COMMENTS FROM THE AUGUST 2023 PUBLICATION OF PROPOSED AMENDMENTS TO FEDERAL RULES

To view the proposed amendments to civil rules that were published for this comment period, please visit the Rules & Policies page of the judiciary's website at https://www.uscourts.gov/ to download the 2023 preliminary draft of proposed amendments.

Comments were submitted at https://www.regulations.gov/ under docket number USC-RULES-CV-2023-0003.

The comment period started August 15, 2023 and closed February 16, 2024.

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–442 and 731–TA–1095–1096 (Third Review)]

Lined Paper School Supplies From China and India

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the countervailing duty order on lined paper school supplies from India and the antidumping duty orders on lined paper school supplies from China and India would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on February 1, 2023 (88 FR 6787) and determined on May 8, 2023 that it would conduct expedited reviews (88 FR 37096, June 6, 2023).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on August 4, 2023. The views of the Commission are contained in USITC Publication 5450 (August 2023), entitled *Lined Paper School Supplies from China and India: Investigation Nos. 701–TA–442 and 731–TA–1095–1096 (Third Review).*

By order of the Commission.

Issued: August 4, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–17085 Filed 8–8–23; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committees on Appellate, Bankruptcy, and Civil Rules; Hearings of the Judicial Conference

AGENCY: Judicial Conference of the United States.

ACTION: Advisory Committees on Appellate, Bankruptcy, and Civil Rules; notice of proposed amendments and open hearings.

DATES: All written comments and suggestions with respect to the proposed amendments may be submitted on or after the opening of the period for public comment on August 15, 2023, but no later than February 16, 2024.

ADDRESSES: Written comments must be submitted electronically, following the instructions provided on the website. Comments will be posted on the website and available to the public.

Public hearings either virtually or in person are scheduled on the proposed amendments as follows:

- Appellate Rules on October 18, 2023, and January 24, 2024;
- Bankruptcy Rules and Forms on January 12, 2024, and January 19, 2024; and
- Civil Rules on October 16, 2023, January 16, 2024, and February 6, 2024.

Those wishing to testify must contact the Secretary of the Committee on Rules of Practice and Procedure by email at: *RulesCommittee_Secretary@ao.uscourts.gov,* at least 30 days before the hearing.

FOR FURTHER INFORMATION CONTACT: H. Thomas Byron III, Esq., Chief Counsel, Rules Committee Staff, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Committees on Appellate, Bankruptcy, and Civil Rules have proposed amendments to the following rules:

- Appellate Rules 6 and 39;
- Bankruptcy Rules 3002.1 and 8006;
- Bankruptcy Official Forms 410, 410C13–M1, 410C13–M1R, 410C13–N, 410C13–NR, 410C13–M2, and 410C13–M2R; and
- Civil Rules 16, 26, and new Rule 16.1.

The text of the proposals will be posted August 15, 2023, on the Judiciary's website at: *https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.*

(Authority: 28 U.S.C. 2073.)

Dated: August 3, 2023.

Shelly L. Cox,

Management Analyst, Rules Committee Staff.

[FR Doc. 2023–16976 Filed 8–8–23; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1238]

Bulk Manufacturer of Controlled Substances Application: Chemtos, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Chemtos, LLC has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before October 10, 2023. Such persons may also file a written request for a hearing on the application on or before October 10, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on July 6, 2023, Chemtos, LLC., 16713 Picadilly Court, Round Rock, Texas 78664–8544, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

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September 8, 2023

COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

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

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

Dear Members of the Advisory Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Robert D. Keeling
Partner

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

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

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

September 18, 2023

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[13] The MDL Subcommittee reported to the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An appropriate note could look like this:

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

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

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

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

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

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

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

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

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

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

[46] *Id.*

[47] *Id.*

[48] *Id.* at 444.

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

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

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

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

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

[50] *Id.*

[51] *Id.* at 450.

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

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

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

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

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

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

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

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

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

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

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[56] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[79] 28 U.S.C. § 1407.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[91] Draft Note at lines 286, 288.

[92] *Id*. at line 293.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[106] *Id.*

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

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

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

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

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

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[107] *Id*.

[108] *Id*.

[109] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

[115] *Id.*

[116] *Id*.

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

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

CONCLUSION

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

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

RABIEJ LITIGATION
LAW CENTER

COMMENTS ON PROPOSED NEW RULE 16.1
OCTOBER 1, 2023

Advisory Committee on Civil Rules

Thank you for the opportunity to comment on the preliminary draft of proposed new Rule 16.1 of the Federal Rules of Civil Procedure, which is based on the standard practices and case-management orders used by transferee judges in the majority of large MDLs. The Committee is to be congratulated for its dogged persistence in advancing a major improvement to the administration of justice and persuading a skeptical bench and bar of the merits and necessity of the proposed rule.

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

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

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

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

MDLs are adding 60,000 new cases annually to the courts' dockets. The 20% is hefty, and it is rising, but it is far lower than 60%.

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

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

A. STYLE AND FORMATTING CORRECTIONS AND SUGGESTIONS

1. Header: "PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE" -- The word "Amendments" in the headers to proposed amendments to the Bankruptcy Rules (pages 61 and 80) and Appellate Rules (pages 26 and 47) are plural. The word "Amendments" in the headers for the Civil Rules (pages 120 and 123) should be plural to be consistent.
2. Line 2. "Initial ~~MDL~~ Management Conference." The Modifier "MDL" before "Management Conference" should be struck. It is verbiage. Line 5 got it right by omitting the "MDL" modifier in front of "management conference." The caption of Rule 16.1 is "Multidistrict Litigation." All subsequent provisions must refer to MDL proceedings. There simply is no need to add the word "MDL" in front of "management conference" every time it is mentioned. Although a single reference to the unnecessary modifier would not be significant, the problem with the draft is that the modifier is used often throughout the draft. The fear that someone will somehow misread the reference to apply to some proceeding in another type of case is not reasonable. For example, the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions do not constantly add the modifier "admiralty" before every noun or action because it is already clear.
3. Line 12: "work with plaintiffs or ~~with~~ defendants to prepare…." The second "with" is not incorrect but it is verbiage, unless the Committee believes that added emphasis is needed to focus on "defendants" in this provision, which seems unlikely.
4. Line 17: "to meet and prepare a report ~~to be submitted to the court~~ filed before the conference begins." Substituting the word "filing" reduces verbiage. More importantly, it makes clear that the report is part of the official record, which is important in this instance because all the other lawyers in the MDL should have the opportunity to view it. (But filing has other consequences,

which are addressed in Substantive Comment 2 directed at Lines 46-48 and Substantive Comment 19 directed at Lines 260-266, *infra*.)

5. Lines 18-23: "The report must address any matter designated by the court~~,~~. ~~which may include any matter listed below or in Rule 26.~~ The report may also address any matter in Rule 16 or any other matter that the parties wish to bring to the court's attention, including the following~~.~~:" The transition from subdivision (c) to paragraph (1) is awkward. With a little tweaking that was done above, it was smoothed over without changing the substance.
6. Line 52: "whether consolidated pleadings should be prepared ~~to account for multiple actions included in the MDL proceedings~~;" Verbiage.
7. Line 73: "Initial ~~MDL~~ Management Order." Verbiage.
8. Line 74: "the court should enter an initial ~~MDL~~ management order" Verbiage.
9. Lines 75-77: "address the matters designated under Rule 16.1(c) ~~-- and any other matter in the court's discretion~~." Verbiage. The court always has the discretion to address whatever it wants in its orders. Retaining the language is inconsistent with the long-established style tradition of eliminating the words "in the discretion of the court," which was heavily sprinkled throughout the rules. Is there any doubt that a judge can insert whatever matters they want in their own orders? The style projects uprooted these weeds.
10. Lines 82-83: "It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings~~,~~ upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will ~~to~~ promote the just and efficient conduct of such actions." Initially, the suggestion was limited to deleting the unnecessary comma punctuation. But in checking on the statutory § 1407, it might be worthwhile to consider adding the full text of the statute. Frankly, I had not focused on this criterion, because it has not attracted much attention. But perhaps under certain circumstances, it might have some significance and adding the full statutory text cannot harm.
11. Line 89: "in the Federal Rules of Civil Procedure ~~Rules~~…." Customary to refer to the formal title.
12. Line 105: "~~Rule 16.1~~ Subdivision (a)." I suspect the caption was inadvertent. But a hallmark feature of the rules committees' style projects, which painstakingly scrutinized and restylized every federal rule, was to maintain consistency throughout the rules. It is important that the draft rules and Committee Notes conform with consistent usage, otherwise future committees will need to undertake comprehensive restylization projects.
13. Line 105: "Rule 16.1(a) recognized that ~~the~~ a transferee judge…" For me, this is a close call, but the more general reference sounds a bit better.

14. Line 106: "an initial ~~MDL~~ management conference" Verbiage, especially because the lead-in clause refers to actions taken by a transferee judge, which can only mean an MDL proceeding.
15. Line 108: "an initial ~~MDL~~ management conference" Verbiage.
16. Line 109: "That initial ~~MDL~~ management conference." Verbiage.
17. Lines 111-112: "Although holding an initial ~~MDL~~ management conference in an MDL proceeding~~s~~ is not mandatory." The unnecessary reference to an *MDL* conference in an *MDL* proceeding highlights the verbiage. Also, singular is more consistent with the style guidelines and is more appropriate in this sentence.
18. Line 116: "~~Rule 16.1~~ Subdivision (b)." Consistency.
19. Line 116. "Rule 16.1(b) recognizes that the court may designate…" Consistent usage; see line 105: "Rule 16.1 (a) recognizes *that*…"
20. Line 120: "the initial ~~MDL~~ management conference" Verbiage.
21. Line 129: "the initial ~~MDL~~ management conference" Verbiage.
22. Line 132: "~~Rule 16.1~~ Subdivision (c)." Consistency.
23. Lines 148-149: "the initial ~~MDL~~ management conference" Verbiage.
24. Line 150: "~~Rule 16.1~~ Subdivision (c)(1)." Consistency.
25. Lines 150-151: "Appointment of leadership counsel is not universally needed in every MDL proceeding~~s~~." Singular is more consistent with the style guidelines.
26. Line 152: "manage the ~~MDL~~ proceedings" Verbiage. The immediately preceding sentence refers to appointment of counsel in "*MDL* proceedings" and sets the context for the next sentence, making it clear that managing proceedings means the *MDL* proceedings.
27. Line 177: "claims by individuals who suffered injuries~~,~~ and also claims by third-party". Unnecessary comma punctuation.
28. Line 191: "the initial ~~MDL~~ management conference" Verbiage.
29. Lines 199-200: "Subparagraph (B) ~~of the rule~~ therefore prompts" Verbiage and inconsistent usage. (See line 203, omitting reference to "*of the rule*").
30. Line 239: "the responsibilities non-leadership counsel" Delete the hyphen punctuation in "nonleadership," consistent with lines 39 and 232.
31. Line 248: "~~Rule 16.1~~ Subdivision (c)(2)." Consistency.
32. Line 260: "~~Rule 16.1~~ Subdivision (c)(3)." Consistency.
33. "~~Rule 16.1~~ Subdivision (c)(4)." Consistency.
34. Line 285: "~~Rule 16.1~~ Subdivision (c)(5)." Consistency.
35. Line 285: "For case-management purposes" Insert hyphen between the words, consistent with the style guidelines.
36. Line 299: "~~Rule 16.1~~ Subdivision (c)(6)." Consistency.
37. "~~Rule 16.1~~ Subdivision (c)(7)." Consistency.
38. "~~Rule 16.1~~ Subdivision (c)(8)." Consistency.

39. "~~Rule 16.1~~ Subdivision (c)(9)." Consistency.
40. Line 331: "~~Rule 16.1~~ Subdivision (c)(10)." Consistency.
41. Line 347: "~~Rule 16.1~~ Subdivision (c)(11)." Consistency.
42. Line 364: "~~Rule 16.1~~ Subdivision (c)(12)." Consistency.
43. Line 364: "An MDL transferee judge~~s~~ may refer" Singular is more consistent with the style guidelines.

B. SUBSTANTIVE SUGGESTIONS

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

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

3. Lines 73-77: "After the conference, the court should enter an initial ~~MDL~~ management order addressing the matters raised in the report or at the initial management conference ~~designated under Rule 16.1(c)~~" The draft language is ambiguous. The lawyers are to address the "matters designated in Rule 16.1(c)." The miscue is whether the lawyers must address the items designated in subdivision (c) or those designated by the transferee judge. The text of the draft rule at line 19 indicates that the "report must address any matter designated by the court," which adds weight on focusing solely on the matters the judge selected. But in addition to this miscue, the draft may be read to omit reference to items that the lawyers themselves raise independently, which may be outside of Rule 16 or Rule 16.1, for example, one of the topics in the Manual for Complex Litigation. Clearly the order

should not be read to necessarily exclude matters raised by the lawyers. The suggested language covers both and fulfills the purpose of the draft language.

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

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

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

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

another thing in "assisting the court" in other matters before leadership counsel is appointed, which usually is about 30 days after the initial conference is held.

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

8. Lines 132-143: "The germaneness and urgency to address certain topics at the initial management conference will depend on the nature of the MDL, the judge's and parties' familiarity with MDL practices and procedures, and the importance and necessity of input from leadership counsel, who may not yet have been appointed. Subdivision (c) lists certain case-management topics that might be useful to discuss at the initial management conference, particularly in some large MDLs, but expressly provides discretion to the court and the parties to address other topics. These other topics are described in the Manual for Complex Litigation, which contains more comprehensive lists of topics that may be useful. The court ordinarily should order the parties to meet to provide a report to the court about the matters it designate~~d~~ ~~in the court's Rule 16.1(c) order~~ ~~prior~~ before ~~to~~ the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters."

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

To be clear, however, the substantial majority of pretrial orders in the 19 mega mass-tort MDLs, which list the topics to be considered at an initial

management conference, are remarkably the same.[2] These mega mass-tort MDLs consist of more than 97% of actions pending in all 172 MDLs (i.e., 408,636 actions).

How these mega mass-tort MDL courts manage their actions should be the touchstone for Rule 16.1. The Committee Note acknowledges as much at lines 92-93, 150-151, and 206. The orders in these MDLs refer to topics listed in § 22.6 of the Manual for Complex Litigation, e.g., "The items listed in MCL 4th Sections 22.6. 22.61, 22.62, and 22.63 shall, to the extent applicable, constitute a tentative agenda for the Initial Conference."[3]

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

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

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

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

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

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

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

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

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

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

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

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

18. Lines 245-247: "But ~~it may be best to defer entering a specific order~~ the court should consider whether to set a fixed percentage of the estimated settlement proceeds as the assessment or a tentative percentage adjusted in the course of the proceedings ~~until well into the proceedings, when the court is more~~

~~familiar with the proceedings~~." The draft provision deferring the establishment of a common benefit fund is not feasible. Lawyers incur substantial out-of-pocket expenses, which must be paid immediately.[4] The real question deals with what percentage. Some courts have fixed an early percentage, which had to be increased later in the proceedings requiring additional consents from all involved. The better practice is to make clear to everyone as early as possible that the common-benefit fund assessment will be assessed but that it may be adjusted later in the proceeding.

19. Lines 260-266: "~~Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice~~. In a separate transmission to the court, the plaintiffs and defendants should submit to the court a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. The court should make clear that these statements will not be filed, will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings. The parties' statement should list all pending motions, as well as all related cases pending in state or federal court, together with their current status, including any discovery taken to date, to the extent known. The parties should be limited to one such submission for all plaintiffs and one submission for all defendants." The suggested language is the standard language used in many case-management orders in large MDLs.[5] As stated by the transferee judge in *Tasignia* MDL 3006, pretrial order No. 1, the

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

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

purpose of these position statements is "to assist the Court *with an overview of the litigation." (emphasis added)*

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

The differences from the draft language are apparent. Instead of speculation about how the provision might be used and their value, the suggested language is intended to provide useful information to the lawyers trying to comply with the rule. Most importantly, the suggestions make clear that these position statements are not binding, do not waive any claims or defenses, and may not be referenced or offered in evidence in later proceedings. The reasons are self-evident.

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

21. Lines 299-303: "A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication. Information on methods to handle discovery efficiently can address, for example, the following: (i) common-issue

discovery; (ii) procedures for handling already-completed common-issue discovery in pre-MDL cases; (iii) establishment of early ESI protocols; (iv) overall time limits on each side's number of deposition hours; (v) benefits of forbidding written discovery motions; (vi) necessary early protective orders; and (vii) procedures to handle privilege disputes." To many eyes, consolidated discovery is the primary purpose for MDLs. The suggested language adds meat to the draft, which makes it more useful. The items were recommended by Judge David Campbell, former chair of the Advisory Committee on Civil Rules and preeminent jurist, in a law review article.[6]

22. Lines 313-314: "courts generally conduct management conferences, often online so that lawyers from around the country can participate, throughout the duration of the MDL proceedings…." Judges are increasingly holding remotely held conferences as a general matter. It may be helpful to highlight this in the MDL context, even if obvious.

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

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

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

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

court MDL actions, the language is opaque. The suggested language tries to clarify the intent.

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

I look forward to seeing the Committee at its meeting on October 17 and will be available to answer any questions about my comments and suggestions.

Thank you.

John Rabiej,
Founder and President

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed Amendments to FRCP 16 and FRCP 26

October 3, 2023

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

WHO WE ARE

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

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

I. BACKGROUND

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

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

II. PROPOSED AMENDMENTS

Rule 16. Pretrial Conferences; Scheduling; Management

(b) Scheduling and Management

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

(B) *Permitted Contents.*

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

Conference of the Parties; Planning for Discovery.

* * * * *

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

* * * * *

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

III. DRI CENTER RECOMMENDATIONS

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

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

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

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

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

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

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

V. CONCLUSION

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

Respectfully submitted,

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

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

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

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

October 4, 2023

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Costs and Burdens

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

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

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

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

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

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

B. Limited Value

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

C. Gamesmanship

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

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

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

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

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

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

D. Lack of Uniformity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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October 7, 2023

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

Re: Comment on Proposed Federal Rule of Civil Procedure 16.1

Dear Members of the Committee:

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Concerns About the Use of Ad Hoc Rulemaking in MDLs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

Respectfully submitted,

/s/ Kaspar J. Stoffelmayr

Kaspar J. Stoffelmayr

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

PUBLIC SUBMISSION Withdrawn

Comment from DRI Center for Law and Public Policy

Posted by the **United States Courts** on Oct 11, 2023

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Reason Withdrawn

This comment is being withdrawn at the request of the submitter due to an incorrect heading reference. The corrected comment can be found at USC-RULES-CV-2023-0003-0010.

There are no documents available to view or download

Comment ID

USC-RULES-CV-2023-0003-0009

Comment Details

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed FRCP 16.1

October 11, 2023

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PROBLEM OF UNSUPPORTABLE CLAIMS IS NOT A DISCOVERY ISSUE

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

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

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

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

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

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

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

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

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

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

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

EXISTING RULES ARE INADEQUATE TO ADDRESS THE PROBLEM OF UNSUPPORTABLE CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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

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

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

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

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

October 15, 2023

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 7-240
Washington, D.C. 20544

Re: Comment on Proposed Federal Rule of Civil Procedure 16.1

Dear Members of the Committee:

On behalf of Bayer U.S. LLC, the undersigned offer this comment on proposed Rule 16.1. Bayer's position is that Rule 16.1 should address the persistent problem of unsupportable claims in MDLs. The current proposal does not address this overarching issue in a meaningful way.

I. Interests of Bayer and Summary of Position

Bayer is a global enterprise with core competencies in the life science fields of healthcare and nutrition. Bayer designs its products and services to help people and the planet thrive by supporting efforts to address the unprecedented global challenges presented by a growing and aging global population. Bayer is committed to driving sustainable development and generating a positive impact with its businesses.

Through bold ideas and unprecedented insights, Bayer is pioneering new possibilities that advance life for all of us. That means reimagining how we care for ourselves and one another by empowering everyday health, improving approaches to patient care, and finding better ways to nourish our communities around the world.

In recent years, Bayer has been involved in **at least seven** distinct MDLs, comprising **tens of thousands** of filed claims, ranging from pharmaceuticals to agricultural products.

Bayer believes that proposed Rule 16.1 does not address the core problem with MDLs today—as the Advisory Committee originally defined it—that "a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because

the pertinent statute of limitations had run before the claimant filed suit."[1] We urge the Committee to revise the Rule to address this key issue.

II. Unsupportable Claims Are a Significant Problem

Claims that lack factual support and are legally insufficient are a significant problem in MDLs. This Committee identified the problem early in the Rule 16.1 process. Experienced plaintiffs' counsel have acknowledged it in testimony, and experienced judges have discussed it. Companies including Bayer face unsupportable claims in every MDL. The presence of unsupportable claims adversely impacts us and the courts in many ways. The comment filed by Lawyers for Civil Justice (LCJ) goes through these concerns in significant detail.

Unsupportable claims are a wasteful and expensive distraction, and often slow resolution of meritorious claims by making MDL litigations larger and more cumbersome. They infect the entire MDL litigation process, because the court and the parties must address them in ad hoc processes as they become aware of their existence at various stages of litigation: through a protracted PFS process that operates as a multi-step discovery dispute; through selection (and then voluntary dismissal) of cases for initial or post-remand trials; and during settlement discussions where other complicating issues like double-representations, deceased clients, or clients who cannot be located or contacted, reveal themselves.

For example, in the *Roundup* MDL in the Northern District of California, after six years of careful MDL supervision, the parties have been preparing cases for remand to their transferor courts as envisioned by Section 1407. As the litigation matured, the court and the parties recognized the need to work up the hundreds of cases that remained on the docket in preparation for remand. After consulting with the parties, the court instituted an orderly process for developing these cases in several tranches over a period of several years. However, once plaintiffs began investigating their cases, they voluntarily dismissed a large number (98 cases) and requested delays (or transfers to later tranches of cases) for more than 200 others. An additional 39 cases were dismissed by the court for failure to comply with court orders or on summary judgment, and more dismissals are expected this year.

During the years those cases were in the *Roundup* MDL, the facts necessary to determine whether those claims should have been prosecuted in the first place could have been collected, and with a Rule requiring such fundamental investigation the cases could have been dealt with administratively at an early stage. It is important to note that all of this administrative work took place after *six* years of

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

MDL practice, and once plaintiffs were required to examine and support their claims, these plaintiffs withdrew them.

Similarly, in the *Xarelto* MDL in the Eastern District of Louisiana, after three trial victories by Bayer in the MDL, Judge Fallon ordered workup of approximately 1200 cases in two waves, resulting in dismissal of approximately 40% of claims.

There simply is no countervailing benefit for allowing these unsupported claims to be warehoused in federal courts. Rule 16.1 should address this concern and provide judges with proper tools to promptly resolve these cases.

III. Plaintiff Fact Sheets Do Not Deter Unsupportable Claims

The solution that proposed Rule 16.1 offers to address this problem—the submission of Plaintiff Fact Sheets (PFSes)—will neither control nor deter unsupportable claims. Put simply, PFSes are discovery tools, not an early vetting method. The defendant does not immediately receive confirmation that each claim has basic merit. Instead, the PFSes that come in are usually only partially filled out and are provided, if at all, years into the litigation.

For example, in the first *Mirena* MDL in the Southern District of New York, the PFS process worked as follows:

(1) A plaintiff filed a case, or the case was transferred to the MDL.

(2) That plaintiff then had 60 days to provide the required PFS. The PFS contained eight simple "core criteria" questions that established Article III standing, subject matter jurisdiction, and ensured no statute of limitations applied.

(3) If the plaintiff did not answer these eight questions, Bayer sent a deficiency letter that provided another 30 days to cure the response.

(4) If there was still no cure, Bayer gave notice to the Plaintiffs' Steering Committee and plaintiff's counsel that it would file a motion to dismiss *without* prejudice after the next case management conference.

(5) If there was still no cure, Bayer filed its motion to dismiss without prejudice.

(6) The motion to dismiss was discussed with the court at the next case management conference, and the judge would dismiss the case without prejudice, providing the plaintiff another 90 days to cure.

(7) If the plaintiff still did not cure the response within that 90 days, Bayer sent a second notice to the Steering Committee and plaintiff informing them that if there was no cure before the next case management conference, it would seek dismissal *with* prejudice.

(8) If the plaintiff still did not cure before the next case management conference, Bayer filed a motion to dismiss with prejudice.

(9) At the next case management conference, the court would confirm that all procedures were followed, discuss the case with Bayer and the Steering Committee, and then dismiss the delinquent case with prejudice.

Thus, to secure a final dismissal in the *Mirena* MDL using the PFS process, Bayer had to interact with an unsupportable case **eleven times,** the Plaintiff Steering Committee had to interact **four times**, and the court had to interact **four times**. At minimum, this process would take **180 days** for each claim, assuming case management conferences occurred precisely as deadlines ran out. This process occurred **650 times** in the *Mirena* MDL, and only three plaintiffs contested the process.

Given that the vast majority of plaintiffs do not defend unsupportable claims, the PFS process is needlessly inefficient, and wastes significant resources compared with the simpler process LCJ has advocated.

To use another example, in the *In re Yasmin and Yaz* litigation, one attorney filed a 127-plaintiff complaint in April 2014.[2] After the case was consolidated into the MDL, Bayer answered the Complaint. The only other court-reported activity on that complaint occurred when Bayer filed a Motion to Dismiss for plaintiffs' failure to comply with the Case Management Order requiring the plaintiffs to fill out PFSes, because **117 of the 127 plaintiffs** had not complied. Plaintiffs' counsel's response was to file a motion to withdraw, because "the identified plaintiffs have failed to communicate with counsel." 117 claims—**92% of a single complaint**—lacked enough information to fill out a PFS but stayed in the litigation for nearly a year.

As these examples show, the simple fact is that PFSes do not deter unsupportable claims. Plaintiffs' lawyers still file such claims *en masse*. It takes extensive motion practice over months, if not years, to clear even a few unsupportable claims off the docket. Most of them stay on the docket; there simply is not enough time or resources to challenge every PSF lacking support.

IV. Bayer Supports LCJ's Proposal

Bayer supports the proposed amendment from LCJ, which would require the transferee court and parties to identify how and when "sufficient information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim." This requirement would provide enough corroborating information

[2] *See In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Prods. Liab. Litig.*, 2015 WL 1500175 (S.D. Ill. Mar. 27, 2015).

to allow a party to determine whether the claim has the merit required by Federal Rules of Civil Procedure 8(a), 9(b), and 11.

Bayer also supports the Comment language proposed by LCJ. The note accompanying the rule should explain the requirement that the court be provided with sufficient information to establish the "constitutional minimum of standing" with respect to each plaintiff. Further, the note should make clear that the proposed amendment to section (c)(4) complements, and does not displace, the rules defining pleading standards. To the extent MDLs are litigated in (and overseen by) federal courts, they should be subject to the Federal Rules of Civil Procedure, including the rules defining pleading standards.

A Rule 16.1 that requires this information and provides a mechanism for disclosure with the consequence that the plaintiff's claim is deemed not filed (or dismissed without prejudice) if it lacks that information, would serve as an important first step in assigning responsibility for researching each plaintiff's claim to the proper parties—plaintiffs and their counsel. In addition, the comment language proposed by LCJ would ensure that MDLs are governed by the existing federal rules.

V. Conclusion

As a defendant in federal court, Bayer has had the opportunity to observe the ways in which improper standards for MDL claims have led to a significant percentage of unsupportable claims. Rule 16.1 requires further amendment to align with the original goals identified by the Advisory Committee. Adopting the proposed changes from LCJ would help address those issues, particularly the significant issue of unsupportable claims.

Respectfully submitted,

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Bart A. Whitley
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PUBLIC SUBMISSION

Comment from STRAW, ANDREW

Posted by the **United States Courts** on Oct 23, 2023

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Proposed Rule 16.1 for MDL management: There needs to be a national standard for how to implement state court rules applied to an MDL. If an MDL court decides a matter based on the interpretation of a state law or state constitution, the MDL court must certify those questions to the relevant state supreme court and will be bound by the answers. There must never be another MDL-2218 where a state supreme court says one thing and an MDL court applies a different interpretation of that state's laws and constitution to the disadvantage of mass tort victims. Similarly, if a U.S. Court of Appeals decides such a question of the meaning of state law and the MDL ends up being in another circuit, the original circuit (above the state in question) must be obeyed. New rules and interpretations in an alien circuit must not be created because an alien circuit that does not normally deal in that state's laws will not have the same competence as the presiding circuit over that state. Not following this logic resulted in thousands of Camp LeJeune victims being deprived of the law that would have protected them in North Carolina and caused Congress and the president to have to pass an entirely new law (Camp LeJeune Justice Act of 2022) because MDL-2218 in N.D. Georgia and the 11th Circuit applied North Carolina law and 4th Circuit precedent incorrectly, as Senator Tillis made perfectly clear afterwards. Senator Tillis (R-NC) of course knew better than the District Court in Georgia 11th Circuit because he was the former Speaker of the North Carolina House of Representatives. Having a sensible respect for an original state and its presiding federal courts above it would have likely resulted in hundreds of thousands of poisoning victims who waited from 1953 to get justice years ago without having to waste so much time and energy passing a new law to overturn the injustice in the MDL and its higher appellate court. This must never happen again.
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USC-RULES-CV-2023-0003-0012

PUBLIC SUBMISSION

Comment from STRAW, ANDREW

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A second comment regarding FRCP Rule 16.1 as proposed: To address the issue of alien circuits deciding the meaning of state laws and constitutions not in those circuits, MDLs should be created at least somewhere in the same circuit where the injury or controversy actually took place. That way, even if the district court applies incorrect interpretations of a state constitution or its laws, the circuit will at least have the competence to make the needed corrections. However, there should still be the obligation to certify questions of state law or state constitutional law meaning to the relevant state supreme court. Andrew Straw, andrew@andrewstraw.com

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October 19, 2023

Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Comments on Proposed Amendments to Rules 16(b)(3) and 26(f)(3) (privilege logs)

Dear Judge Rosenberg:

The undersigned are members of the Council and Federal Practice Task Force of the ABA Section of Litigation, but submit these comments in our individual capacities only, on the proposed revisions to the Federal Rules of Civil Procedure to address the subject of Privilege Logs.

We appreciate the efforts of the Advisory Committee to seek to reduce undue burdens in the application of Rule 26(b)(5)(A)(ii) by requiring parties and the court to address the timing and method of compliance with Rule 26(b)(5)(A)(ii) in the Rule 26(f) and Rule 16 conferences, respectively. The proposed changes are ameliorative. The proposed changes, however, do not go far enough. To remedy this concern, we urge the Standing Committee and the Advisory Committee to address the additional issues discussed below with text as we suggest or other appropriate text.

Benefits of the Proposed Changes. Where privileged or protected documents are implicated in a document production, it is always important for counsel to talk. Unfortunately, that does not always happen. Thus, placing the topic on the Rule 26(f) list will force this communication in situations where counsel need the reminder that parties are required by Rule 1 to achieve the goals of Rule 1.

Courts are also required by Rule 1 to achieve a just, speedy, and inexpensive proceeding. So, it is equally important to involve the court in decisions on the timing and method for complying with Rule 26(b)(5)(A)(ii). Doing so at the Rule 16 conference places the court in the conversation about "the appropriate method for identifying the grounds for withholding materials," as the Draft Committee Note explains.

That Note properly recognizes that '[n]o one-size-fits-all approach would actually be suitable in all cases." It identifies two methods: a document-by-document listing or a listing by category. It suggests that there may be "other methods," without explaining what those might be. A hybrid approach—listing some documents individually and some by category—may be what is contemplated by the reference to "other methods." Whatever is intended by the reference, in cases

involving, on a relative basis, small numbers of documents, privilege log discussions among counsel and the court should result in problem avoidance if counsel and the court read the ultimate Committee Note and actually address the "need for flexibility" originally contemplated when Rule 26(b)(5)(A)(ii) was adopted in 1993.[1]

How to Make Rule 26(b)(5)(A)(ii) Work in all Cases. Not every case, however, features, on a relative basis, small numbers of documents. The "undue burdens" identified in the Draft Committee Note are associated with cases that on a relative basis, involve large numbers of documents.[2] We do not believe that the proposed changes will materially reduce burdens in these cases without some additional guidance from the Advisory Committee.

Let us explain. The Draft Committee Note provides:

> Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

This draft text presumes that by the time of the Rule 26(f) conference, counsel are in a position to have a meaningful discussion on privilege logs. Our experience in significant document cases is just the opposite. In such cases, the focus in the initial conference is on the identification of the discovery relevant to a claim or defense, consideration of the proportionality factors, the scope of preservation, agreement on a Rule 502(d) order, and issues related to the method and timing of producing documents and electronically stored information. It is invariably too early in the process to address privilege log issues with any specificity, as counsel are still typically getting their arms around the types, sources, and volume of documents and ESI that is responsive to identified or expected requests for production. As a result, in such cases, at the 26(f) conference, counsel will have the discussion called for by the proposed change to Rule 26(f), but they will defer resolution until a later date when they have a grasp on the numbers of privileged or protected documents and the burden they might present for creation of a privilege log. Or as often occurs in asymmetric document cases, the document-light party will demand a document-by-document

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[1] Not every court holds a Rule 16 conference. Without an engaged judge, the proposed changes will not accomplish the goals of the Advisory Committee in adopting these changes.

[2] Multidistrict litigation, class actions, antitrust and securities actions, among others, fall into this category.

privilege log—the undue burden referred to in the Draft Committee Note—over the objection of the document-heavy party and the court will not have sufficient information to resolve the dispute.

We are also concerned that if a party is not sufficiently knowledgeable to discuss privilege log issues in detail at the Rule 16 conference (if one is held), that when such issues arise later in the case, the court may give them short shrift, believing that they should have been raised at the Rule 16 conference.

Thus to address the cases where undue burdens often occur, Rules 16 and 26, and the associated Committee Notes, must recognize that where it is too early in the process to address the method of generating a privilege log, the parties should identify when they believe they will be in a position to meaningfully have a meet-and-confer session on the topic, and the court must then be prepared to address any disputes at a later scheduling conference. If this Rule change is to work as intended, there is no substitute for an available judge who is ready to engage with counsel to resolve privilege log methodology disputes. The Rule and the Note must make this crystal clear.

When are counsel best in a position to evaluate the privilege-log methodology? In document-heavy cases, typically, the most appropriate time to address privilege-log issues is at the time of an initial production. Indeed, our experience is that in document-heavy cases—complex litigation—periodic case management conferences are essential to keep discovery on schedule and resolve, without motion practice, discovery disputes that may arise along the way. The Advisory Committee recognized this fact in the 2015 Rules Amendments with its emphasis on the importance of an engaged judge. It should re-emphasize this fact with this proposed rule change if the time and money wasted on privilege log disputes is to be meaningfully reduced.

We believe that the Draft Committee Note also should be modified to reflect the reality of practice. Where parties have an equal burden in generating a privilege log, parties will be motivated to agree upon the most appropriate method of identifying privileged documents *once* they have sufficient information about their clients' documents that are relevant to the case and the potential burdens involved in providing privilege logs. That will not be before the initial Rule 16 conference. So, the court must be so advised and determine the best time for the parties to reconvene, and, if it becomes necessary, the court to become involved, to address privilege log methodology.

Where the need to produce documents will be primarily on one party, the party seeking discovery may seek the most expensive method of logging privileged documents, despite the mandate of Rule 1. If that demand is made at the initial Rule 26(f) conference, the court must be prepared to address the demand at the initial Rule 16 conference. And, as is likely going to be the case, because of the lack of information, the court must again determine the best time to reconvene the parties to address privilege log methodology.

The Note must recognize both categories of cases and the need for the parties and the Court to be reminded of their Rule 1 obligations, and for the Court additionally, to prevent the "undue burdens" identified in the current Draft Committee Note.

We recognize that the Advisory Committee has not proposed any amendment to Fed. R. Civ. P. 26(b)(5)(A)(ii). We believe it is within the scope of the Rules Enabling Act process, however, to consider one conforming sentence in Fed. R. Civ. P. 26(b)(5)(A)(ii) to emphasize the importance of the court's role in preventing privilege log disputes. After subparagraph (A)(ii), add a sentence that reads: "Where necessary to prevent undue burden, the method of compliance with subdivisions (A)(i) and (ii) shall be determined by the court after consultation with the parties."

We appreciate the Standing Committee and the Advisory Committee's consideration of these comments, and respectfully urge that the concerns expressed above be addressed as we have suggested or in a comparable manner.

