TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
HEARING OF THE ADVISORY)
COMMITTEE ON CIVIL RULES)

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

IN THE MATTER OF:)
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HEARING OF THE ADVISORY)
COMMITTEE ON CIVIL RULES)

Remote Meeting
Suite 206
Heritage Reporting Corporation
1220 L Street, N.W.
Washington, D.C.

Tuesday,
January 16, 2024

The parties met remotely, pursuant to the notice, at 10:00 a.m.

COMMITTEE MEMBERS AND STAFF:

HON. ROBIN L. ROSENBERG, Committee Chair
PROF. RICHARD L. MARCUS, Committee Reporter
PROF. ANDREW D. BRADT, Committee Associate Reporter
HON. JOHN D. BATES
PROF. CATHERINE T. STRUVE
H. THOMAS BYRON III, ESQ.
ALLISON A. BRUFF, ESQ.
HON. KENT A. JORDAN
HON. R. DAVID PROCTOR
JOSEPH M. SELLERS, ESQ.
HELEN E. WITT, ESQ.
PROF. EDWARD H. COOPER
CARMELITA R. SHINN, ESQ.

WITNESSES TESTIFYING:

JEANNINE KENNEY
LORI ANDRUS
MARK CHALOS
TOBI MILLROOD
ALYSON OLIVER
JOSE ROJAS

WITNESSES: (Cont'd.)

JAMES BILSBORROW
DIANDRA DEBROSSE
JOHN RABIEJ
DENA SHARP
FREDERICK LONGER
JENNIFER HOEKSTRA
PATRICK LUFF
EMILY ACOSTA
A.J. de BARTOLOMEO
LEE MICKUS
SCOTT PARTRIDGE
CAROLYN MCGLAMRY
LISA ANN GORSHE
RACHEL HAMPTON
ALAN ROTHMAN
DAVID COHEN
JENNIFER SCULLION
NORMAN SIEGEL
JAYNE CONROY
TOYJA KELLEY
CHAD ROBERTS
ANDREW MYERS

P R O C E E D I N G S

(10:00 a.m.)

CHAIR ROSENBERG: Good morning, everyone. Welcome and thank you to all the Committee members, the witnesses and observers who are joining us on Teams for this public hearing on the proposed amendments to the Federal Rules of Civil Procedure. The current published proposals out for public comment include the proposed privilege log amendments, Rules 16 and 26, and the proposed new rule on MDL proceedings, Rule 16.1.

Today's hearing is the second of three hearings on these proposals. The first hearing was held in Washington, D.C., in October and the Committee heard from 22 witnesses. Today, we will hear from 30 witnesses. The third and final hearing will be held virtually on February 6 and we anticipate hearing from 35 witnesses.

We appreciate all who have already testified or submitted public comments and those who plan to do so before the end of the public comment period on February 16. Your input is a vital part of the rulemaking process. Today's witnesses, we look forward to hearing from your testimony, to those of you who are testifying today.

Each witness today will have 10 minutes. We ask that you keep your introductory remarks to two to three minutes so that the Committee members have ample time to ask questions. I have asked Allison Bruff, counsel to the Civil Rules Committee, to note the three-minute mark during your introductory testimony. We ask that you conclude all comments within 10 minutes so that we may continue with the next witness. Allison and I will be keeping time and will remind witnesses as needed.

Finally, please note that the times on the schedule are approximate and will be adjusted as needed. If we get behind schedule, we will adjust the scheduled morning, lunch, and afternoon breaks. And I do understand, due to weather conditions, we may have lost two of our witnesses today, so that may bring our witnesses from 30 to 28.

As for the witnesses, please leave your video off and microphones muted until you are called on to make your formal presentation. As to our Committee members, we welcome Committee members to have their videos on throughout the hearing if desired and to have their audio muted when not speaking. We ask that you use the Raise Hand feature or physically raise your hand in the video frame to indicate a

desire to comment or to ask questions.

The hearing is being recorded and a transcript will be made available publicly on the U.S. Courts website. If you do get disconnected, use the original Teams link to rejoin or use the conference bridge number located at the bottom of the meeting invite to join by phone.

With that, we'll call our first witness, Jeannine Kenney.

MS. KENNEY: Thank you, Judge Rosenberg. I appreciate the opportunity to testify today and I understand you have a long list of witnesses ahead of you. I'll try to be as brief as possible. I submitted extensive written comments, and I'll just try to hit the highlights here this morning.

With respect to the amendments to Rule 16 and Rule 26, as my comments reflect, I strongly support the Committee's approach. I think it is a balanced means of addressing the concerns that the Committee heard through the initial comment period regarding -- from both receiving parties and producing parties regarding some of the concerns regarding privilege logs.

In my experience in the cases I prosecute, we always have this discussion early in the case so

that we can identify any areas of disagreement regarding the form and expected content of privilege logs, resolve those early, and then, when we get the privilege logs, we're not fighting about what the privilege logs should contain but rather whether the documents identified are privileged themselves, and that really focuses the parties.

You know, we certainly leave a safety net should a party wish to modify the privilege log protocol. That can always be done by a member of the parties or by order of the court. And so the concerns that have been expressed that the parties may not know everything about the case early on, I think, is mitigated by provisions like that, and courts are always amenable to adjust to these types of protocols as the case progresses.

With respect to the Committee note, I strongly support some of the content that's in there. I think the emphasis on producing rolling logs is really important. I know there are concerns that rolling logs might, you know, provide quality issues for those early logs, but I can tell you that in my experience we don't get any better quality privilege log when it's produced after all discovery has basically closed than we do when we get them on a

rolling basis. And if you do get them on a rolling basis, it does allow the parties to flag issues early. You know, a party can give direction that this is business advice, this is public relations advice, this is not, you know, a qualified attorney/client communication providing legal advice. And that's really helpful. Those documents then won't be logged going forward, hopefully, if the party takes the cue from the court, and that can save a lot of time, money, and burden with respect to later logs.

I also appreciate the Committee's recognition that there is no one size fits all, and, you know, we certainly take into account differences in cases when we're negotiating protocol for privilege logs early in the case. And there are some times when we can make, you know, exceptions to what we might normally want to see because of the nature of a case, and it's really important that that be recognized, particularly with respect to the discussion regarding exclusions from the logging obligation entirely. That really depends upon the nature of the case, and, in some cases, you know, we can create fairly wide exclusions. In other cases, we can't. And I provided some examples of why that is in my written comments.

I do have some concerns that the note itself

focuses on just one of the concerns that the Committee heard during the initial comment period, which is the cost and burden of logging, and does not reflect something that is really critical, I think, for the Committee to express, which is there is a reason this rule exists and that reason is that there is, you know, I think in my view, an epidemic of overwithholding. We see it in our cases all the time that it is the rule, not the exception, where substantial quantities of documents are withheld and then ultimately produced following challenges or formal motion practice.

And I don't see anything reflected in the commentary about the importance of compliance with the rule or any discussion about what might constitute undue burden. I think that would be helpful to courts as they're evaluating challenges. In my view, a burden with respect to privilege logs is undue only when the log requires more than is necessary for the receiving party to assess the problem. And many of the alternative approaches that those on the other side we advocate often do not permit that assessment, and I think you probably received more than enough comments on that in the initial comment period, so I don't need to reiterate them. I did also --

MS. BRUFF: Ms. Kenney, I apologize.

MS. KENNEY: Sure.

MS. BRUFF: I am so sorry. I apologize for interrupting, but I would like, in the interest of time and to give ample opportunity for Committee members to ask questions, to ask you to briefly summarize and then I'll turn it over to Judge Rosenberg so she can ask questions.

MS. KENNEY: Sure. I mean, that's really --

CHAIR ROSENBERG: Did you want to say anything on 16.1?

MS. KENNEY: I think I'm happy to answer questions on 16.1. My comments were pretty extensive. I think the principal concern with 16.1 is its application to class action MDLs, I think, is very problematic. And I guess the only overarching comment I would make is that particularly in class action MDLs, it is very often our opposing counsel who do not want to have these discussions prior to appointment of lead counsel, of interim lead counsel, because they're having discussions and maybe negotiating away provisions or, you know, positions with those who may not have ultimate authority to guide the case and to decide what happens in the case because only lead counsel has that authority. But I'm happy to answer

any questions you might have about how class action MDLs proceed because it is primarily our practice.

CHAIR ROSENBERG: Thank you so much. So let me first ask if any of our reporters have any questions for our first witness, Ms. Kenney.

PROFESSOR MARCUS: Judge?

CHAIR ROSENBERG: Yes.

PROFESSOR MARCUS: I'd like to call attention to page 10 of your submission, which addresses Rule 26(b)(5). One of the things that has been urged on us is a cross-reference there. You raised concerns. If the Rule only says 26(f) applies, is that a problem?

MS. KENNEY: I don't know that that would be a problem, like, off the top because I don't know that it's necessary since 26(f) applies. So I'm not sure what the reference would be. I mean, my principal concern with those proposals is that, you know, many judges, almost every judge I practice in front of, has standing policies and procedures and they may depart from those policies and procedures if the parties make a good case for it. But I don't think the rules should preclude a court from having, you know, a particular judge from having a preference in its policies and procedures based on its own experience

for how privilege issues should proceed, just as they do with so many other discovery matters.

PROFESSOR MARCUS: So, if I'm correct in understanding, you're saying you're willing that our rule would tell judges they cannot enter orders in individual cases as they see fit?

MS. KENNEY: I think the concern is that the proposal, at least one of the proposals I saw, is that the court -- the rule should require that this be a case-by-case determination, and I would read that then as precluding a court from having a standing preference for a form of privilege log. Yeah, I think that would be a concern.

CHAIR ROSENBERG: Rick, I think you should turn your audio off afterwards because I do think there are issues on your end that we're going to try to help you with the echo that you indicated. Certainly, if you have any further questions, turn the audio back on, but, otherwise, we'll have it off so it doesn't interfere.

Anything else from Andrew or Ed? No.

And then any of our Committee members, do any of our Committee members have any questions either regarding the privilege log comments or the MDL rule comments for Ms. Kenney?

JUDGE PROCTOR: I do.

CHAIR ROSENBERG: Judge Proctor, yeah.

JUDGE PROCTOR: Yes. So how would you -- how do you think the rule should apply when you have competing class actions? I think your concern is, if someone has filed a class action and showed -- and is centralized before a transferee judge and then we have Rule 16.1 in place and there's preparation for a management conference heading into that conference. In Blue Cross Blue Shield, for example, I had I can't even remember how many, 30 or 40 class actions filed, and, you know, I had to ultimately designate who lead counsel was going to be among the class counsel in the various cases. So we're trying, obviously, as you've already indicated, we're trying to develop a one-size rule that doesn't apply to one-size cases. So how would you give us guidance about how that should be tweaked?

MS. KENNEY: Well, I mean, I think the principal distinction is -- I mean, there are certainly like Blue Cross, which my firm was involved in, there are certainly class actions where you have multiple classes proceeding, you know, as was the case in Blue Cross, proceeding simultaneously. They each have their own class counsel. Discovery is

coordinated, you know, it's certainly coordinated among the plaintiff's counsel, approved by, you know, the lead counsel, and so you don't have duplicative discovery.

But I think that even in a case like that, maybe you have, you know, five, six, I can't remember, Judge Proctor, how many actual classes there were in Blue Cross, but even in the generics MDL, which is one of the most complex MDLs, I think you have five classes. You have some individual opt-out plaintiffs, large corporations who are suing on their own behalf, and then you have the states, and you still only have a handful -- really a handful of actions by comparison to a very large mass tort with thousands of individual proceedings that proceed individually.

And so I think the rule could be improved, one, by distinguishing between the different nature of class -- of MDLs and how they are different and the different management concerns they might implicate because some of the commentary I think is just really confusing. I mean, censuses, you know, generally just don't apply, even in a class action where you've got, you know, five different classes proceeding, you know, simultaneously because the claims and facts are all laid out in the class action complaint. I mean,

that's effectively the census for that class.

And so I think the commentary, it's very confusing because it makes a distinction between MDLs and class actions when, in fact, class actions can and usually, you know, and often are MDLs. So I think just identifying the different management issues that might be implicated in a class action versus a mass tort MDL, which I think is what is animating the concern, most of our class actions proceed -- even after MDL proceed in a pretty orderly fashion and almost as any other consolidated -- you know, related matters consolidated under Rule 42 would. I don't know if that answers your question. Sort of a long-winded answer.

CHAIR ROSENBERG: Thank you. Well, if there are -- oh, Professor Bradt has a question.

PROFESSOR BRADT: Thank you. This is very helpful. I wonder whether or not, though, the real distinction that you're concerned about in MDLs is not so much class action versus non-class action because, of course, MDLs and mass torts often feature class actions at the outset. Whether or not they get certified or not is a question going forward and sometimes they culminate in class action in settlement classes.

So is the problem really less about class action versus non-class action MDL and established practices in certain subject matters of MDL, like securities and antitrust? And if that's so, wouldn't judges be more likely to continue following the well-worn path in those kinds of MDLs, even if some aspects of 16.1, like a case census, don't apply to them?

MS. KENNEY: I think in answer to your first question, I don't think it's really -- I don't think that's the distinction. I don't think it's a subject matter distinction. I just think that the actions are very different animals. Leadership has a different role in a mass tort. Settlement is different in a mass tort. Discovery is different in a mass tort.

And, sure, often mass torts culminate in a class action settlement because you have different certification rules, you know, at settlement than might apply in a litigation sense, but I don't think that's the distinction. I think the distinction is that we just don't have the same complex -- there are -- there usually is not a need for a bellwether in a class action, so referring to bellwethers could be confusing.

Courts generally, you know, as a matter of course will issue an initial practices and procedure

order after they get a class action MDL just laying out without any input of parties, just laying out the administrative issues in the case in terms of directing the court to do X, Y, and Z, how, you, know, people should apply for admission to the court and so on. It's just a much more -- certainly, there are, you know, pretty complex class action MDLs, auto parts, Blue Cross, generics, but they implicate different issues. You know, all of the claims are the same. You don't need a census for the different claims. They're all going to be, you know, tried based on the complaint and the discovery obtained. They're going to rise or fall on summary judgment applicable to that class action, so you don't usually have these issues.

Sometimes there are dispositive legal issues that will arise in a class action, but you usually don't need the court's assistance in that because it's the defendant who's going to say, hey, I'm going to move, you know, because I have immunity under the statute, and that might be the first issue to that. That happens. But it isn't something that requires a complex inquiry into all of the different thousands of individual cases.

CHAIR ROSENBERG: Okay. Seeing no other

hands, thank you so much, Ms. Kenney. We really appreciate your written comments and your oral testimony here today. Thank you.

MS. KENNEY: Thank you so much. I appreciate it.

CHAIR ROSENBERG: Okay. Lori Andrus.

MS. ANDRUS: Good morning, everyone, and thank you so much for the opportunity to address privilege logs today. By way of introduction, although I've met many of you, I am president elect of the American Association for Justice. I've been a plaintiffs' lawyer for 25 years now. I have my own small, two-woman law firm based in San Francisco, but I practice all over the country, often in federal court. I do complex litigation almost exclusively, and that includes all types of class actions and mass torts, so I have a good deal of experience with privilege logs in federal court.

And I am here to speak in support of the rule as it is drafted. At the end of my remarks, I'll give one or two suggestions that could, in my view, perfect the rule. But I think that the Committee has captured the most important elements of a Federal Rule, which is flexibility and balance, so two of the most important things, I suppose I should say.

I think judges need to be paying attention to this issue early. Certainly, litigants need to be paying attention to this issue early. I always do. I make a point of it because I don't want to find out at the end of discovery that we have disagreements about the format of the privilege log or how it will be produced.

Ideally, privilege logs are produced on a rolling basis. I know I've seen in some of the other testimony that will be presented today that the preference might be from a defense perspective to produce a privilege log at the end of discovery so that the defendant can focus on producing documents. I think that's inappropriate for a number of reasons, but, really, from a practical perspective, the defendant then has to review each of those documents twice, and it just doesn't make sense, especially if they are hoping to save money or be efficient in the creation of a privilege log. It's best to do it as the documents are being produced, and that's typically on a rolling basis.

Of course, not all cases in federal court are the same. A trucking case involving two parties is managed differently than a large antitrust matter with multiple defendants and multinational

corporations. I've worked on both kinds of cases and I can tell you from experience that privilege logs in these massive cases require more attention from the court, and a tailored approach is best.

I've also seen in some of the other testimony a concern that there can be abuse on the plaintiff's side and that we sometimes are just trying to drive up the cost of the case. In my many years of experience, I've never found that to be true. In fact, it's the opposite. Plaintiffs are always trying to simplify, get to trial as quickly and efficiently as possible and keep costs down in the case. It's in our blood because of the way we get paid. It's important for us to do things efficiently. And I can assure you that I would much rather get a privilege log with 5,000 documents on it that were carefully reviewed and laid out with clear explanations of why they're privileged than to get 90,000 lines on a privilege log, as we did in the Avandia case, where there was clear overdesignation, and I don't know if it was sloppiness. It might have been inadvertent, but after multiple rounds of challenges, we were able to retrieve the documents that never should have been withheld in the first place.

That case was a long time ago, but I raise

it just because it's a strong example, I think, of the power that a privilege log has to disguise or withhold documents improperly. And so plaintiffs are always fighting against that tide, and determining what exactly needs to go in a privilege log at the beginning allows both parties to more clearly understand their obligations and for a judge to evaluate ultimately whether a privilege applies to any particular document.

MS. BRUFF: Ms. Andrus, I'm sorry to interrupt. I'm going to turn it back over to Judge Rosenberg to invite questions.

MS. ANDRUS: Okay. No problem.

CHAIR ROSENBERG: I think you said you had one or two suggestions. Do you want to quickly give those, and then we'll see if there are any comments?

MS. ANDRUS: Yes, I would appreciate that opportunity. Thank you, Judge Rosenberg.

If we're looking at the first paragraph of the Committee note on Rule 26, there's a sentence, "Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document privilege log." I recommend striking that entire sentence. You know, technological advances have made privilege logs much easier and less expensive to

generate, and those costs will continue to go down as our reliance on technology continues to go up, so that sentence isn't even necessarily accurate today and I doubt it will be in the future.

And then the one other suggestion I had in terms of language in the note -- oh, yes. Let's see. It's the sentence about "Overdesignation may be the result of a failure of the parties to communicate meaningfully," and that's in the last paragraph of the draft Committee note. It's the second sentence. First, it mentions overdesignated responsive materials and then it says, "Such concerns may arise in part due to the failure of the parties to communicate meaningfully about the nature of privileges and the materials involved in the given case."

It's never been my experience that overdesignation is a result of my failure to communicate. So overdesignation is its own beast, and I don't think that is a basis to include that sentence in the note. I'm happy to take questions.

CHAIR ROSENBERG: Okay. Thank you so much.

Questions from our reporters?

PROFESSOR MARCUS: Two questions. I've got one related to something we just heard from --

CHAIR ROSENBERG: Rick, Rick, can you turn

your volume up just a tad?

PROFESSOR MARCUS: -- the previous witness. Does that work?

CHAIR ROSENBERG: Yeah, yeah, it seems a little low.

PROFESSOR MARCUS: Okay. I don't know if I can turn it up, but I can turn up my volume.

CHAIR ROSENBERG: Okay.

PROFESSOR MARCUS: And one is, do you see this proposal as written as restricting judges' latitude in handling privilege log issues, and the other, which I already raised, is, do you see any problem with adding a cross-reference to 26(b)(5)(A) pointing out that there is now a provision in 26(f) calling for early discussion and reporting to the judge on privilege log issues?

MS. ANDRUS: I have no problem with either of those things, Professor Marcus. I think this rule as written does make clear that a court has discretion over privilege logs and to assist the parties in tailoring them as is needed for each case, and I would have no problem with a reference to 26(f) either.

I would support the suggestion of Doug McNamara. He testified at the October 16 Rules Committee hearing and he suggested that the rule even

go farther and specific language be added to the Committee note explaining what should be in a privilege log. I'm in support of his suggestion as well.

PROFESSOR MARCUS: Well, wouldn't, if one tried to do that, wouldn't that be tied to current technology and otherwise perhaps become passé pretty soon?

MS. ANDRUS: No, because we're talking about the substance of the description of, you know, how one justifies withholding a privilege document.

CHAIR ROSENBERG: Any other questions? And from our Committee members? Yes, Helen.

MS. WITT: Good morning. Have you had any success in early discussions with opposing counsel in coming up with a proposal or a schematic for categorical privilege logs, or is that not something that you have found either negotiable or workable?

MS. ANDRUS: I actually find that I frequently agree to, through discussions with counsel, certain categories of documents not being on a privilege log at all. I have not ever found that categorization in terms of things like memos or agendas would be appropriate because such a large grouping would make it difficult or impossible really

to evaluate the privilege. And I think there's good case law that requires a certain level of detail that such a categorization is in conflict with that.

But there can be categories, like, for example, communications with litigation counsel post-filing of the complaint, that is typically something that I do not require to be on a privilege log and it saves the other side a ton of work. So sometimes. Every case is different.

CHAIR ROSENBERG: Okay. Any further questions?

MS. ANDRUS: Thank you very much.

CHAIR ROSENBERG: Okay. Seeing none, thank you so much, Ms. Andrus. We appreciate your testimony here today.

And next we'll hear from Mr. Mark Chalos, who will speak on 16.1.

MR. CHALOS: Yes. Good morning, Judge --

CHAIR ROSENBERG: Good morning.

MR. CHALOS: -- and good morning, members of the Committee. Yes, I'm here speaking to the issues of proposed Rule 16.1. First of all, I appreciate the Committee's work over the past several years on this. I know it's a long time in the making and I appreciate all the listening and input that the Committee has

taken great pains to receive.

I have addressed in my comments three areas primarily. The first is that the rule must be flexible, which I think it largely goes -- it largely makes that clear that it must be flexibly applied. I had two fairly modest suggestions in that regard related to the Committee note.

Secondly, I addressed the issue of the coordinating counsel, and after much discussion over many years and various formulations of this concept, my suggestion here is slightly less immodest or slightly less modest and, unfortunately, I've come to the view that I think 16.1(b) is probably not a workable solution in the context of Rule 16.1.

And, thirdly, I have addressed the interplay between and among Rules 16, 16.1, and 26(f) and I have made a fairly modest suggestion there in addition to the Committee note making clear that the conference under 16.1 would satisfy the requirements of 26(f) and thereby either trigger the deadlines that are triggered automatically by 26(f) or would be addressed in the court's order that comes out of the 16.1 order, conferencing order.

So that's a brief summary of my comments, and I'm happy to answer any questions.

CHAIR ROSENBERG: Okay. Thank you so much. Let me first turn to our reporters.

Rick, it looks like you have a question.

PROFESSOR MARCUS: Well, I had the impression that particularly when there are many cases that are tag-alongs and what have you that 26(f) really very rarely is followed in those cases and all of those kinds of things are dealt with in the MDL transferee court. Am I wrong about that? I'm addressing your concern that there might be some kind of tension or overlap and I'm asking for clarification.

MR. CHALOS: Yeah, Professor. I think it -- the short answer is I think it depends. My concern and the concern that I was trying to address is that there are deadlines that are triggered automatically by the ordinary course of Rule 16 and the conference that's held there, and I'm thinking particularly of discovery opening, as well as the mandatory initial disclosures.

My suggestion is not to make a one-size-fits-all rule as part of 16.1 but rather to in the note encourage the court to address that, to say whether --

PROFESSOR MARCUS: One of the things the

rule says a judge can ask the parties to report on is whether there are extant in any of the transferred cases the kinds of orders you're talking about that might need to be modified. Doesn't that address what you're talking about?

MR. CHALOS: It addresses part of it. I'm also looking forward. And my concern is that I could imagine a scenario where we would have after the 16.1 conference some ambiguity as to whether, for example, discovery is open or whether there's a deadline now automatically for the mandatory initial disclosures under (a)(1)(A).

So my suggestion is not to make a one-size-fits-all rule but rather to, as I mentioned, encourage the judge in the notes to address that because I don't think anywhere in the text of the rule currently or in the Committee note there's any reference to Rule 26(f) and how it interplays with Rule 16.1.

There is in Rule 16 express references and vice versa with Rule 26(f), but there currently exists no reference in 26(f)(16) -- I'm sorry -- or 16.1 to either of those other two concepts.

CHAIR ROSENBERG: Okay. Andrew?

PROFESSOR BRADT: Thank you.

Is it your experience that judges don't do

that as a matter of course in the MDLs you participate in? I understand 16.1 doesn't exist in our world, but aren't judges in those cases keeping an eye on how discovery works with tag-alongs and follow-on actions that come into the MDL, or is it your perspective that under the current framework judges aren't considering that at all and you're left without sufficient guidance?

MR. CHALOS: I think, currently, judges address it, but it's explicit in Rule 16. It is not explicit in proposed Rule 16.1, so that's my concern is that if we are now going to be in MDLs operating under this new formulation of 16.1, Rule 16 no longer applies or applies in some limited form in MDLs, then I think we have to address, well, what happens to the interplay between 26(f) and the case management rule, whether 16 or 16.1.

PROFESSOR BRADT: Can I shift gears for a second to the coordinating counsel question? I guess the question I'd ask you is, you know, what in your view is the greatest mischief that having coordinating counsel could cause and why does that not exist in the way that the parties organize themselves at the outset of an MDL now? I guess, in other words, why is having this in the rules significantly worse than the status

quo?

MR. CHALOS: Sure. That's a great question. Short answer is repeat player, and the reason I say that is right now, as it stands, whether it's a mass tort MDL, which I am in the leadership fairly frequently of, or class action MDLs, which I'm also frequently involved in, right now, there's no formal designation. So we on the plaintiff side generally self-organize or we make it pretty clear, you know, it's pretty clear to the court that we were unable to self-organize, at which point the court would then implement some sort of process whereby the court receives information about the various applicants or the various potential either co-leads or steering committee members or what have you.

And that enables the judge to gather information to meet people the judge may never have encountered before, to think about diverse candidates, and when I say "diverse," I mean all sorts of diversity, whereas if we were to shift to a situation where judges are encouraged or may take from its inclusion in the text of the rule that they are being encouraged to appoint coordinating counsel, my concern is the judge has no information on which to make that selection other than I know this person, they've been

in my court before or my colleagues speak highly of this person, all of which go to this repeat player issue.

I would love a world where coordinating counsel has no stickiness to it in terms of ultimately being appointed to lead the litigation. But I think, in reality, the way that will play out is the early leaders will have a chance to audition for leadership. And I think most of the lawyers at least that I work with will do a very good job and will have demonstrated they can lead, which I think inevitably, at least in some or many cases, will lead to the coordinating counsel being lead counsel or something like that.

So I think we're creating a pipeline that reinforces the repeat player issue, whereas the way things work now, I think they generally work fine. The period of inception of the MDL through appointment of formal leadership, you know, it's occasionally a little bit messy, but it gets sorted out. It gets sorted out fairly quickly and usually within, you know, weeks or a month we have formally appointed leadership that was appointed through a process where the judge received fairly robust information at least in many instances. They may interview individual

candidates, and that's becoming something we're seeing a lot more of.

CHAIR ROSENBERG: Okay. Thank you. Anything from any of our other Committee members on this issue?

Okay. Well, thank you, Mr. Chalos. We appreciate your comments and your testimony here today.

MR. CHALOS: All right. Thank you, Judge.

CHAIR ROSENBERG: Okay. Next is Tobi Millrood on 16.1.

MR. MILLROOD: Good morning.

CHAIR ROSENBERG: Good morning.

MR. MILLROOD: Thank you. Good morning. Thank you to the Committee members for your time today. My name is Tobi Millrood and I'm from the law firm of Kline & Specter in Philadelphia where I'm chair of the Mass Torts Division.

Today, I'm offering testimony on behalf of the American Association for Justice of which I served as president from 2020 to 2021. As I've been involved with this discussion from the earliest formation, including with Judge Dow and Judge Rosenberg and Judge Proctor and, of course, with Professor Marcus all along, I just want to commend the Committee for its

continued diligence and dedication to this issue and to the recognition of the important role that MDL cases play in our legal infrastructure.

