL appointments than any other lawyer in America between 2016 and 2019 and currently serve in leadership roles in MDLs including the *3M Combat Arms Earplug Litigation*, *National Prescription Opiate Litigation*, *Philips CPAP, Bi-Level PAP, and Mechanical Ventilator Litigation*, and *Social Media Adolescent Addiction/Personal Injury Litigation*.

My testimony will focus on two subjects: (1) the role of coordinating counsel under the proposed rule and (2) responding to various submissions by members of the corporate defense bar that encourage this Committee to significantly revise the proposed rule to either make it harder for individual plaintiffs to file cases in MDLs or to limit the discretion MDL judges have to prioritize cross-cutting issues over plaintiff-specific issues as they manage their cases. The overall message I hope to convey is the same on both topics: that the Committee should be careful to 'do no harm' and avoid adopting language in the proposed rule that would disrupt orderly MDL practice.

Initial Conference and Coordinating Counsel

I echo the concerns raised by my law partner Jennifer Scullion in her prior testimony about the ambiguous role of coordinating counsel in the proposed rule and the outsized emphasis the proposed rule places on the initial case management conference. Many of the subjects identified in the proposed rule's initial report are simply not suitable for resolution until the appointment of formal leadership. If the proposed rule is adopted in its current form, it risks either coordinating counsel having an outsized role in making key strategic decisions at the outset of the case, or (as I suspect will be more common) producing initial conference reports that are simply not very useful to the Court. I support the set of revisions Ms. Scullion proposes in her testimony.

I will add that I am skeptical there is a real need for a rule—let alone such a detailed one—governing the initial conference in an MDL. I am not aware of significant problems with current practices regarding initial conferences.

Defense Proposals to Revise the Proposed Rule

I also want to provide an alternative perspective on one of the primary issues my counterparts in the corporate defense bar have focused on: the so-called "Field of Dreams problem."

I believe firmly that the plaintiffs' bar has a responsibility to carefully vet cases before filing, and that this responsibility remains in place in MDLs just as in any other case. I believe that the plaintiffs' bar can and should do better in meeting that responsibility.

But reading the submissions from the defense bar on this subject, there is a thinly veiled implication that the growth in the share of the federal docket mass tort MDLs command is driven primarily—or in substantial part—by frivolous cases. That is simply untrue. There is no doubt in my mind that there are many cases filed in MDLs that would not have been filed if this aggregation mechanism did not exist. But in my experience, that's because the public attention MDLs get educates people with meritorious claims that they should go out and get a lawyer. That, in turn, means more cases are filed in MDLs because more injured people learn they may have a claim. None of that is undesirable or illegitimate. The Subcommittee's draft was careful to avoid endorsing any language that would demean the legitimacy of those ordinary people's claims. The Committee would make a serious mistake if it incorporated such language here.

The Subcommittee was also right to reject the defense bar's various proposals to either make it harder to file a case in an MDL (by, for example, eliminating practical MDL mechanisms like short form complaints) or to force judges to prioritize individual case screening over cross-cutting issues in MDLs. The effect of these proposals would be to limit judicial discretion to handle this problem. But careful exercise of judicial discretion is often the best way of screening frivolous cases—there is no one size fits all solution to this problem. In my oral testimony, I plan to provide examples of how I have worked collaboratively with other plaintiffs' lawyers, defense counsel, and MDL courts to resolve this problem in specific cases. The solutions MDL courts have come up with, aided by the parties, are often driven by the specific facts of a given MDL. My testimony will emphasize that flexibility is the best solution to this problem—not the rigid limitations the defense bar would seek to impose on MDL courts.

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

Respectfully submitted,

/s/ Christopher Seeger
Christopher Seeger