Respectfully submitted,

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Comment from Silver, Charles

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Dear Committee Members, I am submitting two articles on judicial management issues in MDLs that came out recently. One argues that the law of restitution and unjust enrichment does not support the practice of granting common benefit fee awards in MDLs. The other shows that the inherent powers doctrine does not support many uses that MDL judges make of it. I hope that, when promulgating rules for MDLs, the Committee will avoid conveying the impression that the law relating to the matters covered in these articles is settled and supports existing practices. In my opinion, the law relating to even such basic practices as the appointment of lead attorneys has received far less attention than it deserves and should not be regarded as settled.

I am also attaching two older articles on MDLs that may be relevant to matters before the Committee. One discusses the responsibilities of judges and lead attorneys. The other addresses a variety of issues, including differences between MDLs and class actions, and proposes a manner of selecting lead attorneys that is designed to be less coercive than existing arrangements with regard to fees.

Best wishes,
Charlie Silver
School of Law, University of Texas

Attachments 4

Silver Responsibilities of Lead Lawyers and Judges in MDLs

Download (https://downloads.regulations.gov/USC-RULES-CV-2023-0003-0015/attachment_1.pdf)

Silver Suspect Restitutionary Basis of Fee Awards in MDLs

Download (https://downloads.regulations.gov/USC-RULES-CV-2023-0003-0015/attachment_2.pdf)

The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations

Download (https://downloads.regulations.gov/USC-RULES-CV-2023-0003-0015/attachment_3.pdf)

Silver and Miller Managing Multi-District Litigations

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THE RESPONSIBILITIES OF LEAD LAWYERS AND JUDGES IN MULTIDISTRICT LITIGATIONS

*Charles Silver**

Recent developments in multidistrict litigations (MDLs) raise important questions about the responsibilities of lead attorneys[1] and judges. Increasingly, lead attorneys seem to use their control of settlement negotiations to enhance their compensation. In a prior article co-authored with Professor Geoffrey P. Miller, I argued that this conduct violates lead lawyers' fiduciary responsibilities.[2] But judges approve of this behavior instead of reining it in.

Judge Eldon E. Fallon, who presides over the massive *Vioxx* MDL,[3] found my critique unconvincing. In an order on common benefit fees and costs, he explained why, in his view, the self-enriching actions of the lead attorneys in that MDL were appropriate.[4] He also criticized a proposal Professor Miller and I set out for selecting and compensating lead lawyers in MDLs.[5] When doing so, he relied on a draft study by Carolyn A. Dubay, formerly a researcher at the Federal Judicial Center (FJC), who also found our proposal wanting.[6]

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* Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure and Co-Director of the Center on Lawyers, Civil Justice and the Media, School of Law, University of Texas at Austin. Professor Silver consults with attorneys involved in litigation and assisted lawyers with Vioxx-related cases.

1. In this Article, I use the phrases "lead lawyers" and "lead attorneys" to describe lawyers formally appointed to positions of authority in MDLs, and the phrases "disabled lawyers" and "disabled attorneys" to describe lawyers denied such appointments. A third category includes lawyers not formally appointed to positions of authority who perform and are compensated for common benefit work, i.e., legal services deemed to be of value for all plaintiffs with cases in an MDL. For convenience, I include disabled lawyers who perform common benefit work in the lead attorney category. For descriptions of the positions of authority in MDLs, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.2 (2004).

2. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

3. Order & Reasons, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Oct. 19, 2010).

4. *Id.* at 3–8, 12–15 & nn.15–16.

5. *Id.* at 3 n.4.

6. CAROLYN A. DUBAY, FED. JUDICIAL CTR., TRENDS AND PROBLEMS IN THE APPOINTMENT AND COMPENSATION OF COMMON BENEFIT COUNSEL IN COMPLEX MULTI-DISTRICT LITIGATION: AN EMPIRICAL STUDY OF TEN MEGA MDLS 7–8, 59–62 (July 2010) (on file with the *Fordham Law Review*). Given the role I played in sparking the Federal Judicial Center's interest in MDLs, I am reminded of Gore Vidal's observation that "no good deed goes unpunished." *See infra* Part IV.

In this Article, I respond to the criticisms made by Judge Fallon and Dubay. The analysis builds on my work with Professor Miller and also on the article in this issue that I co-authored with Professor Lynn A. Baker.[7] I encourage readers to become familiar with those writings before tackling this one.

I. BACKGROUND ON MULTIDISTRICT LITIGATIONS

An MDL is created when the Judicial Panel on Multidistrict Litigation (JPML) transfers related cases pending in diverse federal district courts to a designated forum for consolidated pretrial motions and discovery. When the cases are ready for trial, the MDL judge is supposed to send them back to their original forums.[8] Remands are so uncommon, however, that MDLs have been compared to "black holes."[9] Cases sent into MDLs rarely escape their grip.

After the JPML transfers cases to an MDL forum, lawyers who were formerly litigating separately must coordinate their efforts. They must establish a governance structure that will divide tasks, assign responsibilities, monitor performance, and make decisions. They must also decide whether fees and costs will be shared and, if so, on what terms.

In theory, lawyers could create governance structures themselves. In practice, MDL judges usually take charge of this task. They empower a small number of lead lawyers to exercise managerial authority on the plaintiffs' side and relegate the rest of the lawyers to passive positions. I use the label "disabled lawyers" to describe lawyers denied lead counsel positions because their ability to act for their clients in the MDL is limited.

Lead attorneys enjoy plenary and, in many respects, exclusive control of the litigation. Although they report to and receive input from disabled attorneys, they are independent actors who operate subject to no one's control. Disabled lawyers cannot tell lead attorneys what to do; nor can they fire them for disobedience. If disabled lawyers dislike the way lead lawyers are performing, their only recourse is to complain to the trial judge, who, for a variety of reasons, is unlikely to be sympathetic.

Plaintiffs also have little control of lead lawyers. Although a lawyer must normally follow a client's lawful marching orders as given, there is no evidence that lead attorneys look to their clients for instructions when deciding how to handle MDLs. For example, when, as sometimes happens, bellwether trials occur in MDLs, lead lawyers decide which cases will be tried (or recommended to the MDL judge as candidates for trial) without asking the plaintiffs whether they favor bellwether trials or agree with the choice of cases. The same is true when lead attorneys initiate global

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7. *See* Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833 (2011).

8. 28 U.S.C. § 1407(a) (2006); *see infra* note 70.

9. *See, e.g.*, Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 & n.21 (2008); Brent M. Rosenthal, *Toxic Torts and Mass Torts*, 63 SMU L. REV. 845, 851 (2010); Gary Wilson et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 104 & n.108, 112 (2000).

settlement negotiations. They do not ask plaintiffs for permission to negotiate.

Lead attorneys in MDLs closely resemble lawyers who litigate class actions. Both enjoy considerable independence from the persons they represent. No class member can tell class counsel what to do, not even the named plaintiff.[10] In practical effect, a lawyer representing a class is an independent actor or a trustee, not an agent. The same is true of lawyers assigned to managerial positions in MDLs.

Judges recognize the similarities between class actions and MDLs. They refer to MDLs as "quasi-class actions," and they borrow freely from class action jurisprudence managing MDLs.[11] For example, when compensating lead attorneys or reimbursing their expenses, judges draw upon restitutionary doctrines that evolved in class actions.[12] They also take note of the size of fee awards in class actions when deciding how much lead attorneys in MDLs should be paid.[13]

II. ARE LEAD ATTORNEYS FIDUCIARIES?

The fiduciary duty requires an agent to act solely for a principal's benefit when acting on the principal's behalf. The duty prohibits an agent from using his or her powers to benefit a third party or for personal gain. Ordinary attorneys are fiduciaries. Attorneys who handle class actions are fiduciaries too. There are differences between ordinary attorneys and class counsel, of course, an important one being that an ordinary lawyer is an agent while an attorney representing a class more closely resembles a trustee. The assertion that both lawyers are fiduciaries has merit, even so, because both lawyers must ignore their own interests when representing others. As explained in the article Professor Baker and I co-authored, this means that both lawyers may properly enhance their compensation only as a side-effect of increasing their entrustors' recoveries.[14]

Given that both lawyers who represent individual claimants and lawyers who handle class actions are fiduciaries, it would be surprising to discover that lead lawyers in MDLs were not. Yet, insofar as legal doctrine is concerned, the matter is uncertain. Although commentators argue that lead attorneys are fiduciaries and should be treated as such, solid authority for

10. FED. R. CIV. P. 23(g)(1) advisory committee's note ("Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to 'fire' class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole."). Class actions brought under the Private Securities Litigation Reform Act of 1995 (PSLRA) are an exception to this observation. *See* 15 U.S.C. §§ 77z-1, 78u-4 (2006). In these cases, large investors appointed to lead plaintiff positions exercise real control of class counsel. *Id.*

11. *See* Silver & Miller, *supra* note 2, at 110 & n.7 (detailing the historical background of the "quasi-class action"); *id.* at 110–11, 114–18.

12. *Id.* at 109–10, 122–30.

13. *Id.*

14. Baker & Silver, *supra* note 7, at 1836–42.

the proposition is surprisingly scarce. The MDL statute does not address the matter and the common law is undeveloped.[15]

Consider the statement of lead lawyers' responsibilities that appears in the *Manual for Complex Litigation* (the *Manual*), which requires lead attorneys to "act fairly, efficiently, and economically in the interests of all parties and parties' counsel."[16] The decision to recognize disabled lawyers and claimants separately makes sense, for the fortunes of both rest in lead attorneys' hands. Even so, the language used in the *Manual* falls short of stating the fiduciary standard. The phrase "all parties and parties' counsel"[17] includes the lead attorneys. The *Manual* might therefore imply that lead attorneys can consider their own interests and can put their own interests on par with those of claimants and disabled lawyers. The fiduciary duty requires a lawyer to ignore his or her own interests. It does not permit a lawyer to engage in self-enriching behavior as long as a client is treated "fairly."

Relying on the passage in the *Manual* discussed above, the *Principles of the Law of Aggregate Litigation* (the *Principles*), which the American Law Institute (ALI) published in 2010, concludes that lead attorneys in MDLs are fiduciaries.[18] However, it does not examine the ambiguity just pointed out. It also later states that "[t]o promote adequate representation, judges *may* . . . enforce fiduciary duties on named parties and their attorneys."[19] This seems to imply that it is up to MDL judges to decide whether lead attorneys are fiduciaries or not.

Illustration 4 to § 1.05 in the *Principles* suggests that this implication was not intended. It assumes that "Lawyers I, O, and P [represent hundreds of clients with asbestos-related claims],"[20] that the clients' cases are consolidated in an MDL, and that the MDL judge "appoints Lawyer T, who also has cases there, to the position of Lead Counsel."[21] It then states flatly that "Lawyer T becomes a fiduciary to all plaintiffs and lawyers in the consolidated proceedings and may not use her position to enrich herself at their expense."[22]

The *Principles* also recognizes that lead attorneys are fiduciaries of a certain kind. Some fiduciaries are forbidden from helping one beneficiary

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15. *See* 28 U.S.C. § 1407.
16. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 10.22.
17. *Id.*
18. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 reporter's notes cmt. a (2010) (observing that "[c]lass counsel is a [] fiduciary to a client[, the named plaintiff,] who is also a fiduciary [to other class members]," and that "[a] similar relationship obtains between lead attorneys and other lawyers in a multidistrict litigation"). I was an Associate Reporter on the *Principles* and bore primary responsibility for Chapter One. However, like other American Law Institute (ALI) projects, the *Principles* was a collaborative undertaking. The entire project, including Chapter One, benefited enormously from comments and contributions made by all the Reporters and by other members of the ALI, including Professor Howard M. Erichson, the organizer of this Symposium.
19. *Id.* § 1.05(c)(3) (emphasis added).
20. *Id.* § 1.05 illus. 2, 4.
21. *Id.* § 1.05 illus. 4.
22. *Id.*

at the expense of another. Normally, lawyers fall into this group. By subordinating one client's interests to another's without informed consent, a lawyer would act disloyally. Other fiduciaries are allowed to make tradeoffs. Trustees are the exemplars of this group. A trustee may use entrusted assets to send one beneficiary to college even though less money will be available to help another beneficiary as a result. When making tradeoffs among beneficiaries, trustees need only be reasonable and fair. The *Principles* suggests that lead attorneys resemble trustees more than lawyers or other agents. Their responsibility is to "pursu[e] the good of all," which, if need be, they may do by making tradeoffs that are reasonably "likely to maximize the value of all claims in the group."[23]

In one respect, then, the *Principles* is good authority for the position I espouse. It states unequivocally that lead attorneys are fiduciaries. In another respect, though, the *Principles* has no authority at all. The ALI can identify what its members regard as good practices and doctrines, but the organization has no power to make law. Moreover, on the point at issue, the Reporters' Notes to § 1.05 cite no statutory or common law authority. In this respect, the *Principles* resembles the *Manual*, which cites no authority either. Both volumes thus show plainly that the law governing lead lawyers' responsibilities is immature.

Given the dearth of authority directly on point, judges may take guidance from other bodies of law. If they do, they will quickly conclude that lead attorneys are fiduciaries. Mass tort lawyers are fiduciaries,[24] and so are lawyers who represent plaintiff classes.[25] These examples are the most analogous to lead counsel.

Lead lawyers are certainly fiduciaries to their signed clients. In an MDL, therefore, the question is not whether lead attorneys are fiduciaries—they are—but to whom their responsibilities extend. In particular, it is important to know whether they must treat non-client claimants as well as they treat their clients. The basis for an affirmative answer is clear. To the extent that lead attorneys displace disabled lawyers, they assume disabled lawyers' duties, including the fiduciary duty to refrain from exploiting clients.

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23. *Id.* § 1.05 cmt. f. The argument that lead attorneys resemble trustees more than agents draws support from several facts, including the inability of entrustors to select lead attorneys, fire them, or control them, and the absence of market mechanisms that ordinarily encourage agents to perform well. *See* Tamar Frankel, *Fiduciary Duties*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 127–28 (Peter Newman ed., 1998).

24. *See, e.g.*, Huber v. Taylor, 469 F.3d 67, 81 (3d Cir. 2006) (finding that "the Defendants," who represented a group of plaintiffs with asbestos claims, "were acting as the Plaintiffs' attorneys," and that "[i]t is well-settled law, regardless of jurisdiction, that attorneys owe their clients a fiduciary duty" (citing Akron Bar Ass'n v. Williams, 819 N.E.2d 677, 680 (Ohio 2004)).

25. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, § 21.12 ("[A]n attorney acting on behalf of a putative class must act in the best interests of the class as a whole." (citing FED. R. CIV. P 23(g)(2)(A) advisory's committee note; 2 GEOFFREY C. HAZARD, JR. & W WILLIAM HODES, THE LAW OF LAWYERING § 38.4, at 38-7 (3d ed. 2002)); *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 36 n.12 (1st Cir. 2009) (citations omitted) ("Class counsel are fiduciaries to the class.").

Otherwise, MDL procedures would alter plaintiffs' substantive rights by allowing lead attorneys to take advantage of them.

First principles also support the conclusion that lead attorneys are fiduciaries. In contractual principal-agent relationships, a fiduciary duty is implied when an agent armed with "open-ended management power" can help a principal or act to a principal's detriment.[26] The fiduciary duty protects the principal from exploitation by allowing the principal to demand ex post judicial review of the agent's behavior.[27] In MDLs, lead attorneys possess immense power and discretion. Consequently, non-client claimants are at risk of being exploited and require the protection the fiduciary duty provides. The ALI's *Principles* takes this position. Section 1.05 encourages judges to ensure passive parties are adequately represented in all aggregate proceedings and it identifies the fiduciary duty as a tool to further this goal.[28]

To this point, the discussion of lead attorneys' responsibilities has focused on non-client claimants whose retained lawyers are disabled. Because disabled lawyers also have interests at stake in MDLs, one must also ask whether lead lawyers have fiduciary responsibilities to them. That disabled lawyers are at risk of being exploited is clear. In the *Vioxx* MDL, the lead attorneys asked for $388 million in common benefit fees, 8% of the $4.85 billion recovery.[29] This eye-popping sum was to come from the pockets of disabled lawyers, whose contractual fees would be cut so that lead attorneys could be paid. The possibility of over-reaching is clear. First, Judge Fallon awarded $73 million *less* than the lead attorneys requested, showing that, in his opinion, they over-valued their services by almost 20 percent.[30] Second, the lead attorneys may have used their control of settlement negotiations to prevent disabled lawyers from complaining. The settlement agreement they negotiated required all disabled lawyers to waive their objections to the common benefit fee tax as a condition for enrolling clients.[31] Because disabled lawyers had to do what their clients wanted, those whose clients were better off settling were forced to submit. Plainly, the lead attorneys may have strategized to the disabled lawyers' disadvantage.

The fiduciary duty can protect disabled lawyers while still permitting lead attorneys' to do their jobs. Although a fiduciary duty would prevent lead attorneys from using their control of settlement negotiations to enrich themselves at disabled lawyers' expense, it would leave them completely free to do so by increasing claimants' recoveries. This is what they are supposed to use their powers to do. The duty would also allow lead

26. Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 215.
27. *Id.*
28. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 18, § 1.05(b), (c)(3).
29. *See* Order & Reasons, *supra* note 3, at 9.
30. *Id.* at 37.
31. *See* Master Settlement Agreement § 1.2.4, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007) (requiring waiver of objections).

attorneys to apply to the MDL court for common benefit compensation, just as lawyers do in successful class actions.

III. THE LEAD ATTORNEYS' ACTIONS IN THE *VIOXX* MDL

The business model for MDLs and similar state court consolidations constantly evolves. Techniques that are completely unprecedented first emerge as experiments by judges and lead attorneys. Innovations that further the central players' interests are quickly adopted in other proceedings, even if the practices seem dubious. Because appellate courts rarely interfere with trial judges' management of MDLs, questionable practices can persist for years.[32]

Consider practices relating to common benefit fees and expenses. Very little authority addresses these practices, and almost none of it comes from appellate courts. Although MDL judges force disabled lawyers to cover lead lawyers' fees and expenses, the legal basis for these coercive transfers is unclear.[33] The MDL statute says nothing about compensation. Federal judges' inherent power to manage their dockets, which empowers them to fine lawyers who act improperly, provides no basis for orders that force innocent lawyers to give up millions of dollars. The strongest justification is provided by the restitutionary theory that supports fee awards in class actions, but that theory does not work in MDLs, for reasons Professor Miller and I explained.[34]

Despite these shortcomings and the enormity of the stakes, appellate courts have provided little guidance. When Judge Fallon awarded $315 million in common benefit fees in *Vioxx*, the only Fifth Circuit authority he could cite was a 1977 case, *In re Air Crash Disaster*.[35] There, the trial judge ordered two lawyers to pay the lead attorneys $270,000 after the lawyers refused the trial judge's offer to share the workload in the MDL.[36] In a confusing and haphazardly reasoned opinion that provides little authority for current practices, the Fifth Circuit affirmed.[37]

Recognizing that the legal basis for common benefit fee and cost awards is questionable, MDL judges and lead attorneys have sought to lend these forced transfers a consensual veneer.[38] They first attempted to do so by promulgating form contracts for disabled lawyers to sign.[39] The contracts

32. On the rarity of appellate review of MDL judges' management decisions, see Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1645 (2011) (observing that "[t]he MDL system creates [a] sort of 'kingly power' in trial judges" and that "there is no appellate jurisdiction over most interlocutory MDL orders").

33. Silver & Miller, *supra* note 2, at 126–35 & nn.85–89 (discussing the practice and citing various cases where such orders were issued).

34. *Id.* at 109, 121–30.

35. 549 F.2d 1006 (5th Cir. 1977).

36. *See id.* at 1008, 1010–11.

37. *Id.* at 1021.

38. Silver & Miller, *supra* note 2, at 135.

39. *Id.* at 134–35.

were shams, however, because disabled lawyers' consent was coerced.[40] They could not bargain over terms, decide which lead lawyers to employ, or refuse to sign without penalty.[41] The form contracts were offers disabled lawyers could not refuse.[42]

The form contracts did not even lock in the price of common benefit work for the disabled lawyers who signed them. In the *Guidant* MDL, the court promulgated form agreements setting the price of common benefit work at 4% of the gross monetary recovery.[43] The same judge later set aside 18.5% of the $240 million recovery for the lead attorneys.[44] In *Vioxx*, the contracts specified a 2% levy for fees.[45] The lead attorneys nonetheless demanded 8% of the $4.85 billion settlement and eventually received 6.5% from the court.[46]

In my opinion, the actions that led to the fee increases in *Guidant* and *Vioxx* were opportunistic. In both MDLs, the lead attorneys used their control of settlement negotiations to increase the amount of money available for common benefit fees and to prevent disabled lawyers from complaining. Yet, in neither MDL were the lead attorneys' actions condemned. To the contrary, they were reviewed and approved. Because *Vioxx* presents the cleaner example and also offers Judge Fallon's responses to my complaints, I focus on it here.

As explained, Judge Fallon initially entered an order promulgating fee and cost sharing contracts that set common benefit fees at 2% of the gross recovery.[47] Provisions in the *Vioxx* Master Settlement Agreement (MSA) later (1) expressly superseded that order, (2) raised the cap on common benefit fees to 8%, (3) required that the entire 8% be placed in escrow, (4) made disabled lawyers (rather than claimants) liable for the entire amount, and (5) required disabled lawyers and their clients to waive any and all objections to the MSA as a condition for enrolling in the settlement.[48]

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40. *See id.* at 135.

41. *See id.*

42. This is, of course, a reference to the famous line from *The Godfather*. THE GODFATHER (Paramount Pictures 1972) ("I'm gonna make him an offer he can't refuse."). For a thorough study of the many lessons *The Godfather* has for aggregate litigation, see Richard A. Nagareda, *Closure in Damage Class Settlement:* The Godfather *Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141.

43. Pretrial Order No. 6 at 3–4, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB) (D. Minn. Feb. 15, 2006).

44. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 451076, at *1 (D. Minn. Feb. 15, 2008). The order set aside $10 million in cost reimbursements, only $3.5 million of which was slated to cover the managerial attorneys' out-of-pocket expenses. *Id.*

45. *See* Order & Reasons, *supra* note 3, at 5.

46. *See id.* at 9, 36–37.

47. Pretrial Order No. 19 at 3, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Aug. 4, 2005) (creating a "full participation option" for disabled lawyers who signed form contracts within ninety days and setting common benefit compensation at 2% for fees and 1% for costs). To keep the discussion simple, I ignore costs.

48. Master Settlement Agreement, *supra* note 30, §§ 9.2.1, 9.2.3 (raising the limit on common benefit fees, overriding Pretrial Order 19, and identifying lawyers' contingent fees as the source of funding); *id.* § 9.2.2 (authorizing an award of common benefit expenses); *id.* § 1.2.4 (requiring waiver of objections).

Why these provisions appeared in the MSA is a mystery. Judge Fallon's order setting the 2% cap did not contain language allowing lawyers or parties to override it by agreement. Therefore, the proper way to modify the order was to ask Judge Fallon to revise it. That approach had a downside, however. Had the lead lawyers filed a motion requesting an increase in common benefit fees, disabled lawyers would have been entitled to contest it, to make an opposing evidentiary presentation, and, had Judge Fallon ruled against them, to appeal. Had the lead attorneys filed a motion to raise the common benefit fee after the MSA was announced, they would also have had no leverage over the disabled lawyers or their clients, their services no longer being required.

The presence of fee-related provisions in the MSA also seems odd for another reason: no one—not even the lead lawyers' own signed clients—authorized or instructed the lead attorneys to bargain with the defendant over common benefit fees. The order appointing the plaintiffs' steering committee authorized it to pursue "settlement options pertaining to any claim or portion thereof."[49] This seems clearly to have meant claims the plaintiffs had against the defendant, not claims the plaintiffs or their lawyers had against each other.[50] Common benefit fees fall into the latter category. Nor were negotiations over common benefit fees needed to resolve any plaintiff's claim. The lead attorneys seem to me simply to have chosen to make a matter of interest solely to plaintiffs and their lawyers the subject of settlement negotiations with the defendant.

To appreciate the oddity of this decision, imagine that a lawyer representing a single plaintiff in a personal injury case negotiated a settlement that overrode the existing contingent fee agreement, increased the lawyer's fee by 400%, and made the client waive any and all objections to the lawyer's actions as a condition for getting a payment. Imagine further that the lawyer did all this without telling the client in advance, obtaining the client's consent, or explaining the conflict of interests. The breach of the lawyer's fiduciary duty, the lawyer's lack of authority, and the impropriety of negotiating fees with the defendant would all be self-evident. I believe one should reach the same conclusions when evaluating the behavior of the lead attorneys who negotiated the *Vioxx* MSA.

The only explanation I can think of for the decision to negotiate common benefit fees with the defendant is that the lead attorneys saw an opportunity

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49. Pretrial Order No. 6 at 3, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La., Apr. 8, 2005).

50. Further evidence of the speed with which MDL practices evolve can be found in an order entered in the state court consolidation of *Kugel Mesh* cases in Rhode Island. Assented to Assessment Order, *In re* All Individual Kugel Mesh Cases, No: PC-2008-9999 (R.I. Super. Ct. Aug. 11, 2009). The order expressly authorizes the lead attorneys to negotiate a "payment from [the] defendants . . . separate from and in addition to any payment made to any plaintiff, which separate payment(s) is intended to be for common benefit attorneys[']fees and expenses." *Id.* at 2. This authorization denies claimants adequate representation by building a strong conflict into their relationship with the lead attorneys. For present purposes, though, the important point is that someone recognized that lead attorneys lack authority to negotiate common benefit fees with defendants and moved to correct the problem by including the identified language in the appointment order.

to prevent disabled lawyers from objecting. As mentioned, section 1.2.4 of the *Vioxx* MSA provided that any lawyer who enrolled even a single client in the settlement was "deemed to have agreed to be bound by all of the terms and conditions" in the MSA, including the provisions relating to common benefit fees.[51] Because the settlement was a good deal for many claimants, disabled lawyers were whipsawed. The law in all jurisdictions required them to communicate the settlement offer to their clients, to advise all clients for whom the offer was a good deal to accept it, and to enroll any client who wished to participate. Yet, to enroll even one client, a disabled lawyer had to waive any and all complaints he or she personally had relating to common benefit fees. To protect themselves, disabled lawyers would have had to violate their duties to their clients. As far as I know, none did.

Like the form contracts previously promulgated by the court, the *Vioxx* MSA seems to me to have been designed to foster the false impression that disabled lawyers freely consented to the 400% common benefit fee increase. The lead attorneys sought to capitalize on this impression when they applied for $388 million (8% of the gross recovery) in common benefit fees. The demand was reasonable, they argued, because instead of "us[ing] the MDL work-product, pay[ing] the [2%] assessment, and tak[ing] the chance of trying their case to verdict before a jury,"[52] all but a few claimants "voluntarily chose to participate in the Settlement Agreement with Merck, which agreement clearly denotes the 8% assessment."[53] Professor Miller and I rated this argument "laughable."[54] The fiduciary duty requires lawyers to refrain from using their powers to enrich themselves. It does not recognize the possibility that a client might reject a settlement offer as a reason for allowing a lawyer to act opportunistically when negotiating on a client's behalf. The law could not be otherwise. Clients can always reject settlement offers. A contrary rule would therefore allow plaintiffs' attorneys to engage in self-enriching behavior in all settlement negotiations.

Judge Fallon knew our position, but he sided with the lead attorneys anyway.[55]

> The [2%] fee assessment agreements were reasonable and appropriate to create a fund to compensate common benefit attorneys for the consolidated MDL discovery work that was contemplated at that early stage of the litigation. When circumstances changed as a result of the

51. Master Settlement Agreement, *supra* note 30, § 1.2.4.

52. Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses at 48, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Jan. 20, 2009).

53. *Id.*

54. Silver & Miller, *supra* note 2, at 135.

55. Judge Eldon E. Fallon also attacked us ad hominem. *See* Order & Reasons, *supra* note 3, at 15 n.16 (noting that Professors Silver and Miller were "'paid consultants to a group of attorneys in the *Vioxx* MDL who have questioned or challenged aspects of the settlement, including the fee assessment'" (quoting Silver & Miller, *supra* note 2, at 107 n.*)). More evidence that no good deed goes unpunished.

> extensive discovery, numerous trials, and through negotiation and implementation of a global opt-in settlement, it became necessary to reevaluate the reasonable compensation for the common benefit attorneys who accomplished those tasks. The claimants and their attorneys acknowledged those changed circumstances when they accepted the terms of the Settlement Agreement which supplanted the [Pretrial Order (PTO)] 19 assessments. Settlement Agreement § 9.2.1. Moreover, the Court's equitable and managerial authority and duty to award fair common benefit fees or to adjust contingent fees exists independent of contractual agreement, and the Court's authority to do justice by reducing attorneys' fees necessarily encompasses the corollary authority to increase fees where appropriate.[56]

This passage is rife with mistakes.

First, if the 2% agreements were real contracts rather than shams, then the fact (assuming it is one) that the lead attorneys did more work than they expected was simply their bad luck. All contingent percentage fee agreements assign the lawyer the risk associated with effort. Having set the fee, the lawyer must live with it, even when the workload is unexpectedly great.[57] The lead attorneys were stuck with the fees their signed clients agreed to pay. Why they were not also stuck with the fees *they* put in the 2% agreements Judge Fallon did not say.

Second, Professor Miller and I never denied that the lead attorneys could properly have asked Judge Fallon for a raise. To the contrary, we expressly stated that "[t]o get around the agreements, . . . the lead attorneys might have sought orders increasing the amounts set aside for common benefit compensation,"[58] and we cited the *Bextra* MDL as an instance in which the lead lawyers employed this straightforward approach.[59] Our complaint was that the lead attorneys abused their control of the settlement negotiations. Judge Fallon's observation that he would have given them a raise, had they asked, has no bearing on this point.

Third, Judge Fallon's inference that claimants and disabled lawyers acknowledged the merit of the lead attorneys' demand for a raise is wholly unwarranted. Insofar as the claimants were concerned, the decision to enroll showed only that they preferred settling to continuing to fight. The common benefit fee provisions were irrelevant to them because the money came out of their lawyers' pockets, not theirs. Insofar as the disabled

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56. Order & Reasons, *supra* note 3, at 14 n.15 (citing *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *11–12 (D. Minn. Mar. 7, 2008)).

57. A lawyer can ask a client to renegotiate, and the lead attorneys could have renegotiated the 2% agreements with the disabled lawyers. They didn't, presumably because they knew that many, most, or all of the disabled lawyers would refuse to pay them more. The lead attorneys' failure to negotiate directly with disabled lawyers is another indication that the disabled lawyers' "consent" to the fee increase was coerced.

58. Silver & Miller, *supra* note 2, at 132 (citing Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund at 4, *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 1699 (N.D. Cal. July 7, 2008)).

59. *See* Pretrial Order No. 8A, *supra* note 58; Silver & Miller, *supra* note 2, at 132 & n.86.

lawyers were concerned, one can infer nothing at all. The decision to settle was the claimants', not theirs. Disabled lawyers were legally bound to do what their clients wanted, regardless of their personal wishes.

To see the flaw in Judge Fallon's reasoning, one need only recognize its potential to legitimate *any* provision the lead attorneys might have put into the MSA. They might have commandeered 100% of disabled lawyers' fees. They might have required enrollees to send letters recommending them for the Nobel Peace Prize. According to Judge Fallon's logic, a claimant's desire for a settlement check would legitimate these provisions and others even more egregious. It cannot be right to allow lead attorneys to use the threat to withhold settlement checks to gain unlimited leverage over claimants and disabled lawyers.

The basic point is simple. As Judge Fallon recognized and as Professor Miller and I pointed out, the lead attorneys could properly have obtained a fee increase by requesting one from the court. Consequently, they need not have included any provisions relating to the amount of common benefit fees in the MSA. But they did. A possible explanation, which seems right to me, is that they used their control of the settlement negotiations to pre-empt the opposition they expected disabled lawyers to mount.

By putting their fees on the table when bargaining with the defendant, the lead attorneys may have jeopardized the claimants' interests too. Knowing that the lead attorneys wanted its help, Merck would rationally have sought to exchange cooperation on fees for concessions on other relief. Defendants have often used this tactic to buy off attorneys in class actions. Merck would have been foolish not to have employed it.

In an ordinary personal injury representation, a contingent fee lawyer's sole object when bargaining with a defendant is to obtain the most money possible for the client. By maximizing the client's recovery, the lawyer also maximizes the fee. The harmony of interest between the lawyer and the client is substantial, and the defendant has no control of the lawyer's compensation. Lead attorneys should maintain the same laser-like focus when bargaining for global resolutions in MDLs. No one needs to know how much a defendant thinks a group of lead attorneys should be paid. (A candid defendant would say "nothing," anyway.) Injecting fees into the discussion also creates an enormous conflict between claimants and their representatives, saddling claimants with inadequate representation and denying them due process of law. Lead attorneys should use settlement negotiations solely to maximize the value of plaintiffs' claims. They should resolve the size of common benefit fees by means of real agreements with other plaintiffs' attorneys or by seeking fee awards from MDL judges, who can set them after holding evidentiary hearings in orders subject to appellate review.[60]

60. In Silver and Miller, *supra* note 2, at 160–69, I argue for a fee setting mechanism similar to those set out in the PSLRA. The sentence in the text is not meant to contradict that recommendation.

IV. DUBAY'S CRITIQUE

When I began to study judicial management practices in MDLs, I was struck by the scarcity of data. I wanted to know basic facts, such as which lawyers were appointed to lead positions, how many signed clients they had, how much they requested in common benefit fees, and how much they received. Neither the JPML nor any other public body collected this information. Settlement administrators had some of it, but they would not share. I therefore decided to focus on the three recent MDLs—*Guidant*, *Vioxx*, and *Zyprexa*—that were the source of the emerging quasi-class action approach to MDL management and to learn about them from published opinions and orders, newspaper stories, academic writings, and similar materials.

Before abandoning my search for data, I contacted Thomas Willging, a researcher at the FJC who did empirical studies of mass torts lawsuits, class actions, and attorneys' fees. I had long admired his work and had relied on it many times. Willging, who has since retired, told me the FJC had no data on MDLs. I encouraged him to make them the focus of a future FJC study.

Within months, the seed sprouted. In October 2008, Willging let me know that the FJC planned to look at attorney fee awards in selected MDLs. Thereafter, the tree quickly bore fruit. Preliminary drafts of studies appeared in remarkably short order, including a paper Carolyn Dubay presented at the 2010 Conference on Empirical Legal Studies.[61] These studies have great potential to lift the veil that has long hidden the internal workings of MDLs from view.

I do not know how Judge Fallon came to have a copy of Dubay's report before it was published, but I am not surprised that he did. Because federal judges take FJC studies seriously, the network of persons interested in MDLs distributed Dubay's report far and wide. Because Dubay also disagreed with Professor Miller and me on certain points, it was natural for Judge Fallon to rely on her work when criticizing us.[62] Unfortunately, because Judge Fallon used her draft report as he did, to respond to him I must criticize Dubay in print. That seems harsh, given that her report is just a draft. I hope Dubay will forgive me for critiquing her preliminary thoughts.

In most respects, Dubay is on the same page with Professor Miller and me. We focused on products liability MDLs, so does Dubay. We studied *Guidant*, *Vioxx*, and *Zyprexa*; she examined those MDLs plus seven more. She identified three issues as "critical" ones for the next edition of the *Manual* to address:

> First, as to the appointment of common benefit counsel, guidance should be developed for district courts on whether attorneys without cases

61. *See* DUBAY, *supra* note 6; *see also* Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision To Transfer and Consolidate Multidistrict Litigation, presented at* 5th Annual Conference on Empirical Legal Studies, *available at* http://ssrn.com/abstract=1633703.

62. Order & Reasons, *supra* note 3, at 3 n.4.

> pending in the MDL may serve as common benefit attorneys. Second, as to the compensation of common benefit counsel, guidance on the use of common benefit compensation committees is needed in light of potential conflict of interest issues that have arisen in existing MDLs. Third, as to the determination of proper assessment rates for common benefit fee awards, guidance is needed on whether and in what circumstances differing assessment rates are fair and appropriate.[63]

Professor Miller and I addressed all three subjects at length. Like us, Dubay also emphasized the "lack of uniformity and transparency" that is characteristic of MDLs, noting that "[d]ecisions are rarely published, rarely appealed, and oftentimes records relating to fees are filed under seal."[64]

However, when it comes to policy recommendations, Dubay's object differs from ours. She wants to make MDLs work better for judges, while also making them more transparent and uniform. Because she was an employee of the FJC, her desire to please judges is understandable. Although Professor Miller and I recognize the judiciary's legitimate interest in avoiding duplication, our object is to improve the quality of the representation claimants receive within the context of court-ordered aggregation. We also want to restore judicial neutrality and to ensure that MDL procedures are lawful. Because we are less concerned than Dubay about pleasing judges, judges are likely to find her recommendations more palatable than ours.