This morning, I want to offer a few additional remarks to my prepared testimony that was submitted to this Committee. In particular, I want to briefly comment on three topics: first, the temporal association of the proposed rule as it relates to MDL litigation; second, some cautionary concerns related to the introduction of a coordinating counsel position; and lastly, the misguided emphasis by LCJ and the defense bar on "unsupported claims."

First, it’s axiomatic in rules construction that each word of a rule has meaning. That is to say, it’s not superfluous and, further, that the wording aids the application of the rule.

Here, really, as a fundamental matter, I want to emphasize that as drafted, proposed Rule 16.1 refers to an initial MDL management conference, and as such, what is contemplated by this rule is quite ambitious for an initial conference. My long experience in at least product liability MDLs is that for the first few conferences in an MDL, much of the discussion is relatively shape-of-the-table discussion. After all, at the initial juncture, no

master pleading has been filed, and in many MDLs, there isn't even a real assessment as to the full scope of the types of injuries involved at the initial stage. For that reason, the Committee is urged to either replace "initial" with "early" and/or reduce the number of topics that cannot be discussed intelligibly with confidence and in substance at an initial conference.

Second, this speaks to the serious concerns with "coordinating counsel." Here, the question is asked what's in a name, and our answer is a lot. When you anoint with the imprimatur of a rule a title of coordinating counsel, there is so much potential for unintended consequences. To the question just raised by Professor Bradt, the mischief could be jockeying for supposed future leadership, confusion as to what falls under the roof of coordinating counsel, later gotcha moments from defendants who claim that plaintiffs are stuck with the representations of coordinating counsel when different appointed leadership counsel decides the approach must be different down the road. And for what benefit?

If the goal is to take me to your leader so that the court can have a fulsome discussion, that's all the more reason to shift the rule to an early

management conference after the appointment of permanent leadership.

Finally, I want to address the increasing drumbeat from LCJ and the defense bar about utilizing this rule and the initial MDL management conference to confront what they describe as "unsupported claims." We can save for another day or even week our response to the outsized myth of unsupported claims. But what I want to emphasize for this Committee is that to the extent that an MDL court where the parties are jousting about claims and whether they're supported, the best way of addressing it is through empowerment of plaintiffs' leadership in early orders. They are the best -- that is, plaintiffs' leadership are in the best position to screen cases, confer with fellow plaintiffs' counsel, and help shepherd for filing those claims that properly belong in litigation.

When I served as co-lead counsel in the Zofran Products liability MDL, we asked Judge Saylor for an early order that would permit plaintiffs' lead counsel to collect information privately from plaintiffs' counsel that would, in turn, allow us to screen cases. Judge Saylor granted that order, and what could have been an MDL of thousands of cases became an MDL of hundreds of cases. This kind of

salutary goal can be accomplished through comment to the rule rather than a prescription that suggests that each MDL claim must be limited at the outset.

Those are my remarks this morning and I'm available for your questions now. And, again, I thank the Committee for their attention to this issue.

CHAIR ROSENBERG: Okay. Thank you, Mr. Millrood.

Okay. First, from our reporters, Rick, do you have a question?

PROFESSOR MARCUS: Well, I think so, following up on what you just said. You can hear me?

CHAIR ROSENBERG: Yes, thank you.

PROFESSOR MARCUS: Good. And thank you very much for all the help you've given us over the years.

With regard to coordinating counsel, you may recall that in 2003 Rule 23(g) introduced a notion of interim counsel and I was involved in that and I think that's now well established. As far as that's concerned, that's a new title also. Did that cause any problems you're aware of?

And separately, with regard to your experience in the litigation you mentioned, my recollection early on is that quite a few on the plaintiffs' side were concerned about claims that

shouldn't be there, and what you described, I think, is a manner of dealing with that concern. And in terms of what the rule says, it says there's a whole bunch of topics that ought to be considered, one the judge may -- have to be considered. One is whether to have additional management conferences. I think that it's initial means this is not the only one buy many, as opposed to early. And another is, how and when to do what you just described. I don't understand where the problem is in the rule as proposed. So I'm asking for an explanation.

MR. MILLROOD: Thank you, Professor Marcus, for both those questions. I'll actually take them in the reverse order. And I do think that the concern here relates to (c)(4), how and when the parties will exchange information about the factual bases for their claims and defenses.

My anticipation is that what we will face in that is because it is in the rule, the defense bar coming in and trying to move the goal line, as they often do in these product liability litigations, for the proof of the cases early on.

My experience in many product liability MDLs is that when we really get into the cases, both parties learn a lot more about the case as it goes on.

It’s not unusual even to reform a fact sheet in product liability MDLs because we just don’t know everything at the outset. And so I think the concern is, yes, how the parties will exchange information, I think, you know, that’s fine. I think the concern is that the when is -- my anticipation, like I said, is the defense counsel are going to say, we need to know right now the factual basis for the claims, and, yes, the discretion there rests with the court. I just think there is also the potential to use the word again "potential for mischief" in that sub-paragraph.

As to your first question, I confess I can’t speak with great experience to the class action experience of an interim counsel title in Rule 23, but my expectation is that the architecture of class action cases, the landscape of how many counsel are involved is much, much different. The jockeying that occurs. I know there’s jockeying in class cases, but I think it is a world apart from the steering committees of 20, 25, 30 plaintiffs' counsel, all that will be jockeying for that title that they think will carry so much weight if they get that title of coordinating counsel. I think it really could have very serious unintended consequences that then becomes a headache for the court.

PROFESSOR MARCUS: Can I just follow up on the first thing you were speaking about? The rule proposal says how and when the parties will exchange. Now it sounds like you think that means how and when that will happen before anything else happens. The rule doesn't say that.

MR. MILLROOD: Yeah, I understand. I think organically, I don't -- just sometimes I think that we put language in a rule that could, again, unintendedly have a superfluous result because we always are going to have to find out in any MDL, whether it's a product liability case or securities case or an antitrust case, it's part and parcel of the litigation to find out the claims and the defenses in the case. Why are we putting in the rule when eventually there's going to be a when and there's always going to be a how. Why is it that we need to put in the rule that at the initial status conference we need to now turn that into a potential weapon of the parties? That would be our comment.

CHAIR ROSENBERG: And Andrew.

MR. MILLROOD: I don't know if Professor Bradt has a --

CHAIR ROSENBERG: Yeah, Andrew has a question.

PROFESSOR BRADT: Yes, thank you. Two questions. The first, this is a question that I asked of several of the witnesses in the first hearing, is, are you aware of any empirical evidence that supports the question of how many unvetted or how many non-meritorious claims we're likely to see in mass tort MDLs. We've asked that of the defense side and also plaintiffs' side and so I'm interested if you can shed any light on that.

Second, we heard at the hearing in the fall that the parties in mass tort MDLs do not typically follow Rule 26(a) with respect to mandatory disclosures, and I'm wondering if that's your experience also and, if so, would you be worried that the rule would change the practice as it has customarily evolved?

MR. MILLROOD: Thank you for those questions. As to the first, I know that I've attended numerous conferences where my colleagues in the defense bar like to offer up statistics of empirical evidence of the number of unvetted or claims or the outsized proportion of all MDL litigation that are product liability claims.

I think it's a really nebulous topic to drill down to because, first of all, we have to

understand what is a claim after all. You know, again, I've been in multiple MDLs where what is an actual injury claim reshapes. You know, there are some MDLs where there are two or three injuries at the outset, but once we get into the science, at the end, there might be only one injury at the end.

There would be no way of knowing at the outset before we got into the science that so many of those claims were "unsupported" or they were supported. So I think what becomes a supported or unsupported claim changes as the case goes on.

I do think -- you know, I don't want to get off on a tangent, but I think there are a lot -- I've had -- I've been on a number of panels where this issue has been addressed as how do we get to the question of claims that have to be filed potentially to address a statute of limitations. There's still things that we don't know about the litigation and yet the burden that can be put on the court or the defense about all these flood of claims being filed, there are different novel approaches.

There are concepts of inactive docket. There are tolling measures. I know Judge Rosenberg has employed, for example, the census measure. There are a lot of different measures that can be applied

here, but I think that's all the more reason that it's not a one size fits all. And I think the MDL court has to be armed with the flexibility to address it based on the facts of the case.

As to the second question -- and I hope that helped to address your first question. As to the second question on mandatory disclosures, yes, my experience is that most of the MDL courts, either at the behest of the parties or not, waive off that requirement because, at the outset of the case, there's little that really can be disclosed until the shape of the case takes form. If anything, there are some disclosures that are made on the defense side where they might put in, you know, the initial FDA submission file things that are almost a public record, the design history file in a device case, but mostly there are very few mandatory disclosures that are made.

On the plaintiffs' side, ultimately, that takes shape oftentimes in a profile form, an initial profile form. But, again, I think this speaks to leaving to the MDL court the flexibility of management over the case as to how those disclosures should be made for the given case.

CHAIR ROSENBERG: Okay. Thank you. There

are no other questions or comments. Thank you so much for your time.

We'll go to our next witness, Alyson Oliver, who will speak to 16.1.

MS. OLIVER: Good morning.

CHAIR ROSENBERG: Good morning.

MS. OLIVER: My point here is fairly simple, I think, and it goes directly to the efficiency concept as it relates to the idea of coordinating counsel.

My thought is, is that if the court is going to appoint coordinating counsel in any litigation, first of all, it should, I think, in my opinion, be somebody who is involved with the litigation to begin with, who has many cases or a substantial stake in the litigation. But the rule doesn't state that, and it doesn't have any instruction as it relates to that.

I think the problem could become, if the court is not familiar with the lawyers in the litigation but, yet, is familiar with lawyers in their jurisdictions generally, the appointment may be made to somebody that the court is familiar with and comfortable with and trusts, which makes sense.

But, on the other hand, if that person doesn't have any stake in the litigation and doesn't

know the case, there's going to be a learning curve involved for that coordinating counsel not only with the substantive issues of the case and deploying their responsibilities under the new 16.1 rule if it is passed in the format that it's suggested here but also with the lawyers involved.

So, in order to come up with the initial requirements of 16.1, there's going to need to be familiarity not only with the litigation itself but with the lawyers involved and being able to coordinate those lawyers and get the job done.

What I'm saying is I think, if this person isn't familiar with the litigation and the participants, there's going to be a learning curve for that person and that learning curve is going to be paid for by the litigants at the end of the day, you know, through the common benefit assessments and the awards.

It seems to me that the person who's appointed should be vetted for the purposes of, you know, ensuring that that person doesn't have a huge learning curve where somebody who could more efficiently step into that role because of their familiarity with the litigation and the lawyers could do it a lot more efficiently.

But then, you know, to me, it becomes a natural thought that, well, you know, maybe we'll vet the coordinating counsel to ensure that there isn't this large learning curve and that they do have the familiarity to be able to discharge their duties efficiently.

But, if the court is going to partake in a vetting process for that person, then, to me, it seems duplicative. It seems that, you know, if we're going to vet people, why not just vet the leadership team instead of having that extra step in between. So that's my thought process as it relates to coordinating counsel and why I think it might not be the most efficient way to handle the beginning stages of the litigation.

CHAIR ROSENBERG: Okay. Thank you so much.

Any questions from our reporters?

PROFESSOR MARCUS: Well, can I offer a reaction that is not just to this presentation but to other things we received? One reaction on the coordinating counsel idea is maybe some on the plaintiffs' side are saying, let us run this show, don't tell us what to do, judge. And, frankly, going back to when judicial management of litigation was first introduced, there was a lot of push-back.

I'm wondering if you can address that reaction that has occurred to me that the basic point many are making, and maybe you are, is let us run the show and don't you get involved, judge, this isn't your problem; this is ours. And at least the 23(g) interim counsel idea suggests that maybe sometimes it is valuable for the judge to make some kind of early call on that score. What are your thoughts on that?

MS. OLIVER: Well, you know, I can't speak to others' motives in regards to their comments, but, you know, as it relates to my comments, I'm certainly not suggesting in any form or fashion that the judge isn't in control of the litigation. I mean, that's who we look to at the end of the day to manage and control the litigation and that's who should be in that position, not any plaintiffs' attorney.

My point really goes to efficiency. Currently, I'm serving as the sole time and expense committee for the Phillips CPAP litigation in Pittsburgh, and, you know, through that appointment, I've been able to see, you know, a lot of what does work efficiently and a lot of wasted time and unnecessary expense that seems to be built into the process.

So, yeah, my comments, if they do seem to

suggest that we don't want the judge involved, that's certainly not my position. I just think that this process without any instruction, you know, as to the contrary might invite added expense and, at the end of the day, a lack of efficiency, which kind of defeats the purpose of the rules under which we're doing these consolidated actions to begin with.

CHAIR ROSENBERG: Yes, Andrew.

PROFESSOR BRADT: Thank you so much. My question is similar to one that I asked of an earlier witness, but you have a slightly different perspective that you've presented as somebody who's worked up the cases and then the MDL happens.

My question is, in the status quo, how do you deal with that problem when leadership teams are getting put together? You've worked up cases. Then the MDL happens someplace else. My question is, how do you address that now? And is the only reason that coordinating counsel is worse is that it adds another step, or do you view your position as getting worse materially with the addition of the coordinating counsel idea?

MS. OLIVER: I think it just adds another step and another layer of the possibility of inefficiency as opposed to the goal of efficiency.

Once leadership has been put in place, yes, there's sometimes where things aren't done as efficiently as they should be even then at that point. And I have ideas in regards to how to resolve those issues, but I don't know that that's the topic of Rule 16.1. My point is simply that this, to me, seems to invite another layer of inefficiency in a system that we're already struggling to make efficient.

PROFESSOR BRADT: So the main concern that you have right now is efficiency. It's not that you feel like that your voice is heard now and then would be heard less in a world where coordinating counsel exists?

MS. OLIVER: Correct.

PROFESSOR BRADT: Thank you.

MS. OLIVER: Thank you.

CHAIR ROSENBERG: Any other questions or comments? No?

Okay. Well, thank you so much, Ms. Oliver, for your time and your comments.

MS. OLIVER: Thank you, Judge.

CHAIR ROSENBERG: Okay. Thank you.

And we'll have our next witness, who will speak on 16.1, Jose Rojas.

MR. ROJAS: Good morning. I appreciate the

Committee having me at this testimony this morning. My name is Jose Rojas. I think I come here with a little bit of a unique perspective. I was appointed as a co-lead in MDL 3026, which is the infant formula litigation, despite not having had any prior experience in MDLs at all, and so I think that really provided me with a different path, a different experience that I think is worth sharing.

It has been mentioned briefly by other folks today there is in the world of MDLs a bit of a revolving door problem or repeat player, however we want to call it. I believe that the creation of this new rule, which the Committee's worked so hard on and which is very much appreciated, really provides an opportunity to address some of these issues.

My particular thoughts are that there is traditionally what I consider to be perhaps an exaggerated emphasis on prior MDL experience in the selection of leadership. That is not to say that that’s not a hugely important criterion but rather that it perhaps becomes somewhat exaggerated. And the unintended consequence of that exaggerated emphasis is perhaps an overcreation of the repeat players, which we've discussed, an absence of diversity, and a rather homogenous leadership structure.

And so my thoughts here when I first saw the proposal is that it really presented an opportunity to include language where these other really important criteria could be considered and actually empower a judge to specifically consider them, namely, diversity of background and experience, expertise in the subject matter of the litigation as opposed to expertise in generalized MDL work, and the role that was played in bringing the litigation to bear in the first instance.

My firm started the infant formula litigation. We litigated it alone for two years, filed all the original cases, and I was lucky enough to get appointed. But it's my understanding that that is oftentimes a hurdle, and it should not be in my opinion. So I will not continue to go on too deeply into that.

I do think there's an opportunity for language in the new rule that addresses some of these things. I also commented in my testimony, written testimony, that the coordinating counsel rule may add to that concern, and that's already been spoken about today, so I won't spend additional time there unless there are questions. I'd be happy to take any questions.

CHAIR ROSENBERG: Okay. From our reporters.

Rick?

PROFESSOR MARCUS: One question in your proposed revision to the language, you urge the use more than once, I think, of the word "diversity." It might be that that is a term that some are not entirely comfortable with. I wonder, do you think using that word is important to conveying that message? We do try to emphasize in the note that a variety of experiences, backgrounds, and so on is important to consider. My question is just about that particular word. Does that really add much?

MR. ROJAS: I understand the point, Professor, and it's well taken. I think, for one thing, I think a de-emphasizing of prior MDL experience will actually have the effect of creating diversity in its own right.

Oftentimes, particularly with product liability torts, the aggrieved persons, the harmed persons, are people of color in disproportionate ways. And so, by making sure that we include the lawyers and the firms that originated the litigation, that fought it from the beginning, I think it's going to have the additional impact of bringing both diversity of race, ethnicity, but also of background and experience, which I think is crucially important.

I understand the concern. I don't think diversity should be avoided in the language, but to the degree there is concern in the Committee, I think what is more important is to emphasize those other levels of experience because I think they will naturally bring some of the other advantages as well.

CHAIR ROSENBERG: Thank you.

Andrew?

PROFESSOR BRADT: Yeah, I'll ask the same question I've been asking of others who were skeptical of coordinating counsel, but maybe I'll ask it in a slightly different way from your perspective as somebody who, like Ms. Oliver, would be somebody who had worked up the cases in the beginning and then the MDL comes in.

I guess my question is, wouldn't the institution of a coordinating counsel step potentially be better than the status quo because you're able to come in with a lot of expertise that many of the lawyers who might otherwise be vying for leadership wouldn't have, and so wouldn't your experience with the cases actually create an opportunity for more influence in the leadership, rather than a world that we have now, where it seems that you're describing that you're often left out of leadership discussions

entirely? Isn't there a likelihood that coordinating counsel will make things better for people or attorneys in that situation?

MR. ROJAS: My concern is that because, in the world of MDLs, the typical persons that are being considered for those types of roles are usually people that (a) know the judge; (b) have this prior MDL experience; and (c) are very familiar with a lot of the players that are already in the MDL, and that's where the lawyer that works the case up is oftentimes not in that position. We neither know the judge or the players and oftentimes lack the MDL experience.

And look, to some degree, I'll confess this is a little bit of guesswork. My guesswork here would be that the type of person that would be appointed to that role is more likely to fit within the group of players that actually leads to -- you know, oftentimes these leadership teams are formed by consensus and maybe even some negotiation. And so I'm not sure that a coordinating counsel would be -- especially if that coordinating counsel is vying for a position on leadership herself, I'm not sure that that would be a beneficial thing.

CHAIR ROSENBERG: Okay. Any other questions or comments?

Seeing none, okay, thank you so much, Mr. Rojas.

MR. ROJAS: Thank you.

CHAIR ROSENBERG: Mr. Bilsborrow will now speak on 16.1.

MR. BILSBORROW: Thank you for providing an opportunity for public comment on proposed Federal Rule of Civil Procedure 16.1. My name is James Bilsborrow and I'm co-chair of the environmental and toxic tort practice at Weitz & Luxenberg. In that role, I oversee and participate in litigation involving mass torts and environmental harms, so my perspective here is shaped by MDLs that often involve diverse claims and diverse claimants, claims raised by businesses, municipalities, and individuals that have been impacted by environmental contamination or toxic exposure.

In my remarks, I'd first like to encourage the Committee to maintain the flex --

CHAIR ROSENBERG: We lost you. I don't know if you pressed a button.

MR. BILSBORROW: Can you hear me now?

CHAIR ROSENBERG: Yeah. Now we can.

MR. BILSBORROW: Okay. I'm sorry. I'd first like to encourage the Committee to maintain the

flexibility that's embodied in current Rule 16.1. Again, I litigate environmental and toxic tort cases, and all of those cases involve diverse claims pursued by a range of people and entities. Not all MDLs involve pharmaceutical injuries, and a rule that applies to all MDLs should be flexible enough to deal with the diverse claims and claimants involved in non-pharmaceutical MDL cases.

I remain concerned, however, that proposed Rule 16.1(b) encourages the transferee court to designate a coordinating counsel prior to the initial case management conference. The rule provides no parameters for this appointment, and given the early stage of the litigation, this means that the appointment will likely go to an attorney familiar to the transferee court rather than counsel that is most familiar with the case and best positioned to successfully litigate it.

Professor Marcus has raised a couple of times Rule 23(g) and indicated that it helped the court organize class action proceedings through the appointment of interim class counsel. The difference here is that in my experience, interim class counsel is an individual with a client and an individual that has a case on file.

Under current proposed Rule 16.1(b), coordinating counsel does not need to represent any clients and may have had no involvement in the case prior to centralization in the home jurisdiction. Other counsel are going to appropriately view coordinating counsel as de facto lead, which may or may not be beneficial to the case. And so I would recommend that 16.(b) be removed and a suggestion be maintained in the Committee note.

Finally, even if the Committee maintains the preference for appointment of coordinating counsel, the rule should ensure that substantive decisions that will affect the course of the litigation will not be made until appointment of lead counsel and a steering committee if one is used in the case.

Again, coordinating counsel may or may not be well versed in the subject matter of the litigation, and thus, substantive negotiations regarding the conduct of the MDL, discovery procedures, how to deal with "unsupported claims," whether a census should occur, those decisions should be negotiated by counsel that will be leading the case throughout the litigation.

And in cases with an environmental or toxic pollution component, because the claims and claimants

will be diverse, it's important that a committee be making those substantive decisions, a committee that represents all of the diverse interests.

So, thus, I encourage the Committee to reject proposals by some that would require Rule 16.1 to implement a procedure for dealing with unsupported claims or implementing a census. Thank you.

CHAIR ROSENBERG: Thank you.

And from our reporters. Rick?

PROFESSOR MARCUS: I'd like to go a little further on what you were saying about coordinating counsel. I am not clear on why that would interfere with things or present a serious risk that you just mentioned. That is, the objective is to obtain a report for the court so that the court has something to absorb and understand right at the beginning of management. The first thing on the list is how leadership should be selected. There are a number of other things on which the parties may make presentations and so on. The rule also says that the judge should adapt as time goes by, particularly if the initial order is entered before leadership is appointed.

So it seems to me the risk of having things locked down is quite small, and I'm wondering why you

think it's significant.

MR. BILSBORROW: Well, I guess, from my perspective, how is coordinating counsel going to make any of those recommendations, especially in a situation where --

PROFESSOR MARCUS: I thought the coordinating counsel assists the parties in putting together their report. There are topics in the report. Do you read that to say coordinating counsel all by herself does that or is a conveyance?

MR. BILSBORROW: Not necessarily, but in cases where a court has appointed a coordinating counsel or a liaison counsel for purposes of organization, the plaintiffs' counsel will, I think, appropriately treat that individual as de facto lead at least for purposes of organizing the case, and so counsel are going to try to curry favor with the coordinating counsel, and coordinating counsel will take recommendations from some and probably not take recommendations from others because there'll be a lot of jockeying for position. And I think --

PROFESSOR MARCUS: In your East Palestine case, was there jockeying? Mightn't that happen anyway and should the judge have no role in regard to it?

MR. BILSBORROW: That's not what I'm suggesting, and, yes, there was jockeying in East Palestine. But I think, when you have a coordinating counsel that's been blessed by the court and that is overseeing submission of a report under 16.1(c), you're much more likely to have all of the organization suggestions filter through the coordinating counsel rather than seeing what you see in some MDLs, where counsel can't coordinate with one another or a group can't coordinate with maybe the primary group. You see competing proposals or competing reports submitted to the court, and I don't see a problem with that. I see that as good for the transferee judge because then the judge has multiple options to choose from rather than a single report that may be overly controlled by one group of lawyers at the expense of another. And I think this is especially important in a case like the environmental cases I participate in because the claims can be so different and the claimants can be so different, and it's important that the interests of all of those claimants be presented to the judge at the outset so the case can be organized most efficiently.

CHAIR ROSENBERG: The note does make clear that the -- it says it should be a single report, but

it "may reflect the parties' divergent views on these matters." And then the rule itself speaks to the transferee court should order the parties to meet and prepare the report. So it seems that the way the rule is drafted is empowering the parties to do that, and when the mention of coordinating counsel appears in the rule, it's to help organize, to facilitate the organization and management, like the logistics of do you have a Zoom, what's the Zoom link, and, you know, when are we going to meet, and when am I going to get the, you know, other organizational aspects of it. What are your thoughts on how the note addresses some of the points you've brought up?

MR. BILSBORROW: Well, I think, in practice, again, just based on experience where courts have appointed an early liaison or a position similar to coordinating counsel, the parties are going to treat that as de facto lead at least for the outset of the case. And I think that stifles rather than encourages divergent viewpoints. I think lawyers will be less likely to speak up because they may feel that the court has blessed this particular individual and that individual is likely to have a role in the ultimate leadership.

CHAIR ROSENBERG: Okay. Any

other -- Andrew?

PROFESSOR BRADT: My question just follows up on that. Is it worse than the status quo? I mean, it seems to me that the coordinating counsel report gives an opportunity for the judge to understand that there may be divergent views that might not come out in the status quo process for leadership selection. So I'm still struggling with how coordinating counsel makes the situation worse on the metrics you described.

MR. BILSBORROW: Sure. I think it is worse than the status quo because it will stifle the divergent views. I recognize that in some cases the divergent views are stifled anyway, but I was involved in the Dicamba herbicide MDL. There was a primary group that was advocating for leadership and organization of the case in a certain way, but we could not coordinate with another group that was advocating that the court sort of -- the initial order embraced an antitrust track and focused on antitrust considerations. They submitted their own report at the initial case management conference, and the court said that's a good idea and combined the proposals and created a tort claim track and an antitrust track. If only one proposal had been submitted, there would not

have been an antitrust track included in the case.

CHAIR ROSENBERG: Ed?

PROFESSOR COOPER: Okay. I'm not muted now. Sure. A minor and then an almost perverse question. Minor is just as a matter of experience. How often has it happened in your experience or do you know of others who have experienced that there is an early on appointment, whether it is something like this coordinating rule as envisioned or at least initial lead, where someone who has had no cases, no initial stake in this kind of litigation?

And then the perverse suggestion, could that be an advantage in some cases? You suggest, well, in environmental litigation, we may have municipal entities as plaintiffs, business entities with rather different sorts of interests, individuals affected by it in various ways, property, personal injury and so on, a plethora of quite divergent issues and interests.

And if you have someone who can at the outset talk to all of them without having a stake in any of those diverse divergent concerns, that are able to get a grasp on the complexity of the whole conjuries of problems and as an initial matter -- and that's the focus here -- help organize and present

clearly to the judge what may be a single proposal but more likely to be a multi-track care under the divergent problems, here are how we should proceed to try to get a handle on them as we go forward, could that not happen?

MR. BILSBORROW: So let me try to answer the first question regarding frequency. I don't know how often that happens that someone without any connection to the cases is appointed. I will say that I know in the Camp LeJeune case, which is not an MDL, the court appointed -- well, there's four judges. It's, again, not a traditional MDL, but the court appointed multiple local lawyers that had no experience in mass tort litigation. I'm not saying that's a good or bad thing, but it does happen and one can foresee that in certain MDLs where the transferee judge has no experience with mass tort lawyers that they may appoint a lawyer that they know, all other things being equal, right.

To your second question, whether it's an advantage, I think maybe it could be. It really depends on the personality and the strengths of the coordinating counsel in organizing a diverse group of lawyers. But there's really no parameters to the appointment of coordinating counsel, so coordinating

counsel could not have those strengths, not have an interest in organizing all of the diverse interests and instead be interested in forming some kind of alliance with a smaller number of lawyers that would not represent the diverse interests and the diverse number of clients that could be at issue in the case.

And so I think, in my experience, when you take a big MDL like opioids or the BP oil spill, the lawyers that have significant clients or represent significant client interests, even if they don't get along with one another, they may do what's best for purposes of organizing the case because they know, hey, this person over here represents all the oyster fishermen and the court is going to think it's important that the oyster fishermen's interests are protected. And so I think, when you have actual clients, you can come to the negotiating table with actual leverage to say this is why I should be on the leadership, because it's important to the case.

CHAIR ROSENBERG: Dave, did you have a question?

JUDGE PROCTOR: I do real quick.

CHAIR ROSENBERG: Okay.

JUDGE PROCTOR: So it seems the premise of your assertion about this is that the counsel who's

designated by the court to coordinate will in some way put the thumb on the scale and not present a report that the rule contemplates.