The passage below reflects this difference in philosophy. In it, Dubay criticizes the proposal Professor Miller and I offered, which would give control of MDLs to plaintiffs' lawyers with valuable inventories of cases. Those lawyers would then hire other attorneys to perform common benefit work, the cost of which would be divided among all lawyers with cases in an MDL in proportion to their clients' recoveries. The controlling lawyers would thus pay for common benefit work directly, would pay more than disabled attorneys, and would bear the full risk of loss if the cases were dismissed. They would therefore benefit by hiring lawyers capable of performing common benefit work at the best combination of quality and price. When it comes to managing plaintiffs' affairs, judges would have about the same level of involvement in MDLs as they do in securities class actions brought under the Private Securities Litigation Reform Act of 1995.[65]

Dubay disagrees with us over the advisability of putting lawyers with valuable inventories of cases in charge. She argues that

> [h]aving a large stake in [an] MDL does not guarantee good communication skills, the effective use of attorney time, or even the best lawyering. Instead, the role of the MDL judge demands the ability to effective[ly] coordinate not only the many cases within the MDL, but state cases as well. Moreover, the most experienced and effective

63. DUBAY, *supra* note 6, at 6.
64. *Id.* at 13.
65. Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); *see supra* note 10.

> attorney may have few cases in the MDL, or may represent claimants with only economic injuries. As a zealous advocate, an effective plaintiff's lawyer may have vigorously opposed consolidation in the MDL, or taken advantage of opportunities presented in parallel state court proceedings beyond the control of the MDL court and its orders.[66]

The first and third sentences in this passage reflect the influence of the "nirvana fallacy," the idea that a proposal must be rejected unless it is perfect. The right question is not whether a proposal "guarantees" that claimants will receive loyal, high quality representation (judicial control does not guarantee this either), but whether it makes this result more likely and does so at acceptable cost. Because our proposal takes advantage of markets (which tend to direct cases to good attorneys) and incentives (which encourage lawyers with large inventories to represent clients well), we think it deserves a try.

The second and fourth sentences reflect Dubay's focus on "the role of the MDL judge." She dislikes our proposal because, instead of allowing MDL judges to pick lawyers who can be relied on to help effectuate judges' objectives, it might give control to troublemakers who dislike forced consolidation and actively seek to circumvent it. Dubay never sees the choice of cooperative lawyers as a difficulty, even though due process problems arise when lawyers whose loyalties run to judges first and claimants second gain control of MDLs. Her desire to make MDLs work better for judges also blinds her to the corrosive impact that involvement in plaintiffs' affairs has on judges' neutrality. The loss of neutrality does not bother MDL judges, whose desire for global resolutions causes them to want as much control of plaintiffs' lawyers as they can get. Consequently, it also does not bother Dubay.

When awarding common benefit fees in *Vioxx*, Judge Fallon need not have sided with Dubay or with us. He chose the lead attorneys and set their compensation terms long before our article appeared. Even so, he discussed our proposal in dicta and, not surprisingly, he sided with Dubay.

> Having a large number of cases in the MDL often indicates skill at advertising, but does not guarantee the best lawyering or even the selection of those best suited to handle the matter in a cooperative endeavor which is crucial for MDL proceedings. . . . [T]he efficient and successful resolution of an MDL is dependent on coordination and cooperation of lead counsel for all sides. . . . In an MDL setting where there can be a thousand plaintiffs' attorneys it not only takes a good lawyer to qualify for lead or liaison counsel but one who has the diplomatic skills to coordinate the efforts of a diverse group. Selecting lead and liaison counsel by a neutral party such as an MDL judge may not be the best method but as between it and the selection by other counsel it is the better way. Moreover, the selection of lead counsel by their fellow attorneys would involve intrigue and side agreements which would make Macbeth appear to be a juvenile manipulator. Frequently, recommendations by attorneys for positions on leadership committees are

66. DUBAY, *supra* note 6, at 59.

> governed more on friendship, past commitments and future hopes than on current issues.[67]

This passage is interesting for many reasons. First, it reflects the unjustified hostility many judges have toward lawyers who advertise. Advertising educates people about their rights, makes it easier for them to find representation, facilitates competition, and enhances the public's opinion of lawyers. It works for lawyers the same way it works for other professionals and service providers, such as doctors, dentists, pharmacists, and hospitals, all of which advertise extensively. Judges should neither complain about it nor treat lawyers who advertise as second-class attorneys.

Second, when discussing the characteristics of lead attorneys that are "crucial for MDL proceedings,"[68] Judge Fallon means crucial for judges who want global settlements, not for claimants who want to maximize their recoveries. His desire for "cooperative" lawyers with "diplomatic skills" who will contribute to "the efficient and successful *resolution* of an MDL" reflects his immersion in a culture that glorifies settlements and deplores trials.[69] Judge Fallon implicitly dismisses the possibility that what plaintiffs need most is a team of aggressive lawyers who will get their cases ready for trial in the shortest possible time. Yet, this is what the MDL statute anticipates,[70] and it is also what due process requires. As the Supreme Court observed in *Amchem Products, Inc. v. Windsor*, a plaintiff who cannot threaten a defendant with a loss at trial cannot obtain fair value for a claim in settlement.[71] The lawyers in charge of an MDL should be strongly motivated to get plaintiffs' cases ready for trial.[72]

Third, Judge Fallon's concern about intrigues, side agreements, and other machinations involving lawyers competing for lead positions undoubtedly reflects conduct he has witnessed or heard about in MDLs.[73] What he fails

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67. Order & Reasons, *supra* note 3, at 3 n.4.

68. *Id.*

69. *Id.* (emphasis added).

70. The Multidistrict Litigation Act, 28 U.S.C. § 1407(a) (2006), authorizes transfers for "consolidated pretrial proceedings" and provides that each transferred action "shall be remanded . . . to the district from which it was transferred" when pretrial proceedings are concluded. *See also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) (holding that the MDL court had to remand cases when pretrial proceedings were complete and could not preside over the trial of a transferred case).

71. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) (observing that "permitting class designation despite the impossibility of litigation" would deny class members adequate representation because, when bargaining for settlement, "class counsel . . . would be disarmed").

72. Judge Fallon might respond to the statements in this paragraph by pointing out that he presided over a series of bellwether trials in the *Vioxx* MDL. Bellwether trials can be helpful sources of information, but they are no substitute for a realistic threat to remand all cases consolidated in an MDL for trials in their original forums. A plausible argument can be made that MDL judges should set firm deadlines by which pretrial preparations must be completed so that cases can be remanded, and otherwise leave parties to handle settlement negotiations as they wish. Negotiations would then occur in the shadows of predicted trial results, as they should.

73. Dubay describes instances in which lawyers vying for lead positions formed or were excluded from coalitions competing for control. DUBAY, *supra* note 6, at 31.

to notice or mention is that judges encourage these behaviors by making lead counsel positions profit centers. In context, the omission is remarkable. Judge Fallon failed to recognize the connection between existing MDL management procedures and unseemly competition for lead counsel positions when writing an order that awarded a group of lead attorneys $315 million.

He may see the connection now. After the *Vioxx* Fee Allocation Committee (FAC) submitted its final recommendation for dividing the $315 million fund among attorneys who performed common benefit work, dissatisfied lawyers submitted a boatload of objections.[74] They complained that the lead attorneys, who staffed the FAC, rewarded themselves far too lavishly;[75] that the FAC's scoring system was arbitrary, skewed in favor of the lead attorneys, and opaque;[76] that the FAC compensated some lawyers at rates exceeding $2000 an hour while basing other lawyers' awards on hourly rates below $25;[77] that the FAC punished certain lawyers who objected to its preliminary recommendations by cutting their payments; and that certain lead attorneys exceeded their powers by disbursing fee money without formal authorization from the court.[78] I do not know whether these complaints are valid, but the conflicts and the potential for abuse that exist when lead lawyers set their own compensation could not be more apparent.

No less apparent is the fact that current arrangements make lead counsel positions extraordinarily profitable. The FAC's proposed allocation would give the three law firms that supplied the lead and liaison counsel $111 million.[79] This enormous sum will come on top of the millions in fees the

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74. Many disgruntled lawyers filed objections to the Fee Allocation Committee's (FAC) proposed allocation. For brief accounts and links to some of the complaints, see David Bario, *Fierce Fight Erupts Over $315 Million Vioxx Attorneys Fee Fund*, AM. LAW. LITIG. DAILY (Feb. 24, 2011), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202483003077; Dionne Searcey, *The Vioxx Endgame: It's All About the Fees*, WALL ST. J. L. BLOG (March 3, 2011 6:01 PM ET), http://blogs.wsj.com/law/2011/03/03/the-vioxx-endgame-its-all-about-the-fees/?mod=google_news_blog.

75. Motley Rice's Objection to the Vioxx Fee Allocation Committee's Common Benefit Fee Recommendation at Parts I–II.A., *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Feb. 4, 2011) [hereinafter *Motley Rice's Objection*].

76. *See id.*

77. *Cf. id.* Parts I, II.B.

78. *See* Co-Lead Counsel's Memorandum in Support of Motion for Additional Discovery Pursuing Side Deals Related to the Fund Awarded by this Court's Order of October 19, 2010 at 11–20, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Feb. 28, 2011), *available at* http://online.wsj.com/public/resources/documents/022811becnelfiling.pdf (arguing that certain lead attorneys improperly disbursed common benefit funds without court approval).

79. Order, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Jan. 20, 2011), *available at* http://vioxx.laed.uscourts.gov/Orders/012011.or.pdf. The law firms and the recommended amounts are Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. ($40.9 million), Herman, Herman, Katz & Cotlar, L.L.P. ($32.5 million), and Seeger Weiss ($40.9 million). In addition, the law firm of Ashcraft & Gerel, LLP, which some objectors claim is associated with the liaison counsel, is slated to receive $9 million. The total shared by firms associated with the Lead and Liaison Counsel could therefore exceed $120 million. See Joint Objection of Eric Weinberg, Chris Placitella and Cohen, Placitella and Roth to the Fee Allocation Committee's Jan. 20, 2010 Recommendation at 34, *In re* Vioxx Prods. Liab.

firms will receive from their signed clients. By making compensation of this magnitude available, judges encourage lawyers to use all possible means, no matter how devious, to obtain lead counsel positions.

Although most of the objections filed in *Vioxx* concern the FAC's fee recommendations, some suggest that incentives created by judicial control of common benefit fees corrupted the manner in which the lead attorneys conducted the MDL. For example, the Motley Rice law firm alleges that the six bellwether cases its lawyers prepared for trial were "pushed aside for lesser cases selected by individuals who positioned themselves for a vast overpayment of [fees from the] common fund."[80] In other words, Motley Rice contends that, when selecting Vioxx cases for bellwether trials, the lead attorneys were more concerned about fattening their lodestars than maximizing the value of plaintiffs' claims. I do not know whether this is true, but I can say that the allegation is plausible because the lodestar method, which rewards time expended, creates perverse incentives. If lead lawyers were paid contingent percentage fees, they would gain by selecting the strongest cases for bellwether trials. But lead attorneys are paid by the hour, at least in part. Consequently, they may gain by selecting weaker bellwether cases in which they have invested larger amounts of compensable time. Motley Rice's complaint is plausible because judges base common benefit fee awards in MDLs on time expended and hourly rates.

The proposal Professor Miller and I designed would preserve the good incentives that flow from contingent percentage fee arrangements. It would also replace the political convention mentality that currently prevails in MDLs with an ordinary business model of the sort that operates and works well in joint ventures and law firms. Lawyers who are good at bringing in business will team up with lawyers who are good at delivering legal services of other types, including lawyers who are good at negotiating and structuring mass settlements. The cost of common benefit work will be shared on a pro rata basis but will not be a separate source of income for lead attorneys. There will be problems, the main one being the possibility of kickbacks from common benefit lawyers to the lead lawyers who engage them. If the problems can be addressed, the proposal will restore a desirable degree of order to the plaintiffs' side of MDLs. Instead of enriching themselves by unseemly means, lead attorneys who want to enhance their compensation will have to increase claimants' recoveries.

CONCLUSION

A real need exists to stretch judicial resources by aggregating related claims and lawsuits. Neither this Article nor the article I co-authored with Professor Miller constitutes an attack on aggregation per se. But aggregate

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Litig., MDL No. 1657 (E.D. La. Feb. 2, 2011) (asserting that "the firm that received the third-highest hourly rate, Ashcraft & Gerel, LLP ($1325/hr.) is in partnership with FAC member Russ Herman, seventh-rated at $1102/hr.").

80. *Motley Rice's Objection*, *supra* note 75, at Part II.B.

proceedings can be conducted in many ways, some of which trample so heavily on parties' or lawyers' rights as to be unlawful. Judicial management techniques that interfere with the enforcement of substantive legal rights and obligations are especially concerning. They achieve economies of scale by preventing the civil justice system from doing its job, which requires that parties represented by loyal advocates be able to try cases at reasonable cost and with reasonable dispatch.

Professor Milton Handler identified this problem in a famous article published many years ago. He argued that class action settlements were "legalized blackmail" because judges enmeshed defendants in endless and expensive litigation, effectively preventing them from ever vindicating themselves at trial.[81] Defendants could either settle or bear high litigation costs indefinitely. Judge William G. Young recently made the analogous point with respect to plaintiffs caught up in MDLs, pointing out that that "[o]nce trial is no longer a realistic alternative, . . . [settlement] bargaining focuses . . . on ability to pay, the economic consequences of the litigation, and the terms of the minimum payout necessary to extinguish the plaintiff's claims."[82] Due process is denied when any party, plaintiff or defendant, loses merits-based bargaining leverage in settlement negotiations because a judge is employing a procedure that prevents a case from being tried.

The American civil justice system is miraculous. Because of it, our nation is uniquely devoted to the rule of law and the vindication of legal claims. But we must understand the miracle, if we are to preserve it. Structurally, the civil justice system works because parties represented by loyal advocates are able to try cases in front of judges and juries that are honest, independent, and neutral. MDL practices that saddle plaintiffs with conflicted attorneys, that make trials practically impossible, or that involve judges deeply in the management of plaintiffs' representation, put the miracle at risk.

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81. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971). I describe Milton Handler's view and other versions of the class action blackmail thesis in Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

82. DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 155 (D. Mass. 2006).

The Suspect Restitutionary Basis for Common Benefit Fee Awards in Multi-District Litigations

Charles Silver*

Introduction

There is, or should be, universal agreement that judges must manage Multi-District Litigations (MDLs) lawfully. For example, they must abide by the Federal Rules of Civil Procedure (FRCP), which "govern the procedure in all civil actions and proceedings in the United States district courts."[1] Yet, academic commentators have argued that widely used MDL procedures violate the law in many ways.[2]

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* Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure, School of Law, University of Texas at Austin. I am indebted to Vince Chhabria, Sam Issacharoff, Douglas Laycock, Teddy Rave, and especially Andy Kull for valuable comments on a draft of this Article. I invited Professor Kull to coauthor this Article, but he declined and instead encouraged me to borrow text from an expert report he wrote. For more information, see generally Preliminary Declaration of Expert Andrew Kull as to Podhurst Orseck, P.A.'s Motion for an Award of Common Benefit Fees, Guttenberg v. United States, No. 0:18-cv-62758-WPD (S.D. Fla. Feb. 7, 2022), ECF No. 468-2. I also submitted an expert report in this case and have served as an expert witness in many matters where common benefit fee awards were sought.

1. FED. R. CIV. P. 1. *See also In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020) (observing that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance").

2. *See, e.g.*, Charles Silver, Comment, *What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 181, 183 (2012) (characterizing MDL as the "Wild West" of civil litigation); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111

The legality of the manner of handling lawyers' fees merits careful study because judges regulate fees far more muscularly in MDLs than is customary. Ordinarily, contracts govern both the amounts that plaintiffs pay their lawyers and the terms, if any, on which lawyers share fees. In MDLs, judges assert control over both matters. They routinely override the contractual entitlements of individually retained plaintiffs' attorneys (IRPAs). They also require IRPAs to pay court-appointed lead attorneys enormous sums—hundreds of millions of dollars in the largest proceedings—even though IRPAs neither hire lead attorneys nor agree to pay them anything.[3] Not surprisingly, IRPAs often complain.[4]

Because the few sentences in the MDL statute that address procedures say nothing about fees,[5] judges have sought authority for their actions elsewhere. They have invoked the inherent power to manage litigation,[6] argued that MDLs are quasi–class actions in which they may exercise powers conferred by Rule 23 of the Federal Rules of Civil Procedure,[7] and invoked the equitable power to cure unjust enrichment.[8] I have pointed out

(2015) (describing MDL as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies").

3. For discussions of fee-related practices commonly employed in MDLs, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 109 (2010) and Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 59 (2013).

4. *E.g.*, ALM Media, *Lawyers Duel Over $503M Fee Award in Syngenta Corn Settlement*, LAW.COM (Dec. 17, 2018), https://www.yahoo.com/now/lawyers-duel-over-503m-fee-125050560.html [https://perma.cc/E9XL-HC5R]; Andrew Strickler, *Judge OKs $1.3M Deal Ending 4-Year Rice GMO Fee Spat*, LAW360.COM (Sept. 13, 2017, 8:57 PM), https://www-law360-com.eu1.proxy.openathens.net/articles/963634/judge-oks-1-3m-deal-ending-4-year-rice-gmo-fee-spat [https://perma.cc/53NU-QUX8]; Sheilla Dingus, *Attorneys Challenge Brody's Attorney Fee Allocations in NFL Concussion Settlement*, ADVOCACY FOR FAIRNESS IN SPORTS (Aug. 14, 2019), https://advocacyforfairnessinsports.org/nfl-concussion-settlement/attorneys-challenge-brodys-attorney-fee-allocations-in-nfl-concussion-settlement/ [https://perma.cc/6CZH-QBF3].

5. 28 U.S.C. § 1407.

6. *See In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 424 F. Supp. 3d 456, 496 (E.D. La. 2020) ("[T]he Court . . . finds authority to assess common benefit attorney fees in its inherent managerial authority . . . . The Fifth Circuit has long recognized that a court's power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison counsel and to compensate them for their work."); *see also In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1016 (5th Cir. 1977) (contending that a district court's power to appoint lead counsel would be "illusory if it [depended] upon lead counsel's performing the duties desired of them for no additional compensation").

7. *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (stating that the MDL action "may be properly characterized as a quasi-class action"). For a discussion of the uses made of the quasi-class action rationale in MDLs, see generally Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847 (2017).

8. For a defense of the restitutionary rationale, see generally Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

deficiencies in the first two rationales elsewhere.[9] In this Article, I critique the contention that the law of restitution and unjust enrichment empowers judges to transfer funds because IRPAs benefit from lead attorneys' efforts and can properly be made to pay.

MDL judges cling to this rationale firmly.[10] With the singular exception of Judge Vince Chhabria, whose thoughtful opinion in *In re Roundup Products Liability Litigation*[11] may mark a turning point, MDL judges appear to consider it settled law.[12] But it is not and never could be—first and foremost because it is doctrinally incoherent. Nor is it settled as a matter of authority because the Supreme Court has not considered it. In this regard, it is critical to distinguish MDL fee sharing from fee awards in class actions, which the Court has specifically approved.[13] Vital differences in the procedural setting make it relatively easy to justify class action fees by reference to principles of unjust enrichment, but impossible to do so for forced fee transfers in MDLs.

The unjust enrichment rationale also lacks scholarly support. Three decades ago, I published a sustained and detailed restitution-based defense of fee awards in class actions.[14] The article has since been cited repeatedly and endorsed in the Restatement (Third) of Restitution and Unjust Enrichment.[15] No comparable academic project provides a restitutionary foundation for fee awards in MDLs. Although law professors have argued in favor of compensating lead attorneys when appearing as advocates and

9. *See* Silver & Miller, *supra* note 3, at 121 (criticizing the quasi-class action rationale); Robert J. Pushaw & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigation*, BYU L. REV. (forthcoming 2023) (manuscript at 63), https://ssrn.com/abstract=3893764 [https://perma.cc/LX2G-56TK] ("[T]reating MDLs as quasi-class actions ignores . . . differences."). Others have also criticized the quasi-class action rationale. *See* Stephen B. Burbank, The MDL Court and Case Management in Historical Perspective 5 (April 28, 2017) (presented at George Washington University Law School), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/MDL.GWU.pdf [https://perma.cc/T2Q5-4EVK] (characterizing the quasi-class action doctrine as "the most risible" concoction to emerge from the "kitchen-sink approach to sources of authority" that MDL judges employ).

10. *E.g.*, *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *3 (E.D. La. Mar. 24, 2020); *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010); *In re* Vioxx Prods. Liab. Litig., 802 F. Supp. 2d 740, 770 (E.D. La. 2011).

11. 544 F. Supp. 3d 950 (N.D. Cal. 2021).

12. *Id.* at 960.

13. Boeing Co. v. Van Gemert, 444 U.S. 472, 478–79 (1980).

14. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991).

15. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note c (AM. L. INST. 2011).

experts, they have not defended the practice on restitutionary grounds in published scholarly works.[16]

No academic commentator has even disputed the observation, found in § 29 of the Restatement, that the real basis for fee awards in consolidations is administrative convenience:

> By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation cannot be explained entirely by restitution principles . . . . The fact that such fees may not be authorized by § 29 is probably irrelevant, however, since their predominant rationale is not unjust enrichment but administrative convenience.[17]

The Restatement supports this observation with a citation to *In re Air Crash Disaster at Florida Everglades*,[18] the foundational Fifth Circuit case that lead lawyers and judges routinely invoke when contending that restitutionary principles justify forced fee transfers in MDLs.[19] In the Restatement's view, it is a mistake to offer *Everglades Crash* for this proposition because the decision does not rest on restitutionary grounds.[20]

This Article will show that the law of restitution and unjust enrichment does not warrant forced fee transfers in MDLs. Part II will begin the discussion by identifying the elements of the common fund doctrine. Part III will then show that neither the doctrine nor the general imperative to do equity that the law is said to embody supports forced fee transfers in MDLs. Part IV will focus on hybrid MDLs—which begin as consolidations of separate lawsuits but settle as class actions—and show that the procedural

16. Many authors describe fee-related practices in MDLs without probing the soundness of their justifications. A treatise entry in Newberg and Rubenstein on Class Actions provides an example. The discussion reports that judges possess inherent authority to award fees without offering an account of the inherent powers doctrine that supports this belief. *See* WILLIAM B. RUBENSTEIN, 5 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 15:114 (6th ed. 2022) (noting that courts invoke the inherent powers doctrine in order to award fees in MDL cases but failing to analyze whether that invocation is doctrinally justified). A careful assessment of the constitutional basis for the doctrine shows that judicial practices relating to the appointment and compensation of lead attorneys in MDLs are abuses. *See* Pushaw & Silver, *supra* note 9, at 3 ("As currently managed, MDLs are patently unconstitutional.").

17. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c (AM. L. INST. 2011). *See also id.* at reporter's note c ("In contrast to the standard view of class-action fees, which explains them as restitutionary, the leading accounts of fees to court-appointed counsel in consolidated litigation refer to additional factors, independent of unjust enrichment, to justify the imposition of a liability by court order.").

18. 549 F.2d 1006 (5th Cir. 1977).

19. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note c (AM. L. INST. 2011); *e.g.*, Amorin v. Taishan Gypsum Co. Ltd., 861 F. App'x 730, 734–35 (11th Cir. 2021) *cert. denied*, 142 S. Ct. 769 (2022) (citing *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1017–19 (5th Cir. 1977)).

20. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note c (AM. L. INST. 2011).

change leaves unaltered the conclusions reached in Part III. Part V concludes by asking scholars who endorse the fee-related procedures used in MDLs to publish normative works that set out deep justifications for them.

II. The Common Fund Doctrine

Discussions of the common fund doctrine typically start with *Trustees v. Greenough*,[21] a case whose paradigm facts nicely frame the purpose and limits of the equitable doctrine.[22] The restitution claimant in *Greenough* was a holder of bonds secured by a trust indenture. Suspecting malfeasance, this individual bondholder retained counsel and pursued costly litigation at his own expense, leading eventually to the replacement of the faithless trustees and a restoration of trust assets. These restored trust assets constituted the original "common fund." The bonds were in bearer form, so any coordination or prior agreement to share litigation expenses with fellow bondholders was naturally impossible.[23] But once the fund had been secured, the courts held that the claimant was entitled in equity to reimbursement of his litigation expenses from the other bondholders who benefited from his successful initiative and expenditures.[24]

Greenough made "a perfect case from a restitution viewpoint."[25] The claimant, acting reasonably in the protection of his own interests, *unavoidably* conferred significant net benefits on persons similarly situated. The nature of the transaction meant that the bondholders' interests were exactly aligned. Moreover, because the bondholders could not be identified, prior coordination or agreement between them was impossible. In such a case there is no question of imposing a liability for unrequested benefits that should have been the subject of contract—benefits that the recipient should have had a chance to refuse.[26] Recovery from a fund that was already under the supervision of the court guaranteed that no beneficiary would be required to make an expenditure; the courts merely applied the usual rule that a trust bears the expense of its own administration.

This persuasive case for traditional common fund recovery is largely paralleled today in the class action setting. Class members (like the unidentified bondholders) would be unjustly enriched if they obtained a share

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21. 105 U.S. 527 (1881).

22. The first three paragraphs of this section are borrowed with slight modifications from Professor Kull's expert report. Kull, *supra* note *, at 4–6.

23. *Id.* at 528–29.

24. *Id.* at 537.

25. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note d (AM. L. INST. 2011).

26. According to the Restatement summary of the common fund rule: "A beneficiary is liable in restitution only if . . . liability will not impose an obligation that should properly have been the subject of contract between the claimant and the beneficiary." *Id.* § 29(3), (3)(d).

of the judgment without contributing to the cost of obtaining it. The baseline rule of no liability for unrequested benefits is preserved by class members' ability to opt out. The equitable claim is not as perfect as in *Greenough*, because the restitution claimant (class counsel) and the beneficiaries (class members) are not similarly situated: because counsel seeks a fee from a class recovery, counsel and class members are, to that extent, adverse. Given the key advantages of class actions, however, this relaxation of the original equitable test was easily justified. Allowing compensation to class counsel for unrequested services makes it possible to provide legal services that would not otherwise be provided at all.[27] The numerosity of the class, the difficulty of identifying class members, and the small stakes of most individual claims all mean that the needed services could never be supplied pursuant to contract.

Bargaining Impediments: The law of unjust enrichment takes a back seat to the law of contract, meaning that it strongly disfavors compensation when beneficiaries' liabilities for services can and should be handled by agreement.[28] Restitution for unrequested benefits, voluntarily conferred, that a recipient had no chance to refuse will generally be denied.[29] This restriction recognizes the superiority of markets as means of determining what services are worth and establishes the law's reluctance to force exchanges. *Greenough* is the perfect common fund case partly because the active bondholder could not have identified those who were passive, a necessary predicate to a market transaction. The existence of bargaining impediments is perhaps the principal reason why fees in class actions are so easily analogized to common fund recovery.[30]

Beneficiaries' Passivity: Equity traditionally draws a sharp distinction between passive free riders and active contributors. It (sometimes) requires the former to share the burden incurred by the latter, but it does not reallocate burdens among the latter, it being impossible to measure the value of different contributors' services with precision.[31] Instead, equity normally requires active contributors to bargain among themselves over the terms of their cooperation, as attorneys often do when working together voluntarily.[32]

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27. *See*, *e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.").

28. *Id.* § 29 cmt. g.

29. *Id.*

30. *See id.* § 29 cmt. b ("Where the nonclient beneficiary (and restitution defendant) is identifiable before the intervention takes place, the lawyer is under the same necessity as any other restitution claimant to justify the decision to proceed in the absence of contract.").

31. *Id.* § 29 cmt. f.

32. *See* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1650 (1974) (noting that the California Court of Appeal concluded in one case

In *Everglades Crash*, the Fifth Circuit recognized the difference between passive free riders and active contributors repeatedly. It summarized prior applications of the common fund doctrine outside of MDLs by observing that fees were typically assessed against "persons who ha[d] not employed lawyers . . . . One who hires and pays his own lawyer is not a free rider if the attorney is a contributor to the final results."[33] It also noted with approval that the district court's order imposing an 8% tax on lawyers' contingent fees applied to all IRPAs "except those attorneys who had actively participated in the pre-trial activities," which all had the opportunity to do.[34]

The distinction drawn by the Fifth Circuit between active and passive attorneys was taken from traditional common fund cases in which the claim typically runs between active and passive *litigants*.[35] Given a lawsuit in which multiple parties have identical interests—recurring instances involve will contests, challenges to the legality of taxes, and condemnation proceedings—it is often the case that some of the parties retain lawyers, while others remain entirely passive. When the lawsuit terminates favorably to the parties whose interests are aligned, those who bore the expense of litigation seek restitution from those who did not. The usual response is to assess the recoveries of the passive litigants—ideally by a charge against the "common fund" the litigation has created—while exempting from the assessment those litigants who retained their own counsel.[36] The equitable basis for a requirement of contribution is the same, whether the object is to equalize burdens between (i) active attorneys and passive clients; (ii) active and passive litigants (those who retain counsel and pay fees and expenses vs. those who do nothing); and (iii) active and passive attorneys in the matter of common benefit work.

When courts do make a distinction between the respective contributions of active participants, it is normally in circumstances where those

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that "[a]ny inequity [in attorney fee payment] . . . could only be prevented by arrangements the lawyers made between themselves").

33. *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d. 1006, 1019 (5th Cir. 1977).

34. *Id.* at 1008, 1011.

35. *See* Dawson, *supra* note 32, at 1601–09 (describing *Greenough* and *Central R.R. & Banking Co. v. Pettus* as the traditional common fund cases); Trustees v. Greenough, 105 U.S. 527 (1881); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

36. *See, e.g.*, Vincent v. Hughes Air W., Inc., 557 F.2d 759, 770 (9th Cir. 1977) ("[A]s a general rule, if the third parties hire their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney's fees."); Gen. Fin. Corp. v. N. Y. State Rys., 3 F. Supp. 975, 976 (W.D.N.Y. 1933) ("Where creditors are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other creditors."); *In re* Estate of Korthe, 9 Cal. App. 3d 572, 575 (1970) (stating that the common fund rationale "applies only where a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries sit on their hands"); *In re* Crum, 14 S.E.2d 21, 22, 24 (S.C. 1941) (approving common fund award where nonclient beneficiaries "were in default throughout the progress of the case" and "stood aloof and without counsel").

contributions have been "manifestly unequal."[37] For example, in certain will contests where "the charities that ultimately benefited most had sat on the sidelines until a very late stage and then employed lawyers who seemingly contributed little[,] the fact that the charities had their own lawyers was simply ignored."[38]

Common Fund: A right to payment also arises only when litigation produces or measurably increases the value of a common fund—one that is available for distribution pro rata to all beneficiaries or that enriches them automatically, for example, by increasing the value of a corporation in which all hold shares.[39] Standard examples of such funds include a decedent's estate following a successful will contest, or the amount recovered in settlement of a class action.[40]

The existence of a common fund establishes that the interests of the various claimants are exactly aligned. It means, usually, that one claimant cannot act to advance his own interests without simultaneously advancing *pari passu* the interests of the others. So long as each claimant retains a right of exit—or if bargaining impediments prevent individual arrangements—this perfect alignment of the interests usually justifies an inference that passive beneficiaries would have agreed to pay for services voluntarily, had they been asked, because they can only wind up better off on net.

Insufficient Incentives: A final limitation, which applies whenever unrequested services are delivered, is that, with limited exceptions, the provider must not act pursuant to a contract with a customer.[41] For example, a construction company that renovates one house in a neighborhood has no claim to additional payments from the owners of other homes even if the values of all properties increase. The law assumes that the contract with the owner compensates the builder in full and provides a sufficient incentive to perform the work. The owners of other properties are entitled to enjoy any

37. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1648 (1974). Because judges put lead attorneys in charge of MDLs, IRPAs often contribute little. However, in cases like *Everglades Crash* where the passivity requirement was found to be met, beneficiaries were inactive voluntarily, not because judges ordered them to sit on their hands. *Everglades Crash*, 549 F.2d at 1009.

38. Dawson, *supra* note 32, at 1648.

39. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29(3) (AM. L. INST. 2011) (indicating that a beneficiary to a common fund is liable to a claimant only when there is "measurable value added to the beneficiary's interest in the common fund by the claimant's intervention").

40. Dawson, *supra* note 32, at 1602–03, 1642, 1642 n.149, 1643 n.150 (describing *Greenough* as a class action and both *Carmack v. Fidelity-Bankers Trust Co.* and *In re Faling's Estate* as will contests); Carmack v. Fidelity-Bankers Trust Co., 177 S.W.2d 351 (Tenn. 1944); *In re* Faling's Estate, 228 P. 821 (Or. 1924).

41. *Id.* at cmt. b (noting that where claimants are compensated pursuant to contract there is no "entitlement to restitution" with respect to "incidental benefits resulting from compensated employment that the claimant was free to undertake or to decline").

spillover benefits for free. The Restatement specifically applies this limitation to payment claims asserted by attorneys. [42]

III. Neither the Common Fund Doctrine nor the General Impulse to Cure Unjust Enrichment Warrants Forced Fee Transfers in Multi-District Litigations

In re Xarelto (Rivaroxaban) Products Liability Litigation[43] was a pure MDL, meaning that it began as a consolidation of related lawsuits and ended the same way, not as a class action.[44] When it settled, the presiding judge, Eldon Fallon, awarded the lead attorneys almost $100 million in common benefit fees.[45] In keeping with the prevailing practice, Judge Fallon funded the award by taxing IRPAs' contractual fees.[46] As a result, IRPAs retained less than two-thirds of the amounts their fee agreements with their clients entitled them to receive.

Because the IRPAs had not agreed to pay the lead attorneys, Judge Fallon needed a noncontractual legal basis for this action. He claimed to find one in two sources: the common fund doctrine and the federal courts' inherent powers.[47] Regarding the former, he sometimes wrote as though he believed the doctrine's formal requirements were met. After observing that "the common fund or common benefit doctrine . . . [is] most commonly applied to awards of attorney fees in class actions," he observed that "the common fund doctrine is not limited solely to class actions" and that "MDL courts have consistently cited the common fund doctrine as a basis for assessing common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs."[48] By speaking of the "doctrine" so often, Judge Fallon conveyed the impression that, in his view, the requirements for its application are met in MDLs.

At other times, Judge Fallon seemed to rely on a general equitable impulse to cure unjust enrichment while recognizing that the technical requirements of the common fund doctrine are *not* met in MDLs. In the following passage, for example, he referred to a "common benefit concept" that transcends procedural contexts:

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42. *Id.*

43. MDL No. 2592, 2020 WL 1433923, at *1 (E.D. La. Mar. 24, 2020).

44. *Id.* at *1–2.

45. *Id.* at *10. Funds paid to plaintiffs who received small payments were exempted from these levies. *Id.*

46. *Id.* Dollars to cover common benefit expenses came out of the settlement, which contained a $25 million fund earmarked for this purpose. *Id.* These costs were thus spread across all settling plaintiffs and their attorneys.

47. For a critique of the inherent powers rationale, see generally Pushaw & Silver, *supra* note 9.

48. *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *2–3 (E.D. La. Mar. 24, 2020).

> As class actions morph into multidistrict litigation, as is the modern trend, the common benefit concept has migrated into the latter area. The theoretical bases for the application of this concept to MDLs are the same as for class actions, namely equity and her blood brother, quantum meruit. However, there is a difference. In class actions the beneficiary of the common benefit is the claimant; in MDLs the beneficiary is the individually retained attorney (contract counsel).[49]

The references to equity and quantum meruit convey Judge Fallon's belief in the existence of a general mandate to cure unjust enrichment by seeing that lawyers are compensated appropriately for their work.

Rather than saddle Judge Fallon with a position he may not endorse, I will address both alternatives. Subpart III(A) will consider whether the requirements of the common fund doctrine are met in MDLs. Subpart III(B) will take up the common benefit concept by asking whether unjust enrichment would occur without forced fee transfers.

A. In MDLs, the Requirements of the Common Fund Doctrine Are Not Met

The existence of a common fund is a doctrinal requirement for a restitutionary right to an award of attorneys' fees. In class actions, the fund is the merits recovery, which benefits all absent claimants. Applying a tax against the recovery spreads litigation costs across all class members in proportion to their gains.

In MDLs, judges require IRPAs, not claimants, to pay lead attorneys.[50] Because the claimants are contractually bound to pay their retained attorneys, judges cannot ask them to pay additional fees to other lawyers appointed by courts. MDL practice avoids this necessity by reallocating fees payable pursuant to contingent fee contracts among the various lawyers in accordance with a judge's idea of who deserves what.[51] However, fees paid pursuant to contingent fee contracts are not common funds. Barring an agreement to share fees, they belong solely to the lawyers whose clients pay them.