So, if I were a transferee judge and I appointed you to be the coordinating counsel, do you really think you'd do that, that you would bring to me a report that did not reflect the various issues in the case from everybody's perspective? I'm struggling with that whole concept. It seems like you're immediately going to the worst common denominator of human nature and not really presenting this argument in the context of you're now the court's representative in the room, virtual or otherwise, that gives us a report about what the issues in this case are and what we need to discuss at this management conference upcoming. Help me understand that.

MR. BILSBORROW: Well, I guess I'm not saying it would be purposeful. I'm not saying anyone who's appointed to a position is going to attempt to deceive the court or certainly not in any purposeful way. But, if an individual is appointed that has no experience in the litigation, has no clients, maybe wasn't even involved in the case prior to the appointment, but the judge knows him or her and so that's where the appointment draws from, how are they

going to compile the report or assist the counsel in compiling the report? They are going to have to listen to the lawyers that are jockeying for leadership, and sometimes, by listening to those lawyers, they may have a stilted view of what's important in the case.

And so I'm really worried about -- I am worried about worst-case scenarios. I'm also worried about, you know, diverse viewpoints being cut off even if it's not necessary and not intentional.

CHAIR ROSENBERG: Okay. Any other comments or questions?

Seeing none, okay. Thank you so much.

MR. BILSBORROW: Thank you.

CHAIR ROSENBERG: We appreciate your time. Yeah.

And Diandra Debrosse. This is our final witness before our first break this morning.

MS. DEBROSSE: Good afternoon.

CHAIR ROSENBERG: Good afternoon.

MS. DEBROSSE: Diandra Debrosse for Dicello Levitt. Thank you to the Committee for all of your work and for allowing me to testify here today.

I am co-chair of the mass tort practice at Dicello Levitt and co-lead the hair relaxer MDL and

the In Re: Abbott MDL, in addition to holding leadership seats in a number of MDLs where I represent the interests of individuals and also the interests of public entities.

I came here today to talk about two significant issues, and despite my best judgment, after hearing Judge Proctor's comments, I will volunteer some thoughts on coordinating counsel nonetheless given the length of the discussion and I think it's an important discussion.

The first issue I'd like to address is really DRI and LCJ's strong recommendations on a fixed rule as it relates to addressing product use early in the litigation and framing it incorrectly as a standing issue and also framing it in this realm of unexamined claims as if we don't have a responsibility to vet our cases, to file in good faith. We have our own ethical obligations. And to be clear, it is not in our best interests to advance unexamined cases in litigation that is extraordinarily challenging, extraordinarily taxing, and extraordinarily risky for the families of our plaintiffs and of our plaintiffs.

The recommendation that somehow proof of use is this uniform concept that must be established as a threshold matter is really belied by the reality of

how complex establishing proof of use can be. And so one, you know, real-life example, real-life person is, you know, In Re: Abbott. There are plaintiffs who defendants asserted -- defendant asserted did not establish proof of use. They said early, but it was later in the litigation.

In the medical records, there was no documentation for these individuals for whatever reason of the exact baby formula that was used for that baby within a short time window in which that baby developed necrotizing enterocolitis, which can be a deadly disease that kills the intestine and, in many of our cases, kills the baby.

In that case, in weighing in on the issue, Judge Pallmeyer found that the defendants were concealing information from a product ID standpoint that would satisfy the court for purposes of Rule 20(b)(6) challenge.

So let me talk about what that means. This was after a year of asking the defendants for evidence in their possession about contracts that were held with those respective hospitals that established that that specific formula was used in the NICU at the time that our babies were there.

Similarly, in the hair relaxer litigation,

as it relates to product use, months later, Honorable Judge Rowland similarly had to instruct the defendants multiple times to provide product identification information in response to very organized narrow discovery that we served.

And so, while we understand it's framed as a standing issue (a) it is not and (b) we need discovery often to identify the products to which our plaintiffs have been exposed to and suffered harm.

The second topic I would like to address is 16.1(c)(1) and I believe Professor asked earlier whether the word "diversity" was necessary. I think the language as proposed now recommends that the court keep in mind the benefits of different experiences, skill, knowledge, geographic distributions, and backgrounds. And while I think that's a sufficient language, I think what is much stronger is to explicitly state the role of diversity or that diversity, true diversity, should be contemplated in terms of the appointment of leadership.

I believe it was 2022 -- I'm getting old, I can't track time -- I believe I was the first black woman to be appointed co-lead of an MDL on the plaintiffs' side. I hope we don't have many firsts left and that is something that is long behind us. I

did have prior leadership experience, and that was a challenging path to be able to be seen and to come forward and to get those positions.

I do believe having served in MDLs and serving in many MDLs currently in a high-level leadership position that diversity in a real way impacts the manners in which we organize the case, strategize, and litigate the case. It's a really big deal for our clients in complex cases that impact so many people.

And that leads me to my comment which I did not anticipate making, which applies to coordinating counsel. And I truly understand -- well, I don't understand because I've never been a judge, but I can imagine the complexities from the bench of contemplating how is this case going to be organized and who are these lawyers who are appearing in front of me and what I've heard about the status quo, and I want to say a few things about that.

I am not the status quo. And while it was a difficult path to get here, there are also some sweeping comments made about plaintiff firms who have been here for quite some time that may be unfair. Those doors are open to discussion about new players. Those doors are open to the negotiation over who can

participate in the litigation and how.

I think what my colleagues have expressed is a concern that not that the person who is appointed as coordinating counsel has some ill intent or already comes to the table with firms that they want to work with but that that person will hold so much power in being able to communicate to the judge that any rising tide of a plaintiff lawyer's faction may impact the organization of the case in a way that is less desirable than how we often seek to organize the case, which sometimes isn't pretty.

And I heard a question asked earlier about, did you have conflict in your case. We do, and I don't think that's a bad thing to get in a room and to get on calls and to talk about divergent interests and what is best for our clients in advancing the litigation and assisting the court in efficiently moving the litigation through the court.

So I'm pretty sure I went past five minutes. I'm sorry about that, and I'm happy to answer any questions to the extent I can.

CHAIR ROSENBERG: Okay. Thank you so much.

Rick and then Andrew.

PROFESSOR MARCUS: I have one question that I think builds on what you just said. You mentioned

DRI and other submissions concerning what they sometimes convey and your concern about product use. It seems to me that the rule we propose with its note don't say the things they're saying and, indeed, in these hearings, people who feel that way have told us what we are doing is not enough.

Do you see what we are doing as proposed as creating the risks that you think their proposals would create, or do we have a reasonable balance in terms of whether and when anything of that sort ought to be required in a given MDL?

MS. DEBROSSE: Thank you, Professor. So (a) thank you that we are not considering DRI or LCJ's proposals. Most grateful to hear that.

Secondarily, I do think that while the rule appears rather neutral on its face that I share the concerns of my colleagues that the rule just allow the court to have as much flexibility as the court has right now in being able to consider, you know, all sorts of factors in terms of what should be determined at the early stages, what should be discussed at the first CNC. And my colleague, Mr. Bilsborrow's, comments are well taken, and I don't have to say this to all the jurists on this Teams. But often the case and the subject matter of the case really governs what

do we have to establish at the earlier stages. And so, you know, I agree with you. I don't think on its face it's extraordinarily dangerous, but I do think that we need a lot of flexibility and we ask the courts to have flexibility in terms of how the litigation is organized in the early stages and what is expected specifically from the plaintiffs.

CHAIR ROSENBERG: Andrew?

PROFESSOR BRADT: Thank you very much. This is a question I asked of Mr. Chalos a little bit earlier, but I'll ask it from you, I'll ask it of you as well. Is it your experience that Rule 26(a) on mandatory disclosure is not typically followed in the MDLs that you're involved in? And if the answer to that question is no, do you think it would be better if that rule were observed and parties were not able to easily stipulate their way out of it?

MS. DEBROSSE: Generally, I have not seen that applied and I think the practice is proper as it is, which I believe my colleagues have stated as well.

PROFESSOR BRADT: I guess my follow-up then is, why should, in an MDL case involving a lot of individual tort or product liability claims, why should 26(a) not be followed on both sides?

MS. DEBROSSE: Well, I think that there are

additional considerations as it relates to plaintiffs. When we talk about, you know, you asked the defendant to produce copies of documents and other items required under 26(a), we're often representing, you know, thousands of individuals who have been impacted and these are issues in terms of disclosures that we address often later in the process through the fact sheet process in certain cases.

I guess I'm not sure why that would not be sufficient moving forward, but, generally, we have not seen those disclosures early in the process, whether it's in the In Re: Abbott litigation or in the hair litigation, and I don't believe in the other litigations in which I sit.

CHAIR ROSENBERG: Okay. All right. Well, thank you so much. We appreciate your comments.

And I think that brings us to our morning break. We are a little behind but not too much, so we're going to narrow the break down from the originally contemplated 15 minutes to 10 minutes. So it's 11:40. We'll be on a break for 10 minutes until 11:50 and then we'll pick up with John Rabiej, who will address 16.1. Okay.

(Whereupon, a brief recess was taken.)

CHAIR ROSENBERG: Our next guess is John

Rabiej. I turn it over to you.

MR. RABIEJ: Thank you and good morning.

CHAIR ROSENBERG: Good morning.

MR. RABIEJ: Thank you for the opportunity to testify on proposed Rule 16.1. I commend the Committee for moving forward with this new rule which is long overdue and timely as the number of new annual MDL filings continues to rise and stands at more than 80,000 in 2023. I speak on my behalf only. Let me address my specific items.

First, more than 97 percent of actions pending in MDLs were filed in a total of only 20 big MDLs. To a large extent, Rule 16.1 codifies the orders in these big MDLs. They reflect the collective wisdom of the bench and Bar in addressing the unique case management problems raised when large numbers of law firms are involved. These orders are themselves based on orders issued in 1992 by Judge Sam Pointer, former chair of this Committee, and refined in 2005 in Vioxx by Judge Eldon Fallon, recognized as the judiciary's MDL godfather.

The initial management conference orders in these big MDLs are remarkably similar, and most refer to topics listed in the *Manual for Complex Litigation* as the agenda for the conference.

Now Rule 16.1 correctly provides discretion to address any topic in addition to those listed in the rule for discussion. But, as noted by many, the rule will become the default, with the unfortunate consequence of inexperienced judges and lawyers unaware of topics not listed in the rule which might be important in their MDL.

Substantive Suggestion No. 8 alerts the bench and Bar that there are many other topics found in other sources that are often raised at these conferences that might be especially useful in their MDL. Suggestion Nos. 8 and 9 also emphasize that many of the rule provisions are likely to be more useful in big MDLs, a point that likely needs to be strengthened in light of comments from other witnesses particularly regarding class actions.

Second, the interplay between Rules 16 and 16.1 is not clear. Both cover pretrial conferences. For example, Rule 16(d) says, "After any conference under this rule, the court should issue an order reciting the action taken." Now this language is better than Rule 16.1(d), which contains a reader's mis-cue as I raised in Substantive Suggestion No. 3.

Third, good data on the viability of tag-along actions filed at MDLs is hard to come by.

Several defense witnesses promise to provide such data. I would urge the Committee to make this data public as soon as possible.

In addition, I suggest the Committee request today's plaintiff witnesses to ask their claims administrators whom they hire to disclose the number of claims that are determined to be ineligible for payments and the reasons. Claims administrators have this information, but because they cannot risk offending their plaintiff clients, they will not disclose it. This information will help us understand the true extent of the so-called meritless filings problem, if any.

Fourth, I encourage the Committee to revise its public notice procedures and instructions on the AO web page. They are not user-friendly, and I personally found it difficult to navigate the AO and particularly the regulations government web page.

I also suggest that the Committee consider publishing hard copies of the proposed amendments, circulating them to the 10,000 in the judiciary, other judicial organizations, and interested individuals, as was done in the past. The small number of 16 written comments is disturbing. No judge submitted a comment, which raises red flags. The Committee has always

promoted public comments, making the process as simple and easy to ensure the rulemaking legitimacy because it has the force of law requiring the input of all three branches.

Fifth and finally, the Committee style consultants, Joe Kimball and Bryan Gardner, are national treasures not only because of their expertise but almost as importantly for their institutional knowledge of consistent word usage. I encourage the Committee to ask the style consultants to edit the reporters' Committee notes. Of course, the reporters can accept or reject any suggestion.

And with that, I'd be happy to answer any questions. I do have three specific suggestions regarding coordinating counsel because that seems to be a topic that's been raised up, which I just came up with now. Thank you.

CHAIR ROSENBERG: Okay. Thank you.

Well, I will just say that the stylists have reviewed the rule and the note and also the Committee has received abundant input from judges through surveys and through the transferee conference that is held each year, and they've had the advantage and we've had the benefit of getting extensive input, particularly over the last two years that the

conference has been held.

With that, though, let me turn it over to see if our reporters have any questions. How about Rick, then Andrew.

PROFESSOR MARCUS: Well, John, good to see you. We've been working together on these things for a long, long time in various ways.

Just one. Am I wrong to understand that quite a few of the things you are saying are not about our Rule 16.1 but about the process by which public comment is solicited and tag-along data? I don't think our rule says anything one way or another or that the rules process is the place to collect data of the sort that would be valuable to have.

So I guess my question really is, in terms of the rule, if you are worried that it unduly narrows the range of topics that sometimes matter, are you saying that we shouldn't go forward with this rule and instead should just let things stay as they are?

MR. RABIEJ: No, just on the contrary. The rule, the problem with the rule as drafted right now is the tail wagging the dog. It is trying to provide advice for all different types of cases. What we're really looking at is only these 20 cases and that's what the rule really is modeled on, and for that,

there are 40 or 50 topics that are mentioned in the *Manual for Complex Litigation*. The Committee made a decision to identify 10 or 13 of those. It's important -- I see this conference. This conference is done within 15 to 30 days of centralization.

This conference, the purpose in my eyes is to alert the judge of any problems, you know, serious problems, that may be on the horizon. The judge has got to do hundreds of matters and take actions within this first 30 to 40 days. So the judge needs to get as much information as possible not necessarily to start making decisions but to prepare, prepare themselves.

Now what's interesting about this rule is that, of course, and my suggestion kind of hones in on it, a lot of judges, Judge Campbell, Judge Fallon, all need this rule. This rule really should be targeting the inexperienced judges and the inexperienced lawyers. They need to be aware that it's not just the eight topics that the Committee picked in this rule, but there are a lot of other ones that are out there that in their particular case may be much more important than what's in the rule right now. And it's important for them to be at -- so, for me, it's just a matter of emphasis. There's probably more in the

Committee note that needs to be emphasized that, of course, there's many other topics here that should, that could be addressed.

PROFESSOR BRADT: Two questions from me, and thank you very much for your extensive written comments. They're very helpful.

One question is you're certainly correct that there are many issues that an MDL judge could consider other than the ones that are on the list, but the rule tends to provide for that by allowing the parties to raise any issues in Rule 16 or issues that are not in either rule as part of the report, and so I wonder why that's not sufficient.

Second, you sort of suggest that, well, these will become the most important things and judges won't know how to augment or pick and choose. But we've got 40 years of experience with plain old Rule 16 and it doesn't strike me that that problem has manifested with respect to that rule, and so I'm not entirely sure why we should expect it to exist with this rule, or would you disagree that Rule 16 has led to that kind of distortion? Thanks.

MR. RABIEJ: Well, when you look at the history of these mass tort MDLs and of the rules, you have Judge Pointer's MDL order. After that, all the

other judges kind of copied the language and referred to the items and the agenda items in that order. And for inexperienced judges, like Judge Chhabria, he copied the standard order. He was unaware of this other topic.

Now you're right, of course, that, you know, the judge should be looking at others or the attorney should have raised this and blah, blah, blah, but the point is you have a Committee note. The suggestion that I have is just adding three sentences to the Committee note highlighting, in effect, that you're really not really -- that the eight or nine topics that you've suggested are necessarily the ones, you know, the key ones. I mean, in the note, the reasons, the explanation you picked those nine is because you talked to other lawyers and they said that these are important ones.

Well, important what? You've heard from other lawyers here that most of this stuff does not apply to the 150 MDLs that are out there. This really only applies to the 20 or 30, 40 of the larger MDLs, where case management is a problem because of all the law firms involved. Now that's the key. It isn't the subject matter of the litigation; it's all these law firms and you've got to handle them. That's what

makes it a different animal. That's why you have this rule and that's why it has to be flexible, because you have some judges extremely who are experienced, don't need it, and the other ones that do need it. But they need to be aware that the rule is very flexible and there is other items that you need to consider. And that's what my suggestion is trying do, is try to make this as flexible as possible.

I do want to just one point that Judge Rosenberg when you initially said that you spoke with judges and there was a lot of input, I have no doubt about that, but the rulemaking process is a transparent process. It's very important for the legitimacy of the rule to know what kind of comments are coming into this system so that we all have an opportunity to understand where the rule is coming from, because a lot of this is going to be used as legislative history as well.

And so the more you get it in writing, which we did in the past from judges on comments and my fear is that judges are not submitting written comments, as well as other lawyers, because of how difficult it is. And what I'm suggesting, it won't take much, but you need to spoon-feed this to the public and to me because it was very difficult to me, and I need step-

by-step kind of instructions, which I think would improve the system.

CHAIR ROSENBERG: Thank you.

Any other questions or comments from our Committee members?

Seeing none, okay. Thank you so much. Good to see you.

MR. RABIEJ: Thank you, Judge.

CHAIR ROSENBERG: All righty.

Next witness is Dena Sharp, who has her video on. Thank you. Welcome.

MS. SHARP: Good morning -- or good afternoon. Thank you. My name is Dena Sharp. I'm a partner with Girard Sharp, LLP. We represent plaintiffs in class actions and other complex cases. I've had the opportunity to serve as co-lead counsel in the *In Re: Jewell* MDL recently, as well as several other complex antitrust and consumer MDLs.

Let me begin by thanking the Committee for the opportunity to be heard today and for the considerable effort that has obviously been undertaken and devoted to the important objective of creating a flexible toolkit for judicial management of MDLs.

The modest amendments that I have suggested aim to underscore the rule's flexibility, round out

the transferee court's toolkit, particularly in matters with a class action component, and address the important subject of sequencing in the early stages of an MDL.

First, I'd suggest the Committee may wish to consider clarifying that certain Rule 16.1(c) topics may be addressed at the initial conference on a preliminary basis or deferred to later case management conferences. As we all well know, even in the best of circumstances, there is only so much the parties and court can cover in an initial conference or any one status conference. The topics identified in 16.1(c) are thus often best addressed on an iterative basis over a series of case management conferences in what amounts to an ongoing conversation between the court and counsel on both sides of the V.

Express language along the lines I have proposed clarifying that the initial MDL management conference is likely not the last will leave less margin for error in reading of the rule and will hopefully help organize how best to handle 16.1(c) topics in relation to what the parties are able to productively, if preliminarily, cover before leadership appointments.

My second suggestion also as a matter of

early case management sequencing is toward front-loading leadership appointments and encouraging the transferee court to set expectations about that process that will help shorten the pre-leadership appointment phase and address concerns about setting an overly ambitious Rule 16.1(c) agenda.

In short, early leadership appointments allow the parties and the court to reach the merits of the claims as soon as possible and may alleviate many of the concerns that have been discussed today. Early guidance from the transferee court on its preferences in regard to leadership will streamline the process and again allow applicants to tailor their efforts.

I would point the Committee as an example to Pretrial Order No. 1 from the Jewell MDL, which I attached as Exhibit 1 to my letter, in which Judge Orrick invited the parties to consider leadership issues before the conference, made clear what the court would consider in that regard, and then pointed to the *Manual for Complex Litigation* and several topics therein as a tentative agenda for the conference, invited further input from the parties even if only on a preliminary basis in that initial conference.

As a third topic, a separate but related

concept that has gotten a lot of air time today and I understand in general in these hearings is the concept of designation of coordinating counsel. Since this topic has been addressed exhaustively, I'll keep my comments brief. My suggestion in this regard has been picked up by Professor Marcus in today's hearing as well, which is to consider using nomenclature in an approach that has already been followed by some MDL judges to describe a temporary, limited, impermanent role in the MDL sort of to bridge the gap. Coordinating counsel is one concept that has been used. Another term that has been used in the Jewell MDL in the CPAP MDL was "interim counsel."

Now, to be clear, Professor Marcus referred to Rule 23(g), which I'll discuss briefly in a moment, but the interim counsel moniker here that would be applied would be different in the sense that it wouldn't create the obligations that Rule 23(g) creates for class counsel unless it was warranted in the circumstances of that MDL in part or in whole.

Finally, I've made a couple sets of textual amendment suggestions that I would propose would aim to better reflect the range of matters that fall within the ambit of Section 1407. They fit into two categories. The first again relates to Rule 23(g) in

this context as it relates to leadership proceedings addressed in the proposed rule.

From my perspective, the note and the rule would benefit from explicit cross-references to Rule 23(g), along with a handful of other revisions that will provide the transferee court with important perspective on unique aspects related to class actions.

Of course, in a mass tort MDL, lead counsel represents or presides over claims brought by individuals or entities who have retained other lawyers. In contrast, in a class action, under Rule 23(g), class counsel is vested not just with the authority but with the obligation to prosecute the class's claims in the best interests of the class, which, of course, vests that counsel with different primary obligations.

Finally, as to the question of consolidated pleadings, that too raises issues specific to class actions. In particular, the key question raised by that issue is whether a pleading is "meant to be a pleading with legal effect," as the Supreme Court put it in the Gelboim versus Bank of America case cited in the note.

A consolidated complaint in a class action

serves just that legal effect and the critical purpose of aggregating all the class's claims into a single pleading that effectively has preclusive legal effect for the class through judgment. A master complaint in a mass tort generally serves the distinct purpose of providing a single vehicle defendants may move against through omnibus or cross-cutting motions but does not have the same binding legal effect. As a consequence, some explicit language in the rule relating to consolidated pleadings may help focus the judge's efforts in the first instance as well.

Again, I appreciate the opportunity the Committee has provided for me to testify today, and I'd be pleased to answer any questions if I can.

CHAIR ROSENBERG: Okay. Thank you so much.

And we'll turn to our reporters first. Rick?

PROFESSOR MARCUS: I think I'd like to follow up on your -- if I'm understanding correctly, your -- in relation to Rule 23(g) and interim counsel, it strikes me that "coordinating counsel" as a term recognizes that this position if used is different.

Now, in our district, I think, for example, Judge Alsop says he won't consider a pre-certification settlement unless he has appointed interim counsel.

The Committee note in 2003 says interim counsel owes the same obligations to the class as full class counsel.

Do you read our "coordinating counsel" as having similar ideas, invoking similar authority for this person, and, if not, then maybe saying "interim" would actually confuse or mislead people compared to the 23(g) situation.

MS. SHARP: Thank you, Professor Marcus. I went through exactly the same thought process and the question really is, is using the word "interim" in this setting more confusing or less. By my lights, it appears that the position of coordinating counsel, aside from sort of providing the possibility that one group of lawyers or a single lawyer might get a leg up in the early days of the MDL, does raise a host of questions about repeat players and other important considerations.

As it relates to the nomenclature itself, though, as I pointed out, judges like Judge Orrick and Judge Flowers Conti in the Phillips CPAP MDL used the term "interim counsel," explicitly did not reference a Rule 23(g) kind of scenario there, and said interim counsel is just that, I want you to get going with some discovery issues, without imbuing that counsel

with any further obligations or authority, as Rule 23(g)(3) would do.

So there's certainly the propensity or the possibility for further confusion. On the other side of the ledger, I think there has been perhaps some angst created by the idea of creating yet another counsel position in these MDLs which now so often have liaison counsel and local counsel and coordinating counsel and a variety of types of counsel. So long as the rule and the order are clear whether interim counsel is used in a capacity that's associated with the obligations incumbent on class counsel or separately in the mass tort setting, where, of course, there are no such obligations because there's not a class in the first instance, I feel that the confusion that may be created by use of that language, on the other hand, may become a useful sort of tool for the MDL court to the extent it may be faced in a hybrid MDL with both class counsel and a mass tort type of scenario in which it is looking for some lead counsel.

So I'm not suggesting that it's a perfect solution, but I'm only suggesting that it's something that's been used in other MDLs without the confusion that you've so correctly pointed out could otherwise exist, Professor.

CHAIR ROSENBERG: Okay. If nothing from Andrew, any of our Committee members?

Okay. All right. Thank you so much, Ms. Sharp. We appreciate your comments.

MS. SHARP: Thank you very much.

CHAIR ROSENBERG: All right. And Mr. Longer, who will address 16.1.

MR. LONGER: Good afternoon. Can you all hear me?

CHAIR ROSENBERG: We can.

MR. LONGER: I want to thank the Committee for affording me the opportunity to present my comments on the proposed Rule 16.1. My name is Fred Longer. I'm a partner in a Philadelphia law firm, Levin Sedran & Berman. I appreciate the Committee's efforts to craft a rule that meaningfully addresses the many concerns the judiciary is facing in the context of Multi-District Litigation. And as I was preparing yesterday to testify today, I was reflecting on the legacy of the late Reverend King and apropos to where we are now, Dr. King once said, "We may have all come on different ships, but we're in the same boat now." So recognizing that we're all trying to paddle the same canoe and time is short, I just have a few points that I'd like to raise today, basically, three

points.

One, personally, I don't think we need this rule because an MDL rule already exists.

The second point, the proposal's coordinating counsel adds more procedure when less is needed, and appointment of lead counsel should be front and center, and I think that the coordinating counsel adds this layer of process that is unnecessary.

And my last point is that adding guidance to the early hearings is helpful, but requiring it to be the initial conference and having everything crammed into that initial conference may be misplaced. And I appreciate what Dena Sharp was saying just a moment ago. I think that she captured that point quite well.

So, as to my first point, you know, I raised this in my comments which were filed at the end of last year, an MDL rule already exists. Congress has already spoken. It issued Section 1407, which broadly allowed for consolidated proceedings subject only to the limitation on procedures that are "not inconsistent with the Federal Rules of Civil Procedure." And what I tell you is that Rule 83(b) is your MDL rule. Rule 83(b) already provides for procedures when there is no controlling law, and it

says a judge may regularly practice in any manner consistent with federal law rules adopted under Sections 2007.2 and 2007.5 and the district's local rules. So no new rule is necessary.

And as we heard Mr. Rabiej say just a moment ago, MDL courts need flexibility. It's hard to shoehorn any complex case into a one-size-fits-all rule and that's for good reason. There's different claims. There's different counsel. There's different personalities. There's different issues. It's just a panoply of differences.

And so to have an MDL rule where you think that you can cram everything into one, it's going to be very complicated, and that's because there's not just product liability claims, but there are antitrust claims, there's data breach cases, there are security fraud cases. There's just a whole number of MDL disciplines, if you will, categories. And this rule, as I appreciate it, was really designed -- and I keep hearing this -- it seems like it was really designed to address mass torts or product liability claims involving pharmaceuticals, and it's really not as well focused on these other types of MDLs.

So my second point, trying to brief here, is that I do not believe that "coordinating counsel" is

an appropriate moniker. There's no detail in the rule or the comments on the issue. To me, what's the hurry? I've heard that said in other comments.

The most important thing in my mind for the transferee court to do is to select counsel. That should be pretty much the first thing on their mind, front and center, is let's see who I'm going to be working with in terms of operating this new litigation. So you need to get the plaintiffs' house in order and then things can proceed.

You know, as Hamlet said, the play is the thing. Let's get to the meat of things rather than have this process of a coordinating counsel who is in between getting to the play. And I heard Professor Marcus mention the interim counsel concept and he just went over that with Ms. Sharp, but not every MDL is a class action and not every class action is an MDL.

So, if I were to file a one-off class action complain that I never intend to have in a MDL, I am taking on a fiduciary duty to the class immediately by filing that complaint. And for the court to recognize me to speak on behalf of the class, that's why Rule 23 has that interim appointment. I think it's not a fair analog to apply that to the MDL process. There's very different types of organizations in MDLs, and that's

where I am on that.

MS. BRUFF: Mr. Longer, I apologize for interrupting. If I might ask you to summarize your initial testimony and then we can move to questions.

MR. LONGER: Right. So the only last thing that I'd say -- and I appreciate that, Ms. Bruff -- I'm a little bit concerned about the nomenclature of an initial conference. I think that an early conference is appropriate. You can only eat an elephant one bite at a time, and so to try to cram everything into that first report and have everything done at the "initial conference," put that in quotes, it just seems to me perhaps overambitious, and I would suggest that that phrasing be pulled back a little bit along the lines of what I heard Ms. Sharp saying.

And with that, I'm ready to speak to and address any questions you may have.

CHAIR ROSENBERG: All right. Thank you, Mr. Longer. We'll hear from our reporters first.

PROFESSOR MARCUS: Mr. Longer, I want to pick up on your last point, the word "initial" that we used to modify "management conference." To my mind, "initial" suggests this isn't the only one, and the Committee note to Rule 16(d) on the subsequent order emphasizes that there's no requirement that any of the

scheduling matters included in the report must be acted upon right after that conference. The court must be open to modifying.

What I'm getting at is it sounds to me like what we've got now is pretty much what you would like to see using the word "early," but "early" might be like what Rule 16 says must happen early, which is a scheduling order set somewhat in stone. That's distinguished in the Committee note to our 16.1(d). So I'm wondering, aren't we basically on the same page already?

MR. LONGER: Professor Marcus, I think we are. My concern is initial -- when I hear "initial," I hear 'premier." I hear the first conference. And what you describe in the proposed rule is, at the first conference, you should cover these points, not that you can cover some now and some later at a subsequent hearing. And what I am suggesting is that you should build in this notion that the initial conference need not capture all of the concepts at once. You can't eat an elephant all at once. You have to do it in bites.

And so that being the case, to have all of these conditions or criteria described in the initial report so that everything is done at the initial

conference is overambitious. And I just am saying going back to what I've heard a number of comments made is flexibility is what we are suggesting. You know, I'm not a proponent of the rule, but if you're going to have it, I think that the most important thing is to recognize that the district court is taking on an awesome responsibility and we are just mere mortals.

So we need to recognize that maybe not everything at once. Let's do it as we go along. And if you follow through on that, I think we are on the same page, but I think it's just how you're describing.

CHAIR ROSENBERG: I think I'll jump in and probably Rick or Andrew would point this out. In subsection (c), it says, "The report must address any matter designated by the court which may include any matter addressed in the list below or in Rule 16." So I don't think it was ever contemplated, nor does the language of the rule suggest, that all issues must be addressed.

Andrew, did you have a comment or question?

PROFESSOR BRADT: My only follow-up to that is the question that I attempted to ask Mr. Rabiej a little while ago. We have 40 years' worth of

experience with Rule 16, which is constructed in the same way. Judges may consider something on that list at a pretrial conference or defer it to later.

It seems to me that while everybody here would agree that there's something special about MDLs, judges are pretty good at knowing what issues need to be addressed today and what can be addressed tomorrow, and so, given the experience with Rule 16, I'm struggling with how 16.1 makes anything worse.

MR. LONGER: So, to both of your comments, I don't know about making it worse. I'm just suggesting that, you know, there are best practices guides and judges are smart and they do know what process they are looking for and they're certainly capable of ordering things in the sequences that they like.

And to your point, Judge, yes, the rule does say "may." I'm not suggesting that it says anything other than what it says. But my point is, is that when you see it in writing, counsel, courts, others, those that follow the rule are going to read "may" as "really should consider" and that they're going to prioritize these issues and they may not need to be in that priority -- or in that schedule, that order all at the initial conference. That's all that I'm really pointing out.

I think that there is a lot of agreement here. It's not the end-of-the-world kind of a thing, like hair-on-fire kind of an issue, but it is that type of language that once it's sort of stamped in a rule it takes on a life of its own and it creates more importance than it may deserve, and that's my point.

CHAIR ROSENBERG: Thank you.

Joe?

MR. SELLERS: Thanks.

Mr. Longer, I'm wondering. We heard earlier today a suggestion with respect to these topics that an addition in some fashion that says some of these topics may be addressed later may be useful. I'm wondering if that addresses the concern you're raising?

MR. LONGER: I think it does. I think that you have to recognize that there's only so many hours in a day and there's only so much that can be done initially at the beginning of what could be years -- multi-year-long litigation.

And that being the case, I think that, you know, to Professor Bradt's point, you know, you have smart judges who already looking at this and they're going to know what they can and can't accomplish. But I think the absence of that language is a problem, and

I think adding that language and making it very clear that things can be done in sequences, not everything has to be done at once, my point being it would be very wise to appoint leadership up front. You know, the court, the MDL court, is creating a law firm and it needs to have the plaintiffs' side in place in order to have both sides of the litigation properly before the court, speaking for all the parties in that litigation.

You know, the defense side is pretty much self-organized. You know, it would be nice if the rule said that the court could appoint defense counsel because I'd like to have a say in that, but that's not going to happen anytime soon. And so, you know, it's just that kind of a point, which is I'd like to know who's leading the case. If I'm going to lead it, I want to know that I'm leading it. If John Finbrannon is going to lead the case, I'd like to know that John is doing it because I may have my own views about his leadership capacity.

And so I think, from everyone's perspective, it's very wise to get that up front, which is why the coordinating counsel adds a layer of complexity and process which I think interferes with that initial appointment. And so, yeah, other things can be done

later on, and I think that expressing that would be wise to have that at least in a comment, if not in the rule itself.

CHAIR ROSENBERG: Okay. Thank you so much. If there's no further comments or questions, we'll move on to Jennifer --

MR. LONGER: Thank you all.

CHAIR ROSENBERG: -- thank you -- Jennifer Hoekstra, who will address 16.1.

MS. HOEKSTRA: Thank you. Good afternoon, everyone. My name is Jennifer Hoekstra and I'm a partner with Aylstock, Witkin, Kreis & Overholtz in Pensacola, Florida. My partners and I combined have several hundred years of experience in MDL litigation, most recently, as lead counsel in the 3M Combat Arms litigation. In addition to my work on the 3M MDL, one of the largest in history, I'm currently appointed to the Plaintiffs' Executive Committee in both the hair relaxer and proton pump inhibitor MDLs.

As outlined in my written testimony, I do not believe that there's an urgent need for the provisions of Rule 16.1 as drafted. My main concerns relate to the provisions of 16.1(b) and the role of coordinating counsel, which interfere with the court's flexibility in the appointments of special masters to

assist in running complex litigation. To the extent the provisions are enacted, coordination counsel is not necessary, and there are already mechanisms in place for MDL judges to address this need.

Each MDL has distinct and unique claims, injurious products and parties involved. Therefore, it would be limiting and unreasonable to expect that each litigation that is deemed complex followed the same exact trajectory. There's no magic formula or recipe for handling any MDL. Every one is unique, has its own unique challenges, and the approaches that may work in one may not work in another.

Coordinating counsel appointment appears duplicative of the purpose of the magistrate or the special master in supporting the court. Inserting the role of coordinating counsel at a time when many MDL judges are already appointing magistrates, special masters, and leadership committees for counsel, while also setting a schedule for ongoing case management conference and deadlines in relation to the pretrial discovery that they've been appointed to address, is a role where coordinating counsel is often not needed.

Over the past few decades, I've learned that the first day orders or the framework of an MDL may not vary widely from one to another but that the time

it takes for all counsel, both plaintiffs and defense, and the court to get up to speed on the unique issues of that MDL is specific to the injuries involved and is not something that could be assisted by coordinating counsel.

After spending the past five years managing the 3M MDL, I see a very limited place in the litigation or discovery process for coordination counsel. I don't see any opportunity or location where anything was delayed in the progress of that MDL in relation to where a benefit would come from the appointment of coordination counsel.

In my experience, MDL judges appoint magistrates and special masters in a variety of roles, often in advance of any initial or preliminary conference, based on the complexity of the injuries and the products involved in the litigation.

Thank you all for your time today, and I'm happy to address any questions you may have.

CHAIR ROSENBERG: Thank you so much.

Our reporters.

PROFESSOR MARCUS: Well, thank you very much. I think I'm going to follow up on something that Andrew has asked others, maybe he was thinking of asking it.

With regard to the 3M earplugs litigation, just in reading newspapers I've seen some assertions about whether a significant proportion of the very, very many claims in those cases have, shall I say, panned out or not panned out, I'm wondering in regard to what some call unsupportable or other claims, which you address in your submission, what you could tell us about, say, the statistics that you think one could take away from the 3M litigation on this subject.

MS. HOEKSTRA: I think that, quite frankly, given the volume of the earplugs that were procured or for sale that were given to the military, more than 500,000 pairs that we're aware of within a 10-year period, although they were sold for 15 years total, that at the highest point of filed cases there were about 300,000 cases that were filed. But, when we opened the settlement program, around 290,000 claimants registered for the settlement program. We are 10 days out from the registration deadline for participation in the settlement by which you have to register and file a release, and, at this point, 82 percent of those 290,000 claimants have either signed a release or have failed to meet the court obligations to prove that they were injured and have been dismissed.

We are very, very positive that we will reach 98 percent threshold in that settlement and are honestly expecting close to 230,000 individuals to participate. It may seem -- sorry to assert that there were, you know, 70,000 who fell out as unmeritorious, but, instead, what it seems to be is that there was overlap or duplication between representation, which, quite frankly, happens in these sort of larger litigations when individuals follow up with more than one attorney at the outset.

CHAIR ROSENBERG: Andrew, did you have a question?

PROFESSOR BRADT: Thank you. I'm intrigued by your reference to the appointment of masters and magistrate judges as arguably duplicative of coordinating counsel. I wonder if you could elaborate a little bit on that because my initial reaction would be that if I were an MDL transferee judge and sought the assistance of a magistrate judge or special master, I would still want the benefit of the kind of hearing and report that the rule contemplates. And if I were a magistrate judge, I'd perhaps benefit from that as much, if not more, as the district judge.

So I'm curious as to why you think that the appointment of a magistrate judge or a master is

duplicative of the role the coordinating counsel would play.

MS. HOEKSTRA: Oftentimes, special masters or magistrates are appointed for a specific purpose or a limited purpose. It's very rare in mass torts that they're appointed broadly for the entirety of a litigation. I've been involved in multiple litigations where individuals were appointed as special masters for the purpose merely of assisting the judge in appointing counsel, merely for the purpose of coordinating with interim counsel until that leadership structure was established, and then their positions were vacated or they were reappointed as something else. Three of those, one of those examples were Judge Rogers put together a panel of neutrals to help her establish the framework orders, the first day hearing, and to interview the dozens of candidates who applied for leadership positions while giving her the benefit of their knowledge and expertise in a variety of areas when putting together, I believe, as one of my colleagues referred, you know, a plaintiff side, you know, law firm to litigate the litigation. That's not the only litigation I've been involved with where that has happened or a very specific purpose was put in place.

In the Actos litigation that I worked on 10 years ago or so, the judge put in place a special master purely for law and briefing purposes to work with the parties at the early, early stages before leadership was even appointed to outline any, you know, specific legal disputes or arguments, including preemption, that may come up so that those were specifically addressed not just from a discovery viewpoint but from the legal implications of them at the first day conference.

For that reason, I do believe that there are specialized knowledge that could be appointed that may overlap or interfere depending on what the coordinating counsel's role is as defined in Rule 16.1 as drafted.

PROFESSOR BRADT: But the rule doesn't prohibit any of that innovation were a judge to decide that it would be useful in a particular case?

MS. HOEKSTRA: Earlier today, someone referred to, you know, the coordinating counsel as taking on a special master type of role. If the special master type of role that would be existing has already been filled by the judge, what is the purpose of coordinating counsel? I believe it takes away some of the flexibility an MDL judge has in determining who

that person may be and how they may assist moving forward in the litigation, not merely just for the initial conference purposes.

PROFESSOR BRADT: But the rule doesn't require the judge to appoint coordinating counsel, so if the judge were to decide that one of these other frameworks that you suggest would be better, there's nothing in the rule that prevents her from doing that, correct?

MS. HOEKSTRA: Agreed. I do think that there's a push in the comments that associated with the rule that there's an expectation that a judge may do so, especially one who's less experienced or who's never faced an MDL before.

PROFESSOR BRADT: Thank you.

CHAIR ROSENBERG: Judge Proctor, I think you had your hand up.

JUDGE PROCTOR: Yes, thank you.

So do I understand your primary position to be we just don't need a Rule 16.1, it's not going to be helpful to the judges in getting these cases started?

MS. HOEKSTRA: No, I believe that there's a framework in 16.1 that is helpful in terms of the overall formation of it. I do believe that 16.1

restricts some of the flexibility that MDL judges are used to having in relation to the rules for complex litigation or other procedures that have been followed in the formation and use of our practice over the past, you know, few decades.

I don't believe that the size of an MDL has an impact on whether formality of the rule is necessary. There were arguments or comments made that, you know, the volume and the size of MDLs is what's driving the need for this rule. I don't believe there's a need for the rule, although the overall provisions are already essentially put in place by general practice and procedure by most MDL judges.

JUDGE PROCTOR: What would you say to the point, though, that at two straight breakers conferences where this draft rule or something like it's been presented to transferee judges from across the country, they uniformly and almost unanimously, I believe, told us that this would be helpful to them?

MS. HOEKSTRA: I believe the definition then needs to be perhaps modified to make it clear what the distinct role and scope is for coordinating counsel beyond the initial conference. There seems to be some vagueness in terms of what the extent of the role

might be or what the appointment would require separate from anything relating to liaison counsel, you know, leadership counsel. It seems like it's just one more position that will take away from any recovery for claimants at the end of the day.

JUDGE PROCTOR: And to be clear -- I'm sorry that I was confusing to you -- I wasn't saying specifically the coordinating counsel provision, although we've not had push-back from our judges on that. I'm just talking about the framework of the rule and the presentation of the menu.

MS. HOEKSTRA: No, I believe the framework of the rule, other than the few places where it's in conflict, as I discussed, with actual practice and procedure in certain MDLs, it could be useful overall. I think the main concern, and I think that's been reiterated by several of my colleagues today in terms of their comments, is with the provisions relating to coordinating counsel specifically.

I do believe that MDLs have existed for decades without the lack of, you know, formalization that is present in 16.1, but I don't believe it's in conflict with any of the other Federal Rules. I don't believe MDLs have been in conflict with any, you know, aspect of the Federal Rules' application. So whether

or not there's a need for this is an open question, but I don't believe any of the actual language is concerning.

CHAIR ROSENBERG: Okay. All righty. Thank you so much for your comments. We appreciate it.

Let's hear now from Mr. Luff, Rule 16.1.

MR. LUFF: Thank you, and it's an honor to address the Committee today. My name is Patrick Luff, and I hope to offer a somewhat unique perspective as a former professor of civil procedure, a researcher on the role of litigation in the United States with an emphasis on collective actions, and as an active practitioner and the founding partner of the Luff Law Firm, which regularly represents injured parties in multi-district litigation.

I also have the honor to be a former student of Professor Cooper, although any deficiencies in my testimony should be attributed to my shortcomings as a student and not to his as a teacher.

So what I'd like to do is offer a brief comment on the proposed rule and then a separate proposal, possibly a bit provocative, for the Committee's consideration. I won't dwell long on the well-discussed concerns that others, including members of this Committee, have raised regarding the proposed

rule, but I would underscore the reality that there is no single method that is best for all MDL proceedings because there is no single type of MDL proceeding. The length and breadth of the current iteration of the *Manual for Complex Litigation* is a testament to the variety of MDL case types and the procedures that are best suited to these differences.

This observation leads to the concern of mission creep. If early management merits rulemaking, so too do any number of other topics common in multi-district litigation, and quickly we have a set of MDL procedures whose length rivals the *Manual for Complex Litigation*.

For those who doubt this concern, consider the number of comments asking this Committee to discuss and issue rules on claim insufficiency, despite the apparently narrow temporal scope of the actual rule under consideration. I would therefore spend some time addressing the issue or the potential issue of claim sufficiency, and I will assume for the sake of argument that the criticisms are accurate that, for example, "a protracted PFS process that operates as a multi-step discovery dispute is a wasteful and expensive distraction" and that what these critics truly want to focus on is the resolution

of meritorious claims.

An amendment of Rule 23, perhaps by relaxing the predominance requirement of subpart (b)(3), would, I argue, solve many of these concerns, although perhaps with some possible modifications, such as an opt-in as opposed to an opt-out structure. Let us consider the amount of time and the expense of filing thousands or tens of thousands of complaints, as well as the burden on courts' resources in processing them and of defendants in reviewing and answering them.

Let us consider the PFS process described by Bayer in his comments as that wasteful and expensive distraction. The need for protracted conferral between plaintiffs and defendants' counsel, often with the court or a special master's involvement, would be obviated. Similarly, defendants would be relieved of what I can only imagine are staggering legal bills that they incur so that their counsel can review each and every fact sheet, prepare a list of alleged deficiencies, and then engage in a lengthy back-and-forth on these deficiencies.

We can likely say the same thing about short form complaints, bellwether selection process, remands, and other matters that are common in multi-district litigation. And to be sure, insufficient

claims would still be filed, but they would be resolved in he claims administration and resolution process, which require far fewer court resources.

Resolving mass torts involving personal injury and consumer protection claims as classes would dispose of much of the unnecessary make work that currently occurs throughout the course of an MDL. It would allow the court and the parties to focus on the merits of the dispute, and it would further the goals enshrined in Rule 1 of a more just, speedy, and inexpensive resolution of claims.

So, with those remarks made, I would welcome the Committee's comments or questions.

CHAIR ROSENBERG: Thank you so much.

Questions from our reporters?

PROFESSOR MARCUS: Hello, Patrick. Good to see you.

MR. LUFF: Hello, Professor Marcus.

PROFESSOR MARCUS: Having lived through three episodes of Rule 23 amendments, I'm prepared to guess -- in the first place, that's not what we're talking about here today, but I'm prepared to guess that the people we've been hearing from in favor of vetting or whatever you want to call it in MDLs would not be enthusiastic about relaxing the predominance

requirement, and I don't think that's going to happen anytime soon. Could be wrong.

So, given that, is there a harm to going forward with 16.1, you say, that may become an unwieldy Leviathan that could -- maybe you've explained why that might be true, but we are where we are and we're probably not going where you recommend. So should we simply desist or try to refine what we've done?

MR. LUFF: Thank you, Professor Marcus. And I would dare to say your comment of having gone through three iterations of the Rule 23 amendments may be instructive. Having not been present at any of those personally, I suspect that there were always concerns about the exact same sort of mission creep about the repeated necessity of amendment to deal with more and more issues relating to Rule 23, and my concern is twofold.

Number one is the simplistic case that the Committee is always asked to do more and more as to particular issues that come up in multi-district litigations and that you do have this repeated rulemaking process just as you describe for Rule 23.

But perhaps even more problematic is the law of unintended consequences that I think invariably

comes up with rulemaking, particularly when, as I've said in my comments and my testimony, you have such a variety of types of cases and types of procedures that are most appropriate to each one.

CHAIR ROSENBERG: Any other comments or questions? No?

Okay. All right. Well, thank you so much. We appreciate your comments, Mr. Luff.

MR. LUFF: Thank you.

CHAIR ROSENBERG: And next, we'll hear from Emily Acosta on Rule 16.1.

MS. ACOSTA: Hi. Good afternoon. My name is Emily Acosta. I'm senior counsel at Wagstaff Law Firm. Though we are a Denver-based law firm, like many of my colleagues, we represent folks, victims, in federal and state courts around the country.

My personal experience relates to the preparation of and trial of complex products cases. My testimony focused on three sort of subsections that I found problematic: subsection (b) that related to coordinating counsel, (c) that addressed certain topics at the initial management conference, and I also spent some time addressing unsupportable claims.

Of course, I'm happy to answer questions on any of those topics, but I'd like to focus my

testimony on unsupportable claims and give you specific examples in my practice that lead me to believe that using the term "unsupportable claims" is somewhat misleading in terms of the experience of practitioners.

I think my colleague, Mr. Brose --

PROFESSOR MARCUS: I'm sorry to interrupt, but where do we say that?

MS. ACOSTA: I'm sorry, Professor Marcus, you cut out a moment for me. Could you repeat your question?

PROFESSOR MARCUS: Oh, my question is, I don't remember where "unsupportable claims" appears in our proposal, so I'm asking you to tell me where it is.

MS. ACOSTA: Oh, you're correct, sir. It doesn't appear. However, many of the comments, as I'm sure you're familiar --

PROFESSOR MARCUS: So what you're talking about is whether we should -- whether we might choose to say something that other people are urging us to say, not about what we actually did say?

MS. ACOSTA: Yes, correct. I just wanted to -- obviously, unsupportable claims were raised and proposed solutions were raised in many comments. I

wanted to give you some real-world perspective and sort of insight on why it is that I think the current rule strikes the correct balance and, you know, why some of the proposed solutions would not indeed be solutions at all.

So one of my colleagues addressed product identification. Essentially, this unsupportable claims falls into three buckets, right? So a person that didn't actually use the product, a person that's not hurt in, let's say, the right way where the mechanism of injury is such that you can't believe that the defendant would be liable for that injury, or, third, where the claim is time-barred.

Mr. Brose, I think, shed some light into what is I think a relatively rare situation where product identification and having an understanding of whether or not a client used a product is somewhat opaque because, in that situation, it's given to a child at a hospital and, you know, when hospital records are lacking, there's a lack of clarity about whether a product was used. Most of the time, that issue of whether a client used a product or didn't is fairly clear.

My concern relates to the other two buckets, so to speak. The first is adverse consequences and

whether or not those can be attributable to the defendant and their product, and the second is time-barred. I'll take time-barred first because I think, in many senses, it's easier.

Oftentimes, that is heavily litigated both, you know, in bellwether cases and in remanded cases after an MDL. The facts are highly specific often. You know, for example, I've litigated this in IVC filter in transvaginal mesh cases. A patient will often report to the ER with generalized abdominal pain. The question of whether or not that starts the clock on their statute of limitations depends on a lot of very highly specific factors, like what they were diagnosed with when they left the hospital, what conversations they had with the physician, and, you know, any number of individual factors. It's therefore, I think, very misleading to suggest that before you know all that information you could know that the claim was time-barred, so that's one example.

As it relates to suffering particular adverse consequences, I think the Prodaxa litigation and the state court coordination that followed are instructive on this point. The Prodaxa MDL started and the focus of that MDL was GI bleeds, gastrointestinal bleeds. Later, after the MDL had

been resolved, there was a second iteration of that litigation which was coordinated in the State of Connecticut. While there were cases that revolved around GI bleeds there, there was also a renewed focus on sub-populations like women, people with diabetes, and people with other GI issues that made them pre-disposed to develop an injury after using the drug.

It's important to note that the science that form the basis for those claims had not come out yet and so I think you're seeing both in -- you know, there was a conversation about reciprocal disclosures and why it's difficult to do those out of the gate. You know, part of what a defendant looks for in a plaintiff fact sheet, for example, is the data points to assess the injury. The science is often evolving on that and so getting your arms around the appropriate data points there is sometimes difficult. So that's another example, and, you know, I'm happy to take any questions that you might have.

CHAIR ROSENBERG: Okay. From our reporters, any questions, further questions?

PROFESSOR MARCUS: Well, if I could ask a further question about something somewhat different, on page 4 of your submission, you seem to say that it would be undesirable -- it is undesirable that we

presently say before the initial management conference the parties must deliver a written report to the judge and you say instead they must be prepared to discuss certain things.

And I'm wondering what your reaction is to a reaction which is, gee, shouldn't the judge have some advance notice about what's going to be coming up, or does the judge just have to wing it? A formal written report probably is very helpful to the judge. I'm not clear on why it would be undesirable. Perhaps you could explain.

MS. ACOSTA: Sure. That suggestion is, I would say, primarily a reaction to the concern that I think has been expressed by others in that once a coordinating counsel is appointed, that I think likely will have the effect of stifling other viewpoints.

Additionally, I think some of the things that are discussed in subsection (c), like settlement, for example, the discussion of those things is sort of premature, and I think, in many senses, talking about them early frustrates the overall purpose of resolving an MDL.

And so, while, certainly, it's the case that everyone should be able to discuss intelligibly those conversations at an initial management conference, I

worry that committing them to writing and appointing a particular person to be tasked with putting that together before there is a leadership group that's coalesced around a particular viewpoint of how the tort ought to be run and what the important issues are, that you essentially have a duplication of work that I think is unwieldy.

I mean, like Mr. Millrood mentioned earlier today, if the point is take me to your leader and let's have productive conversations, it seems really difficult to be able to do that when there is not an individual or individuals, frankly, that have authority to negotiate on both sides.

CHAIR ROSENBERG: Andrew?

PROFESSOR BRADT: Thanks. I'm going to follow up just on that point about the question of settlement discussions and when they take place. As has been mentioned, there's already a provision in Rule 16 for considering whether settlement should be facilitated. And so my question continues to be, why does this make things worse than the existing rule? It seems to me the existing rule gives people the opportunity to say it's too early for settlement, and there's nothing in Rule 16.1 that suggests that judges should push settlement if the parties aren't prepared

to consider it. And I think it would be a little bit of willful blindness to suggest that we shouldn't talk about settlement when it seems fairly clear that settlement activities often have gotten going at the time of the initial conference.

So I guess I'm trying to understand where the harm is in adding that into 16.1.

MS. ACOSTA: Well, so with respect to settlement, I think that talking about it too soon does do a significant amount of harm sometimes. So I think that's one thing.

To your question more philosophically of, you know, how does it make it worse, I think in two ways. One is that we're adding another step, right? And then the second is that I think it adds uncertainty because we don't have a clear -- if you're a defense attorney, there is a defense team in place -- you know, assume a single defendant, right? There's a defense team in place and they almost always have a lead trial counsel. There is someone that is captaining the ship on that side of the V, right?

By contrast, you will have a number of plaintiffs' attorneys, even assuming a small number, like five or 10, different people with different ideas, different skillsets, frankly. Not all of them

will be able to have, like, a lead trial attorney, you know, that can sort of command the ship, so to speak. And what you've added is, instead of, you know, having two clear people that are able to negotiate, you have one clear person that's able to negotiate and this amorphous group of other people that can't or at least they can't bind the group.

And so, to me, the better solution is to say let's appoint lead counsel as soon as possible because then there's someone that has authority to bind the group and decision-making authority, whereas I think, if you add another step, it simply sort of clouds that issue, kicks the can, and I don't know what we've accomplished in its place.

PROFESSOR BRADT: I guess a point of genuine curiosity then is, how does leadership counsel bind the group? Like, what are you talking about there in a way that leadership counsel can bind the group? Obviously, if it's not a class action, everybody's got their own lawyer. Everybody's got to make the decision for themselves whether to opt into the settlement, assuming it's not a class. What do you mean by that?

MS. ACOSTA: Sure. So, for example, one of the things that's listed in subsection (c) is what are

the important legal issues and how should -- in broad strokes, what are the important legal issues and how should discovery proceed.

If you have a different idea about what the important claims are, you might structure discovery in one way. If another lawyer has a different idea about what the important claims are and what the important defenses are, they might structure discovery and how it proceeds in a different way.

And so, at a minimum, you've got maybe a couple different competing proposals, which I think is largely inefficient when the alternative is that you could move forward with appointing coordinating counsel quickly and then have someone that really can actually make a binding decision about what are the important claims, how should discovery proceed, you know, and things sort of of this nature.

PROFESSOR BRADT: But not with respect to settlement. You're concerned about, like, the process of litigation. You're not suggesting that coordinating counsel will be able to bind anybody with respect to settlement?

MS. ACOSTA: Yes, yes. Of course not, no. You know, I mean, but my point is only --

PROFESSOR BRADT: Or lead counsel for that

matter.

MS. ACOSTA: Yeah, sure. My point is only just that sometimes going through discussions of settlement before either party has enough sense of what a good case looks like from their perspective is sometimes counterproductive because it sort of tends to increase frustrations without a corresponding benefit that, you know, moves you forward.

PROFESSOR BRADT: So my last question on this is, is it your experience that with the current provision of Rule 16 that allows judges to broach settlement very early on, do you find it to be problematic to say to the judge in one of those cases, we're not ready yet to talk about settlement, it's too early?