In the *Xarelto* litigation, Judge Fallon bypassed the "no common fund" problem by a means that, from a doctrinal perspective, is a sleight of hand. Instead of treating the existence of a common fund *created by litigation* as a

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49. *Id.* at *3.

50. Ratner, *supra* note 3, at 68, 68 n.32. For an example, see *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. CV-MDL-2592, 2020 WL 1433923, at *10 (E.D. La. Mar. 24, 2020).

51. *See* Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 70 (2013) (showing that judges use caps on IRPAs' contingent fees to free up funds that they then transfer to lead attorneys by granting common benefit awards).

prerequisite for awarding fees, he asserted that the doctrine empowers judges to gain control over funds by other means, stating:

> Since the nineteenth century, . . . the Supreme Court has recognized an equitable exception to [the rule that parties must bear their own litigation costs], known as the common fund or common benefit doctrine, that permits *the creation of a common fund* in order to pay reasonable attorney[s'] fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries.[52]

The doctrine does not do this. It empowers judges to tap funds that are "created, increased or protected by successful litigation," as the Fifth Circuit wrote in *Everglades Crash*.[53] In the *Xarelto* MDL, the only such fund was the settlement recovery. But Judge Fallon did not tap that fund. Instead, he created a new one by taxing IRPAs' fees.[54]

In the *Roundup* litigation, Judge Vince Chhabria recognized the difference between a true common fund created by litigation and a faux fund created by a judge. When considering the lead attorneys' request to order the defendant to withhold money from settlements for the purpose of funding a common benefit award, he observed that:

> Lead counsel ha[d] not asked this Court to reimburse them from some fund or property interest that was preserved or established as a result of a victory against, or settlement with, Monsanto[, the defendant]. Rather, lead counsel asked the Court to *create* a fund at the outset—before any judgment was entered and before liability was established—and to require contributions from individual recoveries down the line, whenever they were reached. Exercising equitable jurisdiction over a fund ultimately secured by litigation to reimburse the plaintiff who secured it seems quite different from creating a fund at the beginning of litigation and requiring contributions to that fund from individual recoveries in anticipation of the MDL lawyers needing to be reimbursed.[55]

By concluding that the common fund doctrine does *not* justify the imposition of holdback orders, Judge Chhabria distinguished himself from other MDL

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52. *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *2 (E.D. La. Mar. 24, 2020) (emphasis added). *See also In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 647 (E.D. La. 2010) (describing the Court's recognition of the common benefit doctrine).

53. *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1017 (5th Cir. 1977).

54. *In re Xarelto*, 2020 WL 1433923, at *10. If the claimants' recoveries constituted a common fund, Judge Fallon could have taxed them without distorting the doctrine as he did. This would have caused other problems, however—the primary one being that claimants would have been forced to pay more than their contracts required for the services they received. Judge Fallon might have cured this problem by cutting IRPAs' contractual fees, but neither the common fund doctrine nor the law of restitution and unjust enrichment more generally confers that power.

55. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 959 (N.D. Cal. 2021).

judges. The latter enter these orders routinely and seem not to know that the doctrine empowers them to tax existing funds rather than to create new ones.

The difference between taxing an existing fund and creating a new fund for the purpose of putting money under MDL judges' control is not a verbal quibble or a formality. Blurring this basic distinction tends to disguise the fact that a familiar form of words—"the common fund doctrine"—is being invoked to achieve ends that recognized principles of law and equity do not support.

The judges who decided *Everglades Crash* did not bend the common fund doctrine to their will. They upheld the forced fee transfer because they believed that the district court had inherent power to order it.[56] They did contend that equity "reinforced" the inherent power—an odd thing to say given that different bodies of law are involved[57]—but they knew that *Everglades Crash* did "not quite fit" the equitable fund model.[58] They considered that detail unimportant, however, because unlike "*Greenough* and its progeny," which were "private sector cases," the many lawsuits that stemmed from the plane crash "involve[d] larger interests," such as managing the federal court's burgeoning docket, "whose vindication command[ed] affirmative intervention by the court," including the appointment and compensation of lead attorneys.[59] The correct reading of *Everglades Crash* is that the power to transfer fees existed because the district court needed it to manage the litigation.

Other passages buttress this assessment. For example, when the IRPAs whose contingent fees were taxed pointed out that sixty signed clients were paying for the lead attorneys' services, the Fifth Circuit did not discuss the law of unjust enrichment; it raised a managerial concern:

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56. Per Judge Godbold:

> Managerial power is not merely desirable. It is a critical necessity. The demands upon the federal courts are at least heavy, at most crushing. Actions are ever more complex, the number of cases greater, and in the federal system we are legislatively given new areas of responsibility almost annually . . . . We face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants.

Everglades Crash, 549 F.2d at 1012.

57. *Id.* at 1017. The inherent powers doctrine enables courts to deploy procedures without which they could not adjudicate cases. The law of restitution contains substantive doctrines that regulate the rights and obligations of persons who confer and receive benefits in the absence of prior agreements regarding compensation. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. d (AM. L. INST. 2011) ("Restitution is the law of nonconsensual and nonbargained benefits . . . . [It] deal[s] with the consequences of transactions in which the parties have not specified for themselves what the consequences of their interaction should be."). If by obligating beneficiaries to pay service providers the law of restitution sometimes makes lawsuits easier to manage, that is merely a coincidence.

58. *Everglades Crash*, 549 F.2d at 1019.

59. *Id.* at 1019.

> It is uncertain that appellants or any other plaintiff lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage. The Committee members' 60 cases may affect the amount paid them as lead counsel but not the power of the court to require payment.[60]

The Fifth Circuit also invoked managerial concerns when dismissing the objection that if the award was upheld, "lead counsel [would be] paid twice for the same work."[61] It cited:

> [T]he broader responsibilities that lead counsel bear and the larger interests that they serve. Because of the nature of the case that will trigger appointment, lead counsel's services are in part for all parties with like interests and their lawyers. To a degree, lead attorneys become officers of the court. By making manageable litigation that otherwise would run out of control they serve interests of the court, the litigants, the other counsel, and the bar, and of the public at large, who are entitled to their chance at access to unimpacted courts.[62]

The listed considerations may provide sound policy rationales for supplementing lead attorneys' wages, but they do not ground the legality of forced fee transfers in the existence of unjust enrichment.

The Fifth Circuit also ignored the issue of bargaining impediments. The law of restitution strongly resists the imposition of a "forced exchange"—an obligation to pay for a benefit that a recipient had no opportunity to refuse.[63] Almost invariably, therefore, a claimant who recovers in unjust enrichment for a voluntary conferral of unrequested benefits can point to circumstances that made it difficult or impossible to bargain with the recipient over compensation in advance. Typical illustrations include services rendered in an emergency, or services that the defendant—although obligated to perform—has refused to supply.[64] In a standard common fund case or a class action, the difficulty or impossibility of prior bargaining is an important part of the justification for imposing liability for unrequested services.

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60. *Id.* at 1017.

61. *Id.*

62. *Id.*

63. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 cmt. e (AM. L. INST. 2011).

64. *See, e.g.*, *id.* §§ 20–22 (explaining the topic of "Emergency Intervention"). As the Restatement observes:

> A private party normally cannot compel another to pay for benefits conferred without request, no matter how appropriate the transaction or how reasonable the terms of the compensation demanded, if the effect of payment would be to complete an exchange that—had it been proposed as a contract—the recipient would have been free to reject.

Id. § 30 cmt b.

In the MDL context, by contrast, that justification is frequently absent. In *Everglades Crash*, whatever impediments to bargaining may have existed did not prevent lawyers from carving up the workload and distributing assignments.[65] This is hardly unusual. In the aftermath of mass torts, lawyers often work together voluntarily before cases are formally consolidated. After the mass shooting that occurred at Marjory Stoneman Douglas High School in Florida, lawyers with cases in the state and federal courts entered into a confidentiality and joint prosecution agreement that set out the terms on which they would share materials.[66] In the GMO corn litigation against Syngenta, which involved tens of thousands of farmers and was spread across three courts, the plaintiffs' attorneys negotiated a joint prosecution agreement that included terms relating to the payment of common benefit fees.[67]

Lawyers also cooperated voluntarily in the *Roundup* litigation where Judge Chhabria noted that "it was not difficult to decide which lawyers should take the lead because only one group came forward, presenting themselves as a slate."[68] No competition for control occurred because the lawyers started working together on agreed terms long before the MDL was created. In a letter to the court requesting appointment as lead counsel, Aimee Wagstaff discussed their arrangement:

> A team of Plaintiffs' attorneys across the nation has been working together to advance this litigation. This team filed the first Roundup® cases, filed most of the federal cases on file as of the date of PTO 1, has extensive experience leading and participating in MDLs generally, and is comprised of experienced trial attorneys with vast experience in mass torts and bellwether trials. . . . The attorneys comprising this team developed the factual and legal pleadings that underlie this litigation, successfully briefed and argued the motions to dismiss filed by Monsanto in federal districts (and also in two state actions), have selected a document vendor and are jointly reviewing documents, and have retained experts. Our team has a proven track record of working collaboratively and efficiently in large, complex cases with one another and with opposing counsel, and in this particular case we have worked together seamlessly and collaboratively for the past 13 months. We have met dozens of times

65. *See Everglades Crash*, 549 F.2d at 1009 (discussing informal cooperation that occurred prior to the creation of an MDL).

66. *See* Motion to Terminate Podhurt Orseck, P.A. as Lead Counsel at 5–6, Guttenberg v. United States, No. 0:18-cv-62758-WPD (S.D. Fla. Dec. 12, 2021), ECF No. 421 (indicating that counsel for victims entered into agreement to cooperate and share materials).

67. Report & Recommendation of Special Master Ellen Reisman Regarding Attorneys' Fees, Expenses, & Service Awards at 6, 61, *In re* Syngenta AG MIR162 Corn Litig., No. 2:14-md-02591-JWL-JPO (D. Kan. Nov. 21, 2018), ECF No. 3816 (highlighting that the plaintiffs' attorneys signed an agreement to establish a common benefit fee framework).

68. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 954.

> to advance the speedy and just adjudication of these cases. We have created a joint litigation fund, housed in Denver at Andrus Wagstaff, and are mindful of containing expenses. We believe the team's efforts have succeeded to date, evidenced by the fact that, to our knowledge, all firms with cases on file as of this filing support appointment of the team in the proposed positions.[69]

Lawyers at nineteen law firms supported Wagstaff's application.[70] Presumably, most or all participated in the working group she described.

Wagstaff provided no details about the working group's financial arrangements. She did not say how the lawyers were handling costs or whether they agreed to share fees. But the reported existence of "a joint litigation fund" establishes that some such provisions were in place.[71] And if the lawyers who participated in the joint venture were able to establish ground rules for themselves, could they not also have brought other IRPAs into the fold and set common benefit fees by agreement?

Because the practice of awarding attorneys' fees from nonclients in class actions is often justified on the ground that lawyers have deficient incentives, it also bears noting that the financial interests of lawyers with cases in MDLs may be much greater. The flood of lawsuits that necessitates the creation of an MDL is one piece of evidence supporting this observation. It shows that lawyers expect individual cases to be profitable, perhaps because they will enter into joint ventures or refer them to lawyers with larger numbers of clients. The tendency of candidates for lead positions in MDLs to possess sizeable inventories also indicates that their financial interests are strong. If a need exists to supplement their incentives by forcing other lawyers to pay them, it must be proven, not presumed.

In his *Roundup* opinion, Judge Chhabria made the preceding point about lead lawyers' incentives while also noting the difficulty of fine-tuning compensation:

> One could imagine an argument that there should be no holdback at all for this MDL. The argument would go something like this: Yes, the lead lawyers invested a great deal of time and money in these cases, but now they're likely making so much from settling their own "inventories" that they can each afford to buy their own island. . . . No doubt that the distribution of attorney compensation in this MDL is imperfect, but perfection can almost never be achieved in the area of attorney compensation—that would be a game of whack-a-mole. And there's no indication that the distribution is so out of whack as to

69. Letter from Aimee H. Wagstaff at 1–2, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Ca. Oct. 20, 2016), ECF No. 11.

70. *Id.* at exhibit 2.

71. *Id.* at 2.

> justify the effort and time involved in holding back money from people's recoveries and figuring out how to redistribute it.[72]

By asserting that their incentives are deficient, lead attorneys put MDL judges in the position of public regulators who must estimate the revenues needed to compensate them fairly. But judges possess neither the training in economics nor the data needed to perform this task correctly. Only by the luckiest of accidents will fee awards supplement lead attorneys' incentives correctly.

In *Xarelto*, Judge Fallon argued that common benefit fee awards are needed to "encourage attorneys to accept the considerable risks associated with prosecuting complex, multi-plaintiff matters for the benefit and protection of all plaintiffs' rights."[73] But he identified no substantial costs or risks that the lead attorneys would not also have incurred when representing only their signed clients. When doing the latter, they would have had to prepare and depose the same witnesses whose testimony was needed in the MDL; review the same documents that would have been used as evidence; prepare, argue, and defend the same pleadings and motions; engage the same experts; and so forth. By describing the services that cooperating lawyers delivered before the creation of the *Roundup* MDL, the Wagstaff letter provides positive support for the belief that lead attorneys and lawyers with large inventories carry similar workloads.

To conclude that the common fund doctrine supports the practice of awarding fees in pure MDLs, one must ignore a host of serious problems. Litigation does not produce the pools of money from which dollars are drawn to pay lead attorneys: judges' orders do. IRPAs' fees are individual payments made pursuant to contracts with their clients, not common funds. There are no passive beneficiaries because all claimants hired lawyers and sued, and because IRPAs, who are forbidden by judges from representing their clients in the usual way, are not free riders. Bargaining impediments may be insubstantial, as shown by the fact that attorneys often work together cooperatively before MDLs are formed, and lead attorneys' incentives may not require supplementation. The argument that the common fund doctrine supports the practice of requiring IRPAs to pay lead attorneys in MDLs is wholly unconvincing.

B. The General Impulse to Cure Unjust Enrichment

Because "[t]he common law is not a brooding omnipresence in the sky,"[74] the belief that the authority to award fees in MDLs rests upon a

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72. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d at 969.

73. *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *3 (E.D. La. Mar. 24, 2020).

74. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

general common benefit concept not embodied in a doctrine articulated by a sovereign is hard to square with the rule of law. Yet, the belief enjoys considerable support. Judge Fallon embraces it[75] and Professor William Rubenstein agrees. The latter contends that a "more general concept of unjust enrichment underlies judicial decisions in this area and helps explain [MDL] courts' reliance on the common fund theory, as well as on their inherent authority, in common benefit cases."[76] In support, he cites *Amorin v. Taishan Gypsum Co.*,[77] a recent opinion in which the Eleventh Circuit wrote that "common benefit fees—grounded in the courts' equity power—need not satisfy rigid eligibility requirements."[78]

In *Amorin*, IRPAs whose cases were remanded from a Louisiana MDL to a federal district court in Florida negotiated a settlement with a group of defendants who paid more than $40 million to resolve just shy of 500 claims. After the IRPAs collected their contingent fees, the lead attorneys in the MDL asked the Florida judge to impose a common benefit levy.[79] They argued that the IRPAs should turn over 60% of their earnings because "a substantial amount of [the lead attorneys'] foundational work was used to secure the [Florida settlement]."[80]

The Florida judge agreed that a debt existed. She found that the IRPAs' clients benefited "from the years of litigation conducted" by the lead attorneys in the Louisiana MDL.[81] She also cited a Most Favored Nations (MFN) clause in the Florida settlement that entitled the IRPAs' clients to an additional $13 million after the class action certified in the MDL court resolved on superior terms.[82]

But the Florida judge thought the IRPAs owed less than the lead attorneys wanted. Although the lead attorneys received 60% of the total fee fund when the class action settlement occurred in the MDL, the Florida judge reasoned that the IRPAs before her should pay only 45% because, by negotiating and administering a separate settlement, they did more work than the IRPAs whose cases remained in Louisiana.[83]

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75. Fallon, *supra* note 8, at 376.

76. Declaration of Professor William B. Rubenstein in Support of Application for Motion for an Award of Common Benefit Fees at 17, Guttenberg v. United States, No. 0:18-cv-62758-WPD (S.D. Fla. Feb. 7, 2022), ECF No. 469.

77. 861 F. App'x 730 (11th Cir. 2021) *cert. denied*, 142 S. Ct. 769 (2022).

78. Rubenstein Declaration, *supra* note 76, at 16 (quoting *Amorin*, 861 F. App'x at 734).

79. *Amorin*, 861 F. App'x at 732.

80. *Id.*

81. Amorin v. Taishan Gypsum Co., No. 11-22408-CIV, 2020 WL 11232641, at *6 (S.D. Fla. May 22, 2020), *aff'd*, 861 F. App'x 730 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 769 (2022) (order granting award of fees to lead counsel).

82. *Id.* at *1 n.3, *6.

83. *Id.* at *5, *7.

On appeal, the Eleventh Circuit affirmed. After explaining that "[t]he [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense," it cited *Everglades Crash* for the proposition that "common benefit fees—grounded in the courts' equity power—need not satisfy rigid eligibility requirements."[84] It supported the call for laxity by invoking the need to manage MDLs efficiently:

> Particularly in complex litigation, courts have broad managerial power that includes significant discretion in awarding fees. The panel in [*Everglades Crash*] explained the "much larger interests" that arise in MDL cases—not only the sheer number of plaintiffs and claims involved but also the importance of effectively and efficiently managing the crushing caseloads of federal courts. . . . Thus, the "broad grant of authority" awarded to trial courts when consolidating cases necessarily includes the ability to compensate appointed counsel that carry "significant duties and responsibilities."[85]

In a subsequent passage, the Eleventh Circuit observed that:

> [P]reventing appointed [MDL] counsel from recovering awards when their work leads to massive recoveries down the road [in remanded cases] would make it harder for courts to find capable and competent lawyers to take on that work in the future.[86]

Plainly, the more general concept of unjust enrichment is an alloy in which the primary metal is administrative need or convenience. In *Amorin*, the premise that "courts have broad managerial power that includes significant discretion in awarding fees" was sufficient by itself to support the conclusion that the district court could tax the IRPAs' contingent fees.[87] Unjust enrichment was a trace element whose addition contributed nothing of substance but did enable the Florida court to invoke its equitable powers.

The tincture added nothing of substance because the law of restitution does *not* condemn freeriding. It is blackletter law that "[t]he fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched."[88] Except in limited circumstances, freeriding is fine—even encouraged:

> It is a fact of common experience that a person may benefit from the effort and expenditure of others without incurring a legal obligation to pay. To be the subject of a claim in restitution, the benefit conferred

84. *Amorin*, 861 F. App'x at 734 (citing *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1019 (5th Cir. 1977)) ("Because the payment was assessed against the attorneys this case does not quite fit in the equitable fund cases. It need not precisely fit.").

85. *Id.* at 734–35 (citations omitted).

86. *Id.* at 735.

87. *Id.* at. 734.

88. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 (AM. L. INST. 2011).

> must be something in which the claimant has a legally protected interest, and it must be acquired or retained in a manner that the law regards as unjustified. Otherwise, the fact that we derive advantage from the efforts and expenditures of others is not "unjust enrichment" but one of the advantages of civilization.[89]

This statement is as true for the fruits of litigation as for other positive externalities. Plaintiff B, who copies a complaint or a legal brief filed by Plaintiff A, has no duty to pay. Nor does Defendant B, who benefits from a precedent or a no-liability verdict produced in a case litigated by Defendant A. "[F]ree riding occurs all across our legal system," as Judge Chhabria observed.[90]

As a positive matter, it was true in *Amorin* that the IRPAs acquired the benefit of the MDL lawyers' work "in a manner that" the Florida district court judge and the Eleventh Circuit "regard[ed] as unjustified."[91] But neither court discussed the basis for this normative characterization which, upon being examined, is plainly mistaken. IRPAs do not free ride by choice. They are passive because MDL judges forbid them from acting. The orders that appoint lead attorneys typically provide "that the MDL leadership attorneys are 'the only attorneys permitted' to undertake various tasks."[92] Because judges forbid IRPAs from providing services, it is incoherent to contend that IRPAs acquire benefits "in a manner that the law regards as unjustified."[93]

Assuming it to be true that judges cannot manage MDLs without putting some lawyers in charge and shackling others, the result is not unjust enrichment by any recognized measure. Rather, this practical reality (if it is one) merely bears out the Restatement's observation that the "predominant rationale" for fee awards in MDLs "is not unjust enrichment but administrative convenience."[94] The problem that needs addressing is not of the type that the law of restitution exists to cure. The Eleventh Circuit's fear that a denial of compensation would discourage lawyers from serving as lead

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89. *Id.* at cmt. b.

90. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 960 (N.D. Cal. 2021).

91. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 at cmt. b (AM. L. INST. 2011). *See also* Amorin v. Taishan Gypsum Co., 861 F. App'x 730, 735 (11th Cir. 2021) (recognizing that MDL counsel was the one who did the legwork to bring about the action).

92. Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representations in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 480 (2020) (quoting Case Mgmt. Order No. 1, *In re* Bard IVC Filters Prods. Liab. Litig., No. 2:15-md-02641-DGC (D. Ariz. Oct. 30, 2015)*; see also* David L. Noll, *What Do MDL Leaders Do? Evidence From Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 455–56 (2020) (describing the various ways in which non-lead MDL attorneys are restricted). For an example, see Case Management Order No. 2.A, *In re* Aqueous Film-Forming Foams Prods. Liab. Litig., No. 2:18-mn-02873-RMG (D.S.C. June 26, 2019), ECF No. 130.

93. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 cmt. b (AM. L. INST. 2011).

94. *Id.* § 29 cmt. c.

attorneys suffers the same defect. If true, it warrants legislative action, not restitution.

The Restatement uses an example in which freeriding prevents a desirable project from occurring to explain the common law's position.

> The protection commonly afforded to property rights and contractual liberty . . . comes at an important cost: the invitation to strategic behavior and "free riding" on the part of the owner whose contribution to an enterprise is being sought. If A calculates correctly that B's necessity is so great that A can refuse to contribute to the project and enjoy its benefits at B's expense, the result is a kind of unjust enrichment. On the next occasion, moreover, B may respond to A's strategic behavior by declining to proceed; with the result that a project that would have been mutually advantageous to A and B, and socially beneficial besides, may be frustrated by the parties' bargaining failure. Both this degree of unjust enrichment and this degree of inefficiency are ordinarily tolerated as necessary consequences of rights incident to private property. *Where the cost of such bargaining failure is judged to be too high, the response of the law is not to expand an owner's liability in restitution, but to require the desired behavior by direct regulation* . . . .[95]

The assertion that MDLs will be unmanageable unless lead attorneys are paid merits the same response. The problem is not that unjust enrichment would occur in a form the common law has historically corrected; it is that the MDL statute ought to be changed.

In short, the common law embodies no general concept of unjust enrichment of the sort that MDL judges invoke. The contention that it does collides head-on with the law's refusal to create a general obligation to pay for services that are rendered without request. If the law embodies a general concept, it is that a duty to pay for unrequested benefits exists only when certain demanding and rigorously defined conditions are met. In other words, by invoking an indefinitely malleable general concept, judges stand the law of restitution on its head. They decide that a situation in which A receives something from B without paying for it is an instance of unjust enrichment even though the law of restitution would squarely reject any claim for payment that B might assert. It seems obvious that a judge who orders A to pay B in such a situation is using the general concept of unjust enrichment as a fig leaf to hide the pursuit of a different objective—namely, administrative convenience.

The common fund doctrine is an exception to the general presumption against restitution, which operates in limited circumstances where certain vital inferences can confidently be drawn. The main inferences are that

95. *Id.* § 30 cmt. b (emphasis added).

cooperative working arrangements cannot be negotiated in advance of services being delivered and that all beneficiaries will wind up better off monetarily even after fees are paid. In class actions, these inferences are solid. The baseline for absent class members, who often cannot be identified and are entirely passive, is a $0 recovery. From their perspective, a positive payment from a common fund—even one diminished by a fee levy—can only be an improvement.

By contrast, in MDLs, forced fee transfers can make IRPAs worse off. The transfers require them to purchase lead attorneys' services at prices set by courts. No one can say whether the prices exceed the values IRPAs derive from the services lead attorneys provide. The fact, assuming it is one, that lead attorneys' efforts save IRPAs time and reduce their risks only shows how murky the matter is. To transfer funds in appropriate amounts, judges must estimate these effects and assign values to them. Perhaps because there is no reliable way to do this, they do not even try.[96] In *Amorin*, for example, the Florida judge offered little but the fact that the IRPAs negotiated and administered the $40 million settlement in support of the conclusion that they should keep 55% of their fees rather than the 40% retained by the IRPAs whose clients participated in the class action settlement in the MDL.[97] She neither estimated the fees the IRPAs would have received and the costs they would have incurred had they represented their signed clients in the usual way, nor concluded that they were better off on net after paying the lead attorneys. And what the judge said about the MFN clause was wrong.[98] Credit for the $13 million increase triggered by the class settlement in the MDL belonged to the Florida IRPAs who negotiated the MFN clause for the benefit of their clients. The lead attorneys in the MDL simply got the best deal they could for the class, which is what they were legally bound to do and what the class members paid them to accomplish.

IV. Hybrid MDLs

Nothing better illustrates the tendency to invoke vague, general concepts than judges' frequent use of the phrase "quasi-class action" to describe MDLs. The label is tailor-made to blur essential differences between procedures that are wholly distinct. Consolidations are aggregations of *filed lawsuits* that, while remaining separate, are prepared for trial collectively.

96. *Cf. In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. CV-MDL-2592, 2020 WL 1433923, at *5–10 (calculating only the reasonable value of the work performed by the lead counsels, not the value of the resulting time saved and increased efficiency of the IRPAs).

97. Amorin v. Taishan Gypsum Co., No. 11-22408-CIV, 2020 WL 11232641, at *7 (S.D. Fla. May 22, 2020), *aff'd*, 861 F. App'x 730 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 769 (2022).

98. *See id.* at *4, *6 (stating that "claimants were able to increase their recovery through the global settlement's impact on the Most Favored Nations . . . clause" and "increased their total recovery to [over $12M] when they 'liquidated their MFN rights'").

Class actions are representative suits in which a named plaintiff stands in judgment on behalf of a multitude of claimants who have *not* sued. The class action, which permits virtual representation under defined conditions, is one of the few exceptions to the rule of due process that lawsuits bind only parties who are properly named and served.[99]

Academic commentators have criticized the use of the quasi-class action metaphor repeatedly.[100] But there are contexts in which MDLs and class actions must be considered together. Some MDLs consolidate class actions that were filed separately, often in different courts. Parallel antitrust class actions may be handled this way.[101] Other MDLs begin as ordinary consolidations of individual lawsuits but settle as representative proceedings. This transition occurs, for example, when judges certify settlement classes in MDLs that aggregate lawsuits alleging personal injuries.[102]

When MDLs include class actions from the outset, 28 U.S.C. § 1407 and Rule 23 of the Federal Rules of Civil Procedure work together straightforwardly. The statute empowers a transferee judge to coordinate pretrial proceedings in the actions, and the rule governs the manner of handling class-related issues in each lawsuit, including certification, appointment of counsel, notice, and settlement.[103] To put the matter another way, the statute confers no powers or responsibilities that are class action specific, and the rule confers no powers or responsibilities that are MDL specific. Although needs to coordinate discovery, motions practice, and other matters relating to class-wide issues exist only in MDLs that include class suits, this fact is of no particular importance. Lawsuits differ in the matters they require judges to address pre-trial. Some involve experts whose credentials and methods must be examined. Some have special procedural requirements imposed by other laws. Some require choice of law analyses.

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99. *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)) (identifying the class action as an exception to the "'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process'").

100. *See, e.g.*, Silver & Miller, *supra* note 3, at 111 ("[T]he quasi-class action approach has serious downsides."); Burbank, *supra* note 9, at 5 (deploring the "risable . . . so-called 'quasi class action'" as a "kitchen sink" justification by MDL judges); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 112 (2015) (footnotes omitted) ("[T]here is no such thing as a quasi-class action: A class is either certified or not. Treating Rule 23 as a grab bag of authority to be invoked when convenient undermines the Rule's due-process protections and structural assurances of fairness.").

101. Silver & Miller, *supra* note 3, at 114–15 (describing pre-trial consolidation by the Joint Panel on Multidistrict Litigation, including of antitrust cases); Burch, *supra* note 100, at 79, 79 n.27 (discussing antitrust in the context of MDLs "becom[ing] the primary means for resolving aggregate litigation").

102. *E.g.*, *In re* NFL Players' Concussion Injury Litig., 307 F.R.D. 351, 361, 371 (E.D. Pa. 2015).

103. 28 U.S.C. § 1407(b); FED. R. CIV. P. 23.

The statute empowers MDL judges to coordinate the handling of all pretrial matters, whatever they may be.[104]

When MDLs that start out as aggregations of individual lawsuits settle as class actions, the analysis is the same. Section 1407 and Rule 23 again have separate domains. Rule 23 and the common law expounding upon it govern all class-related issues, such as whether absent plaintiffs are adequately represented and a settlement merits approval.[105] Section 1407 governs all MDL issues, such as how cases filed by non-settling plaintiffs will proceed toward trial.[106]

Despite the neatness of the separation, there may be a perception that certification of a settlement class resolves any uncertainty that exists about the applicability of the common fund doctrine in an MDL. As noted, the class action is the doctrine's natural home. Certification of a settlement class inside an MDL may therefore seem to establish that the predicates required by the common fund doctrine are met.

It does not. The existence of a certified class action is neither a necessary condition for the applicability of the doctrine nor a sufficient one. The first point is better established than the second, but both are correct. As the Restatement observes:

> The recovery authorized by § 29 does not depend on whether the underlying litigation—by which a common fund is secured for multiple beneficiaries—takes the procedural form of a class action. From the restitution standpoint, it is *irrelevant* whether legal proceedings that secure a common benefit were brought in the name of an individual plaintiff or on behalf of a class.[107]

"Irrelevant" is a strong word, but it is the right one. The common fund doctrine applies when its requirements are met. The certification of a class suggests that they are, just as a blaring smoke detector suggests the existence of a fire. In both contexts, though, a direct assessment of the facts may establish that the signal was misleading.

The belief that the requirements of the common fund doctrine are met is especially likely to be unwarranted when settlement classes resolve aggregations that begin as pure MDLs. In these instances:

- Many claimants, possibly all, hired IRPAs and sued. These claimants are not passive free riders. They took steps to vindicate their rights and have their own contracted-for fees to pay.

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104. 28 U.S.C. § 1407(b).

105. FED. R. CIV. P. 23.

106. 28 U.S.C. § 1407(b).

107. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c (AM. L. INST. 2011) (emphasis added).

- IRPAs may have been able to negotiate the terms on which a joint venture would proceed. They may even have worked together voluntarily before lead attorneys were appointed, as in the *Roundup* and *Marjory Stoneman Douglas High School* MDLs.[108]
- IRPAs may not be enriched unjustly because they filed lawsuits and likely took other steps for the benefit of their clients until judges ordered them to sit on their hands.[109]
- The fees that lead attorneys stand to collect from clients who were signed or referred may have provided sufficient incentives to bear the relevant costs and risks. The magnitude of any supplement that may be warranted will also be impossible to calculate.
- If lead attorneys' fees are to be paid by IRPAs, the latter's earnings will not constitute a common fund. They will consist of separate payments from signed clients in which only IRPAs have interests.

In short, certification of a settlement class in a previously pure MDL leaves unchanged the facts that determine whether the common fund doctrine applies, and those facts may warrant a negative conclusion in a hybrid MDL for the same reasons they did initially.[110]

To reach a conclusion other than the one argued for here, one must believe that a procedural change—certification of a settlement class in a previously pure MDL—can create a substantive right to compensation that would not otherwise exist. Rule 23 confers no such power. It permits a court to award attorneys' fees that are "authorized by law."[111] Here, the relevant body of doctrine is the law of restitution and unjust enrichment, which entitles lawyers to fee awards from common funds under defined conditions—none of which is the certification of a settlement class. Using Rule 23 to create a new right to payment would also run afoul of the Rules Enabling Act, which permits the creation of only procedures that leave substantive rights unchanged.[112]

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108. *See supra* notes 66, 68–70 and accompanying text.

109. Many IRPAs have responded to existing MDL management practices by adopting a business model on which they amass clients and wait for lead attorneys to do the work. *See* Silver & Miller, *supra* note 3, at 110 (explaining that cuts in IRPAs' contingent fees trigger "[a] downward spiral" because they "discourage lawyers from working hard"). This is a rational response, but the existence of this business model cannot justify the management practices that foster it.

110. To be clear, certification of a settlement class in a proceeding that began as a pure MDL establishes the propriety of taxing neither claimants nor IRPAs. It may be wrong to tax the claimants because they took steps to vindicate their claims and wrong to tax IRPAs because their fees are not common funds, because lead attorneys can bargain with them directly, etc.

111. FED. R. CIV. P. 23(h).

112. 28 U.S.C. § 2072(b).

V. Conclusion

Federal judges have looked high and low for sources of authority to regulate lawyers' fees in MDLs. They have argued that MDLs are quasi-class actions in which they may exercise powers conferred by Rule 23. They have invoked the inherent power to manage litigation. And they have asserted a general power to cure unjust enrichment. They have even blended these rationales together, contending that the existence of unjust enrichment provides an additional reason for asserting the inherent power to manage litigation.[113]

One has the sense that MDL judges are fudging. If any of these rationales suffices individually, why offer the others? And if they work only when combined, what are their individual deficiencies and how does weaving them together remedy their defects? The ordinary commitment to analytical rigor requires considerably more clarity about these matters than judges have provided.

Fundamental questions remain to be answered, too. Are MDL judges really free to play fast and loose with the doctrines that collectively constitute the common fund exception to the rule that persons who provide unrequested services have no right to payment? Do they really possess a roving commission to cure unjust enrichment whenever they claim to perceive it? And does this power exist in contexts where lawyers could have bargained for payment in advance and may even have participated in joint ventures on agreed terms?

Judges' misapplication of the law of restitution and unjust enrichment contributes to the impression that MDLs are the Wild West of civil litigation, a charge expressed by academics that tort reform groups subsequently embraced.[114] The dearth of scholarship supporting the various asserted justifications for fee-related practices strengthens this concern. Academic commentators have not published careful defenses of the uses MDL judges make of their inherent powers, the aptness of the quasi-class action metaphor, or the applicability of the common fund doctrine, despite having had plenty of time to do so. Now that all three rationales have been challenged, perhaps they will.

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113. *See* Silver & Miller, *supra* note 3, at 121 (criticizing the quasi-class action rationale); Pushaw & Silver, *supra* note 9, at 50–51 (criticizing the inherent powers rationale); Fallon, *supra* note 8, at 376 (describing the justifications underpinning the quasi-class action rationale).

114. Andrew Bradt and Calen Bennett contend that the rhetoric in the Sixth Circuit's opinion in *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838 (2020), was taken from briefs submitted by the U.S Chamber of Commerce and Lawyers for Civil Justice, organizations that have long campaigned against aggregate litigation and lobbied for tort reform. Andrew Bradt & Calen Bennett, Adult Supervision? Opioids, Mandamus, and "Law Reform" in Multidistrict Litigation 3 (Oct. 25, 2020) (unpublished manuscript) (on file with authors). If so, the chorus calling for MDL reform includes a range of voices, some of whose authors, including me, have spoken out loudly against tort reform for decades.

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The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations

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The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations

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"The rule of law applies in multidistrict litigation . . . just as it does in any individual case."

– *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 841 (6th Cir. 2020)

This Article examines the constitutional basis of the federal courts' independent exercise of "inherent powers" (IPs) that Congress has not specifically authorized. Our analysis illuminates the grave constitutional problems raised by the freewheeling assertion of IPs in multidistrict litigations (MDLs), which comprise over half of all pending federal cases.

The Supreme Court has rhetorically acknowledged that the Constitution allows resort to IPs only when doing so is absolutely necessary to enable Article III courts to exercise their "judicial power," but has then sustained virtually all exercises of IP, whether essential or not. The Court's excessive deference has emboldened trial judges to claim an ever-expanding array of IPs. The Constitution, however, requires a sharp distinction between two kinds of IPs.

First, "indispensable" IPs are those without which courts could not properly exercise their "judicial power"—rendering a final judgment after interpreting the law and applying it to the facts. Such adjudication may require judges to fill gaps in written procedural rules; manage their cases reasonably and efficiently; maintain their authority by punishing

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litigation misconduct; and ensure that attorneys are competent and ethical. Article I authorizes Congress to facilitate, but not impair, such indispensable IPs.