MS. ACOSTA: I think sometimes it can be. But, again, I don't know that putting it in the rule is necessarily necessary, right? I don't think anyone's going to forget that resolution needs to eventually occur. And so, you know --

PROFESSOR BRADT: There must be harm, I guess. I mean, if it -- you know --

MS. ACOSTA: I mean, I think the harm is that it force --

PROFESSOR BRADT: -- if they know, why not

have it in the rule?

MS. ACOSTA: I mean, I think the harm is that it forces you into a premature -- you know, I think it's sort of like mandatory arbitrations or things like that. I think sometimes they're incredibly helpful, and I think sometimes they're difficult and sort of thwart the overall process, right? So the benefit of putting it, you know, in the rule I think is minimal, and I think the chances that someone forgets about it is almost non-existent, right? Like, surely everyone knows the point is to resolve the matter.

PROFESSOR BRADT: Thank you.

CHAIR ROSENBERG: Okay. Any more comments or -- yeah, Rick?

PROFESSOR MARCUS: Your commentary about settlement being too soon reminds me of something we heard a lot about several years ago from the defense side, that MDL transferee judges were holding them hostage, preventing appellate review in order to coerce a settlement, and I think we've heard some resistance to any reference to settlement in our proposal from the defense side. I'm wondering, are you in agreement with them that it should -- with the defense side folks that it's just we don't want

anybody thinking about that right up front, only think about that later? I'm a little bit surprised.

MS. ACOSTA: No, no. I think there's a big difference between do you address it at the first settlement conference versus do you never address it, right? I think it could be appropriate to address, you know, at the tenth settlement conference.

And the idea too that, you know, I think there are very few examples where a legal defense or appellate review actually assists in resolving an MDL. So, you know, much in the same way that I think every defendant says they have a preemption defense and anyone that's practiced in this space knows that very rarely is a mass tort disposed of in the, you know, medical device/drug arena using that defense.

So simply because they believe they have a legal defense, that shouldn't be a mechanism for holding up settlement, but, again, I think there's a very big distinction between does it have to be addressed on day one, minute one or should it be addressed when the parties have more information.

CHAIR ROSENBERG: Okay. Thank you so much, Ms. Acosta. We appreciate it.

MS. ACOSTA: Thank you.

CHAIR ROSENBERG: All right. And our final

witness before our lunch break is A.J. Bartolomeo. If you could join us and speak about Rule 16.1.

MS. de BARTOLOMEO: Good afternoon, Committee. First of all, I'd like to thank you all for your hard work and years of dedication on this rule. It's obvious from the discussion we've had this morning how really extensive the work has been.

Yes. My name is A.J. de Bartolomeo. I'm a partner at Tadler Law, and we practice in the complex litigation area, so many times our cases are in MDLs.

I've submitted a written comment, and there's really two areas that I'd like to touch upon briefly here, many of which have been discussed at length this morning.

The first has to do with really clarity as to the coordinating counsel's role, responsibility. There doesn't seem to be any mention of credentials or qualifications, and, actually, it's a little unclear as to on whose behalf the coordinating counsel is acting. In the comments, they speak about the coordination with the plaintiffs or the defendants. The rule makes it clear it's to assist the judge. That's very good. But where my comment really is concerned is I was just not sure exactly what coordinating counsel was intended to do. At one

point, I thought maybe it was more like liaison counsel and thought that some of the guidance from the *Manual on Complex Litigation* may help with the rule in an editorial manner. I know people have discussed interim counsel, although there is a real distinction between 23(g) interim counsel and when the term is just used in some other cases.

And then Judge Cooper, I believe, asked a question earlier on that was very interesting about what if that coordinating counsel has no stake and they're real neutral. And that raised the question in my mind, did the Committee have a thought that maybe it is something more akin to a special counsel to assist the judge and work neutrally with both sides? I am just not sure, which is why my comment essentially asks for a bit of clarity on that role.

The second point of my comment really has to do with adjustment of the timing for the meet-and-confer but prior to the initial conference. And other people this morning have touched upon this in that before you have lead counsel organize for the plaintiffs, they're really somewhat at a disadvantage to be able to have a well-informed conversation on behalf of all of the plaintiffs.

And, obviously, many times the defendants

are more organized when they walk in. They have their client and they know who's representing them. The plaintiffs are not quite at that level yet, and so my textual edit for the rule was that we should have an early conference and then a second early conference, but it should be before the appointment of lead counsel and organization of counsel for the plaintiffs and then after.

And one real-life example that made this kind of clear to me, and I know I mentioned it in the comment, in a data breach class action, the *In Re: Marriott*, which was before Judge Grimm, he's since retired, but he had the initial conference and there were multiple plaintiff tracks. So, if there had been like you would be looking for one person to speak on behalf of them, that would not have worked at the initial conference, and Judge Grimm set up the leadership and liaison for each of those five tracks at the initial conference, including a discovery liaison to work between and among them all. And then, at the 26(f) conference and the next status conference, which wasn't long after that, each of those tracks was able to actually have a very well-informed and well-prepared meet-and-confer with defendants on the issues unique to their track, like

financial track, consumer track, that type of thing.

And the other point that I wanted to make -- and I'll make it briefly because I'm the one keeping everyone from lunch right now -- is that the points raised in (c)(1) through (c)(12), while valid points and the Committee note makes it clear that they're not a limitation, there can be additional discussion points that the parties feel are necessary to bring up to the court or the court thinks are necessary, it just seems that those topics would be better discussed at the second conference when leadership has been appointed because, as others have mentioned, one size does not fit all. Sometimes those will be sequenced or organized or quantified depending upon the legal issues and defenses in the case, and you want to allow the parties to meet and confer and discuss those issues, to present that to the court in the most organized and efficient manner.

And if anybody has any questions, I'll be happy to try to answer them.

CHAIR ROSENBERG: Okay. Thank you so much.

From our reporters?

PROFESSOR MARCUS: Thank you. I see that you propose adding an (e) if we go forward, and I guess what I'm suggesting now is that looks an awful

lot to me like what we say in the Committee note to our 16.1(d) on the order the court ought to enter after the initial management conference. We contemplate further management conferences and invite even setting a schedule for that.

The Committee note says the court should be open to modifying its initial management order. This isn't -- I'm paraphrasing -- this isn't a schedule like a Rule 16 scheduling order, which is somewhat graven in stone, and it may be particularly appropriate to revise if leadership counsel was appointed after the initial management conference.

It sounds to me like your proposed (e) is saying those same things. Am I missing something, or are you just seeking to move what we have in a Committee note up into the rule so that it's more prominent?

MS. de BARTOLOMEO: Yes, Professor, that's exactly it. I really wanted to make the distinction between allowing the court to set leadership counsel and then have another time where leadership counsel would have a good opportunity to meet and confer with defense counsel and then present, again, a well-informed and prepared discussion for the court on what was agreed to and perhaps what wasn't agreed to.

CHAIR ROSENBERG: Andrew? No? Okay.

Any other comments or questions from our Committee?

Okay. Well, thank you so much for your --

MS. de BARTOLOMEO: Thank you.

CHAIR ROSENBERG: -- time and your comments.

That brings us to the lunch hour. It's about 1:12 and we're scheduled to resume at 2 with Lee Mickus as our first witness, and so we're going to stick with that schedule. So the lunch is just going to be condensed a bit, but, hopefully, that'll be enough, 45 minutes for everybody. You can feel free to leave your -- stay tuned into the Teams and just turn your video and your audio off.

(Whereupon, at 1:15 p.m., the meeting in the above-entitled matter recessed, to reconvene at 2:00 p.m. this same day, Tuesday, January 16, 2024.)

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A F T E R N O O N S E S S I O N

(2:00 p.m.)

CHAIR ROSENBERG: Okay. We'll get started again and we can have our next witness, Lee -- is it Mickus?

MR. MICKUS: Mickus, Your Honor.

CHAIR ROSENBERG: Mickus. Okay. I said that the first time before we broke and I questioned myself, so I apologize.

Okay. We're pleased to see you, and you're here to address 16.1.

MR. MICKUS: Thank you, Your Honor, and thank you to the members of the Committee for the opportunity to express my views on this proposed rule.

I am a partner at the Denver law firm of Evans Fears & Schuttert. I'm involved on the defense side in a number of MDL matters, particularly those involving product liability and mass torts.

I'm here today to encourage you to modify Rule 16.1(c)(4) to make that more specific and more focused with regard to the basic disclosures to show that each plaintiff has a viable claim, and I'm also here to encourage you to drop the references, I think there are 12 in all, to settlement in (c)(1), (c)(9), and in the proposed note.

Turning to (c)(4), the most useful thing that an MDL rule would do is establish an expectation and a procedure that unsupportable claims would be weeded out early in the process so they can't bog the parties down during case workups, interfere with the bellwether selections, and create the other problems that have been observed.

To the anticipated question, I can't point you to any empirical data that has been gathered across multiple MDLs about unsupportable claims, but I do note that experienced MDL judges, such as Judge Land in the *In Re: Mentor* matter and Judge Robreno in the *In Re: Asbestos* case, observed that it was a problem for them and that -- and I can speak to my experience, it's been a problem in my cases.

But I will also note that the request, Professor Bradt, has been noted by the defense bar and observed loud and clear. We'll do our best to get back to you with that.

I would also note that any rule to address this issue needs to be direct and specific to indicate that each plaintiff will need to present basic facts demonstrating that there's a prima facie and fundamentally viable case that fits within the defined MDL. The timing can be discretionary, even

potentially staged depending on the nature of the case and the issues involved in a particular MDL, but the occurrence needs to happen.

(c)(4), as presently drafted, simply doesn't accomplish this, and I would suggest that to be effective and to be meaningful, this provision should be revised along the lines of what LCJ proposed in its September comment.

Shifting gears to the settlement references in (c)(1), (c)(9), and the proposed note, anticipating a couple of different questions there, in particular one that Professor Marcus asked to Professor -- or to Ms. Acosta a few moments ago, from my perspective, it does seem that both the plaintiff and the defendants are aligned that neither side wants to see references to settlements in the proposed rule, maybe for different reasons, but it does seem that there is alignment on the ultimate conclusion of that. And I note with a smile Tobi Millrood's comment for AAJ and his footnote indicating that when you see AAJ and LCJ in alignment, that's probably an indication of something that is noteworthy.

To anticipate another question on this front, why not? What's the harm in putting a settlement reference in the rule and in the note? Why

not just leave it there and let the parties ignore it if they want to? For a number of reasons.

First off, to echo what we heard from Ms. Acosta, it's premature. At the early stages in the MDL proceeding, the parties are just beginning to understand the factual issues involved and where the real fighting ground is going to be with respect to the claims and defenses, and until these are developed, the parties have limited ability to assess and place a value on the claims.

Second, it’s counterproductive. Signaling that the court at the very outset is interested in settlement, is motivated to pursue settlement perpetuates the suggestion that’s prevalent in some quarters that the MDL procedure is about a resolution mechanism. It’s not about developing the pretrial matters for furtherance of the litigation. And when that signal is sent, that tends to incentivize and flesh out more of the unsupportable claims. That’s when people who are looking to get on the gravy train are likely to make that move.

Further, and, again, Ms. Acosta touched on this, it’s distracting to the parties. When the court raises the issue of settlement as, if it’s put in the rule, the court is likely to and the litigants are

probably going to make sure that that discussion takes place, the attention is not focused on developing the litigation. It's focused down a different pathway, and going down that cul-de-sac takes parties' eye off the ball with respect to things that actually will be productive toward developing the case to get to a point where the information necessary to identify what a resolution matrix may look like can ultimately be achieved. It takes the attention away from matters where an MDL is most productive.

And then, finally, it's unnecessary. Productive settlement activities usually occur organically. All of the lawyers that you've heard from today are very experienced and they understand where things are likely to go. If there is a turning point in a case, a development of a data point that is useful towards discussion, then that is going to happen.

So, for all of those reasons, I don't think including discussion of settlement within the rule and within the note is useful. In fact, it's counterproductive and would not be helpful.

With that, I'd be happy to answer any questions. I see you, Professor Bradt.

CHAIR ROSENBERG: Yeah, from our reporters.

PROFESSOR MARCUS: Can I go first?

PROFESSOR BRADT: I'm happy to defer to Rick.

PROFESSOR MARCUS: Well, I'd like to pick up on one thing you mentioned about our (c)(4). Can you hear me?

MR. MICKUS: Yes. Yes, I can. It's a little faint.

CHAIR ROSENBERG: Well, actually, is there anything you can do to -- I heard you over the break working with Shelley, but I think some of our members are having a hard time.

PROFESSOR MARCUS: Well, how is that?

CHAIR ROSENBERG: I hate to have you scream. There's nothing on the volume that can --

PROFESSOR MARCUS: I think I've messed with all of those things.

CHAIR ROSENBERG: Okay. All right. Well, we'll make do.

PROFESSOR MARCUS: Okay. Well, sorry.

With regard to (c)(4), that says how and when the parties will exchange information about the factual bases, okay? And you noted that there must be some flexibility in timing and so on because cases are not all the same. Is there any reason why that

provision we presently have would prevent you from persuading a judge that what you think should happen when you're representing the defense should happen, and if something more specific in the rule might be substituted, are you saying it would be good to prevent the judge from doing what the judge thinks is the best idea? I'm a little uncertain why (c)(4) fails your test.

MR. MICKUS: So (c)(4) as it's currently drafted is somewhat ambiguous as to what exactly it is requiring. And my point is what has been identified consistently as a problem is the notion of these unsupportable claims that get filed in some percentage in MDLs. And making this specific that that is what (c)(4) is designed to flesh out, to establish not just basic discovery about the case but basic viability of each individual claim is, I think, a useful goal here for (c)(4).

Now, if your point is can I use (c)(4) as presently drafted as a vehicle to go and argue to the court that we should establish some sort of case-specific structure for doing so, I suppose I could, but the issue is now the judge is having to be persuaded to do such a thing when it should be part and parcel of the MDL process given the experience

that we've had with MDLs and the repeated problem that has been observed with these kinds of unsupportable claims.

CHAIR ROSENBERG: Andrew?

PROFESSOR BRADT: Thanks, and thank you for acknowledging our hunt for empirical data. So far, we've heard anecdotes from both sides but not hearing a lot of testable data.

Setting that aside, I want to focus on your points about settlement, and I'll ask a species of the question that I've been asking before, noting that efforts to facilitate settlement are within the judge's prerogative under Rule 16 as it already exists. Is it your position that if we did not put a reference to settlement in this rule, judges at the initial status conference would not raise it?

MR. MICKUS: No, no, that's not what I'm saying. I mean, the court is going to do what the court is going to do.

My point is the repeated emphasis within 16.1, both in the rule and I think there were 10 different references in the note, just as a matter of emphasis are going to, I think, encourage just through the process, because we're going to tick through all the different subparts, we're going to raise all of

the different issues, the multiple references are a signal to the court and to the litigants that this is something that needs to be front and center in the early discussions.

I generally agree with the direction of what we heard from Ms. Acosta. The parties are in a great position to understand when the timing is right, and the parties can raise this with the court when that timing is right. To push the issue from the very outset, I think, sends the wrong signal about what MDLs are all about. It creates an emphasis that is not productive, in fact, is counterproductive and is distracting to the real purpose of what we're trying to achieve early in the case.

PROFESSOR BRADT: I guess it just raises the question that, again, settlement is part of Rule 16 as it exists now.

MR. MICKUS: Sure.

PROFESSOR BRADT: So are you perceiving that problem in all of your non-MDL cases, that courts are overly emphasizing settlement when the parties may not yet be ready?

MR. MICKUS: Not necessarily, but what I am saying is, as we've seen from a number of judges that after the fact have commented on their MDL

experiences, again, Judge Land, Judge Robreno, about how that process works, when the emphasis is suggested that the MDL is being used and should be considered as a resolution mechanism, that is nudging expectations in the wrong direction and instead is taking the focus of the litigants and taking the focus off of the courts in a direction that's not productive toward moving the case forward to a position where they actually will have the information that may drive development of a matrix or whatever else is going to be useful for getting to a resolution point.

PROFESSOR BRADT: Thank you.

CHAIR ROSENBERG: I guess I have a question. How does including settlement in subsection (9) drive the litigation when it's only one of 12 points? All of the other points are about driving the litigation. In fact, it's the smallest. It's one. And even at that, it says, "whether the court should consider measures to facilitate the settlement."

Doesn't that give the parties the ability to say, Judge, it's too early or -- as opposed to a judge maybe going too far because it's not mentioned and the parties don't want the judge to do that? Isn't this the very opportunity for the parties to say collectively if they agree it's not the time and,

rather, we should be focusing in on identifying the other scheduling orders and the principal factual and legal issues and whether we should have consolidated pleadings, all things that drive the litigation?

MR. MICKUS: Sure. Again, I think it's sending the wrong message about what an MDL is all about. If the parties understand and based on their perspective see that the settlement timing is right or the timing is right to start discussing settlement at that point either through Rule 16 or simply through the organic processes of counsel interacting, it's going to happen.

But building into the rule the suggestion that the MDL consolidation is in meaningful part about driving settlement, again, takes this in a counterproductive direction and sends an improper signal about what MDLs are intended to accomplish.

PROFESSOR BRADT: I guess my question is, is that why is including it in the rule any different than including it in Rule 16, which applies to all cases? Why is it worse in 16.1?

MR. MICKUS: It's worse in 16.1 because MDLs have a perception in certain quarters that the whole purpose of it is as a resolution mechanism. And furthering that by raising it in the rule, raising it

multiple times in the note perpetuates that perspective rather than the MDL is a tool of efficiency for developing the pre-litigation models.

Of course, through Rule 16 or through any other mechanism, the parties can discuss settlement, and in the vast majority of cases, that ultimately will be the outcome. And that's sort of to my point that you don't need it in the rule for that to be recognized among the parties, but by putting it in the rule, it sends the wrong signal about what an MDL is intending to accomplish.

CHAIR ROSENBERG: Okay. If there are -- any comments from our other Committee members or questions? Seeing none, okay.

Well, thank you so much, Mr. Mickus, and we appreciate your comments.

We'll now turn to Mr. Partridge, who will also speak on 16.1.

MR. PARTRIDGE: Great. Thank you, Judge Rosenberg, and thank you to the Committee.

By way of background so you all can appreciate my perspective here, I spent 27 years in private practice, the latter part of that handling mass torts, class actions, and MDLs. I joined Monsanto Company as Deputy General Counsel in 2006 and

I assumed the duties of head of litigation and then took on the role of Chief Deputy.

After five years in those roles, I was asked to move to a business role, a new corporate strategy role, leading a team to coordinate the effort to resolve disputes and avoid conflicts. I led that initiative for seven years, resolving Monsanto's most significant litigations. My final act at Monsanto was I participated in the negotiation for the sale of Monsanto to Bayer. That was closed in 2018, and after that transaction closed, I was asked by Bayer to serve as its U.S. General Counsel, which I did for four years, leaving Bayer at the end of 2022 to form my own firm, Partridge, LLC, to assist both plaintiffs and defendants in resolving disputes. In my role, my various roles, both outside, inside, and as a business lead for more than four decades, I participated in the settlement of over hundreds of thousands of claims, many of them in MDLs.

What I wanted to do was to offer to the Committee a perspective and share information that I think is relevant to what MDL judges need to know about how decisions are made by defendants, particularly corporate defendants and particularly publicly traded corporate defendants.

You've not heard from many sitting general counsel or head of litigation, and that's understandable. When I was sitting as GC, I didn't participate and provide the type of information that I'm going to share with you now. It's very difficult for a sitting GC to talk about boardroom discussions involving current or recent MDLs and to discuss really the decision-making process, but it's critical for MDL judges to understand what that process is.

Regarding the perspective that I will share, I'm not representing any party or speaking on behalf of any present or former client or employer. These are my thoughts, my perspectives that are forged from over 40-plus years of handling complex litigation, including MDLs.

So, as we just discussed, the Advisory Committee is proposing to put settlement issues prominently in the rule. You know, as we know, most MDLs ultimately do settle, but they usually take many, many years to get to that point.

In my experience, the accumulation of unexamined and meritless claims, what we're I think calling unsupported claims, in an MDL can delay and will often prevent advancing the dispute to settlement by a corporate defendant. The existence of unexamined

claims in MDLs is not disputed. I know that there's much discussion about the size of that percentage. In my experience, I believe the percentage of unsupported claims is in the range of 25 to 30 percent. And I know that Professor Bradt is looking for empirical data and I understand there's a group that's working to advance that. I hope we're able to provide you with that data in a meaningful fashion.

In MDLs presenting a significant number of claims -- that present a significant number of claims, the potential exposure to the defendant can be enormous. In examining a potential settlement path, the publicly traded defendant faces a myriad of issues which aren't transparent to the MDL judge, and given the huge number of unexamined claims, this problem and these issues are exacerbated. Many of those issues involve, frankly, avoiding secondary exposures and liabilities. So let me explain some of the complex issues that are discussed by corporate executive teams and in the boardroom.

Let's assume you have a significant MDL with 25 to 30 percent unsupported claims. Make it 100,000 total claims and we know that only 75 -- 70 to 75,000 of those will ever advance to a settlement. What should be reported in the quarterly and annual

Securities and Exchange Commission filings? The claim number of cases, including the 30 percent unsupported, or an estimation of the compensable claims and, hence, that financial exposure. Under-reporting or exaggerating financial information can lead not only to regulator action but can also lead to shareholder litigation.

What numbers should be shared with the financial analysts, the market analysts that love to opine about the health of a publicly traded company? What's shared with shareholders? How is it shared? What numbers and dollars are reported to insurers, the inflated number, which will potentially affect risk calculations for future coverage premiums, or an estimate which removes the percentage of unsupported claims? What warranties and representations are those insurers going to look for regarding unsupported claims? What communications are provided to employees, most of whom will own shares of the U.S. publicly traded company? For a product still in the marketplace with or without modification, what information about the volume and nature of claims is provided to customers in the industry? Importantly, what dollars, what dollar numbers does the company post as a financial reserve, the dollars that are

extrapolated from a hundred percent, including the inflation, or the 70 percent that is an estimate of what will be compensable? In the event a settlement is advanced and funds are needed to be borrowed, what numbers will form the basis of those loans and what interest rate and what representations and warranties will lenders require?

These are just some of the issues that aren't transparent to MDL judges, but they need to understand the effect of unsupported claims and how complex it can make the decision-making process.

In my experience, the existing of significant numbers of unsupported claims in an MDL can slow the settlement process because of the secondary liability issues. They're critical issues to companies. They can't be ignored.

Often, it takes years --

MS. BRUFF: Mr. Partridge, I apologize for interrupting. I might turn it over to Judge Rosenberg in case she wants to initiate the question phase.

MR. PARTRIDGE: Sure.

MS. BRUFF: I would hate to take too much time from the Committee members to ask questions.

MR. PARTRIDGE: Oh, that's fine. Please do. I think I've framed enough of the issues. What I'm

suggesting is we need a rule that requires sufficient basic information from each plaintiff be provided to establish standing and the facts necessary to state a claim. This sort of rule will not only assist the MDL court in advancing a structure that will help the case move to settlement, but it will also promote good management of the litigation.

CHAIR ROSENBERG: So --

MR. PARTRIDGE: I'll answer any questions.

CHAIR ROSENBERG: Yeah. So your focus, it sounds like, is on (c)(4) --

MR. PARTRIDGE: Yes.

CHAIR ROSENBERG: -- with respect to fleshing out the factual and legal issues earlier rather than later. So let me --

MR. PARTRIDGE: That's a great summary. Thank you, Judge Rosenberg. That's exactly what I was focused on.

CHAIR ROSENBERG: And I assume that everything else is highly satisfactory to you?

MR. PARTRIDGE: I don't have enough time to flesh out the rest of it, but the key focus here is unsupported claims, absolutely.

CHAIR ROSENBERG: Yeah. Okay. Let's see if our reporters have any questions. Rick?

PROFESSOR MARCUS: Mr. Partridge, this is Rick Marcus if you can hear me. Basically, the same question I asked the previous witness. Is there any reason why under (c)(4) you can't explain to a judge or the defendant can't explain to a judge why we need what we need soon, and, if that's true, then, if it can be done, then why isn't it exactly what you want instead of something that is a straitjacket maybe for judges who have cases that don't fit the mold of some of the other cases?

MR. PARTRIDGE: Well, I view really (c)(4) more as a discovery mechanism, the sharing of information. While I don't think in order to advance a claim, whether it's a standalone independent claim or an MDL, it's not a straitjacket, I'd say, Professor, to require a basic statement of the nature of the claim, the product involved, and a compensable injury.

CHAIR ROSENBERG: Why is it viewed more as a discovery? Subsection (6) speaks about a proposed plan for discovery. Subsection (4) doesn't speak about discovery; it speaks about exchanging information. You usually don't talk about exchange information in the context of discussing discovery. Subsection (6) is discovery, a plan for discovery. So

why is there confusion over that?

MR. PARTRIDGE: Well, I guess I view exchanging information more of in the frame of a discovery obligation than I do the obligation to actually state a 12(b)(6) claim. I think there should be an obligation if you're going to advance a claim to actually state the basis of the claim, identify the product used, and identify a compensable injury.

CHAIR ROSENBERG: Okay. Let's see. Who else had a question or comment?

MR. PARTRIDGE: And this is not to handcuff plaintiffs. This is -- what I wanted to share with you all is how complicated the decision-making process is for a corporate defendant when there are a large number of unsupported claims and the existence of those claims delays and can frustrate settlement. That's my point.

CHAIR ROSENBERG: Okay. Thank you.

Judge Proctor? Yeah.

JUDGE PROCTOR: Yeah. This is Proctor. Let me first thank you for the substantial contributions you've made in this area for years now. I always appreciate you speaking and feel like I always take something helpful away from it.

MR. PARTRIDGE: Thank you, Judge.

JUDGE PROCTOR: I wanted to start there.

Second, I don't think I'll surprise you by asking this question. MDLs are supposed to focus on global issues, not individual issues. There's many things that plaintiffs don't like about that approach. Their clients don't get individual attention with respect to certain specific, discrete, unique claims or theories they may present.

How do we navigate a path where we can focus in on these unsupportable claims, unsupported claims, but not grind things to a halt in terms of the transferee judge handling these cases? And I know you've given thought about it. I'll just be glad to hear you out on that.

MR. PARTRIDGE: Yeah, I think it is not very complicated. And, actually, unsupported claims eventually do get handled in the system. They're unfortunately years and years down the road. And I will tell you having worked for companies and represented companies that wished to settle MDLs, I have not represented a single company that once a decision is made to try to settle an MDL wants it to be dragged out. They want it to move as quickly as possible.

So requiring a rule that each individual

claimant needs to state a claim upon which relief can be granted I don't think is too significant a burden. I would rather see it done at an earlier stage in the case rather than at a later stage in the case. I think it would save all the parties time, save the court a heck of a lot of time and management headaches, and I think, frankly, it would help promote swift and efficient settlements. That's my experience.

CHAIR ROSENBERG: Andrew?

PROFESSOR BRADT: Perhaps I'm belaboring the obvious, but stating a claim is not the same as supporting a claim.

MR. PARTRIDGE: Well --

PROFESSOR BRADT: What's required is to state the claim and then the support of the claim generally comes later in the process. And so I guess my question for you is, why should we impose an additional burden on plaintiffs simply because they may have had the misfortune of being injured in the same way or allegedly injured in the same way as many other people that's not imposed on plaintiffs in one-off litigation?

MR. PARTRIDGE: You're not imposing any burden on MDL plaintiffs that the Federal Rules don't

already impose on every plaintiff joining a lawsuit.

PROFESSOR BRADT: Is it your experience that Rule 26(a) on mandatory disclosures are not followed in these kinds of cases on the plaintiff side and the defense side? I guess one question is 26(a) seems to be lost in the shuffle here. And in your many decades of litigating, I guess I'm wondering the prevalence with which both plaintiffs and defendants automatically disclose the kind of information mandated in 26(a) in MDLs.

MR. PARTRIDGE: You know, my greatest fear in joining this session today was that I was going to get a Federal Rule specific question. I would defer more to my outside counsel to help me answer that question. I, frankly, have been out of touch with that level of detail for quite some time.