Second, federal judges cannot legitimately claim IPs that are merely "beneficial" (i.e., helpful or convenient), but that do not affect their ability to function as independent courts. Rather, Article I empowers Congress alone to grant such IPs, regulate them, or withhold them. Moreover, courts can never assert IPs in a way that violates parties' due process rights.

The proposed constitutional framework would clarify all IPs, but would be especially useful as applied to MDLs. In these complex cases, district courts have asserted an astonishing variety of IPs to regulate parties and their attorneys. Yet only one IP invoked in MDLs—the power to appoint liaison counsel to handle communications and coordinate litigation activities—is proper because it is indispensable and leaves parties' substantive and procedural rights unchanged.

Other IPs asserted in MDLs should be foresworn because they are beneficial powers that Congress has not authorized. Examples include the practice of forcing parties' retained lawyers to compensate court-appointed lead attorneys, caps on retained lawyers' fees, sua sponte enforcement of state bar rules that govern matters unrelated to adjudication, and judicial review of settlements. Yet other IPs would exceed even Congress's powers because, by asserting them, judges deny parties due process of law. Judicial appointments of lead attorneys who displace parties' retained lawyers fall into this category by saddling plaintiffs with virtual representation (VR), which the Supreme Court has forbidden. Worse, because the success of MDLs as a means of eliminating repetition and conserving resources depends upon the use of VR, the procedure itself is constitutionally infirm.

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INTRODUCTION

When managing multidistrict litigations (MDLs), which now encompass more than half of all pending federal cases, courts extensively use inherent powers (IPs)—those not conferred by Congress.[1] Judges invoke IPs to put lead attorneys in charge of these proceedings, to require the parties' retained lawyers to pay lead attorneys' fees, to cap contingent fees, and to review settlements. The exercise of such IPs violates the Constitution—in particular, Article I, Article III, the Due Process Clause, and the fundamental principle of separation of powers.

1. Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019, 10:54 PM), https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload.

The Supreme Court has long recognized that the Constitution uniquely limits the judicial branch.[2] Article I authorizes Congress to determine the federal courts' structure and jurisdiction and to make for them all governing laws, substantive and procedural.[3] Moreover, Article III judges merely possess "judicial power"—rendering a final judgment after interpreting the law and applying it to the facts.[4] Not surprisingly, the Court has always cautioned that IPs can be asserted only when they "cannot be dispensed with" because courts would be unable to function without them.[5]

To be sure, IPs sometimes serve a valid purpose. They reflect the sensible idea that, in the absence of an applicable procedural rule, judges must have some independent power to (1) fill these legal gaps, (2) manage their cases fairly and efficiently, (3) maintain their authority by imposing sanctions for litigation misconduct, and (4) discipline attorneys for unethical behavior.[6] Over time, the need to resort to IPs has lessened considerably. Congress gradually abandoned its historical approach of directing federal courts to borrow state adjective (i.e., non-substantive) law, with "discretion" to amend those rules when "deem[ed] expedient,"[7] and instead enacted extensive procedural statutes and authorized the promulgation of the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence, as long as those rules did not alter substantive rights.[8] Congress has also allowed each district court to publish "local" rules to regulate its practice in any manner consistent with federal law.[9]

Despite this proliferation of federal adjective law, and contrary to the Court's rhetoric that IPs should be severely circumscribed, it has repeatedly endorsed ever-expanding IPs that are not necessary to—indeed, that often undermine—the proper exercise of "judicial

2. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) (emphasizing the "properly limited" role of the courts in a democratic society) (citations omitted).

3. *See infra* notes 80–83, 85–88, 93–96, 116–153 and accompanying text.

4. *See infra* notes 75, 97 and accompanying text.

5. *See, e.g.*, Chambers v. NASCO, 501 U.S. 32, 43 (1991) (citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)).

6. *See infra* notes 98, 127–129, 136–137, 140–142, 149 and accompanying text.

7. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 94 (regulating process in courts of the United States).

8. *See infra* notes 156–184 and accompanying text.

9. *See* 28 U.S.C. § 2071; FED. R. CIV. P. 83(b).

power."[10] Similarly, the Court has recited, but disregarded, the principle that an IP "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[11] For instance, in its latest IP case, a majority of Justices warned that judges "should not think they are generally free to discover new inherent powers that are contrary to civil practice as recognized in the common law,"[12] yet sustained a judge's assertion of a novel IP to recall a discharged jury when he discovered an error in its verdict, despite the conflicting common law rule.[13] The Court concluded that this IP was "a 'reasonable response to the problems and needs' confronting the court's fair administration of justice."[14]

This supine deference has encouraged federal district judges to invoke established types of IPs aggressively and to invent new ones. MDLs provide a raft of troubling examples, for in these proceedings courts rely on IPs to ride roughshod over plaintiffs and their lawyers.

To promote efficiency and justice, Congress in 1968 authorized the Judicial Panel on Multidistrict Litigation to transfer related actions that are pending in different districts to a single judge for consolidated pretrial proceedings.[15] MDLs typically aggregate mass tort suits and can combine thousands of claims that collectively request billions in damages.[16] Once these pretrial proceedings have concluded, each action must be remanded to the original district court unless it has "been previously terminated."[17]

The same adjective law that applies to other civil actions also governs MDLs. But transferee judges want more power and flexibility than the Federal Rules of Civil Procedure (FRCP) confer, so they resort to IPs routinely.[18] For example, these judges claim the

10. *See infra* notes 185–275 and accompanying text.

11. Dietz v. Bouldin, 579 U.S. 40, 45 (2016). The Court often circumvents this limit by creatively interpreting the relevant procedural statute or rule. *See infra* notes 155, 185, 193–194, 210, 218, 253 and accompanying text.

12. *Dietz*, 579 U.S. at 52.

13. *Id.* at 42–54.

14. *Id.* at 45 (quoting Degen v. United States, 517 U.S. 820, 823–24 (1996)).

15. 28 U.S.C. § 1407(a)–(b).

16. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105 (2010). The following discussion of MDLs summarizes points made *id.* at 109–11, 118–59 and in Part II.

17. 28 U.S.C. § 1407(a).

18. *See infra* Part II.

IP to deny plaintiffs representation by their chosen counsel and to appoint lead attorneys to act for them with binding effect.[19] The judges then usually pressure parties into settling to avoid remanding any action for trial. Upon settlement, the judges then slash the retained lawyers' fees and award the money that is saved, which often amounts to tens or hundreds of millions of dollars, to the lead attorneys. The IPs that supposedly authorize these actions have no legal basis.

By stripping plaintiffs of the lawyers they hire, MDL judges deny them due process as well.[20] Virtual representation by court-appointed counsel is permitted only in class actions, which the FRCP regulate. But MDLs are not class suits and, in *Taylor v. Sturgell*,[21] the Court forbade the creation of "a common-law kind of class action" that operates "shorn of the procedural protections prescribed in . . . Rule 23." As currently managed, MDLs are patently unconstitutional.

MDLs provide an especially egregious, but hardly isolated, example of the misuse of IPs. The central problem is that the Court has declined to set forth concrete rules to govern the exercise of IPs generally and has instead considered each power piecemeal.[22] This approach has enabled the Court to avoid explaining how its expansive approval of IPs can be reconciled with its jurisprudence holding that the Constitution strictly limits the judiciary—most significantly, by granting Congress plenary control over all federal adjective law. The Constitution's text, structure, history, and pre-1937 precedent (both legislative and judicial) demonstrate that such

19. *See* Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representations in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 475 (2020) ("Neither the individual claimants nor their chosen [lawyers] will have selected or voluntarily consented to the addition of these counsel . . . .").

20. Federal judges' promiscuous use of IPs, in general and in MDLs, usually cannot be said to clearly violate "the law" articulated by the Court, which is so vague and inconsistent as to license a breathtaking array of IPs. Nonetheless, federal judges, particularly in MDLs, can be criticized for exercising their IPs in a manner that alters substantive legal rights, violates due process, or both. Ultimately, however, it is up to the Court to revise its IP jurisprudence to conform to Article III, the Due Process Clause, constitutional separation of powers, and the FRCP—and for Congress to step in if the Court fails to act. *See infra* Section II.2.I.

21. Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (quoting Tice v. Am. Airlines, 162 F.3d 966, 982 (7th Cir. 1998)).

22. This analysis of IPs will be fleshed out in Part I, which in turn relies heavily on Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

a schizophrenic result was never contemplated and makes little sense today.[23] Rather, the Constitution distinguishes two kinds of IP, subject to different types of congressional regulation.

First, Article III grants independent federal "courts" the "judicial power," which must by its very nature include the ability to imply auxiliary powers that are indispensable to adjudication, such as by protecting its judgments from political branch interference. Moreover, any true "court" must be able to maintain its authority and integrity, punish litigation misconduct, and administer its internal affairs. Congress can facilitate, but not impair, the exercise of such "implied indispensable powers."

Second, federal judges cannot legitimately assert "inherent" powers that are merely "beneficial" (that is, convenient or helpful) to the decision-making process or that do not affect their ability to function as autonomous "courts." Rather, Article I, particularly the Necessary and Proper Clause, entrusts Congress alone with discretion to bestow such beneficial powers in full, restrict them, or withhold them. Therefore, federal courts' creation of a common law

23. Several peer reviewers have argued that Article III's text and historical meaning are not relevant to modern litigation (including MDLs), which has developed in ways that no one could have contemplated. We have two responses. First, the Framers—most notably James Wilson, the Scottish emigre who was the primary drafter of Article III—were aware that special procedures might be necessary to handle multi-party litigation. *See* JAMES PFANDER, CASES WITHOUT CONTROVERSIES 175, 179–81 (2020) (describing Scotland's authorization of "popular actions" whereby any interested person could claim that defendants had violated legal rights held in common by many individuals, with procedural rules to limit duplicative litigation—a form of action adopted by many early American courts). Second, the Founders understood that concentrating too much power in one person (or a single government branch)—including a judge or court—inevitably led to corruption and oppression. That is why the Constitution granted Congress significant power to ensure that life-tenured judges would not exceed their proper "judicial" boundaries. That concern is as pertinent today as it was in 1789—indeed, even more so, as federal courts have aggressively asserted ever-expanding power over procedural, jurisdictional, and substantive law. *See infra* notes 185–275 and accompanying text.

More generally, analysis of the Constitution's language, structure, political theory, and history yields timeless principles that can help resolve modern legal problems. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448–50, 465–529 (1994) (applying this methodology to propose a new way of thinking about justiciability and other jurisdictional doctrines); Robert J. Pushaw, Jr., *The Original "Market" Understanding of the Commerce Clause: Insights from Early Federal Government Practice and Precedent*, 48 BYU L. REV. 535, 536–38, 542–71 (2022) (employing this approach to determine the original meaning of the Commerce Clause).

to govern beneficial powers violates the Constitution's separation-of-powers design.[24]

Application of the foregoing framework would greatly improve MDLs.[25] Initially, it would clarify that judges have only implied indispensable power to appoint so-called "liaison counsel," who are "[c]harged with [handling] essentially administrative matters, such as communications between the court and other counsel (including receiving and distributing notices, orders, motions, and briefs on behalf of the group), convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions."[26] Congress authorized a single court to administer complex pretrial proceedings in order to streamline fact-finding and sharpen legal issues for decision, thereby facilitating the exercise of "judicial power." A transferee judge's duty cannot be discharged effectively without naming liaison counsel to coordinate with the many other lawyers involved.

But this appointment power has clear limits. Most importantly, liaison counsel cannot displace non-lead lawyers on substantive matters. Due process entitles all litigants to representation by attorneys who speak and act for them with their permission. Furthermore, MDL judges do not have IP to compel non-lead lawyers to compensate court-appointed attorneys. Proof that non-lead lawyer displacement and fee-shifting are unnecessary can be found in both the history of MDLs and the actions of state court judges, who have handled many large consolidations without exercising these powers. MDL judges also lack other IPs that they claim to possess. Because MDLs can be and have been managed without cutting non-lead lawyers' fees, IP jurisprudence does not support this authority. For the same reason, courts lack IP to review MDL settlements.

In short, judges can manage MDLs effectively without exercising many of the IPs they routinely assert. Some IPs—appointing lead

24. Neither the Constitution nor any federal statute authorizes courts to develop a common law of beneficial powers, which are entrusted exclusively to Congress. Moreover, although the Court's precedent governing implied indispensable powers might be characterized as federal common law, such rules are actually based on Article III of the Constitution and hence cannot be overridden by Congress—unlike true common law, which is always subject to legislative control. *See* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 521–29, 577–91 (2008).

25. For elaboration of the following argument, see *infra* Part II.

26. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004) [hereinafter MANUAL].

attorneys who displace plaintiffs' retained lawyers and forcing the latter to pay the former—are neither indispensable nor beneficial to the courts' appropriate functioning, but rather pervert it. Hence, not even Congress could confer such powers.

The foregoing ideas will be developed in two stages. Part I will analyze IPs generally and recommend that the Court carefully distinguish between "implied indispensable" and "beneficial" powers. Part II will concretely demonstrate the value of that framework by applying it to MDLs.

I. A CONSTITUTIONAL ANALYSIS OF FEDERAL COURTS' INHERENT POWERS

The Constitution's language, structure, history, and political philosophy yield three main conclusions. First, Article III "courts" can independently assert an IP only when indispensably necessary to maintain their authority or to exercise their "judicial power" of deciding cases. Second, Congress can effectuate, but not eliminate or impair, these essential IPs. Third, Congress can determine which merely beneficial IPs to confer on federal judges.

Early congressional practice and Court precedent confirmed this understanding, which remained intact for about a century and a half. The modern Court has parroted the principle that IPs can be invoked only when indispensable, yet has approved IPs that are not merely unnecessary but that often transgress properly "judicial" boundaries, flout federal procedural statutes and rules, and violate due process. The Court should abandon this approach and instead reintroduce the genuine constitutional restraints it formerly imposed on IPs.

A. The Original Meaning

The Constitution's drafters adapted longstanding English governmental theory and practice in light of the unique American experience. A simplified summary of complex historical developments illuminates the original understanding of the inherent powers of federal courts.[27]

27. The following sketch of English and American constitutional history, particularly as it bears on inherent powers, draws heavily on the analysis presented in Pushaw, *supra* note 22, at 740–41, 799–836. We will not repeat here the hundreds of supporting sources cited therein, but merely highlight a few of the most important ones and add new authority.

1. British Political and Legal Ideas and Institutions

The Norman Conquest of 1066 gave the King absolute power, which he wielded with assistance from select counselors.[28] A Great Council of leading lords and clerics periodically helped with crucial governing decisions.[29] A smaller group of ministers exercised routine "executive power," which encompassed all law enforcement—both "executive" (administering it generally) and "judicial" (issuing a prudential judgment about the law in a particular case).[30] The latter function was part of the Crown's prerogative power to do justice.[31]

The King delegated judicial duties to courts, which evolved when he possessed all governing authority and which therefore shared his vast discretion.[32] As there was no adjective law and only sparse substantive legislation, judges usually had to develop their own rules.[33] Three royal courts emerged. First, Common Pleas handled ordinary damages actions instituted through a writ such as trespass, from which the common law developed.[34] Second, King's Bench had jurisdiction over important cases implicating royal interests and could compel obedience by issuing various "prerogative writs" like mandamus and prohibition.[35] Third, when courts of law could not furnish a remedy, Chancery could do so in equity.[36] Although all these courts were subordinate to the monarch, they had acquired a separate identity by the late

28. *See* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 1–25 (1969); 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 29–54, 446–49 (A.L. Goodhart et al. eds., 7th ed. 1956); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 11–26, 139–44 (5th ed. 1956).

29. *See* PLUCKNETT, *supra* note 28, at 140–44, 155.

30. *See* Pushaw, *supra* note 22, at 800–10.

31. The King was "the fountain of justice" from which all of the courts' judicial power flowed. 1 WILLIAM BLACKSTONE, COMMENTARIES *266–70; 3 *id.* at *23–24.

32. Judges served as the King's personal representatives in exercising his prerogative power to administer justice. *See* MILSOM, *supra* note 28, at 28–39, 62, 75–77, 83.

33. *See* Pushaw, *supra* note 22, at 800–06, 810–12.

34. *See* 1 HOLDSWORTH, *supra* note 28, at 51–56, 195–203; MILSOM, *supra* note 28, at 22–39; PLUCKNETT, *supra* note 28, at 35, 147–49, 234, 354–81; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 16–17, 35–36, 49–61, 84–85 (2d ed. 1979).

35. *See* BAKER, *supra* note 34, at 35, 46, 118, 123–29; 1 HOLDSWORTH, *supra* note 28, at 204–28; 9 *id.* at 104–25.

36. *See* BAKER, *supra* note 34, at 84–97, 101; 1 HOLDSWORTH, *supra* note 28, at 395–476; 5 *id.* at 284–87; 9 *id.* at 335–76; 11 *id.* at 522–25; 12 *id.* at 258–85; MILSOM, *supra* note 28, at 74–87.

fourteenth century.[37] Gradually, they assumed a distinctively "judicial" role: rendering a final judgment after interpreting a fixed law and applying it to a set of facts.[38]

These judges also asserted four types of auxiliary power.[39] First, they necessarily had to craft rules of procedure and evidence.[40] Second, judges managed litigation details such as calendaring, granting stays, and appointing experts.[41] Third, a court could maintain its authority by (1) dismissing cases for abuse of its process, and (2) fining or jailing for contempt (i.e., misconduct in its presence or by its officers, as well as defiance of its orders).[42] Fourth, a court could regulate its main officers, lawyers, by ascertaining their fitness to practice and disciplining them for litigation misbehavior.[43]

Only royal courts had such inherent powers, which flowed from the Crown; inferior tribunals created by statute did not.[44] For instance, contempt against a royal court was treated as an offense

37. *See* PLUCKNETT, *supra* note 28, at 16–20, 27–29, 35–38, 44, 142–43, 147–52, 155–59, 173, 178–81, 188–96, 209, 232–38, 353–58, 394–95, 679–81, 688–89, 695–706. Because courts were so closely associated with the Crown, and because they each developed on a separate track, it is impossible to pinpoint when they came to be regarded as discrete institutions. Moreover, even after this individuation had occurred, it took several centuries for courts to achieve independence from the King. *See infra* notes 53–56 and accompanying text.

38. This modern conception of the appropriate "judicial" function began to take shape in the 1500s and became entrenched by the mid-eighteenth century. *See* BAKER, *supra* note 34, at 69–74, 89; PLUCKNETT, *supra* note 28, at 18–20, 46–47, 342–50, 381–82; M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 87–88 (1967).

39. *See* Pushaw, *supra* note 22, at 801–15; I.H. Jacob, *The Inherent Jurisdiction of the Court*, CURRENT LEGAL PROBS. 23–52 (1970).

40. *See supra* notes 33–38 and accompanying text. These rules, which dated back to the fourteenth century, were eventually compiled systematically in WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS (1974) [hereinafter TIDD'S PRACTICE].

41. *See* Jacob, *supra* note 39, at 35–39; Pushaw, *supra* note 22, at 812.

42. *See* Jacob, *supra* note 39, at 26–29, 40–50; Pushaw, *supra* note 22, at 812–15. Royal courts could punish contempt because they represented the sovereign King and hence could defend his authority. American courts assumed this sanctioning power even though their government rested on the sovereignty of the People. *See* RONALD GOLDFARB, THE CONTEMPT POWER 1–45, 104–05 (1963).

43. *See* Blewett Lee, *The Constitutional Power of Courts Over Admission to the Bar*, 13 HARV. L. REV. 233, 238–40 (1899) (showing that English courts claimed power to regulate attorneys beginning in the thirteenth century). In 1605, Parliament set forth basic qualifications for bar admission, which courts then supplemented. *See* TIDD'S PRACTICE, *supra* note 40, at 60.

44. *See* 6 HOLDSWORTH, *supra* note 28, at 234–43 (making this point). This English framework might suggest that "inferior" Article III courts, which must be established by Congress, possess only such powers as the legislature grants. *See infra* notes 79, 86, 92–96 and accompanying test.

against the King and thus could be punished severely.[45] To take an extreme example, a criminal defendant once threw a stone object at a judge, who summarily ordered that the man's hand be chopped off and that he be hanged in the courtroom.[46]

Over the centuries, however, the Crown's powers diminished. Correspondingly, courts enjoyed increasing autonomy as adjudicators of a neutral "law."[47] Meanwhile, the Great Council evolved into a House of Lords and combined with an elected House of Commons to form a Parliament, which eventually gained enough independence to challenge the King in the sixteenth century.[48] After protracted conflict, the Glorious Revolution of 1689 formally established the sovereignty of Parliament, which consisted of Lords, Commons, and a King with an absolute veto.[49] Parliament had all "legislative power": to enact, amend, or repeal laws.[50] The Crown retained the "executive power" of administering and enforcing the laws, including the prerogative of doing justice.[51] Separating "legislative" from "executive" power, and entrusting each to an independent institution, were deemed critical to any government's legitimacy.[52]

Relatedly, courts were now viewed as servants of the law, not the King (or Parliament).[53] For example, their judgments could not be revised by political officials.[54] In 1701, Parliament formalized this transformation by granting judges tenure during

45. *See supra* note 42.

46. *See* Davis's Case, 2 Dyer 188b (1631), *reprinted in* 73 Eng. Reps. 415–16.

47. *See* 2 HOLDSWORTH, *supra* note 28, at 253–55, 435–41; 4 *id.* at 187–89; 10 *id.* at 343–45, 356–60; PLUCKNETT, *supra* note 28, at 18–26, 46–47, 157–59, 332–35, 342–50, 681.

48. *See* Pushaw, *supra* note 22, at 800, 806.

49. *See id.* at 806–07. Parliament combined the one (the King), the few (Lords), and the many (Commons). *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *44–52, *147–55, *160–62, *185–86, *260–69. In a vestige of its original role as a council helping the King discharge his major responsibilities, the House of Lords retained the ability to reconstitute itself as a "High Court" to decide cases of unusual importance. *See* 1 HOLDSWORTH, *supra* note 28, at 361–79, 390, 644; PLUCKNETT, *supra* note 28, at 200–01.

50. *See* Pushaw, *supra* note 22, at 806, 808, 815.

51. *See id.* at 807–10.

52. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. XII, at 143–44 & ch. XIV, at 159–60 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). For a comprehensive study of the development of this doctrine of separation of powers, see VILE, *supra* note 38, at 23–33, 44–75, 83–99, 102–03, 106–08, 110–11.

53. *See supra* note 47 and accompanying text.

54. *See* James Bagg's Case, 11 Co. Rep. 93, 98 (1615), *reprinted in* 77 Eng. Reps. 1271, 1277–78.

"good behavior" and guaranteeing their compensation.[55] Accordingly, although in theory courts still acted as the King's agents in vindicating his "executive" *power*, in reality they independently exercised the uniquely "judicial" *function* of adjudication.[56] As a result of these changes, certain powers originally founded in the royal prerogative were re-characterized as simply inhering in courts.[57]

Moreover, even though Parliament now had sovereign power to make all laws, it generally did not legislate on IPs, including adjective lawmaking.[58] Courts had become established as distinct organs—and had developed and refined their own rules of procedure and evidence—centuries before Parliament emerged as supreme, and legislators had no incentive to tamper with a system that had proven to be fair and workable.[59]

All of the foregoing historical developments contributed to the idea that there was a fundamental "Constitution" that everyone had to respect.[60] It consisted of (1) a few foundational documents such as Magna Carta (1215) and the Declaration of Rights (1689);[61] (2) certain monumental Acts of Parliament—for instance, the law guaranteeing

55. Act of Settlement, 12 & 13 Will. III, ch. 2, § 3 (1701).

56. *See supra* notes 37–38, 47–55 and accompanying text. Blackstone distinguished the "executive" *power* and *prerogative* to do justice from the court's judicial *function* of deciding cases impartially. 3 WILLIAM BLACKSTONE, COMMENTARIES *2–3, *24–25, *327, *380.

57. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *282–85; *see generally* Pushaw, *supra* note 22, at 806–10, 814–16.

58. Pushaw, *supra* note 22, at 812, 814–15. Courts created adjective rules for administrative convenience, and such laws never had the binding force of statutes. *See* Jacob, *supra* note 39, at 33, 37.

59. Pushaw, *supra* note 22, at 815 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *267). English courts, which began to take shape in the 1100s and were well established by the 1300s, made rules of practice, procedure, and evidence to govern their proceedings. *See supra* notes 32–43 and accompanying text. This adjective law had become entrenched by the time Parliament emerged as the undisputed sovereign in 1689. And even if Parliament had wanted to change adjective law, the King might have wielded his veto to protect his prerogative of doing justice through courts. Pushaw, *supra* note 22, at 815–16. This English practice contrasted sharply with the system under America's Constitution, which created a legislature (Congress) that had (1) complete discretion over the establishment of lower federal courts; (2) substantial control over the Supreme Court's size and jurisdiction; and (3) power to make adjective law for all federal courts. *See infra* notes 80–83, 85–88, 93–96, 116–153 and accompanying text.

60. Pushaw, *supra* note 22, at 806–08.

61. *See* PLUCKNETT, *supra* note 28, at 23–26, 59–61, 337.

unlawfully detained citizens the writ of habeas corpus;[62] and (3) hallowed unwritten concepts and customs such as separation of powers, the rule of law, and due process (that is, prior notice about laws and their application by an impartial decision-maker).[63]

England extended its political and legal framework to the American colonies but did not make modifications to reflect changes in the mother country, such as guaranteeing judges' independence.[64] Thus, colonial governors and courts always represented the King and exercised his broad prerogative authority, including inherent judicial powers.[65] Royal officials' abuses and disregard of English constitutional norms (e.g., jury trials) eventually caused a Revolution.[66]

2. Limited Inherent Powers Under America's Constitution

The tyranny of British executive and judicial officials persuaded Americans to grant sovereignty to state legislatures and establish a weak national government, the Articles of Confederation, which similarly vested almost all powers in a "Congress."[67] The Articles did not provide for an independent President or judiciary, so no "judicial power" (inherent or otherwise) existed.[68] The resulting

62. Habeas Corpus Act of 1679, 31 Cha. 2, ch. 2. Parliament recognized, and slightly expanded, a writ that the royal courts had been issuing since the fourteenth century. *See* BAKER, *supra* note 34, at 126–28.

63. *See* Pushaw, *supra* note 22, at 806–08.

64. *See id.* at 816–17; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 296–97 (1969) (recognizing England's transplantation of its basic governmental framework, but noting that each colony made certain legal, political, and economic adjustments based on its unique circumstances).

65. WOOD, *supra* note 64, at 159–60; Pushaw, *supra* note 22, at 816–19.

66. *See* WOOD, *supra* note 64, at 173–81, 259–68, 291–305, 344–54, 455.

67. *See id.* at 132–61, 305, 352–63, 373–74, 393–429, 436, 452–54, 463–67, 475–83, 549–56. State legislatures typically controlled governors and judges, who could not check abuses such as debtor forgiveness statutes that destroyed credit markets and violated treaty obligations. *See id.* at 300–04, 354–63, 393–429, 452–54, 463–67, 475–83; Pushaw, *supra* note 22, at 819–21. The Confederation, a loose alliance of sovereign states, could not compel them or their citizens to obey federal laws. *See* THE FEDERALIST NO. 21, at 129–33 (Hamilton) (Jacob E. Cooke ed., 1961) (note: all subsequent citations will be from this edition). For a catalogue of the defects of the Articles, see THE FEDERALIST NOS. 1, 6–9, 11–13, 15–17, 21–23 (Hamilton); NOS. 10, 14, 18–20 (Madison).

68. Under Article IX, Congress could appoint temporary tribunals to (1) decide cases concerning piracies, captures, and prizes, and (2) make preliminary determinations in interstate disputes, subject to Congress's final appellate jurisdiction. The lack of a permanent judiciary stymied impartial justice. *See* THE FEDERALIST NO. 38, at 247 (Madison).

political and economic chaos demonstrated the value of England's strong central government that separated powers.[69] America could not, however, replicate Britain's constitutional traditions—particularly its hereditary upper legislative chamber and chief executive (with courts in that department). The Founders therefore ingeniously accommodated English political principles to distinctively American ideas and conditions.[70]

The Federalists' key innovation was relocating sovereignty from the legislature to "We the People," who retained all powers not granted in their written Constitution.[71] The People vested three types of power (legislative, executive, and judicial) in three government branches and enumerated the subjects to which each power extended.[72] Voters would indirectly select the nation's upper lawmaking body (the Senate) and Chief Executive (the President).[73] But instead of endowing the President with vast prerogatives, Article II conferred the basic "executive power" (executing the law) and a few other defined powers.[74]

Furthermore, the "executive power" no longer subsumed the judicial. Rather, Article III gave independent courts a distinct "judicial power"—rendering a final judgment in a case after interpreting the law and applying it to the facts.[75] This sharp division

69. *See, e.g.*, THE FEDERALIST NO. 48, at 335 (Madison).

70. For a detailed analysis of this accommodation, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 399–452 (1996).

71. James Wilson was the earliest proponent of this link between popular sovereignty and a written Constitution that delegated and limited government powers. *See* THE WORKS OF JAMES WILSON 20–25, 73, 77–79, 293, 303–04, 310–17, 401–02, 414, 497, 764 (Robert Green McCloskey ed., 1967) [hereinafter WILSON'S WORKS]. Other Federalists emphasized this theme. *See, e.g.*, THE FEDERALIST NOS. 39, 46–49, 51 & 55 (Madison); THE FEDERALIST NOS. 36, 60 & 84 (Hamilton).

72. *See* U.S. CONST. arts. I, II, and III.

73. For these two entities, the democratic process was not direct (as in the House) but rather filtered. *See* U.S. CONST. art. I, § 3, cl. 1 (providing that each state's elected legislature would choose its two Senators); U.S. CONST. art. II, § 1, cls. 2–3 (authorizing each state's legislature to direct the manner of appointing electors who would select the President).

74. *See* U.S. CONST. art. II. Moreover, most of those other powers (e.g., over appointments, military matters, and foreign affairs) could not be exercised absent Congress's approval.

75. The leading Federalists frequently articulated this standard definition of "judicial power." *See, e.g.*, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 233–34 (Max Farrand ed., 1911) (Madison); THE FEDERALIST NO. 78, at 523–24, 529 (Hamilton); WILSON'S WORKS, *supra* note 71, at 296. Thus, We the People decided that their executive and judicial representatives would exercise distinct powers in independent departments. *See, e.g.*, THE FEDERALIST NO. 39, at 251–52 (Madison); THE FEDERALIST NO. 64, at 436 (Jay); THE FEDERALIST NO. 68, at 458–

meant that federal judges, unlike their English counterparts, had no derivative executive powers or prerogatives—for example, to fashion a procedural code, issue writs, or punish contempt in the name of the Chief Executive.[76]

The foregoing changes seemingly left little room for "inherent" authority, as the Constitution specified the government's powers.[77] Nonetheless, because the Framers sought to create a workable system, federal officials could exercise implied powers that were "indispensably necessary . . . [but] not expressly granted," as Madison put it.[78] This "strict necessity" restraint would honor the constitutional principle of limited and enumerated federal powers. And Articles I and III, read in light of the Constitution's structure and underlying political theory, revealed that the federal courts' implied or "inherent" authority would be especially narrow compared to that of the other branches.[79]

61 (Hamilton); THE FEDERALIST NO. 70, at 471–80 (Hamilton); THE FEDERALIST NO. 78, at 522–23 (Hamilton); WILSON'S WORKS, *supra* note 71, at 293–98, 310–19.

76. *See supra* notes 32, 37, 44–45, 51, 56 and accompanying text (discussing these assertions by British judges of derivative executive power and discretion). The Supreme Court later confirmed that the Constitution authorized Congress to enact adjective law, confer writ power, and regulate contempt. *See infra* notes 124–148 and accompanying text. The Constitution also required the executive branch to execute legal judgments. *See* THE FEDERALIST NO. 78, at 522–23 (Hamilton).

77. *See* Pushaw, *supra* note 22, at 741, 744, 823–24.

78. THE FEDERALIST NO. 44, at 303–04. Madison clearly argued that the Constitution authorized *Congress* to grant such "indispensably necessary" implied powers to all three branches, but never directly stated that executive and judicial officials could assert such powers on their own. *See infra* notes 79, 82–83, 89 and accompanying text. However, Madison's other writings, and the logic of the Constitution, reflect his assumption (shared by other Founders) that all federal officials could imply essential auxiliary powers, subject to reasonable congressional regulation. *See infra* notes 79, 89 and accompanying text.

79. The Convention and Ratification records contain no explicit references to inherent judicial powers. Thus, their nature and scope must be determined by examining the Constitution's text; its animating structural and theoretical principles like popular sovereignty, separation of powers, and limited and enumerated federal powers; and early practice and precedent. Pushaw, *supra* note 22, at 822–36. The only arguably relevant public comments were by Madison. One suggested that federal officials (including judges) could imply indispensably necessary powers. *See supra* note 78. The other was that, in the executive department, "much greater latitude is left to opinion and discretion than in the administration of the [courts]." *See* 2 RECORDS, *supra* note 75, at 34; *see also* THE FEDERALIST NO. 78, at 522–23 (Hamilton) (dubbing the judiciary "the least dangerous" branch because it could exercise "merely judgment," whereas Congress made rules governing all citizens and "the executive not only dispenses the honors but holds the sword").The Founders believed that legislative power, by its nature, was far broader than executive or judicial power. *See infra* notes 80–83 and accompanying text. The logical conclusion—that the courts' discretion

Article I created a Congress with "[a]ll legislative Powers"[80]: passing laws that reflected the majority's desired policies.[81] The Founders thought that legislative power dwarfed executive and judicial authority in both magnitude[82] and breadth of discretion.[83] Federal judges could not create law, but could only expound existing law, unless there was a legal gap that had to be filled to process a case.[84] Article I did not, however, grant Congress general legislative authority *a la* Parliament, but rather extended such power to the subjects "herein granted"[85]: those listed in Section 8. The most obviously relevant provision authorized Congress to "constitute Tribunals inferior to the [S]upreme Court."[86]

More subtly, Congress could "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[87] Articles II and III lacked such language. Therefore, Congress alone could enact statutes it deemed "necessary and proper" to effectuate its own powers and those of the executive and judicial branches.[88] The only ambiguity concerned the meaning of "necessary." Madison argued that this word restricted Congress to

and inherent powers were the most constrained—was confirmed by the early Congress and Supreme Court. *See* Pushaw, *supra* note 22, at 822–43.

80. U.S. CONST. art. I, § 1.

81. *See* Pushaw, *supra* note 22, at 739, 741, 744–46, 799, 829–30.

82. "In republican government the legislative authority, necessarily, predominates." THE FEDERALIST NO. 51, at 559 (Madison). Congress's constitutional powers were "more extensive and less susceptible of precise limits" than those of the President or the courts. THE FEDERALIST NO. 48, at 334 (Madison).

83. THE FEDERALIST NO. 48, at 334 (Madison). Legislatures controlled their agenda and could decide which laws they would pass. By contrast, if a legislature enacted a statute, the executive and judicial departments did not have discretion to decline to apply it. *Id.* The Constitution incorporated this dynamic, in which Congress had the most power and discretion—and the judiciary the least. *See* THE FEDERALIST NO. 78, at 523 (Hamilton); *see also* Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 798–802, 806–42 (2018) (demonstrating the original understanding of Congress's dominant position and describing its multiple roles, including being the "chief facilitator" of the executive and judicial branches).

84. *See* Pushaw, *supra* note 22, at 746–47; *see also* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 980–84 (1996).

85. *See* U.S. CONST. art. I, § 1; *see also* WILSON'S WORKS, *supra* note 71, at 764.

86. *See* U.S. CONST. art. I, § 8, cl. 9.

87. *See* U.S. CONST. art. I, § 8, cl. 18.

88. *See* Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 857–58.

laws that were indispensable to carrying out the government's express powers.[89] By contrast, Randolph maintained that this Clause gave Congress "supplementary power," albeit not "unlimited discretion," to provide each department with even nonessential means that would best effectuate their enumerated powers.[90]

Critically, the Founders' debate centered on whether *Congress* could grant executive and judicial officials incidental powers that were merely helpful, convenient, or useful. No one said that those officials could claim such "beneficial" powers on their own.[91]

89. Initially, he noted that the Framers had rejected the provision in the Articles of Confederation that prohibited Congress from exercising any powers not "expressly" delegated, thereby allowing the new government to imply powers that were "indispensably necessary . . . [but] not *expressly* granted." THE FEDERALIST NO. 44, at 303–04. Therefore, "all the particular powers, requisite as means of executing the general powers, . . . resulted to the government, by unavoidable implication . . . . [W]herever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included." *Id.* at 304–05. The Necessary and Proper Clause simply made this implicit principle explicit: Congress could provide all three departments with means that were essential and appropriate to effectuate their enumerated powers (or, if the executive or judiciary had asserted such powers independently, to reasonably regulate their exercise). *See id.* at 303–05. If Congress misconstrued this Clause, such a usurpation of power would be checked by the other two branches or, ultimately, by the voters. *Id.* at 305. Similarly, Hamilton contended that the Clause merely spelled out the "unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers." THE FEDERALIST NO. 33, at 204–05. He elaborated that this Clause was inserted as a "precaution" to remove any doubt that Article I's grant of "legislative power" to Congress included giving each branch the means to effectively exercise their granted powers. *Id.* "[I]n relation to all other powers declared in the [C]onstitution . . . [,] it is *expressly* to execute these powers, that the sweeping clause . . . authorizes the national legislature to pass all *necessary* and *proper* laws." *Id.* at 205. Congress had "to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union" and would be politically accountable for its decisions. *Id.* at 206. Whereas Madison defined "necessary" as "indispensable," Hamilton did not say whether that word might also include powers that were merely helpful, useful, or convenient. In the 1789–1790 debates over whether Congress had Article I power to establish a national bank, Hamilton embraced this broad definition, whereas Madison reaffirmed his narrower view. *See infra* notes 102–103 and accompanying text.

90. *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 463–64 (1901). Randolph's interpretation is more persuasive, especially as it comports with the structural precept that "legislative power" was far more expansive and discretionary than the other two powers. *See supra* notes 82–83 and accompanying text. He later reversed course and endorsed Madison's interpretation. *See infra* note 102.

91. *See* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effects of the Sweeping Clause*, 40 L. & CONTEMP. PROBS. 102, 107–34 (1976) (demonstrating that this Clause, as originally understood, empowered Congress alone to determine what nonessential "incidental" powers executive and judicial officials should be given, and that therefore these officials cannot assert such powers on their own).

And even assuming some Framers or Ratifiers silently accepted this possibility, the Necessary and Proper Clause allowed Congress to approve, modify, or eliminate such powers, which were not required for courts to fulfill their constitutional role.[92]

In short, Article I confers broad legislative authority to shape the judiciary, which Article III reinforces. For example, Congress could determine the structure of the lower federal courts and the number of Supreme Court Justices;[93] delineate their jurisdiction;[94] and set forth the substantive and procedural rules those courts had to apply.[95] As to that last item, many Founders stated, without challenge, that Congress could regulate the judiciary's adjective law.[96]

Nonetheless, Article I powers could not be exercised in a manner that subverted the judiciary's independence and constitutional functions. Consequently, once Congress established a "court," its judges would be immune from political interference in exercising

92. *Id.*

93. Article III, Section 1 of the Constitution provides that "[t]he judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress determines the number of Justices and has total control over the lower federal courts' size and structure. *See* Prakash, *supra* note 83, at 800–01, 826–27, 829–30.

94. Congress's power to establish inferior federal courts has always been interpreted as carrying with it complete discretion to set forth their jurisdiction. *See, e.g.*, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812). Congress can also make "Exceptions" to, and "Regulations" of, the Supreme Court's appellate jurisdiction. *See* U.S. CONST. art. III, § 2, cl. 2; *see also Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that this power is plenary). The only express limit on Congress is that it must give the Court "original Jurisdiction" in "all Cases" affecting foreign ministers and "those in which a State shall be a Party." *See* U.S. CONST. art. III, § 2, cl. 2; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–75 (1803) (describing this lone restriction on Congress).

95. *See* Pushaw, *supra* note 22, at 741, 745–46, 822, 825, 828–36.

96. Three constitutional provisions supplied this authority. First, "[a] power to constitute [inferior] courts, is a power to prescribe the mode of trial." THE FEDERALIST NO. 83, at 559 (Hamilton). Second, Congress could "regulat[e]" the Supreme Court's appellate jurisdiction, which included procedural rulemaking. *See* 2 ELLIOT, *supra* note 90, at 534 (Madison). Third, Congress could make adjective law as it deemed "necessary and proper" for courts to operate effectively. *See* 2 ELLIOT, *supra* note 90, at 488 (Wilson); THE FEDERALIST NO. 80, at 535 (Hamilton) (emphasizing that Congress could regulate the judiciary and thereby limit or eliminate any possible "inconveniences" presented by these new courts). Congressmen would have a political incentive to please their constituents by enacting fair and efficient rules on matters such as jury trial. *See, e.g.*, 2 ELLIOT, *supra* note 90, at 415, 488, 517–18 (Wilson); 3 *id.* at 68–69, 203–04 (Randolph); 3 *id.* at 517, 520 (Pendleton); 3 *id.* at 534, 537 (Madison); 3 *id.* at 555, 561 (Marshall); 4 *id.* at 144–45, 152, 165–66 (Iredell); 4 *id.* at 308 (Pinckney). Finally, many Founders noted Congress's power to enact rules of criminal procedure and evidence. *See* Pushaw, *supra* note 22, at 832–33 nn.517–518 (citing sources).

their "judicial power"—finding the facts, construing the applicable law, and rendering a final judgment.[97] Moreover, Article III's express grants logically included implied powers without which courts could not operate: administering their internal affairs and managing their cases; preserving their authority and integrity; and sanctioning litigation-related misconduct.[98] Even as to those indispensable inherent powers, however, Congress under the Necessary and Proper Clause could enact legislation that would facilitate—but not hinder—their exercise, such as by ensuring their reasonable and uniform application.[99]

Finally, the Constitution divided powers between the states and the federal government, and separated the powers of the latter, to create a system of checks and balances that would expose officials' unlawful or arbitrary actions and thereby promote individual liberty. The Bill of Rights, particularly the Fifth Amendment Due Process Clause, confirmed this purpose. Among other things, that Clause prohibits courts from creating and applying IPs without notice during litigation, which deprives parties of their rights set forth in written laws.[100]

The preceding analysis explains how the Framers and Ratifiers thought that inherent judicial powers would fit within the constitutional structure.[101] That understanding informed the actions of the statesmen who implemented the Constitution.

97. *See* Pushaw, *supra* note 22, at 741, 823, 826–31.

98. *Id.* at 822–36.

99. *See id.* at 799, 833–34. For example, Congress could not eliminate or hamper federal courts' indispensable IP to punish contempt, but could limit such power to its traditional categories (courtroom misbehavior, disobedience of judicial orders, and misconduct by court officers) and penalties (fine or imprisonment). *See infra* notes 118, 142–147 and accompanying text.

100. *See* Pushaw, *supra* note 22, at 741, 761–64, 771–73, 778–79, 793–96, 806, 850–53, 863–64.

101. Professor Yablon has maintained that the Framers deliberately declined to define the precise scope of Article III "judicial power" and the extent of Congress's control over federal courts to avoid battles during Ratification, thereby deferring the details to the political process. Charles M. Yablon, *Inherent Judicial Authority: A Study in Creative Ambiguity*, 43 CARDOZO L. REV. 1035, 1051–58 (2022). Admittedly, contemporaneous records do not disclose any direct discussion of the interaction between Congress and the judiciary. *See supra* note 79. Nonetheless, the Constitution's structure and text (particularly the Necessary and Proper Clause) reflected a shared understanding that Article III courts (1) had a core "judicial power" (adjudication) immune from legislative interference; (2) could assert auxiliary powers indispensably necessary to perform that function (which Congress could regulate but not hamper); and (3) could exercise nonessential powers only pursuant to a statutory grant.

B. Early Congressional and Supreme Court Precedent on Inherent Powers

Federal officials confirmed three basic principles. First, the Necessary and Proper Clause granted Congress sweeping power to determine the federal government's structure and operations. Second, Articles I and III authorized Congress to broadly regulate federal courts. Third, the only exception to this legislative control was an inviolate core of indispensable judicial IPs.

1. The Necessary & Proper Clause and the National Bank

The debates in 1790 over the proposed Bank of the United States revealed sharply differing interpretations of the Necessary and Proper Clause. Madison and Jefferson argued that this Clause permitted Congress to enact only laws that were essential to enable it and the other two branches to carry out their enumerated powers—and that the Bank did not meet that strict test.[102] Nationalists led by Treasury Secretary Hamilton responded that Congress could provide any means (such as the Bank) that it determined were most useful or conducive to attaining the ends of the express powers.[103]

Hamilton's view persuaded Congress (which passed the bill), President Washington (who signed it),[104] and the Marshall Court in *McCulloch v. Maryland*[105] (which upheld it):[106]

> [T]he sound construction of the [C]onstitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. . . . [Establishing the Bank] must be within the discretion of Congress, if it be an appropriate means of executing the powers of government.[107]

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102. *See* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 40–44, 82–83 (Madison) (M. St. Clair & D.A. Hall eds. 1832) [hereinafter BANK HISTORY]; *id.* at 91–94 (Jefferson). They were joined by Randolph, *id.* at 86–89, who abandoned the position he had taken during Ratification. *See supra* note 90.

103. *See* BANK HISTORY, *supra* note 102, at 95–110.

104. *See id.* at 35–36, 85.

105. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

106. *Id.* at 400–25.

107. *Id.* at 421–22.

Chief Justice Marshall reasoned that We the People, in granting Congress various great powers (e.g., over war, revenue, and commerce), must have entrusted it with the choice of the best means "to facilitate [their] execution."[108] The Court then held that the Necessary and Proper Clause "remove[d] all doubts" about Congress's "right to legislate on th[e] vast mass of incidental powers"[109] and was not limited to laws of "absolute physical necessity. . .[that were] indispensable, and without which the [express] powers would be nugatory."[110] Rather, the Clause "enlarge[d] [Congress's] discretion . . . to exercise its best judgment in the selection of measures"[111] that would be most "beneficial," "convenient," "useful," or "conducive" to accomplishing the objectives of the express powers.[112]

Although *McCulloch* upheld an Act of Congress that facilitated the exercise of its own powers, it could make similar policy judgments as to the auxiliary powers of executive officials or judges.[113] For example, the Chief Justice noted that Congress had exclusive authority to criminalize conduct as a means of ensuring

> the beneficial exercise of [an express] power, but not indispensably necessary to its existence. . . . [P]unishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury. . . is certainly conducive to the due administration of justice. But courts may exist, and may decide causes brought before them, though such crimes escape punishment.[114]

108. *See id.* at 402–11; *id.* at 408 (quoted phrase).

109. *See id.* at 420–21.

110. *See id.* at 413.

111. *See id.* at 420.

112. *See id.* at 409–10, 413–17, 422–24. "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers[] to insure . . . their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. . . . To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *Id.* at 415–16. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 56–57 (1999) (discussing *McCulloch*).

113. *McCulloch*, 17 U.S. (4 Wheat.) at 415–16.

114. *Id.* at 417.

This passage reflects a very narrow conception of judges' implied indispensable powers, as arguably a court would not be able to perform its key fact-finding function if it could not penalize those who lied under oath or falsified records. Indeed, that constricted view helps explain why the Court interpreted the Necessary and Proper Clause as authorizing Congress to grant beneficial powers: Because federal judges (and executive officials) could not imply such powers on their own, depriving Congress of this discretion would have hamstrung those departments from operating effectively in light of changing circumstances.[115]

In short, *McCulloch* captured the original understanding. As this case focused on Congress's right to effectuate its own powers, one might discount Chief Justice Marshall's more general statements as dicta that have limited applicability to the judicial department. But early federal statutes and cases that directly concerned federal courts always recognized the fundamental difference between Congress's expansive authority and the judges' limited discretion to assert implied or "inherent" powers.

2. Congress's Regulation of the Judiciary

The seminal Judiciary Act of 1789 had three pertinent provisions.[116] First, federal judges could issue various writs, such as habeas corpus, mandamus, and prohibition.[117] Second, judges had "discretion" to punish "by fine or imprisonment . . . all contempts of authority in any cause or hearing before the [court.]"[118] Third, Congress set forth a few procedural rules (e.g., concerning jury trials, process in district courts, production of writings, and certain depositions),[119] but otherwise entrusted judges to make "all

115. *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 99, 173 (Gerald Gunther ed., 1969) (reprinting Marshall's anonymous justification).

116. *See* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; *see also* Pushaw, *supra* note 22, at 747–51 (discussing this law, related procedural statutes, and cases interpreting such legislation). The Act also (1) fixed the Supreme Court's size at six and prescribed its jurisdiction; (2) established district courts and granted them admiralty and diverse-party jurisdiction; and (3) provided that state law would supply the substantive rules of decision, absent a contrary federal constitutional, statutory, or treaty provision. *See* Act of Sept. 24, 1789, ch. 20, §§ 1–5, 9, 11, 13, 34, 1 Stat. at 73–81.

117. Act of Sept. 24, 1789, ch. 20, §§ 13–14.

118. *Id.* § 17.

119. *Id.* §§ 9, 11, 15, 26, 30; *see also id.* § 12 (removal, attachment, and discovery in land ownership controversies); §§ 22, 25 (appeals); § 29 (venue for capital crimes); § 33 (bail).

necessary rules" to conduct their business (including standards for granting new trials and punishing contempt).[120] Congress quickly reconsidered this near-total delegation of power and passed the Process Act, which instructed each federal court to apply the rules of procedure of the forum state, with "discretion" to amend those rules as the court "deemed expedient" based on prevailing legal norms.[121]

This framework left federal judges with leeway to flesh out laws of practice and procedure as necessary to exercise "judicial power" properly.[122] As the political and legal system matured, Congress gradually filled many of these gaps, including by delegating to the Supreme Court power to promulgate uniform rules of practice in equity and admiralty.[123]

3. The Supreme Court's Treatment of Adjective Law and Inherent Powers

The Court upheld all such federal statutes. It reasoned that, although federal judges had inherent authority to take any actions indispensably necessary to process, manage, and decide cases, the Constitution authorized Congress to regulate such powers, to control merely beneficial powers, and to prescribe all

120. *Id.* § 17.

121. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94. Because Congress enacted very few statutory provisions concerning evidence, the Court presumed Congress ordinarily intended for state rules of evidence to be applied. *See* United States v. Reid, 53 U.S. (12 How.) 361, 363–65 (1851) (noting this federalism-based presumption).

122. *See* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 23–27, 34–36 (2011).

123. Congress authorized the Court to make such rules based on established law. Process Act of 1792, ch. 36, § 2, 1 Stat. 275–76. The Court initially did so on a case-by-case basis. *See, e.g.*, Grayson v. Virginia, 3 U.S. (3 Dall.) 320, 320–21 (1796) (equity); Marine Ins. Co. v. Young, 9 U.S. (5 Cranch) 187, 187–91 (1809) (admiralty). The Court later codified this law. *See* Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) at v–vii (1822), *amended by* 42 U.S. (1 How.) at xli (1843); Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction, 44 U.S. (3 How.) at i–xix (1844).

adjective law.[124] *Ex parte Bollman*[125] illustrates this interplay between judicial and legislative power. *Bollman* involved treason—a federal concern. Hence, state law was inapposite, but Congress had not supplied rules concerning the validity of affidavits and depositions.[126] Because such rules were crucial to deciding the case, the Marshall Court had to make them.[127] By contrast, Chief Justice Marshall dismissed the argument that "issuing writs of habeas corpus . . . is one of those inherent powers . . . incidental to [a court's] nature"[128] and concluded that writ power could only be bestowed by statute, as Congress had done.[129]

Reinforcing that latter holding, the Court in *Wayman v. Southard*[130] recognized that Article I authorized Congress "to regulate all the proceedings of the court[s]"[131] as necessary and proper for them to effectually exercise their Article III powers.[132] In fact, Congress had a "duty" to provide such procedural rules, which it had fulfilled in the Process Act by directing federal judges to apply state rules but with discretion to alter minor details as the judges deemed expedient—a permissible delegation

124. For example, Congress did not set forth procedures to govern the Supreme Court's original jurisdiction, which included state-party controversies to which the law of the states involved could not sensibly be applied. Therefore, the Court concluded it had no choice but to make such procedural rules—including those concerning service of process and compelling appearances—yet acknowledged Congress's authority to override such rules. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 428–29 (1793); *but see id.* at 432–34 (Iredell, J., dissenting) (agreeing that federal courts had inherent power to fashion procedural rules when strictly necessary, but finding that standards for service and appearances did not fall into that category and thus were within Congress's exclusive discretion to prescribe). The Court often asserted similar discretion. *See, e.g.*, Mandeville v. Wilson, 9 U.S. (5 Cranch) 15, 17–18 (1809) (crafting rules on amending pleadings).

125. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

126. *Id.* at 130–31.

127. *See id.*; *see also id.* at 94 (noting that judges had independent power to protect themselves and all court participants from disruptions to their functions).

128. *Id.* at 80.

129. *Id.* at 93–101. *But see id.* at 105 (Johnson, J., dissenting) (contending that federal courts had inherent power to issue such writs). Johnson's argument is sensible, given that the writ of habeas corpus is one of the few rights identified in the original Constitution, which reflects its ancient pedigree as a safeguard against government deprivations of liberty without due process. *See supra* notes 62–63 and accompanying text. Yet the Marshall Court did not agree that issuing the writ was an IP, again revealing its narrow conception of such powers.

130. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

131. *Id.* at 29.

132. *Id.* at 21–22, 43.

of legislative power.[133] Consequently, the Court sustained the provision of the 1789 federal statute mandating that execution of judgments conform to state law, but with the mode of execution subject to change by federal courts.[134] The Court reached a similar conclusion in two seminal opinions discussing contempt.

First, *United States v. Hudson & Goodwin*[135] held that Congress alone could define federal criminal jurisdiction, and that therefore Article III judges lacked inherent authority to assert such jurisdiction based on traditional common law.[136] Chief Justice Marshall declared:

> Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. . . . To fine for contempt—imprison for contumacy—enforce the observance of order, &c. are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all the others: and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases . . . is not within their implied powers.[137]

The Court flagged, but had no need to resolve, the thorny question of when an assertion of inherent authority might be incompatible with "the peculiar character of our [C]onstitution."[138]

Second, in *Anderson v. Dunn*,[139] the Court reiterated that the Constitution was "hostile to the exercise of implied powers" and that accordingly federal officials should exercise "the least possible power adequate to the end proposed"—that is, only those "auxiliary and subordinate [powers] . . . [that were] indispensable

133. *Id.* at 42–50.

134. *Id.* at 43–46. This delegation of discretion over the form of the execution of judgments was especially proper because rendering judgments was the essence of "judicial power," and therefore courts had always supervised this procedure. *See id.*; *see also* Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51, 51–62 (1825) (reaffirming that Article I's express powers to establish inferior federal tribunals and to make "necessary and proper" laws for them authorized Congress to regulate their procedures, including execution of judgments and writs).

135. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

136. *Id.* at 33–34 (dismissing a common law action against Congress and the President for criminal libel).

137. *Id.* at 34.

138. *Id.* at 32–34. Although the Court did not elaborate, it must have been alluding to our novel written Constitution in which the People enumerated and limited the federal government's powers. *See supra* notes 71–76 and accompanying text.

139. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

to the attainment of [that] end."[140] For example, courts were "universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and as a corollary . . . to preserve themselves and their officers from the approach and insults of pollution."[141] The Court interpreted the 1789 Act as simply recognizing this inherent judicial power, along with "its known and acknowledged limits of fine and imprisonment."[142]

Federal courts sometimes ignored such restraints. For instance, Congress confined contempt to matters "before the court."[143] Nonetheless, in 1826 a district judge relied on his IP to disbar an attorney for comments made after the court no longer had jurisdiction of the case.[144] Congress responded in 1831 by cabining contempt to its three traditional Anglo-American categories: (1) "direct contempt"—misconduct in the court's presence or so close that it "obstruct[s] the administration of justice;" (2) "disobedience or resistance to . . . a writ, process, order, rule, decree, or command;" and (3) misbehavior by court officers "in their official transactions."[145] The Court upheld the constitutionality of this statute, as well as the 1789 Act's limitation on penalties to fine and imprisonment, as reasonable regulations of IPs.[146]

The contempt statute codified one aspect of the IP to regulate lawyers as officers of the court: policing their abusive litigation conduct.[147] This IP also included determining whether an

140. *Id.* at 225–26, 231. The Court elsewhere repeatedly cautioned that the Constitution restricted implied powers to those that were essential to effectuate express ones. *See id.* at 225–26, 228, 233. While upholding Congress's assertion of inherent contempt power, the Court warned that this sanction could be used tyrannically and thus limited it to punishing offenders who had actually disrupted legislative proceedings. *Id.* at 225–28.

141. *See id.* at 227–28. This analysis of judicial contempt power was dicta because the case involved Congress's use of that sanction.

142. *See id.* at 228; *see also* Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) ("[A]lthough [judicial power] has its origin in the Constitution, [it] is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress . . . .")

143. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

144. *See* John W. Oliver, *Contempt by Publication and the First Amendment*, 27 MO. L. REV. 171, 182–83 (1962) (describing this incident).

145. Act of Mar. 2, 1831, ch. 99, 4 Stat. 87.

146. *See Ex parte* Robinson, 86 U.S. (1 Wall.) 505, 510–12 (1874). Consequently, the Court again rejected a judge's attempt to disbar an attorney for contempt. *Id.*

147. Such disciplining was "incidental to all Courts, and . . . necessary for the preservation of decorum . . . ." *See Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824); *see also Ex*

attorney was competent and fit to practice law (again, subject to congressional oversight).[148]

Overall, early federal legislators and Justices correctly implemented the Constitution's intended design. On the one hand, Article III courts legitimately asserted inherent powers that were indispensable to processing, managing, and deciding cases.[149] On the other hand, Congress regulated such powers and determined the content of beneficial IPs.[150] Relatedly, Congress

parte Secombe, 60 U.S. (19 How.) 9, 13–14 (1856) (citing an 1829 case recognizing this "well settled" IP).

148. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226 (1821); *see also Ex parte* Garland, 71 U.S. (4 Wall.) 333, 379–81 (1866) (confirming that Congress could prescribe qualifications for attorneys practicing in federal courts). The IP to regulate attorneys, which had ancient roots in England, became an accepted part of American judicial practice. Lee, *supra* note 43, at 238–40. *Cf. Robinson*, 86 U.S. (1 Wall.) at 512–13 (noting that this IP included the power to disbar attorneys who later proved unfit or incompetent, but only after affording them an adequate opportunity to defend themselves).

149. *See supra* notes 135–142, 146, 148 and accompanying text (discussing *Hudson*, *Anderson*, and *Robinson*). Most notably, judges retained the prerogative of managing litigation details. *See, e.g.*, Nudd v. Burrows, 91 U.S. 426, 441–42 (1875) (holding that the 1872 federal statute requiring Article III courts to conform to current state adjective law did not apply to the "personal conduct and administration of the judge" in matters such as jury instructions, which fell within his "inherent" powers).

150. Several scholars have maintained that Article III's grant of "judicial power" to "courts" has always included discretion to independently assert both indispensable and beneficial powers, subject to reasonable congressional regulation. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1470–72 (1984); David E. Engdahl, *Intrinsic Limits of Congress's Power Regulating the Judicial Branch*, 1999 BYU L. REV. 75, 158–59; William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 776–78 (1997); Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 42–73 (2008). This argument rests primarily on statements by Hamilton, Marshall, and others about the National Bank recognizing that the Constitution's grant of express powers to the federal government necessarily included certain implied powers. *See supra* notes 103–115 and accompanying text. Yet those remarks occurred in the context of upholding *Congress*'s expansive Article I "legislative power," confirmed by the Necessary and Proper Clause, to choose any means (whether indispensable or beneficial) that Congress determined would best carry into effect its enumerated powers. *See supra* notes 103, 106–115 and accompanying text. The Court in *McCulloch* suggested that Congress had similarly broad discretion to effectuate the express powers of the executive and judicial branches—and made that point explicitly and repeatedly as to the judiciary in cases like *Bollman*, *Wayman*, *Hudson*, and *Anderson*. *See supra* notes 107–115, 125–142 and accompanying text. Indeed, the same Chief Justice Marshall who endorsed Congress's vast discretion in *McCulloch* carefully limited the federal courts' IPs to instances of indispensable necessity in *Hudson* and other opinions—and even then acknowledged Congress's authority to regulate and limit such powers. These cases make little sense if federal judges could independently invoke any powers they pleased.

enacted adjective laws that federal courts had a duty to apply.[151] Some of those statutes directed judges to use state rules of procedure and evidence,[152] which produced a lack of uniformity that led to calls for reform starting in the early twentieth century.[153]

C. The Court's Modern Approach to Inherent Powers: Limited in Theory, Unlimited in Practice

The patchwork of adjective laws could not survive the New Deal (1933-39), which massively increased the volume and complexity of federal litigation. Since then, federal statutory, regulatory, and constitutional laws have continued to proliferate. Congress has responded to this expansion by amending or adding to the rules of procedure and evidence, with substantial input from Article III judges. Such published rules emerge from a deliberative process and ensure uniformity, unlike IPs.

These comprehensive laws should have decreased resort to inherent powers. Nonetheless, federal courts have invoked IPs with ever-increasing aggressiveness and have rarely been checked, for two reasons. First, appellate review has been sporadic and based on a blindly deferential "abuse of discretion" standard.[154] Second, the Court, on the few occasions when it has considered the assertion of IPs, has typically upheld their use by creatively interpreting—and sometimes ignoring—written adjective laws.[155] Summarizing the key statutes and cases helps to illuminate the need for a fresh approach.

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151. *See* Ryan, *supra* note 150, at 765–98 (arguing that the Constitution, as originally understood, authorized Congress to enact procedural laws, which federal courts had to apply unless a rule impaired their core power of deciding cases).

152. *See supra* notes 121, 133 and accompanying text.

153. *See* Pushaw, *supra* note 22, at 754–55 (summarizing these critiques).

154. Meaningful appellate review of a trial judge's assertion of IP under this standard is nearly impossible because (1) existing law does not set bounds on the judge's discretion by identifying the range of outcomes that are permissible, and (2) judges often use IPs informally and do not write a reasoned opinion that can be examined. *See* Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 948–59, 984–87 (2010); *see also id.* at 987–94 (recommending that a judge's exercise of IPs should be assessed not by appellate review of possible abuse in one isolated case, but rather through attorney performance evaluations or judicial disciplinary proceedings that consider multiple cases to discern patterns of discretionary actions that fall outside of established norms).

155. *See infra* notes 185–275 and accompanying text.

1. The Explosion of Federal Adjective Law

The Rules Enabling Act of 1934 (REA) authorized the Supreme Court to (1) evaluate rules drafted by a committee of expert judges, scholars, and lawyers; (2) promulgate the Federal Rules of Civil Procedure (FRCP), provided they did "not abridge, enlarge nor modify the substantive rights of any party;" and (3) seek Congress's approval.[156] The FRCP were finalized in 1938, and the Court upheld them as a valid exercise of Congress's power.[157] The FRCP, as well as local rules issued under Rule 83,[158] covered pleadings, motions, joinder of parties and claims, discovery, trials, appeals, sanctions, and sundry administrative details.[159]

Of course, procedural rules were not frozen in 1938. Rather, new federal statutes and FRCP amendments have addressed four major changes in civil litigation. First, the Warren Court (1954-1969) revolutionized constitutional rights.[160] Second, starting in 1964, Congress enacted sweeping civil rights, social welfare, and environmental legislation.[161] Third, diversity jurisdiction increased during the 1960s as states began to adopt the theory of strict products liability, which often involved claims by hundreds or

156. Act of June 19, 1934, ch. 651, Pub. L. No. 73–415, 48 Stat. 1064 (currently codified at 28 U.S.C. § 2072 (2018)).

157. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9–16 (1941).

158. 28 U.S.C. § 2071 (2018) (authorizing such local administrative rules, as long as they are consistent with federal statutes and the FRCP). As each federal district court can formalize a valid IP in a local rule, an individual judge should not bypass this process by either (1) issuing standing orders that apply to all litigation before that judge, or (2) creating and applying an IP in a particular case.

159. Here we provide a bare-bones summary of the REA and FRCP. Several scholars have thoroughly analyzed the history of federal procedural rulemaking, the political and legal developments that culminated in the REA, its purposes, the process of drafting and promulgating the FRCP, its many provisions, and its benefits and disadvantages. *See, e.g.*, Steven N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

160. *See generally* THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed., 1996).

161. *See generally* G. CALVIN MACKENZIE & ROBERT WEISBROT, THE LIBERAL HOUR: WASHINGTON AND THE POLITICS OF CHANGE IN THE 1960S (2008). Courts often enforced these new federal constitutional and statutory rights by administering long-term injunctions that restructured large state institutions such as schools. *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (arguing that district courts' exercise of massive discretion in such suits is political in nature and thus presumptively illegitimate, rebuttable only where government officials are defaulting on their constitutional obligations).

thousands of people.[162] Fourth, during the same decade, antitrust suits mushroomed.[163]

These four developments overloaded federal dockets and induced many district courts to rethink their function. Instead of waiting for adversarial parties to litigate and then deciding the case, judges asserted IP to actively manage litigation with the goal of settlement.[164] Congress addressed the foregoing trends with major reforms. Two concerned multi-party suits. First, amendments to Rule 23 in 1966 ushered in the modern class action, later amended by the Class Action Fairness Act of 2005.[165] Second, Congress allowed multidistrict litigation in 1969.[166] Other laws codified powers that many courts had already begun to exercise in managing cases.[167]

Most importantly, amendments to Rule 16 in 1983 and 1993 authorized judges to schedule mandatory pretrial conferences to establish "early and continuing control" and "facilitat[e] . . . the just, speedy, and inexpensive disposition of the action."[168] Matters for consideration included (1) controlling discovery and formulating a plan to streamline the presentation of evidence;[169] (2) simplifying the issues so they could either be adjudicated summarily or resolved cleanly at trial;[170] (3) disposing of motions;[171] and (4) "settling the case and using special procedures to assist in

162. *See* George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

163. *See* Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 ABA J. 621, 621–28 (1964) (describing how federal courts developed coordinated procedures to handle this avalanche of lawsuits).

164. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (contending that district courts' exercise of untrammeled discretion in supervising litigation has resulted in serious abuses that compromise the impartial administration of justice).

165. 28 U.S.C. §§ 1332(d), 1453, 1711–15.

166. 28 U.S.C. § 1407.

167. The Notes of the Advisory Committee on the Rule 16 Amendments in 1983 made this point and declined to comment on whether this previous assertion of IP had been valid. The Committee later recognized that courts retained some discretion to reasonably exercise inherent powers as to pretrial conferences. *See* Federal Rules of Civil Procedure, 146 F.R.D. 401, 597–601 (1993).

168. FED. R. CIV. P. 16(a)(2); 16(c)(2)(P).

169. FED. R. CIV. P. 16(c)(2)(C),(D),(F),(G),(N) & (O); 16(d) & (e).

170. FED. R. CIV. P. 16(c)(2)(A),(E).

171. FED. R. CIV. P. 16(c)(2)(K).

resolving the dispute when authorized by statute or local rule."[172] Judges could also adopt "special procedures" for handling "difficult or protracted actions . . . involv[ing] complex issues, multiple parties, difficult legal questions, or unusual proof problems."[173] Rule 16(f) permitted judges to impose sanctions (including payment of attorneys' fees) for failure to participate in good faith in conferences—a provision designed "to obviate dependence upon . . . the court's inherent power[s] . . . ."[174] Ultimately, the judge was obliged to issue a scheduling order that had to "limit the time to join other parties, amend the pleadings, complete discovery, and file motions" and that could also address any other "appropriate matters."[175] Rule 16, while broad, did not allow courts to disregard the REA and alter substantive rights.

Reinforcing Rule 16, Rule 26 set forth general disclosure requirements and discovery provisions. It has been amended thirteen times and specifically mandates a separate conference to work out discovery details.[176] Similarly, Rule 37 has been revised eleven times to give judges ever more discretion to sanction any discovery abuses (including by assessing attorneys' fees).[177]

Congress followed the REA blueprint in promulgating the Federal Rules of Criminal Procedure in 1946,[178] the Federal Rules of

172. *See* FED. R. CIV. P. 16(c)(2)(I); *see also id.* at 16(a)(5) (identifying "facilitating settlement" as a purpose of pretrial conferences). Rule 16 did not "impose settlement negotiations on unwilling litigants," but merely provided a neutral forum to discuss this possibility and encouraged mediation or non-binding arbitration. *See* Notes of the Advisory Committee on the Rule 16 Amendments in 1983. However, a separate statute or local rule could require such alternative dispute resolution in defined circumstances. *Id.*

173. FED. R. CIV. P. 16(c)(2)(L). The Advisory Committee in 1983 explained that this provision gave judges more flexibility and suggested that they use *The Manual of Complex Litigation* as a guide.

174. Notes of the Advisory Committee on the Rule 16 Amendments in 1983; *see also* Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 U. KAN. L. REV. 347, 348, 366–74 (2002) (arguing that Rule 16 should be formally amended to encompass everything that might be tried or settled—including both unrepresented claims and non-party interests—instead of relying on judges to make such changes piecemeal by exercising their IPs, a practice that undermines the legislature's role, lacks definite standards, prevents uniformity, and sows confusion).

175. FED. R. CIV. P. 16(b)(3)(A); 16(b)(3)(B)(vii).

176. FED. R. CIV. P. 26(f).

177. FED. R. CIV. P. 37(a)(5), (b)–(f).

178. *See* 327 U.S. 821 (1946) (publishing these rules pursuant to the Act of June 29, 1940, ch. 445, 54 Stat. 688 (currently codified at 18 U.S.C. § 3771 (2018)).

Appellate Procedure in 1968,[179] and the Federal Rules of Evidence in 1975.[180] Furthermore, in 1948 Congress authorized federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[181] Congress has also enacted many other adjective laws.[182] One prominent example is the Alternative Dispute Resolution (ADR) Act of 1998, which requires each federal district court by local rule to devise an ADR program and encourage litigants to consider using mediation, voluntary arbitration, or other types of ADR.[183] This mountain of adjective law, which encompasses all aspects of litigation and often grants federal courts significant discretion, should have vastly diminished IPs. Yet their usage and scope have inexorably increased.[184]

2. Jurisprudence on Inherent Powers

The Court has promoted this development by rhetorically acknowledging restrictions on IPs, then neutering those limits. Initially, the Court recognizes Congress's constitutional power to regulate adjective law, but subverts that power by interpreting those statutes narrowly—particularly by applying an unfounded presumption that Congress intended to license IPs absent a clear statement to the contrary.[185] The Court then typically cites

179. *See* Act of Nov. 19, 1968, 102 Stat. 4648, promulgated by the Supreme Court on Dec. 4, 1967 (currently codified at 18 U.S.C. § 3372 & 28 U.S.C. § 2072 (2018)).

180. *See* Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926. The Constitution should not be interpreted as permitting federal courts to assert inherent authority to disregard Congress's limitations on their discretion to make and apply rules of evidence that are merely helpful or appropriate—as contrasted with those that are indispensable—to the exercise of judicial power. *See* Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 170–202 (1979).

181. *See* Act of June 25, 1948, ch. 646, 62 Stat. 944 (currently codified at 28 U.S.C. 1651 (2018)).

182. *See* Pushaw, *supra* note 22, at 755–57 (summarizing modern adjective laws).

183. *See* 28 U.S.C. § 651. Similarly, FRCP 16(c)(2)(I) authorizes federal courts to "us[e] special procedures to assist in resolving the dispute when authorized by statute or local rule."

184. *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004) (arguing that the Constitution, as originally understood and implemented for well over a century, granted Congress control over procedural rulemaking, and that Congress should reassert its dominant role against courts that have seized more power in this area); *but see* Yablon, *supra* note 101, at 1088–97 (approving federal judges' assertion of IP to innovate through common law procedural rulemaking).

185. *See* Pushaw, *supra* note 22, at 759, 761, 776–79, 784–87, 850–53 (questioning the validity of such narrow, strained constructions of federal procedural statutes and rules to

Hudson in cautioning that IPs should be resorted to only when indispensably necessary,[186] yet routinely allows invocations of IPs that are hardly essential to exercising "judicial power" or maintaining the integrity of "courts."[187] Finally, by focusing on the particular IP in each case, the Court has avoided the need to explain how its cumulative approval of massive IPs can be reconciled with its longstanding precedent holding that the Constitution stringently limits the judiciary and authorizes Congress alone to make all federal laws—including those governing the courts' jurisdiction and procedures.[188]

To illustrate the foregoing points, we will begin by canvassing cases that address the issue of which branch controls adjective law. We will then turn to litigation management, sanctions, and attorney regulation.

a. Adjective Lawmaking. The Court has consistently held that federal judges can make adjective law independently only in the absence of an applicable statute and that "Congress retains the ultimate authority to modify or set aside any judicially related rules of evidence and procedure that are not required by the Constitution."[189] But the Court has never clearly identified which rules are constitutionally mandated and hence form the core of impregnable inherent authority.