PROFESSOR BRADT: That's fine. I'm just trying to understand in terms of this vetting situation the degree to which MDLs are/ought to be treated differently from other kinds of litigation. And I appreciate your points because I think the questions you asked and we're discussing in your testimony are very important to understanding why there would be a problem with unsupported claims, as you've described it, being parked in the litigation,

even if they're not ultimately paid out as part of settlement, that there's an array of concerns. I'm just trying to figure out the best way to think about that. And so I didn't mean to ambush you with respect to the rules.

MR. PARTRIDGE: No, that's okay. If Rule 26 provides a vehicle to solve the problem that I'm concerned about, it hasn't been employed correctly then because it hasn't solved the problem.

PROFESSOR BRADT: Okay. Thank you.

CHAIR ROSENBERG: Okay. All right. Well, if there's anything further -- if there's nothing further, thank you, Mr. Partridge. Thank you for braving the civil procedure world and subjecting yourself to professorial questions like that.

MR. PARTRIDGE: Thank you. I appreciate your time. Thank you, Judge.

CHAIR ROSENBERG: Okay. Thank you.

I believe Erin Copeland is not with us. Just to confirm that, I'll wait a second. Yeah, I think due to some weather issues. And I understand Michael McGlamry is not with us, but Carolyn McGlamry is with us.

MS. MCGLAMRY: Yes, that's correct.

CHAIR ROSENBERG: Okay. Great. Okay. Good

to see you. Yeah.

MS. MCGLAMRY: Nice to see you as well. And thank you all. I know this is a bit unconventional, but my law partner and my father, Mike McGlamry, was admitted into the hospital last night and he's still there. So, as of this morning, I was asked to present his comments on his behalf, so I will do my best to do those justice.

CHAIR ROSENBERG: Well, thank you for doing that, and we're sorry to hear about your father. We hope he's okay.

MS. MCGLAMRY: Thank you.

So Mike has been with Pope McGlamry in Atlanta practicing primarily in class action and mass torts for the last 25 years. He served in MDL leadership roles and has been appointed as class counsel over 50 times. His comments and the information he submitted was directed largely at the issue of selection of plaintiffs' leadership counsel in the context of the proposed rule.

So defendants come into the MDL with their chosen counsel in place and courts do not and shouldn't dictate who represents the defendants. And even though plaintiffs have individual counsel going into a consolidation, the court has to appoint a

permanent leadership group if that's going to happen because, obviously, there's too many counsel to represent everyone in those situations.

Potential leadership differ in skill, history, their, you know, connections or relationships with opposing counsel, their caseload, you know, political involvement, reputation, kind of all of those aspects. And since MDLs typically last a very long time, several years, you know, it is important to spend a little bit of time on the front end to put together a complete, you know, diverse and appropriate plaintiffs' leadership team. You know, I can't really imagine anyone who has served in a permanent MDL leadership position who, you know, suggest or recommend that you do it any other way. You've got to put some thought obviously into who's going to take on such a role.

Some of the practical problems, until you have permanent leadership in place, there's constant and intense pressure, manipulation, you know, negotiations, kind of alliance-building that goes on both in public and behind the scenes. Some of this, you know, I've tried to catch as many other speakers today as possible and I know some of these things have been raised before. And so it can create a conflict

and how can you adequately represent the interests of all plaintiffs if your decisions can affect whether, you know, you're selected for permanent leadership and, you know, do you create, you know, kind of a dichotomy that's created there.

An interim position requires the same time, effort, and expertise as a permanent position yet requires that lawyer to also lobby and negotiate for a permanent position at the same time. It also involves a limited number of people, whereas a permanent leadership team usually encompasses a larger number of attorneys, and those individuals eventually appointed to permanent leadership who are not part of -- you know, who are not the initial leadership or part of a smaller initial leadership coordinating or interim counsel don't have the benefit of having been involved, knowing what all has gone on behind the scenes, what took place, what decisions were made and why, and that can lead to ultimate disagreement and kind of lack of consistency in the leadership as the litigation moves forward.

You have to have permanent leadership on the front end really if you want the rule to be fair. The rule contemplates that the court may designate coordinating counsel before appointing permanent

counsel to assist in preparing a report to the court before the conference and assist at the conference, and (c), you know, (1) through (12) and Rule 16 set out the potential issues to be addressed and/or decided and, you know, include some of the most critical decision-making for the litigation.

And I realize that the rule doesn't require that all these issues be addressed in the report, but, obviously, the expectations are that they will or likely will. Otherwise, there wouldn't be a need to identify or address them in the proposed rule.

The other fairness issue, most of (c)(1) through (12) should involve permanent counsel, but some issues really demand it. To me, Mike, (c)(6) in particular addresses a proposed plan of discovery, and that's undoubtedly, at least on the plaintiffs' side, one of the most critical decisions in an MDL. A proposed plan of discovery can include a lot of decisions about scope of discovery, bifurcation, bellwether selection, you know, timing, sequencing of discovery, scheduling, use of special masters, kind of all of those pieces, and to do that prior to having the permanent leadership in place can create issues with the consistency of leadership over the course of the litigation.

In every MDL that Mike has been engaged in, any discovery plan takes months to envision, develop, put together, organize, you know, get the buy-in and to obtain that buy-in from the plaintiffs' leadership and obviously coordinate it with defense counsel and so, you know, the fairness to plaintiffs in the MDL or plaintiffs' leadership in empowering coordinating counsel with the authority to set in place or kind of dictate that plan of discovery because there's really no going back once it's in place.

And so this is kind of of equal concern for (c)(5) and (7) for consolidated pleadings and pretrial motions, which are critical issues that can and should take, you know, months of leadership to kind of envision, discuss, draft, negotiate between the parties. And the same is also true for (c)(9) in addressing settlement, which I know that's been a topic of conversation for the last several people, and, you know, there is no --

MS. BRUFF: Ms. McGlamry, I'm sorry to interrupt. I'm so sorry to interrupt, and I want to reiterate what Judge Rosenberg said earlier. Thank you so much for being here. If it's okay with you, I'm going to check with her and see if she'd like to open the floor for questions.

MS. MCGLAMRY: Okay.

CHAIR ROSENBERG: As long as you've covered substantively the topics and, of course, we've read the comments in the proposed summary of the testimony.

So let me see if any of our reporters have any questions for you. Let's see. Rick doesn't and Andrew doesn't. Okay. And then any Committee members? Okay. So why don't we give you back a minute or two to make any final remarks and make sure you've been able to cover everything.

MS. MCGLAMRY: All right. Thank you. I appreciate that. I would, of course, try and answer any questions as best I could, but I can't guarantee that I would have all of his knowledge.

CHAIR ROSENBERG: I'm sure you would do just fine. No worries about that.

MS. MCGLAMRY: Maybe.

So I guess, to kind of wrap it all up, you know, whether a case is ripe to begin settlement discussions, you know, the act and kind of art of settlement, you know, there are a lot of nuanced, complicated kind of decisions that go into that and, of course, have heard what you all said, that it's really just whether those discussions can happen and that's obviously just one of 12 points. But I think

it's just kind of the general issue of, if it goes too far down that path without involving permanent leadership counsel for plaintiffs, that that's a disadvantage of not having permanent leadership in place.

And so, to sum it all up, you know, agree that it's proper and makes sense to have a framework for an MDL transferee court in managing an MDL. It's a long process, it deserves that. But, you know, there are some of the aspects of this rule that, you know, could create issues on the plaintiffs' side with having interim counsel go too far with some of the items, you know, espoused in 16.1.

So thank you for letting me make the comment on Mike's behalf. I do appreciate it and the lack of too many questions that I may or may not be able to answer, thank you.

CHAIR ROSENBERG: Well, we're very appreciative that you stood in for your father, and please do again convey our best wishes to him. So thank you so much for your helpful comments.

MS. MCGLAMRY: Thank you so much.

CHAIR ROSENBERG: Okay. So we're going to hear next from Ms. Gorshe on 16.1 as well.

MS. GORSHE: Good afternoon. I'd like to

thank the Committee for this opportunity to be heard on Rule 16.1. I do support the proposed rule as a method to provide guidance to the courts and the parties, and I appreciate the considerable effort by the Committee to improve the MDL process through the implementation of a rule.

By way of background, I've been practicing for 25 years, of which just over 20 of those years have been primarily in the mass tort arena related to pharmaceuticals and medical device litigation. Over the course of those years, I've relied on the *Manual for Complex Litigation* or in most recent years in the annotated manual that's published.

During this time frame, I've had the opportunity to participate at varying leadership or non-leadership levels in consolidated mass torts. Most recently, I was appointed by Judge Conte as part of the three-member settlement committee holding the title of Vice Chair.

First, I wholeheartedly agree that an initial MDL management conference should be scheduled in the transferee court as soon as practicable. However, Rule 16.1(b) contemplates designating a coordinating counsel in order to jump-start the litigation. The coordinating counsel is to prepare an

initial report for the court with coordination with the defense counsel.

However, as the comment reflects, the contemplation of a coordinating counsel is a plaintiff-side issue and thus is creating a two-step approach to the leadership of the mass tort. The interim coordinating counsel may not be appointed to the final leadership. We saw that in the CPAP litigation. Only one member of the interim counsel was on the final leadership in a lead counsel role, although not all members of the interim counsel were appointed to the overall leadership group.

Leadership in the mass tort arena is important and it's best served when there exists a continuity related to who is tasked with the overall representation of the plaintiffs. There's strategic planning that often is occurring by coordinating plaintiff groups in order to advance the litigation. We want the initial rules and orders that are implemented not to have to be revisited later after final leadership is approved. The rule contemplates -- or the comments provide the court with great guidance on how leadership pay be appointed. However, when it comes to coordinating counsel, it lacks that same instruction.

When plaintiffs are consolidated in a mass tort, the leadership may be formed in a number of manners. The court can chose a structure that they find most advantageous and efficient for the particular litigation. Consolidations may have tens of thousands of plaintiffs involved or just several hundred. Conversely, that means there could be hundreds of law firms in one litigation and, in the next litigation, it is a small number of law firms that are participating.

Going on with the contemplation of the coordinating counsel, in this context, they are working with defense counsel to develop what is initially going to be presented to the court. Rule 16 has a number of items for that initial conference that would be addressed, which include discovery, settlement, as well as the schedule for pretrial motions, consolidated pleadings. Many of those items are best addressed once final leadership is appointed by the court so that there is that continuity of the case that is progressing.

Further, part of that first report also contemplates how the leadership is set up. I dare say that there's an implication that defense counsel has the opportunity to speak how the leadership structure

is set up. As a plaintiff's counsel, I do not have the opportunity to tell a defendant whom represents them. Likewise, I would prefer that defense counsel, although I do get along with a number of defense counsel, I would rather they not have a say in who is in leadership. I'd rather have that be determined by the judge as presented who is involved in the case and familiar with the litigations and the nuances of the litigation and quite perhaps who represents the greater numbers of plaintiffs within that litigation.

The rule also contemplates these are all front-end items for that first status conference. Just like an individual case, because I do also represent individual cases, there are a number of pretrial orders that -- or I shouldn't say pretrial orders -- status conferences during those individual cases as the case develops where we apprise the court. That also happens in an MDL. Litigation flows and changes over the course of the litigation and there needs to be, when leadership counsel is appointed on the plaintiffs' side and they're able to coordinate throughout the litigation with defense counsel, there is a continuity so that later on those matters, such as discovery, that have been thought out can be addressed at a second or third CMC before the court.

MS. BRUFF: Ms. Gorshe, I apologize for interrupting. It might be a good time to, if you can summarize the rest of your testimony, we can give it back to Judge Rosenberg for questions.

MS. GORSHE: In summary, I agree that the rule is important and there are pieces of the rule, but some of the pieces are just a little premature prior to leadership counsel being addressed.

CHAIR ROSENBERG: Okay. All right. Thank you so much.

From our reporters?

PROFESSOR MARCUS: Thank you. I want to follow up on something we just heard from, I'll call it, the defense side. You're on the plaintiffs' side in mass tort litigation. I'm guessing that you gather information regarding your clients as you are preparing to file suit. I'm wondering, would that put you in a position to provide the kind of information that Mr. Partridge wants? And what are the reasons why you would argue you shouldn't have to provide that to him? (c)(4) says the judge can direct how to handle these things. What are the reasons you might offer to a judge on why you shouldn't provide it to the other side, assuming you've gathered it before filing your lawsuit?

MS. GORSHE: Okay. First, let me -- hopefully, I get all these addressed, Mr. Marcus. I do investigate a claim before I file it. At times, there are times that I do need to file a case prior to obtaining medical records on behalf of a plaintiff because of a impending statute and I don't want to run afoul of the statute of limitations in a particular state. So I will file based on the plaintiff's representations to me early on in the litigation while I'm still collecting.

And let's be clear, I do collect medical records early on, but not always is there a response from a pharmacy or a doctor's office in the manner that I would like them to produce to me so that I can have all of that at the time the complaint is filed.

Addressing that, as soon as an MDL is formed is not always efficient because oftentimes an MDL is formed very expeditiously by the JPML and records may still be collected. I believe it's important to come up with a process for sharing that information and I support developing a process for that information, but need it be addressed at the first case management conference? I don't think so. I think it could wait until leadership is appointed because there's a multitude of ways that it can be shared with the

defendant. Does that answer your question?

PROFESSOR MARCUS: Yes, thank you.

CHAIR ROSENBERG: Any other comments or questions? From any of our members?

Okay. All right. Well, thank you so much for your time and for your comments.

MS. GORSHE: Thank you.

CHAIR ROSENBERG: We will next hear from Ms. Hampton regarding 16.1.

MS. HAMPTON: Thank you, Judge Rosenberg, and thank you to the Committee. My name is Rachel Hampton. I'm an associate at Sidley Austin. I'm here to talk about the proposed Rule 16.1.

I'm offering my perspective as someone who's more junior in their career and as someone who's less experienced with MDLs. I became a member of the Bar in 2017. I clerked for a federal district court judge and an appellate judge, and then I joined Sidley full time in 2019.

Nonetheless, I've had the opportunity to study MDLs and work on MDLs both for my corporate clients and through my participation in LCJ. And, you know, the chance to participate today with the Advisory Committee for a civil procedure nerd like myself is just a dream, so I appreciate the

opportunity to speak here today.

I'd like to make two points. First is the importance of rules particularly to new litigants and then second is how a junior attorney may read the proposed Rule 16.1. So turning to my first point, the importance of rules particularly to new litigants, this is probably an obvious point. We all understand that the Federal Rules guide litigation and govern the profession, but we may forget or undervalue the importance of rules to new litigants.

You know, I remember learning in my first year of law school the way in which civil rules work, and that knowledge has empowered me to really jump into my cases and manage my caseload from the get-go because it sets the expectations and helps me predict what could happen in cases.

So I've been surprised as I learn more and get more exposure to MDLs that this sort of road map in the rules does not exist and, it's only been through practice and for me through my work with Alan Rothman, who is testifying next, that I've learned really anything about MDLs, and so I do think the work of this Committee is important for that reason.

But that does bring me to my next point, which is how a junior attorney may read the proposed

Rule 16.1. And before I do that, I'll just say, you know, in reading the proposed rule and hearing members of the Bar express concern over some of the enumerated sub-topics, I do think the Committee should exercise some caution in its use of "may" and including sub-topics that the Bar does not agree with, you know, I think, for example, in highlighting settlement because I think including certain enumerated topics will mean those issues work their way into more cases than intended and, indeed, become the practice in all MDLs.

And I think, in reviewing the transcripts and comments, one thing that stuck out to me is there seems to be a sort of suggestion from the Committee and those submitting comments that, again, these are all suggestions and the parties can sort of contract around enumerated topics as they litigate cases. But my perspective is that this codifies insider baseball into the rules and that, again, including certain enumerated topics in the rule will mean those topics become the practice. And so this is where I think the junior attorney experience comes in.

So, as a junior attorney, if I had to look at the rule and be the first-round drafter on a status report, for example, I might go down the list and draft something on each topic. And a more informed

practitioner might stop me and say, you know, no, we don't want to get into this topic for X, Y, Z reasons, strategic or otherwise. But, for me, if it's in the rule and for someone who doesn't know better, I think there's going to be a temptation to include it for the sake of including it, right? We're taught in law school to be thorough and check all boxes.

You know, similarly, I clerked for a federal judge in the district court, and if I'm a law clerk and I'm helping the court as to what to do during the initial conference and assuming we're both new to MDLs, I might say, you know, Judge, there's 16.1 and the parties didn't address everything in the rule, so you should ask them about it, and that might force the parties to get into something they might not want to, and so you can see how these sort of clues aren't going to be just guideposts. They might push the practice in that direction. So I think put differently, it'll put parties on the defensive to explain why not to do something the way the rule prescribes. So, again, why I think the rules are important, I think it would also be important to include a very carefully prescribed set of topics.

Last point I'll say is, you know, similarly, my colleagues have expressed concerns about early

vetting, and I do think it should give the Committee some pause if the rule doesn't address something that should be addressed because I think similarly, if it's not in the rule, it won't get addressed or the same attention because, in that situation, the thumb's put on the scale in a different direction and it's going to require you as the attorney to go on the offensive there.

So, with that, I welcome the Committee's questions, and I really thank you for your time.

CHAIR ROSENBERG: Well, thank you, Ms. Hampton. It was very helpful, and we often have asked the question when we have been drafting the rule what would a new attorney say or what would a new judge say, so hearing from someone who has less experience, although you were very articulate and well versed, is most appreciated. So thank you.

Andrew?

PROFESSOR BRADT: Thank you very much. And as somebody who was a law firm associate not too long ago and who remains a civil procedure nerd, I both empathize and appreciate your perspective here, so thank you for being here.

I guess my question is a broad one, and that is, you know, you referred to MDL being a kind of area

where the Federal Rules don't provide the sort of road map that you would like to see or that you think the Federal Rules provide in non-MDL cases.

I guess my question, though, is that even if the rule is somewhat overinclusive with respect to some cases, doesn't the rule go some direction towards taking what you called as inside baseball and making it a little more apparent? Absent the rule, you're kind of left even more at sea to look at the manual or find best practices guides. For somebody who's a young or mid-level associate, isn't the existence of this rule and the list of what's in it an improvement with respect to giving you some sense of predictability?

MS. HAMPTON: I agree with you, Professor Bradt, and I think, you know, with one caveat and I think, again, that having the road map is super helpful. I think, again, what has struck me in reading the comments and listening to the transcripts is there's sort of -- you know, I view you all as the insider baseball and, you know, sort of carving out exceptions as we speak like, oh, maybe this language, you know, doesn't quite say that, but can't you argue that.

And so, you know, those little, you know,

trade-offs and discussions I think aren't getting -- or to the extent they're not codified in the rule themselves, I think that's where I'm just identifying, you know, that'll be lost to a new litigant. But I agree, having a road map is helpful.

CHAIR ROSENBERG: And Rick?

PROFESSOR MARCUS: I think this is in keeping with what Andrew just said, but as you speak of the rule -- and this is a long-term interest of mine -- do you read the Committee note as well, and in this instance, does it provide context and refinement that seems to you to help the new initiate figure out what to do under the rule?

MS. HAMPTON: I think, for better or worse, the Committee notes get somewhat disregarded, right, when you're looking right off the bat at the rule. The text of the rule --

CHAIR ROSENBERG: Oh, that is terrible news for Professor Marcus. You might want to dial that back.

MS. HAMPTON: Well, I will say, of course, you know, to the extent we're debating, you know, certain provisions and then trying to carve out exceptions, you know, the guidance that's provided can be helpful. But, again, and I'm, you know, trying to

think of an example, but, you know, I think these discussions we're having through these hearings, you know, not all those discussions are apparent in these Committee notes. And so, again, while the Committee notes definitely provide context and exceptions and ways to think through the issues, you know, I think it's definitely helpful to make sure they're thorough on all aspects.

CHAIR ROSENBERG: Anyone else? Okay. Thank you so much, Ms. Hampton. We really appreciate your perspective.

MS. HAMPTON: Thank you.

CHAIR ROSENBERG: Thank you.

And from the same firm, I guess that was coincidental in terms of how we organized everybody, but you're going back to back. Alan Rothman, who will also speak on 16.1.

MR. ROTHMAN: Thank you, Your Honor. And I want to thank the Committee for the opportunity for this discussion today and for all its work. I think I would begin with wholeheartedly endorsing Judge Rosenberg's view of Ms. Hampton as both articulate and well versed. She's extremely modest as well.

But my name is Alan Rothman. I'm a partner at Sidley Austin. I've had the experience over the

past two decades and maybe a privilege to be involved in more than two dozen MDL proceedings and a wide variety of industries for the defense. My remarks today will focus, as Judge Rosenberg mentioned, on 16.1(c)(4), but, again, specifically, as has been addressed by some others, I think I can say this this afternoon for those on this time zone is addressing the prompt for MDL judges with respect to the basic information that should be addressed at the outset of an MDL proceeding in (c)(4).

I want to be mindful and try not to rehash the comments that have been said before. I want to try to be reactive. I have over the course literally over the last hour or two tried to organize my remarks to helpfully be responsive and reactive to what I view as six categories of questions. Professor Marcus asked why is an exchange of information in the proposed rule not sufficient, to which Judge Rosenberg also commented why is it different than -- it is different than subsection (6) or should be regarded as different. Judge Proctor mentioned making sure that litigation should not grind to a halt. Professor Bradt asked the civil procedure question with respect to Rule 26 and also why is this different than one-off litigation.

We've also discussed over the course of the day and throughout how do we justify a rule in a limited number of cases, why is use of information about use and injury insufficient, and, finally, the ultimate question Professor Bradt which has mentioned about empirical data relevance to MDL proceedings that would frame it.

Just to try to frame this, and I've been thinking long and hard over the past few weeks, what can I add to the discourse that hasn't already been addressed. My only analogy that I could hopefully turn to was baseball. I know we talked a little bit in the last colloquy about baseball. I am not going to talk about *Field of Dreams* and about, if you build it, they will come. The agenda books are replete from the very almost outset with that reference.

But I want to try to frame what we're really talking about when we talk about exchange of information, why it's critical to state what exactly does that mean in the rule. What comes to mind and, again, this may be a little bit of yesteryear of baseball, but thinking about the new season is how people would gain entry into a stadium. There was a ticket. There were two basic pieces of information. Not a QSR code, a hard-copy ticket that had two basic

pieces of information: are you at the right stadium and do you have the right, believe it or not, home game number, which was actually on if this is -- if it's April, so it probably says in those days, I guess it was one, two, three, four, five, depending where it was.

People would wait online for a member of the stadium personnel at the turnstile to actually look at that ticket with only making sure that that basic information was there, stadium, game number. I don't care where you're sitting. Are you sitting in a box seat in Section 110, in Seat 22? That's not what's there. Once you have satisfied that limited information, you come into the stadium, you then figure out with the usher where am I supposed to sit, do I get to sit up front, do I get to move along, where will I move around within the game.

I think it's an apt analogy because what we're talking about here is (c)(4), and at the outset of an MDL proceeding, that could have tens of thousands of individuals, is do you have that basic information that's in the possession of plaintiffs, product used, product exposed to, that's one, exposure use we'll call one, and a subsequent injury. That's it. Limited exchanged information. When were you

injured? Was it possibly caused by the product exactly? Is there an SOL issue? That you'll deal with in PFS discovery as you move along. That's why it's there.

I know my time is nearing its close, so I want to try to address as many of the issues I flagged early on in these remarks, but certainly welcome questions from the Committee or if the Committee wants to address those or any others.

I think the most important point to keep in mind is Professor Bradt's point about how is this different than one-off litigation. I would submit, as the Supreme Court made clear in Gelboim, you really have to view an MDL as individual actions and those individual actions, how would I litigate an individual action. Most likely at the outset you will know whether the product was used by the plaintiff, whether the plaintiff sustained a subsequent injury.

Again, I want to be mindful if the Committee would prefer that I go through some of those questions or the Committee has other questions, happy to defer to the Committee.

CHAIR ROSENBERG: Okay. Thank you. Let me turn it over to our reporters. I'm just going to clarify. So Andrew's last name is Bradt, so it's

Professor Bradt.

MR. ROTHMAN: Professor Bradt.

CHAIR ROSENBERG: Yeah. So just so everybody knows that.

MR. ROTHMAN: I apologize, Andrew.

CHAIR ROSENBERG: So Professor Marcus.

PROFESSOR MARCUS: Let me follow up on where you end -- can you hear me?

MR. ROTHMAN: Yes, I can.

PROFESSOR MARCUS: Okay. I'm following up on where you ended. In an individual action, you would know those things right up front. They're not in the complaint, right? We don't require that medical records or other things of that character be attached to a complaint, so when and how would you get them in an individual action? And this goes back to Andrew's question in part about initial disclosure under Rule 26(a)(1). That's the pull-a-rule-out-of-your-pocket example because it doesn't sound to me from what I know about individual litigation that you've got to put that right in the hopper at the beginning. And I'm wondering, MDLs are different because there are a whole lot of them or a whole lot of claimants or in MDLs, we should make those -- we make everybody put that in the hopper, even though we

don't in individual litigation.

MR. ROTHMAN: Yes, Professor Marcus, the suggestion is not that it go into the complaint, no different than any other litigation, but that at a reasonable time in looking at the Committee's proposed Rule (c)(4), the how and when, that's discretionary. Is it 60 days, is it 70 days, is it two months, but it should be at the beginning.

But the focus is the exchange of information because, in a one-off case, I can pose the question to counsel right up front on a one-to-one basis and say, you really want to pursue this case, you have to show me a chit, an insurance record, something that shows that the individual took the product. Not asking for it in the complaint. Show me an insurance record, a doctor note, something that sustained an injury. It would make no sense to proceed, but because there are so many cases, that's where this issue has become, well, exactly when do you provide it, but we have to come back to the Gelboim model, and to answer it, I apologize again, Professor Bradt, is the Rule 26 question. What happens in an MDL? In my experience, those are either waived by the parties, dispensed of, or dealt with in a PFS in most of my experience.

CHAIR ROSENBERG: Andrew?

PROFESSOR BRADT: Thank you for addressing this question. And thank you for your -- I'm a -- as a self-described civil procedure nerd, I also appreciate your efforts on a word from the panel.

MR. ROTHMAN: Thank you.

PROFESSOR BRADT: Setting that aside, though, I've heard a lot of complaints from folks typically on the defense side that plaintiffs are not exchanging information early. I've not heard anybody say that defendants in these cases are engaging in pretrial disclosure under Rule 26(a), and I've been led to understand that one reason for that is the defendants would prefer to wait until the discovery process to reveal the information that's going to ultimately become relevant in the litigation.

And so I guess the question is, is what's good for the goose good for the gander here and are defendants participating in the exchange of information contemplated in a one-off litigation, or are they too able to hold back in MDL cases?

MR. ROTHMAN: So thank you for that question and I appreciate that. I think the answer to that question is there is different timing, and let me explain why the timing is different, because what we're talking again in (c)(4) is this early very, very

limited information that will inform the parties as to whether or not this case can proceed further. Will it backlog the system that was discussed earlier today if there are too many plaintiffs and some, even a few, do not have the basic information. That creates a chain reaction in the system because there's a bellwether process whereby bellwethers need to be selected. And if this individual did not even ingest the product or did not sustain a subsequent injury, at that point, it has to come out of the system because the other 10,000 who are trying to find out if they're going to be in the box seat or in the mezzanine or some other section will not have their opportunity.

Will defendants provide that information about claims in the form of a defense fact sheet, which is commonly employed in an MDL? That is in the bucket of discovery because (c)(4) again -- I know it sounds one-sided because I will be candid with the Committee, it has to be one-sided to address this basic issue of we'll call it unsupportable claims, claim sufficiency, what is bottlenecking the system so that it imposes costs on clerks of the court, that they have to deal with complaints, with notices. It clutters email boxes when someone files a case because there are notices of appearance. There are withdrawal

of counsel. There are Rule 25 suggestions, again, all of it civil procedure harbors. So that's my answer. There's a time and place, but that's not the --

PROFESSOR BRADT: Have you ever been in an MDL where a case was selected for a bellwether that the plaintiff had fell into this category of never having taken -- never having used the product or something like that?

MR. ROTHMAN: Never having been exposed to a product where there's no evidence as it moves along that it was a particular defendant's product, that has happened. Sometimes it happens in the context of generic versus brand name MDLs. It could happen.

PROFESSOR BRADT: But those aren't the kinds of cases that we're talking about where the person has just never taken the product and is showing up because there's an MDL?

MR. ROTHMAN: No. Correct. But there are some cases where that will happen where, again, maybe it was the issue dealt -- I believe it was addressed this afternoon where plaintiffs' counsel files a case and, yes, the time of the complaint to avoid, whether it's an SOL or otherwise, doesn't have that piece of information. But remember, under the JPML process, it takes at least 45 to 60 days from the time that MDL

petition is filed until an MDL is created, there's plenty of time to get that basic information about whether it's there, and sometimes it turns out that, yes, and, again, defense bar is trying to assemble some figures and some empirical data. But, yes, the plaintiff simply just did not ingest the defendant's product and was not exposed to the defendant's product. That does happen in my experience.

CHAIR ROSENBERG: Any further comments or questions?

Okay. Thank you so much, Mr. Rothman.

MR. ROTHMAN: Thank you.

CHAIR ROSENBERG: We will here now from Mr. Cohen, and he is going to address privilege logs.

MR. COHEN: Thank you. My name is Dave Cohen. I'm a partner in the firm Reed Smith, and I'll give you a little bit of background about myself and then quickly get to the issues.

I've had the privilege of practicing law for 40 years now since I graduated from law school in 1983 and I've been a litigator that whole time, so I've seen great metamorphosis in discovery. When I was a young associate, I was working on cases looking at hard-copy paper documents and there was no such thing as email. And I watched the age of e-discovery coming

along. In 2005, I co-founded an e-discovery practice group at K&L Gates. It's now K&L Gates. And since 2012, I've been running an e-discovery practice group at Reed Smith. We currently have 80 attorneys, of whom about 60 work full time on discovery in terms of document review and preparing privilege logs. And I've been doing this for a while now, mostly focusing on e-discovery, so I have a lot of experience with privilege logs.

Three main points that I want to emphasize today, one is that for big cases, the existing system does not work very well. We spend a small fortune -- I should say waste a small fortune -- in creating privilege logs in large document cases. It costs our clients a lot of money. My back-of-the-envelope estimate is that we probably spent over $4 million last year or charged clients over $4 million for privilege log preparation, and none of that advanced the resolution of any of the matters that our clients had worked on, so the system's broken. And I'll get into more detail on all three of these points, but that's point one.

Point two is that here are alternatives to the present means of privilege logging which could save a lot of money without hurting the administration

of justice at all. In fact, it would improve the administration of justice.

And my third point is that the world is changing technologically with artificial intelligence and the ability of AI to help identify privilege documents, and we need to be prepared for that change.

I think all three of these points support the amendment that is being considered, but I would say, if anything, it does not go far enough. I was pleased when the 1993 amendments came along and the rules comment to the new amendments made the point that while privilege logs might be appropriate in cases with only a few documents, in larger cases, they may be unduly burdensome. That was 1993, and yet judges completely ignore that, and the working assumption going into any big case is that the withholding party will prepare document-by-document privilege logs regardless of the fact that that costs a small fortune in particular cases and doesn't really advance resolutions.

And I know I've seen a lot of the comments that have been submitted by members of the plaintiffs bar or usually the requesting parties. They don't really see this burden. They don't see how much money we're spending because, under the existing system,

it's always the producing party that spends the money.

But these detailed logs that we're spending all this money preparing don't really help. In some ways, they make the problem worse. I am aware that sometimes clients overdesignate privileged documents, and one reason for that is there's so many of them and there's so much time that goes into it, we have to go out and hire temp attorneys to go through 50 documents an hour on relevance and privilege and they make quick decisions. They're not the most highly trained attorneys. The idea is, oh, we've got to get this done. We've got to make these privilege determinations. We've got to get the log out. That's where the money is spent instead of focusing on what's really important, which is really making sure that the decisions are made accurately, and most of those decisions can be made at a category level.

There's little to be gained in logging documents that are already being produced in redacted form because parties are already getting that information. There's little to be gained in trying to write individualized descriptions for every document when metadata logs which can be prepared for close to free give the other side lots of bases for looking at documents. And there's little to be gained in making

repetitive entries of email chains or these days Teams messages. That's a lot of wasted time and effort.

And having more communication between the parties, earlier communication, and looking at creative alternatives to traditional logs is really the way to go, so we applaud the proposed amendment and, if anything, maybe it doesn't go far enough.

So let me stop there just in case anybody has any time or any questions that I can address.

CHAIR ROSENBERG: Rick?

PROFESSOR MARCUS: I'd like to follow up with something that invites you with your very extensive experience to reflect on things we've been hearing. Some of them are from your, I'll call it your side that there is a huge amount of effort spent to very little effectiveness. Part of the reaction one might have is, well, there's two tasks. Task number one, identify the items among responsive items that can arguably be withheld on grounds of privilege, and then task number two is make a list or a log of them in one way or another. And is it true that task number one is a snap and task number two is the big problem?

From the other side, often there are assertions that some on defense companies CC:

somebody, the assistant general counsel, on every communication and so there is what you might call on both sides mud-slinging in the sense that some on the defense side say, oh, the plaintiffs are just using this as a club to make us pay up and settle a case for big bucks. How should we approach this since we're sitting here without inside information on either side, inside baseball or anything else?

MR. COHEN: Right. So, yeah, it's certainly not true that all the time goes into privilege logs. More time goes into making the privilege determinations. In today's world, we have to look at them on a document-by-document basis. But then, once you've made a privilege determination, a logging process could be almost free if we were allowed to rely on metadata logs in the first instance. And that doesn't stop the other side from discovering if calls have been made improperly. You know, I think that in exchange for not having to prepare more detailed logs than metadata logs that the producing party should be willing to sit down with the opposing party, pick some documents off the log. Let's pull them out, talk about them in detail. Let's make sure that we're making these decisions correctly, make sure you have confidence in that.

You know, we know with the magic of sampling large populations of documents you don't have to sample that many to determine if these judgments have been made properly or not. You know, I took some statistics courses and have used some statistical experts, and even with an infinite population, if you get --

PROFESSOR MARCUS: Can I interrupt --

MR. COHEN: I'm sorry?

PROFESSOR MARCUS: -- you with that point? Can I interrupt just with a follow-up question?

MR. COHEN: Sure. Yeah.

PROFESSOR MARCUS: So it sounds to me like you're in favor of some kind of rolling process of interaction concerning designations that have occurred so that you can build on that information as you move forward through completing discovery. Does that sound like a good idea?

MR. COHEN: It sounds like a good idea to me. I like the early and continuing attention to privilege issues because you don't want to get to the end of the road and find out that there's been some issue that requires you now to go back and redo everything.

But I don't think it needs to start with one

party being put under a huge burden of doing document-by-document privilege log beyond a metadata log. You can start with a metadata log. Not have to log redacted documents or every document in the chain and then let the other side come to you if they have some issues with some things or talk about the systemic issues. Was this individual, this in-house counsel acting with his corporate hat on or his lawyer hat on or when was litigation anticipated so that we can decide when it's appropriate to start claiming work product.

So there's some big issues that could be discussed like that up front and then -- and I think, you know, I agree with some of the plaintiffs' counsel that existing procedures don't work for them either, that these logs alone do not stop some improper withholding. So I think really stopping the waste of money on individual doc-by-doc logs rather than metadata logs and putting a small part of that investment into better ways of assessing privilege and discussing privilege would be a big improvement.

CHAIR ROSENBERG: Any other questions or comments? It looks like Joe has a question.

MR. SELLERS: Yeah. So, Mr. Cohen, you sound like a very reasonable guy with respect to this

process. I'm wondering why -- whether the rule as at least I think it's currently proposed has an interactive discussion that's contemplated to start as early as possible and be ongoing between the parties. Wouldn't that address the kind of concerns that you raised? It sounds like there are concerns, as you say, on both sides of the V here about the inefficiencies of some kind of privilege logs and the burden for both sides that, you know, is costly to review, as well as to produce.

MR. COHEN: I think it's an excellent start. I think the problem is the same problem we saw with the '93 comments, will people really -- will that really change anything. And I think, as we saw with proportionality amendments in 2015, proportionality had been in the rules for years, but people didn't start paying attention to it, judges didn't start paying attention to it until the Rules Committee emphasized it more in comments.

So I think that the message needs to be said loud and clear. It's not business as usual. We're not going to start with the assumption that you have to do a detailed document-by-document log. We're serious about relooking at this to reduce burden, bringing back proportionality and being more effective

about it.

So that's why I say I think the rule is good but maybe doesn't go far enough. I think we really need to push judges because, otherwise, we just keep getting back to the same thing where the expectation is a traditional detailed individual doc-by-doc privilege log. That's sort of being viewed by judges as the gold standard and they always fall back on it even though prior rules have said, you know, be more tailored and more creative.

PROFESSOR MARCUS: Can I ask one more question, Judge Rosenberg?

CHAIR ROSENBERG: Yes. Yeah, yeah. Of course.

PROFESSOR MARCUS: Just a follow-up I forgot to ask. Some have suggested we should put some kind of cross-reference in 26(b)(5)(A). And, by the way, that, I think, is where the Committee note you're talking about from 1993 appeared.

MR. COHEN: Exactly.

PROFESSOR MARCUS: Just to call attention to what is now proposed to be put into 26(f) and then Rule 16(b), my question to you is, will that be helpful and, if so, why?

MR. COHEN: Yeah, I think it will. I mean,

I think we need to -- both sides need the ammunition to point judges to to say, you know, this is not the -- this should not always be the fall-back to do privilege logs the old way. The Committee has looked at this and is really interested in enforcing that comment from '93 and looking at new and more efficient ways that don't waste resources and that help us get to the result that we're looking for. So I think that kind of cross-reference to 26(b)(5)(A) would be helpful.

CHAIR ROSENBERG: Okay. Anybody else?

Seeing no other comments or questions, thank you so much, Mr. Cohen. We appreciate it.

MR. COHEN: Thank you very much for your time. I appreciate it.

CHAIR ROSENBERG: Okay. All right. So that brings us to our mid-afternoon break, and we will take a break and resume again at 3:40 with Jennifer Scullion, who will address Rule 16.1 and privilege logs at 3:40.

(Whereupon, a brief recess was taken.)

MS. SCULLION: Good afternoon.

CHAIR ROSENBERG: Okay. Good afternoon, Ms. Scullion. You may take it from here.

MS. SCULLION: Thanks very much. So good

afternoon. I'm Jennifer Scullion. I'm a partner at Seeger Weiss in Ridgefield Park, New Jersey. I'm going to apologize in advance for I will inevitably mess up somebody's title because I'm meeting most of you for the very first time and I'm sufficiently nervous about that part, okay?

CHAIR ROSENBERG: It's okay. I've already messed up people's names, so don't worry about it at all. You can point if you need to.

MS. SCULLION: I'll definitely try not to point. My comments are mostly directed to draft Rule 16.1, but I'm also happy to comment on privilege log issues.

Just by way of background, Seeger Weiss, we are a national law firm representing plaintiffs in complex litigation, including class actions and mass tort cases. I'm currently working or I have worked with leadership in MDLs in a variety of areas, including antitrust, consumer protection, public nuisance, and product liability. I'm highlighting the variety of areas of MDL experience because I think it does illustrate the need for flexibility in rules concerning MDL management in order to suit the needs of the particular case.

One of the hallmarks of MDL practice even in

its variety is, in my experience, you have lawyers from all sides, as well as the court, really using their best ideas and wisdom to get their arms around how to best manage that particular MDL. MDLs are complex by nature but in many, many different ways.

I am not going to repeat everything that's in my written testimony. I did want to emphasize, I think, my main point, which is greatly appreciate the effort to try to codify a rule with respect to at least initial MDL organization and management. My concern is that it may try to do too much too soon, and that is with respect to how much is suggested to potentially be done in this preliminary conference, the initial conference. So a number of strategic and important issues for the overall shape of litigation are contemplated, so much so that there is then the idea of having coordinating counsel to help put this report together.

And, to me, that's an indication that too much is trying to be done in this very first conference. And one of the reasons I was thinking about this was, okay, in an antitrust MDL, I frequently see that folks are coming in when they are even applying for leadership for the MDL and explaining their very different views of what the

theory of that case should be, and that can impact, you know, who then does get selected for leadership.

So, if we have an initial conference as the draft rule seems to contemplate where you're dealing both with the question of how should leadership be selected, as well as a number of substantive, strategic issues, what are the fact and legal issues in the case, leadership is going to have to decide what that is in a case, what settlement process makes sense. Completely an issue in which you want the folks who are going to be leading the case to have given it thought and give their input.

And it's not that the rule obviously precludes those issues from being discussed further after leadership is selected and, again, whether it's MDL leadership in terms of co-leads and executive committee or interim class counsel. It's not that the rule says you can't revisit those issues, but it is a bit -- there's a strangeness of having this coordinating counsel in this report opining on these issues potentially before leadership is in place, so it does feel like it's a bit of the cart before the horse.

Very quickly, just on privilege logs, again, I didn't put in written testimony on this, but the

principal concern of privilege logs seems to be, again, sort of the idea of the burden of preparing those. I'd respectfully disagree in terms of how simple and useful a metadata log is. What I've seen be much more useful is a metadata plus, so most of the information is automated but then with some additional information to really tell you what that particular document may have been about.

But my bigger comment is that I don't think enough is being made of the use of Rule 502(d) to give more breathing room to the logging process but also, and in conjunction with 502(d), the idea of what I have used in the past of a quick peek approach to certain privileged documents. I had the benefit of having worked more than a decade on the defense side doing antitrust and other litigation, and I've done this and it took some doing with clients to say, look, here's this case, the main issue is over here and we have some core privileged materials over there. We'll focus on that, but here's a bunch of stuff that is old, virtually irrelevant. I couldn't tell the other side it's irrelevant, but it's not really core to the case, but, you know, technically, it falls within privilege. Maybe it's drafts back and forth of contracts that in the end aren't all that core. And I

managed to get the client to say, let's put those in a room, invite counsel to come in on a no waiver basis, look at them, and tell us, do you genuinely, you know, dispute the privilege nature of any of this and, by the way, do you even care about any of it. That took care of, you know, thousands and thousands of pages of privilege.

I don't see this sort of creative practical approach to privilege issues being used enough, and I think those should be emphasized in terms of trying to alleviate burdens. So I'm going to stop there and see if I can answer any questions.

CHAIR ROSENBERG: I have one question before I turn it over to the reporters. Do you think it would help the court in appointing leadership to understand some of the issues that are set forth in subsection (c) of 16.1 to have a better understanding of the way that discovery will be conducted, the principal facts and legal issues, the exchange of information so, when considering whether it's applicants or a slate for leadership, the court approaches it with a better understanding of the case?

MS. SCULLION: Judge Rosenberg, I do, and that frequently is the case in terms of the leadership process, is it becomes a learning process in itself

and so frequently written applications are put in, and whether it's individuals or slates will comment on their view of the case, how it should be shaped, how it should be managed, what will make sense here. And then, whether it's through an interview process or, you know, appearing for a beauty contest, if you will, it's also a chance for the court to explore those issues in more depth with the applicants.

And not only does it give the court a chance to sort of get its head around what potentially are the most important pivotal issues in that MDL that are going to make and break everyone's lives the next couple of years but also to hear, you know, directly from counsel on these substantive issues, what is their thinking on this, where are they drawing on, because, again, these are the folks that are going to be entrusted with the claims and financial resources of a lot of folks, as well as, very importantly, the court's time.

So I think it actually is very useful to take some of those items and in a leadership application process to say, I'd like to hear your thoughts on these specific issues.

CHAIR ROSENBERG: Okay. Thank you.

From our reporters, Rick and Andrew?

PROFESSOR MARCUS: Can I go first, I guess? I think I do have a privilege log question, but that's not what you addressed in your written submission.

MS. SCULLION: Right.

PROFESSOR MARCUS: And in terms of getting too much too soon, I'm struck that you find our (c)(2) concerning scheduling orders already entered in cases to be something that it shouldn't be on the front burner. It seems to me that if judges who have had these cases before have set deadlines for doing things, that would be really important to deal with right up front so that more generally I'm unclear what the downside you worry about is for additional things to at least come to the judge's attention. I think Judge Rosenberg is suggesting that some orientation may be very valuable there. And then, if you have time, totally different and not what you submitted, in terms of privilege logs, it sounds to me like our rule proposal that you've got to talk to each other is actually something you would like, but I'm mainly interested in your submission on our 16.1.

MS. SCULLION: Sure. And I appreciate the question very much, and I tried to be a little more nuanced in my written comments. I was unsuccessful. My suggestion is just that the focus beyond are there

immediate dates that need to be addressed, as opposed to wholesale, let's take the scheduling orders and tee them up, again, at this very initial conference. Completely agree with you that if there are immediate things coming up, that the court should look at those and address them if need be, for example, to stay certain dates that may be coming up.

So that was the intent, was to say let's again take only as much as is practically necessary before leadership is appointed. And, to be clear, I'm very much in favor of having a very practical but efficient and quick leadership appointment process. It is important to get leadership in place relatively quickly to start working on the larger management issues, you know, with opposing counsel and with the court.

So my comment was just meant to say there's no need to, as a default, take in the scheduling orders and think you need to revisit all of them. There will be certain dates that will need to be addressed and others that will not.

On privilege logs, yes, agree. Talk more and that there are more practical solutions to -- I would think about it as adding more breathing room into the logging process. I heard Mr. Cohen, for

example, and I understand he's saying, you know, we need to get every bit of the log right, except that's not quite right with 502(d), right. There's breathing room there.

And, like I said, I think quick look can and should be used more. You know, again, in my experience, there are a substantial number of documents which, again, are technically privileged, technically responsive and relevant, but that in the end neither side really particularly cares about, and if you can do a 502(d) and a quick look stipulation, you've saved yourself maybe a million dollars' worth of time to not have to log that.

CHAIR ROSENBERG: Andrew, did you have a question or comment? No.

And, Joe, did you have a question or comment? No.

Okay. Anybody else? All right. Seeing no hands --

MS. SCULLION: Thank you very much.

CHAIR ROSENBERG: -- thank you so much.

MS. SCULLION: Take care.

CHAIR ROSENBERG: And we'll next hear from Norman Siegel on 16.1.

MR. SIEGEL: Good afternoon. Thank you for

allowing me this time to address the Committee. My name is Norman Siegel and I'm a partner at Stueve Siegel Hanson in Kansas City. My practice involves a significant amount of work in class actions, including serving as court-appointed class counsel on several of the larger class actions that have been recently centralized by the JPML in recent years.

As summarized in my written submission, my primary concern regarding draft Rule 16.1 is the interplay between what is designated as coordinating counsel and leadership counsel on the one hand in the proposed rule and the well-established rules governing appointment of interim class counsel under Rule 23(g).

As all of you know, in class action MDLs, there's an established practice grounded in Rule 23(g) and the manual for the appointment of interim class counsel at the outset of an MDL that centralizes class actions. For example, Rule 23(g) provides the express criteria the transferee court "must consider" in making such appointments, including the obligation to appoint counsel "best able to represent the interests of the class" where there are multiple applicants, which is the case in most class action MDLs.

This is important because interim class counsel is typically appointed for the entire case,

from the filing of an operative or superseding complaint through settlement or trial, and, of course, interim class counsel is also empowered to represent all absent class members during the pendency of the case.

The manual makes clear that such appointment of interim class counsel at the outset of a case is important because interim class counsel will be able to speak for the proposed class on pretrial matters, including the very type of pretrial matters identified in the draft Rule 16.1(c), things like identifying the principal factual and legal issues, how and when the parties will exchange information, a discovery plan, likely motion practice, and, of course, how settlement should be approached, all very substantive matters that interim class counsel in the class action context is typically responsible for under Rule 23 in the manual.

To proactively address something Judge Rosenberg asked the last witness, I do think all of these issues that are identified in Rule 16 can be part of the Rule 23(g) process, the application process. Indeed, Judge Burroughs in the MOVEit MDL asked applicants to submit a traditional Rule 23(g) application and why you should be lead counsel in the

MOVEit data breach but also asked applicants to say how you would approach litigation. Should there be bellwethers in this class case? Should there be different tracks of cases?

And so I do think there's some lessons that can be taken from the draft rule but respectfully suggest that in the class action context, the draft rule is perhaps not applicable, perhaps conflicting with existing process that we undertake in class actions centralized by the panel and, therefore, would at least ask the Committee to consider excluding class actions centralized from the rule or making it clear how the interplay between these different counsel designations should apply in class actions, where we already have the application of Rule 23.

With that, I will defer to questions.

CHAIR ROSENBERG: Okay. We'll have Rick, then Andrew. Thank you.

PROFESSOR MARCUS: Well, thank you. I suspect it's just an observation. If we say excluding class actions, then that means, if any one of a thousand cases that the panel wants to combine is a proposed class action, then this rule does not apply. That could be a problematical thing. I'm not pushing that point.

But the 23(g) comparison strikes me as worth considering. Two parts. Number one, as I look at 23(g), it doesn't in 23(g)(4) offer any standards for picking interim class counsel therefore. After certification, 23(g)(1) does have considerations and I remember laboring over those a whole lot 20-plus years ago.

So my question to you is, do you think with interim class counsel that the rule provides guidance? And in your experience with leadership in MDL proceedings, leadership in MDL proceedings, have you found that there is a set of criteria that ought to be written into a rule that maybe we should be considering? My basic reaction is we've been moving along without criteria. Now people, maybe not you, are saying, oh, you must write criteria into a rule. I'm not understanding why that's true.

MR. SIEGEL: Yes. Thank you for the question, Professor Marcus. Two things. First, as I mentioned in my written submission, I think, in the instances where you have a hybrid MDL, where you have some class component, it should be expressed that management of the Rule 23 class components of that MDL should defer to Rule 23 and the rules applicable therein, including the appointment of interim class

counsel.

With respect to your second question, it is the overwhelming practice, universal in my 20-plus years' experience doing plaintiffs' work in class actions, that since the adoption of Rule 23(g)(1), those are the very criteria that are being applied when courts consider interim class counsel at the outset of a case. So whether the intent of the Committee was that those four factors that the court "must consider" are applied only at the certification stage, that is not what's happening. What's happening is, in the applications at the start of class action MDLs, courts are considering those exact factors under Rule 23(g)(1)(A), which I know you carefully considered, that's what courts are considering when they appoint interim class counsel. It's the same exact standard as the rule currently provides under that rubric.

So I don't think we need more rules for class action. I think we have a well-established rule that in conjunction with the manual has given sufficient guidance to transferee courts handling class actions. I hope that addressed your question, Professor.

PROFESSOR MARCUS: Well, I think it did and

I submit to you that to some extent the coordinating counsel is not the same as interim counsel. We've covered that already today. But the criteria for picking someone who would be appropriate presumably would be affected.

RECORDING: To end this recording, hang up, or press 1 for more options.

PROFESSOR MARCUS: I want more options. That was a reference to what we just heard.

It seems to me that you could expect that in a different way, coordinating counsel would be selected with an eye to what matters in the litigation and not recruiting people off the street. Would you agree with me that probably will happen if this rule goes through?

MR. SIEGEL: I don't disagree, and I have no -- I don't take a position in the product liability mass tort world because I don't primarily practice there. What I'm just trying to communicate from the class action bar on the plaintiffs' side is that we've been operating under these well-established rules in MDLs that happens in centralized class actions. And I think it's fair to characterize this rule being animated by something very different, which are product liability cases. And so I would just ask the

Committee to consider.

Now the tried and true practice under Rule 23 under the manual for the appointment of interim class counsel and how the rule and the comments, Professor, would overlay that. The comment to 16.1(c) in that second paragraph has sort of other criteria the court should consider and whether that supplements what's already contained in 23(g)(1)(A), you know, that's where I think there's going to be some confusion, and I would just submit the existing process in class actions, and I'm talking about exclusively class actions, is running rather smoothly under the existing rules.

PROFESSOR BRADT: If it's okay, I'd like to drill down a little bit more on that because I continue to try to figure out why this rule would make the world worse. It strikes me that anytime that there's an MDL it means there are multiple cases, meaning there are multiple class actions and presumably multiple interim counsel. And once the MDL gets created, there must be some mechanism through which there's coordination, whether it's done by yourselves or initiated by the judge or what.

And so I guess I want to understand better what is the process of coordinating multiple

attorneys, some of whom may represent overlapping classes. I assume there may also be opt-out actions for those who have already decided to opt out of one putative class or another. There must be some kind of coordination among those lawyers within the MDL once it's established, and I want to understand better what it is about 16.1 that would disrupt that process.

MR. SIEGEL: Sure, Professor. So thanks for the question. I think, again, let's start with the situation where you have exclusively class actions. So we'll put the hybrid ones off to the side where you may have an opt-out. So the cases I'm talking about would include the Equifax data breach MDL that I was co-lead counsel in, T-Mobile data breach, Capital One data breach, all cases I've led. Those cases all started with those cases being centralized by the JPML and the first order of business by all those judges was to set forth a process by which applicants would submit submissions under Rule 23(g) to be interim class counsel.

Some judges say, explain to me how you think, you know, the case should be run once we're up and running. But the concept that interim class counsel should be speaking for the putative class out of the gate is the core concept here because, unlike

mass torts, it's very often that all of those individual lawyers representing -- in the nationwide Equifax class of 150 million people are representing the same people. And it's the court's obligation to appoint the counsel that is best suited based on factors they must consider to represent that class, and that's from the jump.

And so it's that designated interim class counsel that's going to engage, Professor, with the very items that are identified currently in Rule 16. How is the case going to be litigated? And I think the prior witness was speaking to this, that that's the lawyer who should be empowered to speak on behalf of the putative class to the defendant, to the court, about these pretrial matters.

PROFESSOR BRADT: But isn't Judge Rosenberg right that the coordination report and hearing envisioned by the rule would assist the judge in figuring out whom to appoint as interim counsel when you have multiple class actions that have been centralized into a single MDL? I mean, won't this assist the court in figuring out how to decide whom to empower from what you call "the jump"?

MR. SIEGEL: Yeah. So I think there's some ministerial tasks that can be done by, you know,

whatever coordinating counsel is appointed, identifying all the cases, if there's parallel cases in state court, you know, case census orders that had been entered in transferor courts prior to transfer. Those are all ministerial tasks that I think are fine and I think they can help guide the court on getting their arms around a centralized class case.

I think the concern is that there are substantive topics baked into paragraph (c) there that really it's interim class counsel, and if you go through the manual and some of the sections I cited in my written submission, the manual talks about the idea that it should be interim class counsel that is undertaking to address those substantive issues. Things like discovery plan are among the more substantive things you take on in a case. That's something that should be in the hands of designated interim class counsel under a rule that already exists under 23(g). I hope that addressed your question.

PROFESSOR BRADT: What do you do now? What do you do now? So you have multiple lawyers --

MR. SIEGEL: Yeah.

PROFESSOR BRADT: -- some of whom may have been named interim class counsel already prior to the transfer of the case in the MDL. What do you do now

to assist the judge to figure out who to appoint as leadership in that kind of an MDL?

MR. SIEGEL: So I'll give you a current example in the MOVEit data breach litigation. There was disparate class cases. I was appointed lead counsel in the Milliman litigation in the Eastern District of Virginia. There was an intra-district central, you know, rocket docket consolidation of six or seven cases filed there. There was an appointment order. Then the MDL happened. There was one other appointment order in one other case. They all went to Judge Burroughs in Boston, and I think it was clear she was starting over.

And so I think her view was everyone's going to resubmit applications for lead counsel. There's now scores of lawyers in here seeking to be lead counsel over this litigation. And the first order of business is appointing counsel based on the criteria in 23(g)(1)(A), and, as part of that, she asked again for the separate submission is, how do you envision grouping these cases; what is the sequence that we should take on these things; what does a potential discovery plan look like. And so that's a real-life example. But I think that's actually an outlier case.

In the typical case, in the Equifax case

before Judge Thrash, for example, in the Capital One case before Judge Trenga, in the T-Mobile case before Judge Wimes in the Western District of Missouri, all of these judges, first order of business is there needs to be a process by which the lawyers who filed cases and had cases transferred to the MDL are applying for lead counsel, I'm going to appoint lead counsel and then we're going to go through, we're going to have our substantive case management conference to address how we're going to handle the litigation.