Hanna v. Plumer[190] illustrates this studied ambiguity. On the one hand, the Court reaffirmed that the Constitution authorizes Congress to make procedural laws, either directly or by delegation to the judiciary.[191] On the other hand, the Court stressed that the FRCP aimed to promote uniformity, "especially . . . of matters

maximize IP); *cf.* Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of Inherent Power*, 91 IOWA L. REV. 1147, 1163–66, 1206 (2006) (maintaining that the "clear statement" rule might defensibly be applied to statutes addressing indispensable IPs, but that its application to beneficial IPs effectively usurps Congress's constitutional power).

186. The standard citation is to the Marshall Court's definition of inherent powers as those which "[c]annot be dispensed with . . . because they are necessary to the exercise of all others . . . ." United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

187. *See* Pushaw, *supra* note 22, at 738–39.

188. *See id.* at 739–41.

189. Dickerson v. United States, 530 U.S. 428, 437 (2000).

190. Hanna v. Plumer, 380 U.S. 460 (1965).

191. *Id.* at 472–73 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941)).

which relate to the administration of legal proceedings, an area in which federal courts have traditionally asserted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules."[192] This dichotomy allows the Court to profess fealty to Congress's constitutional authority to make adjective law, yet construe federal procedural statutes and rules narrowly to maximize the scope of IPs.[193] The latter practice is especially dubious because the Court itself can always propose an FRCP to formally codify and define an IP.[194]

The Court's extreme deference to trial judges' arrogation of power to develop and apply adjective law has bled over into other IPs.[195] The Court has routinely approved judges' independent

192. *Id.*

193. This creative interpretive method has enabled the modern Court to avoid striking down an exercise of IP as contrary to a statute or rule on civil procedure. Such an invalidation has occurred only once, in a case on dismissals for failure to prosecute, which was swiftly overturned. *See infra* notes 194, 210, 218 and accompanying text. Rather, the few invalidations have concerned IPs that disregarded *criminal* procedural rules. *See* Carlisle v. United States, 517 U.S. 416, 425–28 (1996); Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988). That difference likely reflects the Anglo-American judicial tradition of demanding strict adherence to written criminal laws, procedural or substantive.

194. *See* Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311 (2010) (arguing that (1) the Court should abandon the "clear statement" canon and instead recognize that using an IP as an alternative source of authority when a written federal procedural rule also applies undermines the rulemaking process established by Congress and its goals of fairness, predictability, and uniformity; and (2) the Federal Rules should be formally amended to clarify when they may be supplemented by IPs).

The Court has also abandoned review of each federal court's supplemental procedural rules. For instance, it denied certiorari in a case challenging the Eleventh Circuit's rule against hearing new issues raised after the filing of the opening brief, even though after that filing the Court had rendered a decision overturning contrary governing precedent on criminal law in that circuit. Joseph v. United States, 574 U.S. 1038–40 (2014). Three Justices wrote separately to note that this local rule was (1) not followed by any other circuit; (2) inconsistently applied by the Eleventh Circuit; and (3) in conflict with the Court's settled principle of applying changes in law retroactively. *Id.* But even these Justices joined the decision on the ground that the Court rarely reviewed the validity of such idiosyncratic procedural rules, and instead expressed "hope" that each circuit court would "reconsider whether its current practice amounts to a 'reasoned exercise' of its authority." *Id.* at 1040 (citing Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993)). Justices Kennedy and Sotomayor would have granted cert. *Id.* at 1038. Although they did not explain why, they presumably sought to enforce the lower court's duty to adhere to Supreme Court precedent.

195. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1962 (2007) ("[I]t is only a slight exaggeration to say that federal procedure, especially at the pretrial stage, is largely the trial judge's creation, subject to minimal appellate review.").

decisions regarding litigation management and sanctions, even when it appeared that Congress had treated these issues differently.

b. Managing Cases and Administering Internal Affairs. The Court has long recognized that the "judicial power" necessarily includes broad discretion to manage litigation and court business to ensure order and efficiency.[196] Federal statutes, the FRCP, and local court rules typically have ratified and clarified such longstanding practices—for example, to appoint special masters,[197] grant stays,[198] and consolidate cases with common factual and legal issues.[199] Indeed, Congress has directly or indirectly covered nearly all elements of litigation.[200] Some of those rules are specific, such as the number of days required to file pleadings.[201] Most rules, however, build in flexibility because each case is unique. For example, courts control their dockets by determining the timing of discovery, hearings, motions, and trials and by deciding whether to grant continuances, stays, or recesses.[202] In short, Congress

196. *See, e.g.*, Dietz v. Bouldin, 579 U.S. 40, 45–47 (2016) (citing cases dating back to United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)).

197. FED. R. CIV. P. 53. The Court had previously recognized this IP but acknowledged that it was not essential, and that therefore Congress could regulate or reject its exercise. *See Ex parte* Peterson, 253 U.S. 300, 306–07, 312–14, 317 (1920). This IP traces back to Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 127–29 (1864). For discussions of similar IPs, see Robert L. Hess II, Note, *Judges Cooperating With Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors*, 54 VAND. L. REV. 547, 550–51 (2001) (arguing that, unlike the appointment of expert witnesses under the FRE's written standards, courts' exercise of IP to appoint technical advisors (1) unconstitutionally delegates judicial power, and (2) undermines the adversarial system by allowing advisors to usurp the role of parties in presenting evidence); Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195 (2004) (criticizing lower federal courts' invention of the IP to disqualify expert witnesses based on conflicts of interest without any finding of bad faith).

198. FED. R. CIV. P. 62. *See, e.g.*, Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 381–82 (1935) (asserting this historical IP).

199. FED. R. CIV. P. 42(a). *See* Bowen v. Chase, 94 U.S. 812, 824 (1876) (recognizing this power).

200. *See supra* notes 156–184, 189, 192, 197–199 and accompanying text.

201. For instance, a defendant must file an answer within 21 days of being served with a complaint. FED. R. CIV. P. 12(a)(1)(A)(i).

202. *See, e.g.*, Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1810 (1995) (stressing that both Congress and the Court have realistically recognized that written procedural rules cannot prescribe all of the administrative decisions a trial judge must make). To take one example, the Sixth Circuit concluded that a trial judge did not abuse his discretion in exercising his inherent docket-control power by waiting until four days before trial to grant summary judgment. Anthony v. BTR Automotive Sealing Sys., 339 F.3d 506, 516–17 (6th Cir. 2003).

generally trusts judges to prudently manage such details, which are usually trivial.

Even when no positive law confers judicial discretion, the Court has approved particular IPs related to docket control, such as hearing motions *in limine*.[203] Such invocations of beneficial IPs are debatable, as Congress should provide for such procedural tools.[204] Even more dubiously, the Court has permitted judges to claim IPs that go far beyond administrative details, disregard applicable statutes and rules, or both. Most importantly, in two decisions the Court allowed a federal court with statutory jurisdiction and venue to invoke its IP to manage litigation to throw out the case.

First, in *Gulf Oil Corp. v. Gilbert*,[205] the Court adopted the doctrine of *forum non conveniens* to enable district judges to dismiss complaints if they determined that another federal forum would be more appropriate, based on a discretionary weighing of factors.[206] Justice Black dissented on the ground that Article III imposed a duty on federal courts to exercise all jurisdiction validly conferred by Congress.[207]

Second, *Link v. Wabash Railroad Co*.[208] involved Rule 41(b), which provides that "for failure of the plaintiff to prosecute . . . a defendant may move for a dismissal of any action." The Court, without mentioning its recent holding that Rule 41(b) plainly authorized such dismissals only upon a defendant's motion,[209] now concluded that the Rule did not clearly state Congress's intent to revoke federal judges' IP to dismiss for lack of prosecution *sua sponte*.[210] Dissenting, Justice Black argued that this dismissal violated due process because the plaintiff had not received notice before being deprived of his property right in his claim.[211]

203. *See* Luce v. United States, 469 U.S. 28, 41 (1984).

204. *See supra* note 24 and accompanying text.

205. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

206. *Id.* at 507–08.

207. *Id.* at 513–15 (Black, J., dissenting).

208. Link v. Wabash R.R., 370 U.S. 626, 630 (1962).

209. Societe Internationale v. Rogers, 357 U.S. 197, 207 (1958) (holding that FRCP 37 sanctions for disobedience of an order to produce documents were exclusive, and that therefore a trial court had erred in asserting IP to dismiss the case for failure to prosecute).

210. *Link*, 370 U.S. at 629–33.

211. *Id.* at 642–49 (Black, J., dissenting).

In its most recent IP case, the Court applied *Link*'s method of statutory construction. *Dietz v. Bouldin*[212] held that a district judge's inherent authority to manage litigation included rescinding his order that had discharged a jury and recalling it for further deliberations after he had discovered an error in its verdict.[213] Justice Sotomayor noted that the Court had "never precisely delineated the outer boundaries" of IPs, but had "recognized certain limits."[214] The main restriction was that "the exercise of an inherent power must be a 'reasonable response to the problems and needs' confronting the court's fair administration of justice."[215] She concluded that the judge had reasonably addressed the problem of a mistaken verdict in a way that avoided the waste of a new trial.[216] The other key restraint was that an IP "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[217] Justice Sotomayor interpreted Rule 51(b)(3), which explicitly authorizes giving a jury new instructions to rectify a mistake *before* it is discharged, as not implicitly limiting a judge's ability to provide such curative instructions shortly *after* a jury has been released and recalled.[218]

The Court cautioned, however, that this new IP "must be carefully circumscribed, especially in light of the guarantee of an impartial jury that is vital to the fair administration of justice."[219] Accordingly, a judge had to weigh several factors to ensure that none of the reassembled jurors had been exposed to prejudicial external information.[220] The Court held that such a discretionary

212. Dietz v. Bouldin, 579 U.S. 40 (2016).

213. *Id.* at 42–54. In a personal injury action, defendant stipulated that plaintiff's medical expenses were $10,136, so the only remaining issue was whether he could recover greater damages. *Id.* at 43. The jury returned a verdict for plaintiff but awarded him $0, and the judge discharged the jury. A few minutes later, the judge realized that this amount could not possibly be correct, recalled the jurors, explained the mistake, asked them to deliberate anew, and entered their revised verdict for $15,000. *Id.* at 43–44.

214. *Id.* at 45.

215. *Id.* (citing Degen v. United States, 517 U.S. 80, 823–24 (1996)).

216. *Id.* at 46–47, 51, 53–54.

217. *Id.* at 45.

218. *Id.* at 47–48 (citing Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

219. *Id.* at 48.

220. *Id.* at 48–51 (clarifying that a court could not exercise this IP if it determined that any juror had been directly tainted and that it must also consider the time lag between discharge and recall, whether a juror had discussed the case with anyone, and whether he or

judicial determination, as well as changes in modern trial practice and treatment of juries, justified an exception to the common law bar on recalling a jury.[221] In dissent, Justices Thomas and Kennedy contended that potential juror prejudice could be avoided only by strictly enforcing the common law rule, not countenancing a novel IP exercised through prudential application of malleable factors that would invite costly satellite litigation.[222]

With *forum non conveniens*, dismissals for failure to prosecute, and recalling juries, the Court could at least colorably claim that it was preserving IPs that Congress had not clearly eliminated or restricted. Recently, however, the Court has protected district judges' IP to stay proceedings despite Congress's unambiguous imposition of limits on that power.

Most notably, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 sharply curtailed federal judges' previous discretion over habeas corpus.[223] For example, Congress promoted finality in capital cases by giving petitioners incentives to exhaust all claims in state court before filing a federal habeas action and by placing strict time limits on such petitions.[224] In *Rhines v. Weber*,[225] the Court sustained a district judge's assertion of IP to stay a habeas action (thereby tolling the limitations period) to allow a petitioner

she had witnessed a reaction to the verdict). The majority ruled that the judge did not abuse his discretion because he had applied these factors and ascertained that none of the jurors had been prejudiced. *Id.* at 51.

221. *Id.* at 51–54.

222. *Id.* at 54–58 (Thomas, J., dissenting). The majority cited *Hudson* for the proposition that courts had inherent power to manage their cases, but not its "indispensable necessity" language. *Id.* at 45. Some lower courts and commentators have read *Dietz* as eliminating that requirement. *See, e.g.*, *In re* Micron Technology, Inc., 875 F.3d 1091, 1100–01 (Fed. Cir. 2017) (approving IP to find waiver of a venue objection based on a discretionary judgment about facts and circumstances not mentioned in FRCP 12); James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 642 n.82 (2016). Other courts have correctly concluded that the Court would not have overturned such an ancient precedent *sub silentio*. *See, e.g.*, United States v. Wright, 913 F.3d 364, 371–75 (3d Cir. 2019) (holding that a court could not assert powers that had not been granted in a statute or rule, except in the rare case when "necessary to address improper conduct and ensure respect for [its] proceedings").

223. 28 U.S.C. § 2254 (1996).

224. *Id.* § 2254(a)–(c). Congress also (1) prohibited federal courts from granting relief from a state court's decision unless it had made "unreasonable" findings of fact or had ruled contrary to "clearly established" Supreme Court precedent; (2) barred successive habeas petitions; and (3) eliminated ineffective assistance of counsel as a ground for relief. *Id.* § 2254(d), (e), & (i).

225. Rhines v. Weber, 544 U.S. 269 (2005).

to properly exhaust certain claims in a state forum, even though the stay admittedly frustrated Congress's explicit AEDPA goals.[226] In *Ryan v. Gonzales*,[227] the Court reaffirmed district judges' virtually unbridled discretion by declining to set forth legal standards for issuing stays in AEDPA cases.[228] Finally, the Court has extended this broad IP over stays to removal orders under the Immigration Nationality Act,[229] even though Congress amended that statute precisely to curb judicial discretion in this area.[230]

As troubling as they are, reported Supreme Court cases are only the tip of the iceberg. In exercising IP to aggressively manage litigation, trial judges typically operate off the record, which makes meaningful appellate review difficult and invites abuses.[231] To illustrate, judges' personal interest in efficient disposition of cases often leads them to impose unreasonably short deadlines, dismiss possibly meritorious claims or defenses, coerce parties to use ADR or settle, and threaten anyone who objects with negative decisions or sanctions.[232] Even in the rare instances when such pressure tactics are reviewed, appellate courts tend to approve them[233]—for

226. *See id.* at 276–78. The Court confined this IP to situations where, as here, petitioner had good cause for not exhausting his claims, this failure was not a dilatory tactic, and the claims were not plainly without merit. *Id.*

227. Ryan v. Gonzales, 568 U.S. 57 (2013).

228. *Id.* at 74–77. The Court ruled that judges had IP to determine whether to grant a stay for a petitioner who alleged mental incompetence, limited only by the caveat that a stay would be improper when there was no reasonable hope he would ever regain competence.

229. *See* Nken v. Holder, 556 U.S. 418, 428–33 (2009) (statutory citation omitted).

230. The Court finessed its apparent defiance of Congress by maintaining that the statute only governed *enjoining* the removal of an alien and thus applied to the conduct of a party, whereas a *stay* operated upon the judicial proceeding itself. *Id.* at 428. However, this "highly technical distinction" disregarded Congress's intent to restrict federal judges' discretion. *Id.* at 446 (Alito, J., dissenting).

231. A prominent scholar identified this problem four decades ago. *See* Resnik, *supra* note 164, at 411–13, 424–31; *see also* Laura Margolis Washawsky, *Objectivity and Accountability: Limits on Judicial Involvement in Settlement*, 1987 U. CHI. LEGAL F. 369, 371 (1987) ("The danger of undue coercion becomes particularly acute when one recognizes that a judge who may favor a particular result has an opportunity to use threats of sanctions or unfavorable treatment at trial—in addition to making representations as to his own view of the law and facts—to make a decision and then effectively insulate it from review by bringing about a settlement. And since judges have a personal interest in keeping their dockets under control, the incentive exists for judges to exercise their power accordingly.").

232. *See* Resnik, *supra* note 164, at 402–03, 413, 424–31.

233. *See, e.g.*, S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 802–08 (9th Cir. 2002) (upholding a district court's assertion of managerial IP to afford a party only one day to object to a

example, the IP to compel unwilling parties to submit their case to private mediation[234] despite the contrary ADR Act and FRCP 16.[235] Such heavy-handedness compromises judges' impartiality, which Article III sought to guarantee, and subverts basic due process values of fairness and justice.[236]

c. Sanctions. Anglo-American judges have always punished litigation abuses.[237] One ancient example is dismissing cases upon discovery of a fraud upon the court.[238] Most importantly, since 1831 Congress has codified the traditional IP of contempt, which features three categories (misbehavior in court, disobeying orders, and misconduct by court officers in official transactions) and two penalties (fine or imprisonment).[239] Furthermore, Congress has responded to modern changes in litigation by approving Federal Rules that extended contempt authority to include the failure to

settlement proposal); United States v. Comm'r of Hamilton Cnty., 937 F.3d 679, 687–91 (6th Cir. 2019) (concluding that a trial court properly exercised IP to enjoin a party from withdrawing from a proposed settlement agreement on its expiration date).

234. *See In re* Atlantic Pipe Corp., 304 F.3d 135, 143–45 (1st Cir. 2002) (justifying this IP as possibly conserving judicial resources if the parties settled).

235. Congress required each federal district court to adopt a local rule setting forth an ADR program that encouraged litigants to consider using processes like mediation, which Rule 16(c)(9) reinforces. *See supra* notes 172, 183 and accompanying text. This statute and FRCP cannot sensibly be interpreted as (1) allowing an individual federal judge (as contrasted with the entire district court) to assert idiosyncratic discretion concerning ADR untethered to a written rule, or (2) authorizing either the court or any judge to compel, rather than encourage, the use of ADR. *See* Carrington, *supra* note 84, at 940–41. We therefore reject the argument that federal judges can require ADR based on their IPs to manage cases and control litigants and their attorneys. *See* Amy H. Pugh & Richard A. Bales, *The Inherent Power of Federal Courts to Compel Participation in Nonbinding Forms of ADR*, 42 DUQ. L. REV. 1, 2, 20–26 (2003).

236. *See* Pushaw, *supra* note 22, at 738, 762–64.

237. *See supra* notes 42–46, 98, 137, 141–142, 145–147 and accompanying text.

238. *See* Hazel–Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 244 (1944) (noting the historical roots of this doctrine); *see also* FED. R. CIV. P. 60(c) (codifying this power). This power is indispensable, both to protect the court's integrity and to ensure that its judgments are based on true facts, not intentionally false representations.

239. *See supra* notes 98–99, 118, 145–146 and accompanying text. This longstanding approach to contempt is codified at 18 U.S.C. § 401 (2018).

obey orders during discovery[240] and subpoenas at trial,[241] as well as the submission of a summary judgment affidavit in bad faith.[242]

During its first century, the Court acknowledged Congress's Article I power to regulate sanctions and reined in trial judges who had exceeded statutory limits.[243] In the late nineteenth century, however, the Court began to abandon restraints on contempt, particularly by allowing judges to invoke it to unfairly punish labor leaders.[244] Judges later targeted figures such as Communists during the Cold War and civil rights activists in the 1960s.[245]

More recently, the Court brushed aside the Act of Congress, dating back to 1789, confining contempt penalties to fine or imprisonment.[246] The lone statutory exception permits courts to order lawyers who "unreasonably and vexatiously" multiply proceedings to pay their opponent's attorneys' fees.[247] The FRCP also allow this sanction for frivolous filings[248] and violations of particular discovery and disclosure rules.[249] These federal statutes and rules, by identifying the few situations in which attorneys' fees may be assessed, should preclude this penalty for any other conduct.

240. *See* FED. R. CIV. P. 37(b)(1) (deponent's violation of court order); FED. R. CIV. P. 37(b)(2)(A) (disobeying discovery orders).

241. FED. R. CIV. P. 45(g).

242. FED. R. CIV. P. 56(h). Furthermore, although certain other misconduct was not labeled "contempt," courts could now sanction it. *See* FED. R. CIV. P. 11(c) (submitting frivolous pleadings and motions); FED. R. CIV. P. 16(f) (failure to participate in good faith in pretrial conferences); FED. R. CIV. P. 26(g) (violation of duties to disclose and cooperate in discovery); FED. R. CIV. P. 30(g) (failure to attend a deposition). United States Circuit Courts have similar discretion to sanction abuses, such as filing a frivolous appeal. *See* 28 U.S.C. § 1912 (2018); FED. R. APP. P. 58.

243. *See supra* notes 141–146 and accompanying text.

244. *See, e.g.*, *In re* Debs, 158 U.S. 564, 577–600 (1895); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 435–39, 450–52 (1911).

245. *See* Pushaw, *supra* note 22, at 738, 770–71 (citing cases).

246. *See supra* notes 98, 118, 142–146 and accompanying text. For example, the Court has continued to insist that federal judges retain broad IP to impose sanctions for violation of their orders, up to and including dismissal of the case. *See* State Farm v. U.S. *ex rel*. Rigsby, 580 U.S. 26, 37 (2016).

247. 28 U.S.C. § 1927 (1980).

248. *See* FED. R. CIV. P. 11(c)(4).

249. *See* FED. R. CIV. P. 26(g)(3) and FED. R. CIV. P. 37(a), (b), (c), (d) & (f). This sanction may also be imposed for failure to attend a deposition or submitting a summary judgment affidavit in bad faith. *See* FED. R. CIV. P. 30(g) and FED. R. CIV. P. 56(g).

Nonetheless, in *Chambers v. NASCO*,[250] the Court upheld a trial judge's imposition of this sanction for bad-faith conduct,[251] even as it reiterated that IPs could be invoked only when indispensably necessary.[252] The Court presumed that Congress, in enacting and approving extensive federal statutes and rules governing sanctions, did not intend to displace inherent IPs absent a clear contrary statement.[253] As the dissent pointed out, however, (1) these comprehensive federal laws did not provide for this penalty; (2) it was unnecessary, as the authorized sanctions (fine or imprisonment) sufficed to punish misconduct; (3) Congress has generally rejected the "English rule" requiring fee-shifting from the losing party; and (4) all of these published laws—unlike IPs—had emerged from a deliberative process supervised by the Court, thereby ensuring uniformity and giving litigants and their attorneys the notice required by the Due Process Clause.[254] Despite these problems, the Court has reaffirmed *Chambers*[255] and extended it to bankruptcy cases.[256]

Overall, any true "court" must be able to sanction challenges to its authority and serious litigation misconduct. Nonetheless, powers such as contempt are uniquely susceptible to abuse because they concentrate all three government powers in a judge who

250. Chambers v. NASCO, 501 U.S. 32 (1991).

251. *Id.* at 42–58.

252. *Id.* at 43 (citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)).

253. *Id.* at 41–51.

254. *Id.* at 61–72 (Kennedy, J., dissenting).

255. *See, e.g.*, Marx v. General Revenue Corp., 568 U.S. 371, 382 (2013) (concluding that a provision in the federal debt collection statute authorizing an award of attorneys' fees to defendant if plaintiff brings an action in bad faith codifies the IP recognized in *Chambers*). This IP extends only to compensating attorneys' fees incurred as a direct result of litigation misconduct, not to imposing punitive damages. *See* Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 107–08 (2017).

256. The Bankruptcy Code automatically entitles a debtor who meets certain conditions to convert from Chapter 7 to Chapter 13. *See* 11 U.S.C. § 706(a) & (d). A debtor satisfied those conditions, but the Court allowed a bankruptcy judge to refuse to grant the conversion by invoking his IP to sanction the debtor for bad faith (hiding assets). *See* Marrama v. Citizens Bank, 549 U.S. 365, 376 (2007); *but see id.* at 376–77 (Alito, J., dissenting) (arguing that courts cannot assert IP to contravene clear statutory provisions). The majority also justified this exercise of IP on the ground that the finding of bad faith would eventually result in a re-conversion to Chapter 7, so that denying the debtor access to Chapter 13 immediately would be more efficient. *Id.* at 376. In a later case, the Court relied on that latter rationale to insist that *Marrama* did not contradict the Bankruptcy Code, but actually furthered its overall purpose of processing bankruptcies expeditiously. *See* Law v. Siegel, 571 U.S. 415, 426 (2014).

often feels personally insulted—and hence cannot maintain the objectivity that Article III and due process require.[257] That is why reasonable congressional checks are imperative.

d. Regulating Lawyers. Congress can regulate attorneys practicing in federal court, but has only exercised that power in a few statutory and FRCP provisions concerning litigation management and sanctions.[258] Otherwise, Congress has authorized courts to promulgate rules for counsel in conducting cases.[259] Instead of doing so, however, federal judges have usually exercised their IP with little oversight, as the Court has shown almost no interest in this area.[260]

Historically, the IP to regulate lawyers has been limited to two items.[261] The first was ensuring that attorneys involved in a case were qualified and fit to practice law.[262] Although federal courts initially did so on an individual basis, the vast increase in their business and in the number of lawyers eventually led them to defer to the determinations of state supreme courts, which relied on bar associations.[263] Second, a court has always been able to discipline

257. *See* Pushaw, *supra* note 22, at 765, 770–73, 785; *see also id.* at 793–97 (noting the many scholars over the years who have argued that judges' invocation of IP to punish contempt was rarely essential to maintaining their authority and often violated due process and separation of powers). Until quite recently, the Court acknowledged such problems. *See, e.g.*, *supra* notes 143–146, 239, 243 and accompanying text (describing misuses of contempt dating back to the early 1800s and the Justices' willingness to defer to Congress's regulation of that power). Most importantly, the Court often invalidated judges' imposition of sanctions as violating due process rights. *See, e.g.*, Hovey v. Elliott, 167 U.S. 409, 413–19 (1898) (concluding that the sanction of entering judgment against defendants deprived them of property without due process); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (requiring notice and a hearing before leveling sanctions). In *Chambers*, however, the Court disregarded such constitutional concerns.

258. *See supra* notes 147–148, 174, 177, 240–243, 247–249 and accompanying text.

259. *See* 28 U.S.C. § 1254 (1988).

260. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1211–13 (2003) (arguing that the Court lacks the time, resources, incentives, and expertise to regulate attorneys and therefore leaves this subject to lower federal courts).

261. *See supra* notes 42–43, 143–148 and accompanying text (describing the historical lineage of this IP).

262. *See supra* notes 43, 148 and accompanying text.

263. *See* Barton, *supra* note 260, at 1170, 1175–246 (questioning this arrangement on the ground that state supreme courts are institutionally ill-suited to the legislative task of regulating attorneys because the justices are inaccessible to the public and too connected with—and sympathetic to—lawyers and state bar associations, whereas legislatures have the capacity to balance attorneys' desires with the public interest, especially clients' concerns).

attorneys for litigation misconduct that threatens its authority or ability to process and decide a case.[264]

Gradually, however, Article III judges have claimed ever-expanding IP. For example, although federal courts often follow the state's code of legal ethics or the ABA's Model Rules of Professional Conduct, they have asserted discretion to modify or ignore such rules depending on the facts of the case.[265] No judicial opinion, however, has identified a plausible legal basis for such a general authority to police lawyers' ethics.[266] A federal judge only has IP to address an attorney's ethical violations as necessary to manage and dispose of a case.[267] By contrast, many rules of professional responsibility are unrelated to specific litigation, such as those protecting third parties, preserving the image of the profession, or promoting public service.[268] To take one example of overreach, some courts have asserted IP to compel lawyers to represent civil rights plaintiffs *pro bono*.[269]

Most pertinently for present purposes, a few judges have claimed IP to supervise attorneys' fees and reduce amounts deemed unreasonable.[270] Such a power has not been mentioned in any

264. *See supra* notes 42, 145–147 and accompanying text.

265. *See* Judith A. McMorrow, *The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 1, 6–9, 11–12, 15–16, 19–43, 47–49 (2005) (describing and defending federal judges' exercise of flexible IP to deal with lawyers on a case-by-case basis—usually in a minimalist and fair manner—rather than through written rules, which cannot cover every problem that might arise).

266. *See* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1306–09, 1324–25, 1339–42, 1352–53 (2003).

267. *See supra* notes 44–45, 98–99, 144–147 and accompanying text.

268. *See* Zacharias & Green, *supra* note 266, at 1303–13, 1324–78 (persuasively arguing that the IP to regulate lawyers cannot reasonably be extended to such matters, but rather should be limited to addressing attorneys' litigation misconduct that impairs the court's ability to operate or threatens the integrity of the judicial process—for example, violating written procedural rules, disrupting proceedings, bribing a witness, or suborning perjury).

269. *See* Naranjo v. Thompson, 809 F.3d 793, 802–03 (5th Cir. 2015) (maintaining that appointing counsel was necessary to provide such plaintiffs with a meaningful hearing, which was critical to the fair administration of justice). *But see* Sarah B. Schnorrenberg, *Mandating Justice:* Naranjo v. Thompson *as a Solution for Unequal Access to Representation*, 50 COLUM. HUM. RTS. L. REV. 260, 283–92 (2019) (describing the lack of precedent for this asserted IP and the absence of later cases following it).

270. *See, e.g.*, Rosquit v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982); United States v. Overseas Shipholding Grp., 625 F.3d 1, 9 (1st Cir. 2010). For instance, in *Ross v. Douglas Cnty.*, 244 F.3d 620 (8th Cir. 2001), the court rejected as unreasonable a contingent fee

statute, rule, or Supreme Court case. Moreover, since the mid-1800s, Congress has provided that losing parties should pay specified costs (e.g., for court reporters and printers) but has excluded attorneys' fees.[271] Congress has made two narrow exceptions: (1) as a sanction for specific types of misconduct,[272] and (2) as a financial incentive for lawyers to represent certain "underdog" clients, such as plaintiffs in civil rights cases,[273] unfair debt collection suits,[274] and—most relevantly—class actions, with detailed requirements regarding notice, rights to object, hearings, and discretion to appoint a special master or magistrate to determine a reasonable fee award.[275] These targeted federal statutes would make little sense if courts already had freestanding power to regulate attorneys' fees.

The only valid justification for such an IP would be if it were essential to the performance of judicial duties. But a court reaches the issue of attorneys' fees, if at all, after it has rendered its final judgment. Thus, the exercise of "judicial power"—the fact finding, law application, judgment, and associated case management—has already ended. Furthermore, if monitoring attorneys' fees were truly necessary, judges would have long asserted such power.

e. Summary. In theory, the Court has acknowledged that the Constitution empowers Congress to regulate adjective law and allows federal judges to rely on their IP only when doing so is indispensable to maintain their authority or to adjudicate cases. In practice, however, the Court has approved the exercise of a

agreement in a civil rights case that would have entitled plaintiff's counsel to 50% of the overall verdict plus 50% of the court-awarded attorneys' fees. *Id.* at 622. In *Dale M. ex rel. Alice M. v. Bd. of Educ.*, 282 F.3d 984 (7th Cir. 2002), the Circuit Court reversed the district judge's award of attorneys' fees to plaintiffs, but they had already turned the money over to their lawyer. *Id.* at 985. The district court then invoked IP to order the lawyer to return the money to the defendant. *Id.* The appeals court affirmed because it would have been unethical to allow the lawyer to keep the fee, and inefficient to order the plaintiffs to pay the sum to the defendant, which would then have forced the plaintiffs to sue their lawyer for unjust enrichment. *Id.* at 985–86. Significantly, the court did not assert IP to consider the reasonableness of attorneys' fees or to assess them as a sanction. Rather, the attorney legally was not entitled to any such fees.

271. *See* Fee Act of 1853, 10 Stat. 161 (currently codified at 28 U.S.C. § 1920 (2018)).

272. *See supra* notes 174, 177, 247–249 and accompanying text.

273. *See* Civil Rights Attorneys' Fee Award Act of 1976, 42 U.S.C. § 1988.

274. *See* Fair Debt Collection Practices Act, 15 U.S.C. § 813(a); *see also* Clayton Act, 15 U.S.C. § 15(a) (private antitrust suits). Similarly, Congress has allowed recovery of attorneys' fees to prevailing parties in cases involving infringement of copyrights, patents, and trade secrets.

275. FED. R. CIV. P. 23(h).

wide range of IPs, regardless of necessity or seemingly applicable federal laws.

D. Scholarship on Inherent Judicial Powers

Like the Court, scholars have typically focused on particular assertions of IP[276] instead of providing a thorough analysis of all such powers.[277] The two seminal studies that comprehensively considered IPs reached opposite conclusions.

1. The Meador and Pushaw Approaches

In 1995, Daniel Meador argued that the dramatic increase in the size and complexity of modern litigation justified the Court's flexibility in leaving the exercise of IPs almost entirely to trial judges' discretion.[278] Meador simply assumed the constitutional legitimacy of IPs and instead looked at practical and policy issues.[279]

276. In section I.C above, we cited many such works in analyzing adjective lawmaking, case management, sanctions, and regulating lawyers. Of special note are two studies that analyze a specific IP as a springboard to explore constitutional issues. *See* Ryan, *supra* note 150, at 765–75, 782–813 (arguing that the Constitution requires a federal court to apply procedural statutes and rules unless they unduly interfere with the core judicial function of adjudication, and concluding that Congress's imposition of time limits that hinder judges' deliberation falls within that narrow exception); Beale, *supra* note 150, at 1433–35, 1464–522 (maintaining that the Court should repudiate the IP to supervise federal law enforcement officials based on judicial notions of fairness and justice, as the Constitution restricts judges to ensuring that such officials comply with particular constitutional and federal statutory requirements).

277. Professor Carrington has praised the Court's approach as enabling it to avoid explaining how its consistent approval of broad IPs on a case-by-case basis can coexist with its longstanding precedent acknowledging Congress's constitutional power to regulate federal judicial procedure. Carrington, *supra* note 84, at 967–71. Similarly, Professor Yablon has applauded the Court for (1) deliberately collapsing essential and discretionary judicial power into a single category of "inherent authority;" and (2) declining to define either the limits on such IPs or the permissible scope of congressional regulation of them. Yablon, *supra* note 101, at 1037–41, 1054, 1096–97, 1106. He believes that this ambiguity usefully allows the Court to reaffirm extensive IPs to protect judges' independence and effectiveness by innovating procedurally when they deem it expedient for optimal case management, yet sidestep constitutional clashes with Congress. *Id.* at 1037–41, 1044, 1050, 1054, 1088, 1093–94, 1096–97, 1106.The Court's refusal to clear up these constitutional boundaries, however, has left attorneys and their clients at the mercy of federal judges who invoke IP without any legal standards or limits, thereby creating uncertainty and inviting abuses that threaten due process. *See supra* notes 10–14, 22–24 and accompanying text.

278. Meador, *supra* note 202, at 1805–07, 1816, 1819–20.

279. Instead of examining the Constitution's history, Professor Meador asserted that American courts have long followed the British judiciary's model of claiming broad and adaptable IPs. *Id.* at 1805–06, 1819–20. Although modern judges have done so, the Supreme

In 2001, one of us (Pushaw) provided the first analysis of all IPs in light of the Constitution's text, structure, political theory, drafting and ratification history, and practice since 1789.[280] Initially, he emphasized that the Court's use of the term "inherent powers" to describe and approve an array of judicial actions conflicts with its longstanding jurisprudence recognizing three structural constitutional principles. First, allowing judges to exercise virtually unbridled discretion contravenes the Constitution's limitation of the federal government to its enumerated powers (with special restrictions imposed on the judiciary). Second, Article I grants Congress "legislative power" to make laws, whereas Article III confines courts to the "judicial power" of interpreting existing laws—except when they must craft a rule because of a gap in a federal statute or the Constitution. Third, Articles I and III authorize Congress to regulate the federal courts' jurisdiction and to make for them all laws (including adjective ones) that it deems "necessary and proper" to effectuate the exercise of judicial power.

Moreover, written procedural rules provide notice to parties and their attorneys, as required by the Due Process Clause. By contrast, such rights are infringed when judges creatively and arbitrarily invoke IPs on a case-by-case basis.[281]

Pushaw therefore urged the Court to define IPs more precisely, which in turn would clarify Congress's power to control judicial overreach and provide litigants with adequate notice.[282] He began with Article III's text, which explicitly vests "judicial power"—issuing a final judgment after applying the law to the

Court for well over a century correctly held that the significant constitutional differences between English courts and their American federal counterparts dictated a far narrower scope of IPs for the latter (only when indispensably necessary). *See supra* notes 98, 127–129, 136–137, 140–142, 149 and accompanying text. Moreover, the federal courts' abandonment of traditional constitutional restraints on IPs is not a mere academic quibble, but rather has had substantial and troubling real-world effects.

280. For a detailed explanation of the points made in this paragraph, see Pushaw, *supra* note 22, at 739–47, 785, 798–99.

281. *See id.* at 759–60 n.102 and accompanying text, 761, 794–95, 850–51 n.592 and accompanying text. A countervailing due process argument is that federal courts must have broad IPs because otherwise their dockets might become so clogged that parties could not receive reasonably efficient justice. Although that contention might be valid in an extreme situation, the Constitution entrusts Congress with making this policy judgment about appropriate federal caseloads. If that were not true, federal judges could arbitrarily dismiss a percentage (say, half) of their cases to reduce their dockets to what they considered to be a reasonable level.