CHAIR ROSENBERG: If the judge did not have interviews for the leadership appointments but rather asked for this various information in their applications, how do you envision the case proceeding, what's your plan for discovery, and, for whatever reason, the judge wasn't going to have interviews, then there wouldn't be an opportunity for the judge to really engage with anyone to fully understand the issues to be able to make proper appointment.

Wouldn't the initial conference with this report that's submitted that isn't final in any way, it's initial and it also represents potentially aligned and more likely divergent views, but at least that begins the educational process for the judge so

that when she decides to conduct interviews or maybe just to have applications and seeks this information, at least she comes to the process with the background and an open conference where she's had the ability to ask questions and engage. I think there's this notion out there that this initial conference is like a final conference, that this initial report is like a final report, that the plan for discovery needs to be buttoned up from A to Z with every deadline for exchange of experts and things of that.

If one looked at it more generally like what's the general idea about discovery, in other words, are you ready to submit a proposal to the court on discovery or do you need to have a certain motion heard, if you were to look at it through that lens as educational, as not binding, as not definitive, as not the authoritative guide but the initial kickoff, get the case rolling, get the judge informed, get the parties before the court, might you not see it as a beneficial way to begin an MDL? As most everyone says, the best thing one can do with an MDL is to get it going right away and not let it linger.

MR. SIEGEL: For sure, Judge. And with all the caveats that you put in your question, I don't disagree. But I think the concern is that the concept

of a coordinating counsel taking on substantive topics and being designated or appointed to interact with defense counsel, for example, creates a friction with what has been the established practice, which is, you know, the defense lawyers want a counter-party that has the imprimatur of the court, somebody that's been appointed by the court, so they can actually substantively engage in, okay, this is actually how this case is going to be litigated, versus talking to somebody who is either powerless or talking to a hundred different class action lawyers that filed the same case.

And so that's why I think what's happened over time is a real front-loading, appropriately in my view, of disappointment. That doesn't mean the court can't -- I don't think you need coordinating counsel. I think the court can have a hearing where the court solicits submissions from whomever wants to submit one or if they can be combined, great, about how they see the scope of the case, what are the key discovery issues.

I think all of that can happen in a case where the court wants it, but I think the currently framed rule, which suggests to empower coordinating counsel with this role on very substantive issues, I

think is what's causing the concern that I and a few other colleagues in the plaintiffs' bar have raised.

CHAIR ROSENBERG: Okay. Any other comments or questions? Okay. Thank you, Mr. Siegel. Very helpful. We appreciate it.

MR. SIEGEL: Thank you for the time. Thank you all and appreciate all your hard work.

CHAIR ROSENBERG: Thank you for your time. Thank you for your time.

Okay. Ms. Conroy.

MS. CONROY: Good afternoon, everybody. Can everyone hear me okay?

CHAIR ROSENBERG: We can.

MS. CONROY: Great. Thank you.

I'm a partner at Simmons Hanly Conroy. We're a plaintiffs' firm, national plaintiffs' firm. And for many decades, I've been a mass tort and class action plaintiffs' lawyer with several MDL appointments and committee appointments and things like that.

I'm currently a co-lead in the opioid MDL before Judge Polster. I'm sure you're all aware that's a very sweeping litigation. It's a testament to very obsessive attention to organizational structure. So I really appreciate and thank you for

the work that you're doing and have done over the years because structure is what is so important, and that becomes an efficient way for us to achieve justice for our clients.

I'm going to address coordinating counsel and the list of topics that would be intended for the Rule 16.1(c) conference. I'll start with coordinating counsel, which I will state at the outset I'm opposed to the concept because I think it adds a layer to the early process of an MDL that is potentially detrimental to both parties.

In the cases that I've been involved with, the newly appointed MDL judge has taken pains to acquaint themselves with the plaintiff counsel who are applying for leadership, and adding a coordinating counsel to me seems to be adding a whole other layer to that process and it would, to me, seem to dilute the judge's, the MDL judge's, evaluation of leadership and who should be appointed. The counsel at the very start of a case could in no way know more than what the counsel who are seeking leadership could know or could share in an interview or in a written submission to the MDL court.

But I think what is most -- what's closest to my heart about the issue with coordinating counsel

is the potential step backwards for the diversity in the appointment of leadership by MDL judges. It's a whole other layer, as I said, and it's human nature that coordinating counsel will look to the lawyers that he or she ultimately will recognize and potentially provide that perspective to the MDL judge.

I know from my years in the Bar that it has -- I know from personal experience it has been the MDL judges that have been the champions for diversity. That is what effectuated change. We tried all sorts of different ways to be heard and to make sure that our leadership reflected our clients, and it was not until the MDL judges took that to heart and really pushed diversity that we are beginning to see that over and over again. I'm concerned that if we have a coordinating counsel, we're again buffering that ability for the MDL judge to really deal directly with the diversity issue.

And, secondarily, I'm concerned that a coordinating counsel can potentially make representations or somehow impact my clients' rights because they don't represent my clients. There's a little bit of a difference between what Mr. Siegel was just talking about with interim class counsel that potentially represents very similar classes. When

you're talking about an MDL, you're talking about different types of clients. And so I'm concerned in those early weeks and months of an MDL that a coordinating counsel who is really not, you know, appointed other than by the judge is not really going to make the type of representations or take the positions that leadership would endorse.

And that brings me to the problems that -- and I think Ms. Scullion was talking about the cart before the horse -- but the problems that I have with the 16.1(c) issue. The topics that are listed there would take place and would be discussed again by coordinating counsel before leadership is appointed, and I don't believe that's appropriate. I think what is appropriate -- I think the topics are fine. They're just very premature in having someone other than leadership that is working to develop the trust of the plaintiffs' bar and of all of the clients that leadership must represent, it's creating a potential problem by having coordinating counsel taking positions, discussing discovery strategies, any of the topics there.

And I take the point that it's early in the litigation and, you know, things are not set in stone at that point, but that first conference is

extraordinarily important. It is the beginning conference that starts the development of trust between all the plaintiff counsel and the leadership that is entrusted with their cases, and to sort of add that additional issue of a coordinating counsel to that process seems to me very difficult.

And so I think I'm available to answer any questions. One sort of side note that I would make for Rule 16.1(c) is there's so much that the MDL judge can do to empower leadership to try to get their arms around and harness the cases that they will be responsible for. Practically speaking, when you're appointed into leadership, the only tool that you have is the docket to try to figure out who the plaintiff counsel are and what the cases look like, and it can be a very laborious task to try to figure out what diseases, if it's a product defect or, you know, whatever, to try to figure out from the docket or looking over complaints what it is that leadership has to deal with.

And so there's so much that an MDL judge can do at the very beginning of a case to provide leadership with the ability to get more information from plaintiffs' counsel across the country on what the cases look like and their discovery strategies and

bellwether strategies and the like.

So those are really my comments, and I'm available for questions.

CHAIR ROSENBERG: Thank you, Ms. Conroy.

From our reporters? Nothing from Rick and Andrew? No.

And our Committee members? Judge Proctor, are you raising your hand? I couldn't tell. No, yes? No.

JUDGE PROCTOR: No.

CHAIR ROSENBERG: Did you have a -- no, you didn't. Okay.

All right. I guess you've said it all, Ms. Conroy.

MS. CONROY: Great. Thank you so much.

CHAIR ROSENBERG: You've left them speechless. Okay. Thank you so much.

Okay. Next is -- so I believe Anita Modak is not coming because of weather issues, so Toyja Kelley on 16.1.

MR. KELLEY: Yes. Good afternoon. Can you hear me?

CHAIR ROSENBERG: We can. Good afternoon.

MR. KELLEY: Okay. Thank you for the opportunity to address the Committee regarding its

proposed Rule 16.1. I'm a partner in the litigation department of Locke Lord, LLP. I'm here today in my individual capacity, but in full disclosure, I'm a past president of DRI and also a past president of the Center for Law and Public Policy, and I'm currently chairing its proposed MDL rules subcommittee.

As you can imagine, I wholeheartedly support the positions taken by DRI and the Center for Law and Public Policy in their written comments regarding proposed Rule 16.1. And as has been the case with my previous testimony given concerning other proposed rule changes, my comments today are informed by the fact that my practice today involves a substantial amount of commercial litigation in which I often find myself on both sides of the V in litigation, and I consider proposed rules through the prism of both a plaintiff and defendant in litigation.

Today, I'm here specifically to speak in support of revising the proposed language of Rule 16.1(c)(4) with a clear rules-based approach to address the problems of unsupportable claims. And to be clear, earlier today there was some discussion about what is meant by "unsupportable claims." When I use that term, I mean those claims that fail the Article III standing requirement.

I would encourage the Committee to expressly require that the report called for in 16.1(c)(4) include a mandatory proposal for addressing the supportability of claims pending or transferred into the MDL. It is my belief by including this requirement it discourages the filing of unsupportable claims before they even become part of the MDL and, when they are filed, creating an avenue of disposing them as a more ministerial task rather than extensive motion practice.

To be clear, this suggestion could be met by requiring plaintiffs' counsel to state in its preliminary report subject to Rule 11 that each individual claimant is asserting a claim that does not suffer from the issues of these types of unsupportable claims. This approach would not already add to the overflowing plate of judges involved with the MDL process.

My view on this issue is informed by experience that I had a number of years ago involving a TCPA case. Several Maryland cases were filed by a former attorney as a pro se plaintiff. He filed a number of them stating claims under the federal TCPA which all became part of an ongoing MDL. He subsequently filed a state TCPA case because he wasn’t

satisfied with how things were moving in the MDL with the exact same operative facts. The only change he made was he did not include the federal TCPA. He based the claim under the Maryland TCPA, which was nearly identical to the federal act. That case was resolved summarily in Maryland's lowest trial court for a fraction of the time and a fraction of the cost as the cases that were proceeding MDL.

I recognize that my experience is anecdotal, but there is a real concern that these types of claims make up a substantial if not majority of the claims in the MDL. Whatever the desired benefit of an MDL proceeding, appropriately filed cases that are caught up in the noise of these unsupportable claims could never receive the treatment for which the MDL proceeding is designed to benefit in the first place.

Unless there any questions, I'll conclude my statements by stating that this rule-based approach at addressing these pervasive problems in an MDL would benefit all of the relevant stakeholders, the courts, the plaintiffs, and the defendants. Thank you.

CHAIR ROSENBERG: Thank you. Thank you very much.

From our reporters?

PROFESSOR MARCUS: Thank you. Thank you for

moving and standing front and center because that prompts a question from me. You mentioned Rule 11. Am I correct in understanding that if some lawyer violates Rule 11 and makes allegations in a complaint that my client took your drug and then got sick in the way that the litigation claims is caused by the drugs, so the allegations are there. Maybe the lawyer didn't investigate properly or made things up. Is that a standing problem?

MR. KELLEY: Well, my approach -- in that specific example, it may not be a standing issue, and I was trying to -- as I was sitting there listening to some of the prior questions and responses to this issue, I was trying to sort of to the best I could articulate what I in my mind consider to be the issues. And in my real-world example, it really was a standing issue as opposed to anything else. And in your hypothetical, perhaps it's a standing issue, perhaps it's not. But, in any event, you know, it would involve a claim that should not be part of the MDL process in my view.

And I think requiring a confirmation at the beginning of the case that I've done the minimal due diligence required to bring this case forward I think is something that would benefit, you know, the MDL

process, and now is the time to do that as we're thinking about how to make this process better than what we're dealing with currently.

CHAIR ROSENBERG: Andrew?

PROFESSOR BRADT: I guess Rick's question, though, is, doesn't Rule 11 serve that purpose already? What would be the benefit of repeating the same Rule 11 requirement that applies to all papers in 16.1? I mean, I think we're all in agreement that the Federal Rules of Civil Procedure apply to MDL, despite loose talk otherwise, so I don't understand why we should repeat Rule 11 here.

MR. KELLEY: Well, it's not so much about repeating Rule 11. I mean, I agree that the rules apply, and I think you asked one of the other folks earlier about, you know, if this was a stand-alone case, is it any different than a case in an MDL, and on a fundamental level, the answer is no, but we know that there is a problem. I know you had raised a question of how big of a problem it is, but we know that there is a problem, and if it's a problem, that suggests to me that relying solely on Rule 11 in a different context is not getting it done.

And I think here's an opportunity that I think could address the problem because it will on

some level, in my view, minimize the filing of what I consider to be unsupportable claims.

PROFESSOR BRADT: Thanks.

CHAIR ROSENBERG: David?

JUDGE PROCTOR: Yes, thank you. This question's been asked a number of times in various -- in the last hearing or broached in this hearing, addressed as we led up to the drafting of Rule 16.1, but I haven't heard your perspective on it. Is your position that we should include language that there's a mandatory disclosure in all MDL cases along the lines you're discussing here?

MR. KELLEY: That would be my suggestion, yes.

JUDGE PROCTOR: How does that fit in a patent MDL antitrust with just two competing class actions? How does that fit when you're dealing with just simply what I would call more of your garden variety MDL that doesn't deal with mass tort issues? And wouldn't that cause just substantial confusion with our transferee judges when they have a case where there's not a need for some type of vetting or census or assessment of individual-by-individual claims? And I take it your answer would be, yeah, I don't intend those things -- that rule to apply in those cases.

Well, how would we draft language other than what we've done here that gives the transferee judge the opportunity to say here's going to be the plan in this litigation on this issue? And I'll listen to you. Thank you.

MR. KELLEY: Sure. I mean, I think you put your nail on the head of the issue overall with trying to craft some rule that really addresses sort of divergent sort of, you know, types of cases. I mean, I've had a little bit of experience in MDLs on some pharmaceutical litigation. As I said, much of my experience has been on some Consumer Protection Act litigation. Obviously, there's some similarities as it relates to the MDL process. There are some differences.

And, you know, I've really gone back and forth on exactly how I come out on that, but I think my answer today, subject to change, is you create the rule -- I mean, so, fundamentally, my view is, is that, you know, you require this Rule 11-type, you know, affirmation. And in the patent litigation case, they comply with it, with the understanding that that's a different type of case and the specific issues that are germane to patent litigation in an MDL may necessitate, you know, as you go forward and as

you learn more about the case a different sort of analysis of, you know, what went into making that affirmation at the beginning of the litigation.

But, in a case like the one that I gave as an example, I mean, that was an attorney sort of understood fundamentally on some level the minimal threshold requirements for stating a claim under that Act. Why shouldn't we, if that requirement exists in a stand-alone case, why shouldn't we insist that that requirement should be a part of the MDL process?

I don't know if that exactly addresses your issue, but, I mean, it's always -- I guess it's always a problem of trying to craft a rule that applies to all various types of litigation, and, you know, my view of it is, is that that's such a fundamental threshold question that I think it can apply in all of these types of cases with the understanding that maybe its impact, maybe its significance is different in a different type of case, but that goes for any type of civil litigation.

JUDGE PROCTOR: Let me ask you one follow-up question then and I asked this of some of your friends at the first live hearing. Let's say hypothetically you have a case where there's a big question about preemption or general causation that could lead to an

early dispositive motion that would be a TKO on substantial portions and not all the litigation. Do you think your clients would want to fund kind of the tree-by-tree analysis of the claims prior to those issues being resolved?

MR. KELLEY: I would say, in my experience with the cases that I've been involved in in MDL, it's less of an issue than, say, the pharmaceutical litigation, where the numbers and the cost associated with is different. But, again, I think I go back to my prior comments. I think, you know, what I would tell my clients is we are better off knowing that someone is stating a viable claim against us sooner rather than later overall, even if getting to the sooner is going to cost some money because I think the later is going to cost a lot more money.

CHAIR ROSENBERG: Okay. And -- oh, another question?

JUDGE PROCTOR: Thank you.

CHAIR ROSENBERG: Oh, okay. Any other comments or questions? Seeing none. Okay, thank you so much, Mr. Kelley.

MR. KELLEY: Thank you.

CHAIR ROSENBERG: And Mr. Roberts is on, and we'll hear from you on privilege logs.

MR. ROBERTS: Thank you very much. How is my connectivity with you today?

CHAIR ROSENBERG: Perfect.

MR. ROBERTS: Thank you. I'll be brief. I know it's been a long day for the Committee.

My name is Chad Roberts. My firm is eDiscovery CoCounsel, PLLC. I've been a trial lawyer for a little over 30 years primarily representing individual plaintiffs in complex litigation, including MDLs and mass torts. For about the last 10 years, my practice has been exclusively focused on the conduct of electronic discovery in civil litigation and specifically the use of technology to support the conduct of electronic discovery in civil litigation.

The summary of my commentary is that the existing proposed amendments and commentary about privilege logging strike a pitch-perfect degree of appropriateness and that any attempt to embellish these proposed amendments with additional substantive content would not be wise, and the reason I think it would not be wise is that I cannot think of a subject matter of the civil rules that is more likely to have its fundamental assumptions altered by emerging technologies in the very near future than is the subject matter of privilege logging.

As the Committee is aware, privilege logging includes two essential tasks, and the first is to identify those items that are likely to contain privileged content and simply print out a list of those items. The second task is to prepare a summary of that content in a way that does not disclose the privileged information itself yet provides enough of a description that can permit a requesting party to evaluate the claim of privilege.

And while I don't want to minimize the tasks involved in the very largest examples of complex litigation with very large volumes, in the big scheme of things, the first task is generally a manageable one, especially when paired with the availability and protection of 502(d) claw-back orders.

It's been this second task, summarizing the content in a way that does not disclose the privileged information itself yet provides enough of a description that can permit a requesting party to evaluate that claim of privilege, that's the task that has historically been a repetitive and tedious and, yes, an expensive task requiring lawyers.

By the time this rule is enacted, that historical premise, the one involving that second task, will, in all certainty, be materially different

than it is today due to rapidly emerging technology.

So to circle back to the larger point is that the existing proposal's emphasis on flexibility and not an attempt at substantive specificity is likely to be the only approach which will encourage continued innovation, creativity, and permit this proposed rule to remain relevant in the years to come.

And with that, I'll conclude my comments and answer any questions you may have.

CHAIR ROSENBERG: Thank you. Actually, I didn't mean to take my camera off when I turned my mic off.

Okay. Professor Marcus.

PROFESSOR MARCUS: Thank you, Mr. Roberts. I think you may have been president at the creation. I was president at the creation of what became the 2006 e-discovery amendments, and one of the things we were trying to do then was devise rule language that was technologically neutral. That is, it would accommodate unforeseeable changes in technology.

I'd like to bring up something I've read about, probably we've all read about, in the newspaper concerning use of generative AI in certain legal contexts and that is the hallucination problem. In terms of the second step logging potential, I'm

guessing you're thinking of something like generative AI. And how are we supposed to get a handle on that now or forever? And maybe we should just sit back and wait to see what happens. What are your thoughts on this subject?

MR. ROBERTS: So this technology is already here, and your students are probably using it to summarize Pennoyer v. Neff the night before class.

The issue of hallucinations and reliability and credibility is a work in progress that way, but summarizing a document is not a heavy lift for this technology, and summarizing a document with criteria that floats it up to a level of disclosure that does not disclose privilege is not a heavy lift for this technology. Even the simple act of drafting the proposed summary would enormously accelerate this process and bring great efficiencies to this process.

So my only point is that things that seemed insurmountable with these kinds of problems you raised 10 years ago are now routine for us and five years, 10 years hence, these kinds of things that seem enormously burdensome and disproportionately costly, the premise of those are going to be much, much different and that the rule needs to survive those kinds of changes. And the existing draft does that, I

believe, and the calls by some to go further and try to create time-specific specificity is not going to survive technology's changes.

CHAIR ROSENBERG: Any further questions or comments? No?

MR. ROBERTS: Thank you.

CHAIR ROSENBERG: Okay. Thank you, Mr. Roberts. We appreciate it.

And our final witness for the day is Andrew Myers on privilege logs.

MR. MYERS: Good afternoon. Excuse me. I haven't spoken all day. Good afternoon and thank you to the Committee and everyone participating for giving me an opportunity to speak today on privilege logs and the proposed rule changes.

My name is Andrew Myers. I'm an attorney working in the litigation department at Bayer U.S. I have experience in creating and overseeing production of priv logs of different kinds and different scales involving different technologies, easily more than a million records logged at this point.

For written submission, I will look to provide supplementary comments, but I support the comments already put forward by Robert Keeling, Jonathan Redgrave, and Alex Stahl in the fall.

Frankly, I thought that I might be rehashing some already discussed materials and this may be even more so following David Cohen's testimony this afternoon.

Nonetheless, I wanted to appear on three particular aspects that have come up a lot in the discussion, including just now Mr. Roberts' discussion. The first is that while I very much appreciate the Committee's interest in priv logging and particularly the emphasis on the cost and the burden of privilege logs and early attention from the court, these are all great, from my experience, I would like to see either the rule proposal proposed committee notes go further. Specifically, we've discussed somewhat other -- it wasn't me -- you've already discussed cross-referencing or something to Rule 26(b), whether putting something directly in there, (5)(A) --

PROFESSOR MARCUS: To interrupt you there, I'm the guy who's been bringing that up.

MR. MYERS: Well, sir --

PROFESSOR MARCUS: And I'd be interested in your explaining why that would be helpful since 26(f) tells people what to do before they submit their report to the judge and 16(b) addresses that. We've got that in there. Why is a change to 26(b)(5)(A) of

value as well?

MR. MYERS: Absolutely. So thank you.

So very straightforwardly, if you're going to describe the nature to assess the claim, that is where, to use the analogy, the best contract is one that's signed and thrown in a drawer and nobody ever looks at.

And so there are a lot of people on the call today that I think I could work very well with about how to generate and come up with a log and what needs to be on it. And meeting and conferring, we do that already. We meet and confer and even exchange example logs in matters, and yet still the default, including in matters that I'm involved in, including ones where I would like to do something different, is a document-by-document log. So even though we do meet and confer and we do exchange and discuss that, the rule doesn't push behavior, whether due to practice or case law, to where it isn't just expected that it'll be a document-by-document log.

And so kind of like in the way that when people stop getting along you go and look at the contract when people can't work things out, having some sort of idea as to what would be required to assess the claim and what actually would meet that

burden and remain proportional, I think, would be very helpful in the parties not just getting into, you know, a slog-fest and see because, as the typical producing party, the requesting party doesn't have a lot to lose in that fight if that makes sense.

And then Professor -- oh, awesome. Thank you. And from my experience, one of the things I think that -- not to overstate it, there are real consequences to having to go through a document-by-document log. There's the cost. And that can be -- it isn't 10 percent of the overall discovery and document production costs. It can be and has been -- I went and looked through some matters, and it can be on par with the cost to identify the potentially relevant producible set.

It can be sort of there's a seesaw. It would be in balance between all the work done to come up with the entire producible potential relevant set and the work done to describe the final privilege determinations and to describe them for logging purposes if it's a document-by-document.

Similarly, you can have the same thing happen with the time where it can be two months to come up with a producible set and two months to come up with a log.

I will add that I want to go to Mr. Roberts' technology, there is a cost to that technology. And so, while it is wonderful to see where, you know, generative AI and other things are moving, unlike metadata logs that have been discussed a few times, that additional technology is not free. There is a substantial cost to coming up with generative AI, and you have other problems. It's not entirely perfect. And also we have increasing data, so discovery costs time, even though we have technology that helps us do it better.

And so I don't want to go too far in my time -- past my time and leave time for questions. Two other things that I thought came up a lot. One, one of the reasons I wanted to talk the rolling privilege logs, I wanted to specifically talk about that because I agree very strongly with an iterative process is beneficial to the parties and the court. Rolling production logs, if they are just produced -- I'm sorry, production logs -- rolling privilege logs, if they're simply going to be this document-by-document and you do half of one and then you do another half later, that is more than the same amount of work.

But, if you're doing different kinds where

you're having a privilege log where you start with a categorical log and then you make those determinations and then you get a metadata log until you get down to a set where it makes sense to either sample or do some other version, like do a document-by-document, I'm in full support of that.

And then I'll add one real quickly. I'll say I want to make a comment on the sufficiency of logs that are not document-by-document. I think there's been some disparaging comments made about categorical logs and I think they have a lot of value. And one of the ways I recognize that they have value is because, when a categorical log -- because, when claims that we -- that something is not privileged, whether it's in a letter from the requesting party or an order from the court, including Chhabria's order in the Facebook matter that was referenced before, they're often done categorically.

So they come forward and say here, we've produced an 8,000 document-by-document privilege log and then the response might be back these 36 entries are not privileged because they have a non-Bayer, non-outside counsel party on them. And so, if the response is categorically go back, I think it would actually benefit everyone to streamline the process by

doing categorical logs and saying, hey, let's work out these how we're going to treat and how we're going to respond to this, the joint defense companies or some other outside group, and I think that would be a real benefit to progressing. And with that, I'll pause and leave any questions, please.

CHAIR ROSENBERG: Thank you so much.

Rick?

PROFESSOR MARCUS: Just if I heard correctly, the previous speaker said what we have put out for comment is pitch perfect. How does the pitch sound to you?

MR. MYERS: I would like a little more because, to be honest -- to be respectful, of course, the things that the comment suggests that we -- after this -- you know, the discovery plan that we are meeting and talking about the priv log and that there already is a 1993 comment, right, stating that a document-by-document priv log isn't necessary, so we do meet and confer on every matter and talk about priv logs, even exchanging samples of what we think would be a workable priv log, and yet the default remains that we produce document-by-document priv logs is the expectation, and so I feel --

PROFESSOR MARCUS: So, in terms of the 1993

Committee note, are you telling us that our Committee notes don't really control what happens out there in the world?

MR. MYERS: I think that may be the truth, especially if there was a lot of them or if the case law hasn't tracked them. And in an asymmetric discovery situation, you have sort of a limited -- you know, there's a limited number of motions we want to make in a discovery setting before the court. We don't want to every week to be saying, oh, you know, they want to have us do this burdensome thing, we need to be seen before the court. We'd much rather have something to point to beyond that note because, respectfully again, it exists and yet we still were doing for the past 30 years, the default position is document-by-document privilege logging.

CHAIR ROSENBERG: Thank you. Any other -- any further comments or questions? Okay. Well, thank you so much, Mr. Myers. Thank you for your patience and waiting all day and helping us conclude a very valuable day of testimony, so we appreciate it.

MR. MYERS: Okay, great. I appreciate it.

CHAIR ROSENBERG: And for the 42 or so who hung in there all day, it looks as if so many participants are remaining, we do want to tell you at

this point that we're concluding the hearing. We did get through all I guess a total of 28 witnesses. We originally had 30, but due to weather, of which I don't know anything about because I'm in Florida, we lost two of our witnesses. But, as I think I said at the October hearing, we cannot thank each and every one of you enough. You have taken time out of your busy schedule. You've written comments. You've provided testimony. You've provided summaries of your testimony. You've appeared. You've waited. You've answered questions from our civ pro professors and our reporters and our judges, and you have, most importantly, enlightened us and educated us and given us much more work to do, which we intend to do.

As I also mentioned in the beginning of this hearing, for those who are interested, of course, the witnesses will be there, but it's an open hearing. We'll be back at it on February 6. I think Allison at some point will have disseminated the Teams link and the schedule. We want to thank Allison and everybody at the AO for helping with the logistics. She too was caught in weather issues and had to do this double virtually, so we thank her for that.

And with that, I'll just note that we were very much on schedule. Maybe that's because two

witnesses didn't show up and we cut our break short, but we're concluding before 5:00 p.m. for the record.

So have a nice evening and we'll look forward to seeing maybe some of you again at the February 6 hearing. Thank you.

(Whereupon, at 4:55 p.m., the meeting in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

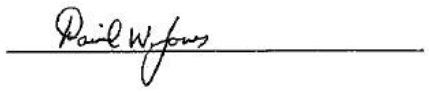
CASE TITLE: Proposed Amendments to the Federal Rules of Civil Procedure

HEARING DATE: January 16, 2024

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: January 30, 2024



David Jones
Official Reporter
Heritage Reporting Corporation
Suite 206
1220 L Street, N.W.
Washington, D.C. 20005-4018