282. The following five paragraphs summarize the arguments made *id.* at 741–44.

facts in a litigated "case"—in "courts" staffed by independent "judges." Turning to the Constitution's early understanding and implementation, he argued that these express provisions were widely viewed as carrying with them certain implied powers, but that they fell into two very different categories.

First, "implied indispensable" powers were critical to the exercise of "judicial power" by "courts." The "judicial power" has always had several elements. Initially, to ensure accurate fact-finding, a judge must have auxiliary power to supervise discovery and the presentation of evidence at trial; rule on fact-related motions; and appoint experts if necessary to elucidate complex matters. The next step in adjudication is identifying the governing law and applying it—or, in a jury trial, providing legal instructions. Courts would be unable to perform this vital function if federal legislators or executive officials tried to influence judicial exposition of the law. Finally, a court must enter a final judgment, which necessarily carries with it the ability to prevent political actors from tampering with that judgment.

The other kind of implied indispensable power flowed from Article III's establishment of independent "courts," which must be able to handle their internal administration and manage cases, maintain their authority, and safeguard the integrity of their processes. Courts have always done so by ensuring lawful and respectful behavior by everyone involved (parties, lawyers, witnesses, jurors, and spectators) and by sanctioning litigation-related misconduct.

Because implied indispensable powers were rooted in the Constitution, Congress could not prohibit or impair them. Rather, Article I's grant of "legislative power" and its Necessary and Proper Clause authorized only statutes that facilitated the exercise of the "judicial power" vested in "courts." This legislation would recognize that judges must have certain ancillary powers but would keep them within defined and reasonable boundaries to preserve due process.

Second, "beneficial" powers were helpful, useful, or convenient to judges in fulfilling their Article III role. The modern Court has approved many such beneficial IPs, which raises several constitutional difficulties. Most obviously, such approval contradicts the Court's own admonition, dating back two centuries, that Article III permits courts to imply powers only when indispensable.

Furthermore, Article I authorizes Congress alone to make all prospective laws based on its policy judgments—including which (if any) beneficial powers are necessary and proper.

Hence, Pushaw rejected the claim that the growing volume and complexity of litigation licensed federal courts to create new IPs in common law fashion.[283] Rather, judges should operate within the established federal legislative scheme and seek to have any novel powers formally recognized in a statute or a congressionally approved FRCP.[284]

Pushaw recognized that, although ideally the Court should thwart all attempts by federal judges to claim beneficial powers independently, realistically it would not overrule its entrenched precedent sustaining such common law.[285] Accordingly, as a second-best solution, he recommended that the Court make clear that beneficial IPs, unlike indispensable ones, can be modified or eliminated at Congress's discretion.[286]

283. *See* Anclien, *supra* note 150, at 71–73; *see also* Meador, *supra* note 202, at 1805–07, 1816–20 (making this argument, despite acknowledging that the modern proliferation of written adjective laws should have decreased resort to IPs). However, the appropriate volume of federal court business is a policy matter that Congress alone has constitutional power to address, as it has. *See supra* notes 3, 88, 94, 113–153, 165–184, 188, 191, 203–204, 207, 223–236 and accompanying text.

284. *See* Pushaw, *supra* note 22, at 741 n.18.

285. *See id.* at 743.

286. *See id.* One might claim that Congress has silently acquiesced to federal courts' assertion of broad IPs (including in MDLs) by failing to affirmatively limit or prohibit their exercise. Congress's inaction, however, likely reflects two political realities, not implied consent. First, Representatives and Senators prioritize high-profile substantive issues that most concern voters (e.g., taxes, crime, and the environment), not procedural matters. Second, many federal legislators are not attorneys, and almost none are experienced trial lawyers, so they tend to defer to federal courts' superior expertise as to adjective law. That is exactly why Congress delegated the nuts and bolts of the Federal Rules of Civil Procedure and Evidence to the judiciary. Those rules tend to be amended only when federal judges themselves or an influential interest group are adversely affected. Judges like having great discretion, and mass-tort plaintiffs' attorneys and corporations in MDLs have no incentive to upset the status quo. *See infra* notes 321, 380–382, 409, 416 and accompanying text. Individual plaintiffs and their chosen counsel, who involuntarily experience consolidation, do not have such clout. These practical considerations, however, do not excuse federal courts from misusing their power. By way of analogy, the exceedingly remote likelihood of impeachment should not lead a Justice to deliberately misinterpret the Constitution.

2. Post-2001 Literature

Over the past two decades, many scholars have focused on specific IPs and typically followed either Meador's flexible, pragmatic approach[287] or Pushaw's constitutional framework.[288] Two commentators have argued that the Constitution's text and history support Pushaw's analysis concerning implied indispensable powers, but that his approach should also be applied to beneficial ones.

First, Joseph Anclien contends that the Founders and the early Court understood that federal judges had expansive IPs—any action "naturally related" to the exercise of judicial power—that were "coextensive" with those of Congress.[289] Thus, he concludes that Congress could only facilitate, not impede, the exercise of any IPs[290]—a thesis first proposed by David Engdahl.[291]

Although the Constitution's grant of express powers did carry with them certain implied ones, it does not logically follow that each branch had "coequal" authority in this regard.[292] Rather, the Constitution empowers *Congress* to make all federal laws, procedural and substantive—including those it deems "necessary and proper" to effectuate the powers of the judicial branch.[293] That explains why the same Chief Justice Marshall who endorsed Congress's broad Article I implied authority in *McCulloch* limited the courts' inherent powers to indispensable ones in *Hudson*—an understanding that continued for well over a century.[294] Finally, Anclien's theory leads to the bizarre result that Congress must facilitate federal courts' novel assertions of beneficial IPs to refuse

287. For example, commentators have endorsed expansive IP to order ADR and regulate lawyers. *See* McMorrow, *supra* note 265, at 6–49.

288. *See, e.g.*, Lear, *supra* note 185, at 1152–206 (*forum non conveniens*); Parness & Walker, *supra* note 174, at 366–74 (pretrial conferences).

289. *See* Anclien, *supra* note 150, at 42–77, 83–84.

290. *See id.* at 42, 53, 74–77 (maintaining that Congress cannot curtail or abrogate any IP if doing so would intrude upon a court's "basic function" or "central prerogative").

291. *See* Engdahl, *supra* note 150, at 80–81, 94–175 (arguing that Congress can only enact laws concerning federal courts' jurisdiction, inherent powers, or remedies that are "necessary and proper for carrying into execution" the Article III "judicial power"—and that therefore statutes impeding, rather than effectuating, the exercise of such powers are unconstitutional).

292. Anclien, *supra* note 150, at 42–62, 83–84.

293. *See supra* notes 3, 80–96, 99, 104–153, 156–183, 188–191, 203–207, 223–224, 239–243, 258–259, 280–286 and accompanying text.

294. *See supra* notes 105–115, 135–138, 150 and accompanying text.

to exercise jurisdiction or apply adjective laws that Congress has validly enacted pursuant to Articles I and III.[295]

Second, Benjamin Barton agrees with Pushaw that the Constitution gives Congress near-plenary authority over the federal judiciary's structure, jurisdiction, and procedures, with only one limit: A statute cannot interfere with adjudication itself or make it impossible for courts to function.[296] However, he maintains that Article III's language vesting "judicial power" in "courts" is too vague to permit solid inferences about the scope of IPs, except that judges have always had broad common law discretion to act where Congress is silent on a particular IP that they consider beneficial (again, subject to legislative override).[297] That conclusion, however, conflicts with the weight of historical evidence.[298]

Although Pushaw's approach captures the original understanding, he and his critics both recognize that the modern Court has consistently allowed several IPs that are merely beneficial. At the very least, however, the Court should require federal judges to clearly identify which IPs fall into this category (and are therefore subject to complete congressional control) and

295. Similarly unpersuasive are the following assertions: "[C]ourts have shown no propensity to abuse the authority they have arrogated. . . . Most rules springing from inherent powers have evolved to be exceedingly narrow. . . . [A]ppellate courts have been vigilant in monitoring the lower courts' use of inherent powers. . . . [T]here is an innate restraining force, inherent in the judiciary, which tends to circumscribe the application of inherent powers and prevent a troubling incursion into the legislative domain." Anclien, *supra* note 150, at 67–69.

296. *See* Barton, *supra* note 122, at 5–31, 38–42.

297. *Id.* at 2–13, 32–38, 40–42. Another scholar argues that courts should independently exercise both indispensable and beneficial IPs (with the latter then subject to Congress's complete control) because otherwise judges might describe IPs as indispensable when they actually are not, which would later force courts to resist congressional regulation. *See* Dustin B. Benham, *Beyond Congress's Reach: Constitutional Aspects of Inherent Power*, 43 SETON HALL L. REV. 75, 90–94, 98–102 (2013); *but see* Pushaw, *supra* note 22, at 743 n.23 (contending that judges should have the burden of showing, not merely asserting, that a specific IP is essential, but conceding the possibility that "courts might act in bad faith and manipulate these categories" by claiming that a beneficial power is indispensable).

298. In a practical rather than historical analysis, Professor Dobbins recognizes that courts' exercise of legally unconstrained discretion in asserting IPs is inconsistent with the very purpose of written procedural rules: to provide notice, predictability, and fairness. Jeffrey Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 414–18, 426–29, 433–34, 448–57, 455–62 (2020). Such a law-free use of IPs also precludes meaningful appellate review for "abuse of discretion." *Id.* at 420–22, 450–54, 456, 460. Therefore, Dobbins recommends that courts assert an IP only if they (1) explain why they determined it was necessary to do so instead of applying an existing procedural rule, and (2) if so, articulate clear legal standards governing when and how the IP should be used. *Id.* at 421, 452–62.

which are indispensable (and hence amenable only to enabling legislation) instead of lumping all IPs together.

E. Applying the Distinction Between "Indispensable" and "Beneficial" Inherent Powers

To properly exercise Article III "judicial power," federal "courts" must be able to maintain their authority and to process and decide cases independently. Congress cannot, and has almost never attempted to, hamper this essential function. On the contrary, it has worked with the Court to craft rules of procedure and evidence to handle all aspects of litigation and has allowed each district and circuit court to promulgate local rules, many of which confer significant discretion.

Unlike in the early days of the Republic, then, today it is almost never indispensably necessary for a federal judge to invoke IP to fill gaps in adjective law in order to manage and adjudicate a case. Rather, courts should amend their local rules, or recommend that the Court (with congressional approval) revise the Federal Rules, to meet that rare need. Such amendments safeguard due process by giving parties and their attorneys notice instead of subjecting them to arbitrary assertions of IPs.

Therefore, the Court erred in *Gulf Oil Corp. v. Gilbert*[299] by announcing a new IP, *forum non conveniens*, that granted trial judges discretion to dismiss any case if they concluded that another federal court would be better suited to hear it.[300] This power does not seem essential, as federal courts did without it for a century and a half, and its exercise did not alleviate the federal judiciary's overall workload. Rather, it is a mere beneficial power that Congress chose not to bestow.[301] Accordingly, the Court should not have unilaterally created the doctrine but instead asked Congress to do so.[302] Remarkably, even after Congress ratified *Gilbert* by giving

299. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

300. *Id.* at 507–08. Admittedly, federal courts in admiralty jurisdiction have long exercised a power similar to *forum non conveniens*, but admiralty law has many unique features (such as the absence of juries) that have never applied in actions at law.

301. *See* Pushaw, *supra* note 22, at 743.

302. The Court likely adopted *forum non conveniens* to give federal trial judges a tool to deal with the significant increase in their dockets caused by factors such as the New Deal and the relaxation of personal jurisdiction standards. Again, the Constitution authorizes Congress to address such policy concerns.

each district court discretion to transfer venue to a more convenient *federal* forum, the Court went beyond this statutory grant to permit trial judges to dismiss cases if they concluded that a *state* or *foreign* tribunal would be preferable.[303]

The Court's treatment of *forum non conveniens* runs afoul of the Constitution in two ways. First, when Congress exercises its powers under Articles I and III to confer jurisdiction and venue on federal courts, they cannot legitimately refuse to proceed based on their notions of sound policy.[304] Second, plaintiffs reasonably expect courts to discharge that constitutional duty. Thus, judges who dismiss a case without notice that they will be asserting discretion to decide whether to carve an exception to that obligation (as in *Gilbert*) violate the plaintiffs' due process rights. This latter concern no longer exists as to *forum non conveniens* since plaintiffs now know it might be invoked, but the Court at a minimum should acknowledge and respect Congress's regulation of this beneficial power (and all others).

Admittedly, written adjective laws tend to set forth flexible standards. Nonetheless, they sometimes contain clear legal rules, which judges should not be free to ignore or amend by invoking "inherent powers." Unfortunately, the Court has permitted this result in two situations.

First, instead of giving effect to the obvious meaning of procedural statutes and rules, the Court has creatively read them as preserving IPs unless Congress clearly states otherwise. For example, FRCP 41(b) provides that if a plaintiff fails to prosecute, "a defendant may move" to dismiss. Specifying that a "defendant" can bring this motion naturally supports the conclusion that judges cannot dismiss such actions on their own, but the *Link* Court presumed that Congress did not intend to abrogate this IP.[305] The power to delete a case from the docket, however, is not indispensably necessary to a district court's ability to function. Therefore, the constitutional solution would have been for Congress, in consultation with the Court, to have amended Rule 41. The trial

303. *See, e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994); Piper Aircraft v. Reyno, 454 U.S. 235, 247–61 (1981). *Forum non conveniens* has now become entrenched. *See, e.g.*, Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 433 (2007).

304. *See* Lear, *supra* note 185, at 1148–53, 1166–207; *see also supra* notes 206–207, 211, 223–230, 293 and accompanying text.

305. 370 U.S. 626, 629–33 (1962).

judge's idiosyncratic decision to ignore this rule without warning in *Link* overleapt Article III bounds and deprived the plaintiff of due process.

Although *Link* is a *fait accompli*, its constitutionally questionable approach should have been abandoned. Instead, the Court has repeated its mistake. For instance, in *Dietz* it construed Rule 51(b)(3), which authorizes giving a jury new instructions to rectify a mistake "before" it was discharged, as not clearly eliminating a judge's IP to provide such curative instructions *after* the jury had been let go and then recalled.[306] Yet such a power could not possibly have been indispensably necessary (or even beneficial) because courts have done without it for hundreds of years—indeed, have applied the opposite common law rule that prohibited recalling a jury after it had been discharged.[307]

Second, the Court has sometimes abandoned the *Link*/*Dietz* pretense of merely "interpreting" federal rules as not clearly affecting IPs. Rather, the Court has permitted judges to exercise virtually unbounded IP to stay proceedings, despite conceding that Congress unambiguously intended to limit that power in AEDPA and INA litigation.[308] Those statutes constrain such judicial discretion in narrowly defined circumstances to achieve Congress's important policy goal of expediting death penalty and immigration cases,[309] in contrast to a total or extensive ban on the courts' ability to grant stays (which would raise serious Article III concerns). The Court should stop allowing judges to defy Congress's valid exercise of its Article I power to regulate habeas corpus jurisdiction and immigration law.[310]

Similar constitutional problems have arisen in the context of sanctions. An Article III "court" would be unable to exercise "judicial power" unless it had the ability to punish challenges to its

306. Dietz v. Bouldin, 579 U.S. 40, 45–54 (2016).

307. The majority acknowledged, but declined to apply, this ancient common law rule, even though it helped guarantee the constitutional right to an unbiased jury. *Id.* at 51–53.

308. *See supra* notes 223–230 and accompanying text.

309. *See supra* notes 223–24, 226, 229–230 and accompanying text.

310. Likewise, the Court has let district courts assert IPs and make local rules to reduce delay and costs without considering conflicting federal constitutional or statutory provisions. *See* Carrington, *supra* note 84, at 929–31, 938–64, 957–1007; *see also supra* note 194 (criticizing the Court's practice of denying review of circuit courts' supplemental procedural rules that plainly violate federal law and instead "hoping" that they will correct the error).

authority or actions that obstructed the administration of justice.[311] Congress has never hindered this indispensable power. Rather, for nearly two centuries, Congress has carried the contempt power into effect by expressly acknowledging each court's authority to fine or imprison anyone who misbehaves in its presence or disobeys its orders, as well as misconduct by court officers in official transactions.[312] More recently, Congress has approved FRCPs that expanded the categories of contempt to address modern problems such as discovery abuses.[313]

The foregoing statutes and rules enable federal courts to fully exercise their contempt power, while setting forth reasonable boundaries to prevent judges from imposing sanctions that are not a proportionate response to bad behavior but rather a manifestation of personal animosity.[314] The Court faithfully adhered to these laws for many years. For instance, since 1789, Congress has restricted contempt punishments to the traditional ones of fine and imprisonment, and the Court respected that limit until 1991. In *Chambers v. NASCO*,[315] however, it sustained a trial judge's IP to impose a novel penalty for misconduct: paying the attorneys' fees incurred by the other party.[316] The Court declared that this IP could be exercised despite existing laws providing sanctions for the same behavior: "[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power."[317]

Applying that reasoning, however, a court might conclude that only summary execution would be an appropriate penalty, as an English judge once decreed.[318] As that admittedly extreme example demonstrates, there must be some restraints on a judge's sanctioning discretion. And constitutional separation-of-powers principles dictate that courts cannot always be trusted to impartially

311. *See* Pushaw, *supra* note 22, at 742.
312. *See supra* notes 98–99, 118, 141–148 and accompanying text.
313. *See supra* notes 159, 174, 177, 240–242, 248–249 and accompanying text.
314. *See* Pushaw, *supra* note 22, at 742.
315. Chambers v. NASCO, 501 U.S. 32 (1991).
316. *Id.* at 42–58.
317. *Id.* at 49–50.
318. *See supra* note 46 and accompanying text.

limit themselves.[319] Instead, only Congress can do so, as long as the restrictions are reasonable and do not impair the proper functioning of Article III courts.

Finally, the IP to regulate attorneys should be confined to ensuring that they are qualified to practice and do not engage in actions that threaten the court's authority or its ability to process and decide a case. Such truly necessary IPs should be contrasted with powers recently asserted by federal judges that have nothing to do with lawyers' competence or misconduct during litigation—most notably, assessing the reasonableness of attorneys' fees.

F. Summary

Distinguishing "implied indispensable" from "beneficial" powers would enable the Court to reconcile its IP jurisprudence with its cases recognizing three other fundamental constitutional principles. First, the enumerated powers doctrine supports interpreting Article III as limiting federal courts to the exercise of the "judicial power" of deciding cases and other powers without which they would be unable to perform that role. Second, Article I grants Congress alone all "legislative power," which includes making the substantive and procedural rules that the judiciary must apply. Nonetheless, Congress cannot enact laws that subvert the Constitution, such as by interfering with adjudication by Article III courts or denying them powers that are vitally necessary for them to perform that function or to maintain their authority. Rather, Congress can only facilitate the exercise of such indispensable powers. As to powers that are merely beneficial, however, Congress has complete discretion. Third, and relatedly, Articles I and III give Congress substantial control over the federal courts'

319. Federal courts have routinely declared that, in addition to Congress's checks on them, they must also enforce limits on themselves imposed by Article III, federalism, or separation of powers. Familiar examples are the various justiciability and abstention doctrines. The Court has labeled these doctrines as exercises of "self restraint," but they can also be characterized as activism: refusing to exercise jurisdiction that Congress has constitutionally bestowed on them. *See* Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289 (2004) (developing this thesis). We cannot fully address this point here, but merely note that the federal courts' demonstrable lack of self-restraint in asserting IPs has parallels in other areas, such as jurisdiction and substantive constitutional law.

structure and their jurisdiction, but Article III guarantees those judges independence in exercising the jurisdiction granted.

The foregoing framework should be applied to all IPs to keep them within constitutional bounds. It would be especially helpful in MDLs because courts handle such important and lucrative cases almost entirely by exercising IPs unguided by any legal standards or limits.

II. ASSERTIONS OF INHERENT POWERS IN MULTIDISTRICT LITIGATIONS

In this Part, we will show that the only implied indispensable power in MDLs is appointing "liaison counsel" to manage the practical details of litigation. Yet MDL judges have asserted many other IPs: (1) to name "lead attorneys" who do not merely coordinate with the plaintiffs' hired lawyers but displace them; (2) to force plaintiffs to accept such representation; (3) to compensate lead attorneys; (4) to fund this compensation by taxing non-lead lawyers' earnings; (5) to cap non-lead lawyers' fees below the amounts they contracted for with their clients; and (6) to review settlements, including the discretion to disapprove them. These uses of IPs subvert the Constitution's structure and violate the Due Process Clause. We therefore describe them as lawless, even though they are lawful in the less profound, positive sense that MDL courts have asserted them and have yet to be constrained by appellate courts.

Several peer reviewers challenged us to explain how MDL courts could process multitudes of lawsuits without the powers we condemn. Although we suggest alternatives in the discussions below, the burden of designing constitutional means rests with MDLs' proponents. If judges must violate the Constitution for the procedure to work as desired, then it ought to be scrapped.

A. The Federal Rules of Civil Procedure Govern the Conduct of Cases Consolidated in Multidistrict Litigations

Because the MDL statute provides no procedures for these proceedings, judges have had to create them. Courts have not done so by rulemaking, however. Instead, they have drawn upon the Manual for Complex Litigation, a mere guidebook, and crafted

procedures on the fly.[320] In effect, they have created a common law of procedure for MDLs. Judges like this approach because it maximizes their freedom to manage MDLs as they wish.[321]

The common law of MDLs exists in tension with the FRCP. Most importantly, Rule 1 states that, with enumerated exceptions, "these rules govern procedure in *all* civil actions and proceedings in the United States district courts."[322] MDLs are not exempted. As the Sixth Circuit wrote:

> The rule of law applies in multidistrict litigation . . . just as it does in any individual case. . . . That means an MDL court's determination of the parties' rights in an individual case must be based on the same legal rules that apply in other cases, as applied to the record in that case alone. . . . The rules at issue here are the Federal Rules of Civil Procedure, which have the same force of law that any statute does.[323]

Addressing the complaint that "much that happens inside MDLs reminds one of the Wild West,"[324] the court later added that

320. The several editions of the *Manual for Complex Litigation* discuss procedures for the conduct of MDLs at length. But even though the Manual reflects the accumulated wisdom of federal judges, it lacks the force of law. *See* MANUAL, *supra* note 26, at 1 (The Manual "is not, and should not be cited as, authoritative legal or administrative policy. . . . It was produced under the auspices of the Federal Judicial Center, but the Center has no authority to prescribe practices for federal judges. The Manual's recommendations and suggestions are merely that.").

321. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1675 (2017) (describing interviews with MDL judges who "resist[ed] at all cost imposing rules—whether in the [FRCP] or through uniform federal procedural common law—on the MDL process"); *see also* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 131–33 (2019) (arguing that MDL judges have illegitimately invoked IPs to assert unlimited power to take actions such as coercing settlements).

322. FED. R. CIV. P. 1 (emphasis added).

323. *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 841 (6th Cir. 2020).

324. *See* Charles Silver, *What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 181, 183 (2012); *see also* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015) (characterizing MDL as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies"); Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129, 140 (2018) ("Thus, the alacrity with which MDLs are now created and resolved, and the absence of meaningful scrutiny, has created a kind of Wild West outpost of federal litigation."); Jay Tidmarsh & Daniela Peinado Welsh, *The Future of*

"MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[325] Whether cases are consolidated or not, parties' procedural rights are supposed to be identical.[326]

Because the FRCP apply in MDLs, any room that remains for the exercise of IPs is limited to matters the rules do not address. And, as always, the use of IPs is confined to problems with the potential to prevent MDL forums from functioning as courts - that is, from fulfilling the mandate to exercise the judicial power.[327] It follows that judges may properly invoke IPs when dealing with managerial difficulties but may not use them to alter or override parties' procedural or substantive rights. Unfortunately, courts do the latter routinely. MDL procedures must be overhauled completely.

B. Federal Judges May Appoint Liaison Counsel to Provide Managerial Assistance

Pressing administrative problems arise when MDLs involve multitudes of plaintiffs and attorneys. Matters that normally are handled easily, such as communicating with counsel, convening meetings, scheduling hearings, and managing document depositories, can be daunting. Typically, MDL judges minimize their burdens by assigning responsibility for administrative tasks to local plaintiffs' lawyers who know the ropes. The chosen attorneys are called "liaison counsel."

Multidistrict Litigation, 51 CONN. L. REV. 769, 773 (2019) ("Seizing on the lack of formal structures or individual protections, many have expressed concerns that MDL proceedings have become the Wild West of aggregation law[.]").

325. *In re National Prescription*, 956 F.3d at 844. Andrew Bradt and Calen Bennett contend that the rhetoric in the Sixth Circuit's opinion was taken from briefs submitted by the U.S. Chamber of Commerce and Lawyers for Civil Justice, organizations that have long campaigned against aggregate litigation and lobbied for tort reform. Andrew Bradt & Calen Bennett, *Adult Supervision? Opioids, Mandamus, and "Law Reform" in Multidistrict Litigation* (Oct. 25, 2020) (unpublished manuscript) (on file with the authors). If so, the chorus calling for MDL reform includes a range of voices, some of whom, including Professor Silver, have spoken loudly against tort reform for decades.

326. *See* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 28 TULANE L. REV. 2323, 2330 (2008) ("[J]ust like consolidation under Rule 42 of the Federal Rules of Civil Procedure, consolidation of individual cases in a transferee court by the MDL Panel pursuant to § 1407 'does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.'") (quoting Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496–97 (1933)).

327. *See supra* Part I.

The IP to appoint liaison counsel was first recognized in *MacAlister v. Guterma*,[328] which, employing the nomenclature of the day, referred to them as "general counsel." In *MacAlister*, the defendants in three actions that were consolidated under Rule 42 asked the trial judge to coordinate the litigation by appointing general counsel for the plaintiffs. Believing that no power to do so existed, the judge declined. On interlocutory review, the Second Circuit reversed, finding that the power was "within the clear contemplation of [Rule 42]" and could also be based on the "inherent authority of every court 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for the litigants.'"[329]

The power recognized in *MacAlister* was only to appoint a litigation manager. The Second Circuit based its holding, squarely and expressly, upon its understanding that plaintiffs' retained lawyers would continue to represent their clients on substantive matters.

> [G]eneral counsel is not substituted for the counsel of each party plaintiff's choice. The function of general counsel is merely to supervise and coordinate the conduct of plaintiffs' cases. The separate actions are not merged under the direction of one court appointed master of litigation—each counsel is still free to present his own case, to examine witnesses and to open and close before the jury, if there be one.[330]

Supervising and coordinating are the functions that liaison counsel perform today.

This power is not controversial. The FRCP give judges considerable freedom to process matters efficiently,[331] and IPs are properly used to handle managerial problems that the rules do not address. Because the power asserted in *MacAlister* facilitated the

328. MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958).

329. *Id.* at 68 (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)).

330. *See id.*; *see also id.* at 69 ("The benefits achieved by consolidation and the appointment of general counsel, i.e., elimination of duplication and repetition and in effect the creation of a coordinator of diffuse plaintiffs through whom motions and discovery proceedings will be channeled, will most certainly redound to the benefit of all parties to the litigation.").

331. *See* FED. R. CIV. P. 16(c)(2)(L), (P) (empowering federal judges to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve . . . multiple parties" and to "facilitat[e] in other ways the just, speedy, and inexpensive disposition of the action," respectively); *see also supra* notes 167–175, 235 and accompanying text (analyzing Rule 16).

litigation while also leaving retained lawyers free to represent their clients as they normally would, the decision to appoint general (liaison) counsel was appropriate.

C. Federal Judges Lack Inherent Power to Appoint Lead Attorneys

The conventional wisdom is that MDLs are "representative" proceedings in which federal judges possess inherent authority to empower lead counsel "to act for and to bind the cases that they represent," including those filed by plaintiffs who are not their signed clients.[332] On reflection, though, it is clear that no such power exists. Judges cannot lawfully burden plaintiffs with virtual representation by lead attorneys they never retained.

1. Lead Attorneys Exercise Extensive Control of Substantive Matters

MacAlister recognized the IP to appoint liaison counsel whose responsibilities are purely administrative or managerial. As shown, the court predicated its holding on the belief that plaintiffs' retained lawyers would continue to represent their clients in the usual ways. Today, however, MDL judges completely ignore the limit *MacAlister* placed on appointed counsels' authority. They burden plaintiffs with virtual representation by lead attorneys who displace individually retained lawyers and act in their stead. This practice is so well established that "the literature on complex litigation takes [such appointments] for granted."[333]

Lead attorneys' powers and responsibilities are plenary. They

> [f]ormulat[e] . . . and present[] positions on substantive and procedural issues during the litigation. Typically they act for the group . . . in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.[334]

332. PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 7:13 (2021).

333. David L. Noll, *What Do MDL Leaders Do?: Evidence From Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 440 (2020).

334. MANUAL, *supra* note 26, at § 10.221. The *Manual* also contains a sample appointment order that sets out the powers and responsibilities in more detail. *Id.* § 40.22.

Appointment orders document the breadth of lead attorneys' commissions. To illustrate, the order entered in the massive Roundup MDL empowers lead counsel to "[e]nter into stipulations with the defendants"; "[s]ign and file all pleadings relating to all actions in the MDL"; "[d]etermine the plaintiffs' position on matters arising during the pretrial proceedings"; "[c]oordinate and conduct discovery on behalf of all plaintiffs"; "[l]iaise with defense counsel"; "engage in settlement negotiations with the defendants"; "propose . . . a plan of allocation"; and "[c]onsult with and employ expert witnesses."[335] It also requires non-lead lawyers to obtain lead attorneys' permission before communicating with the defendant or commencing settlement negotiations.[336]

MDLs thus afford non-lead lawyers' clients their day in court only indirectly. Judges put control of proceedings in the hands of lead attorneys and attribute their actions to all plaintiffs. By this means, all plaintiffs are deemed to have been able to file complaints, take discovery, offer and examine witnesses, argue motions, etc. As Paul Rheingold, an experienced mass tort lawyer, observed, "the court sets the ground rules for a steering committee, and the decision of the committee binds all of the cases made part of the litigation."[337]

2. Lead Attorneys Displace Non-Lead Lawyers

In addition to being plenary, lead attorneys' dominion is exclusive.[338] Professor Lynn Baker and Stephen Herman, a prominent lawyer who often receives judicial appointments, trace

335. Pretrial Order No. 4: Plaintiffs' Leadership Structure at 1–3, *In re* Roundup Prods. Liab. Litig, No. 16-md-02741 (N.D. Calif. Dec. 7, 2016).

336. *Id.* at 3.

337. Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1, 3 (1982).

338. The sample appointment order in the *Manual* states that "Plaintiffs' lead counsel shall be generally responsible for coordinating the activities of plaintiffs during pretrial proceedings and shall . . . present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) to the court and opposing parties the position of the plaintiffs on all matters arising during pretrial proceedings[.]" *See* MANUAL, *supra* note 26, at § 40.22. The object of excluding non-lead lawyers is obvious. *See* Noll, *supra* note 333, at 455–56 (describing the restrictions that appointment orders impose on non-lead lawyers). The sample order also provides that non-lead lawyers who disagree with lead counsel "may present written and oral arguments, conduct examinations of deponents, and otherwise act separately on behalf of their clients as appropriate." MANUAL *supra* note 26, at § 40.22. None of the appointment orders we reviewed included this language.

exclusivity to appointment orders, which state "that the MDL leadership attorneys are 'the only attorneys permitted' to undertake various tasks."[339] Lead attorneys are supposed to consult non-lead lawyers, but the conversations are invariably one-sided because the latter cannot order the former to do anything. A disgruntled non-lead lawyer can appeal to a presiding judge, but this option is rarely effective. A non-lead lawyer who "disagrees with a strategic choice made by lead counsel . . . faces a steep uphill battle to reassert control over [a] representation."[340] Consequently, the "court-appointed lawyers on the 'plaintiffs' steering committee' [] make the key strategic decisions and lead the negotiations with the defendant, with little to no input . . . from lawyers on the periphery."[341]

Disagreements between lead attorneys and non-lead lawyers matter greatly because actions taken by the former preclude subsequent efforts by the latter. For example, a non-lead lawyer who believes that a lead attorney's deposition of an important witness was ineffective cannot depose the witness again. Nor can non-lead lawyers remake lead attorneys' innumerable judgment calls. "Do overs" are forbidden because the point of the MDL procedure is to make litigation more efficient by eliminating duplication.[342]

339. *See* Baker & Herman, *supra* note 19, at 480 (quoting Case Mgmt. Order No. 1, *In re* Bard IVC Filters Prod. Liab. Litig., No. 2:15-md-02641 (D. Ariz. Oct. 30, 2015)); *see also id.* at 474 ("[E]ffectively if not explicitly, the [appointment] order will prohibit a claimant's [individually retained counsel] from engaging in certain aspects of a claimant's representation.").

340. Redish & Karaba, *supra* note 324, at 143.

341. Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1263 (2017) [hereinafter Bradt & Rave, *The Information-Forcing Role*]; *see also* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1314 (2018) ("[Court-appointed lead] lawyers make most of the important strategic decisions on what discovery to pursue, which experts to hire, which cases to push forward towards bellwether trials, and lead the negotiations toward possible global settlements. So, although each plaintiff in the MDL has hired his or her own lawyer, those lawyers typically have little input into how their clients' individual cases are litigated for as long as they remain consolidated in the MDL. They are at the mercy of the lead lawyers until the MDL judge determines that pretrial proceedings are over or the parties reach some sort of global settlement agreement.").

342. Noll, *supra* note 333, at 454 ("Designating particular attorneys as leaders [would do] little to address coordination problems on the plaintiffs' side if non-lead attorneys [were] free to engage in discovery and motion practice, engage with the court and defendants, and generally litigate however they want.").

3. The Practice of Appointing Lead Attorneys Rests on a Misreading of MacAlister v. Guterma, *the Seminal Case*

The fact that MDL courts routinely appoint lead attorneys who displace claimants' retained counsel does not establish that the practice has a sufficient legal basis. *MacAlister* did *not* hold that judges' IPs extend this far. As shown, the Second Circuit predicated its decision in support of the power to appoint general (liaison) counsel on the expressed belief that plaintiffs' retained lawyers would continue to act for their clients.[343]

The first edition of the *Manual for Complex Litigation* applied the rule of *MacAlister* correctly.[344] It advised courts to appoint liaison counsel but said nothing about lead attorneys, and it expressly discouraged judges from "compel[ling] a party to authorize counsel other than his own to make admissions by stipulations in matters of substance."[345] (To see how greatly MDL judges have expanded their powers, consider that the appointment order entered in the Roundup MDL authorized lead attorneys to "[e]nter into stipulations with the defendants.")

To streamline the consideration of substantive matters, the first edition embraced an organic approach. Judges were to "urge counsel to cooperate to eliminate unnecessary motions, objections or other actions which would delay the discovery that will ultimately be required" and to adopt a practice of requiring lawyers "to meet and confer freely to resolve differences over forms and areas of discovery without the presence and intervention of the court."[346] If the authors of the first edition considered the possibility of imposing lead attorneys on plaintiffs and their retained counsel, they did not embrace it.

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343. *See supra* notes 328–330 and accompanying text.

344. The first edition cited *Rando v. Luckenbach Steamship Co, Inc.*, 25 F.R.D. 483 (E.D.N.Y. 1960), in support of the judicial power to appoint liaison (general) counsel. MANUAL FOR COMPLEX LITIGATION § 1.9 n.27 (1st ed. 1969). In turn, *Rando* relied on *MacAlister* when rejecting an objection to the appointment of general counsel brought by retained lawyers who feared being displaced. *Rando*, 25 F.R.D. at 484 (quoting *MacAlister* to the effect that "general counsel is not substituted for the counsel of each party plaintiffs' choice").

345. MANUAL FOR COMPLEX LITIGATION §§ 1.9 & 1.10 (1st ed. 1969).

346. *Id.* § 1.10. The possibility of allowing lawyers to create governance structures for MDLs is discussed further below. *See infra* notes 353–59 and accompanying text.

In later years, courts forgot or ignored the limitation that figured so prominently in *MacAlister*. For example, in *Vincent v. Hughes Air W., Inc.*, the Ninth Circuit wrote:

> *MacAlister v. Guterma*, 263 F.2d 65 (2d Cir. 1958), represented "the first time that the power of the courts to order consolidation for the pre-trial stages and the appointment of general (lead) counsel to supervise and coordinate the prosecution of plaintiffs' case (was) presented to a federal appellate court." *Id.* at 67. Defendants in a stockholders' derivative suit moved the district court for an order consolidating various related actions and appointing lead counsel for the consolidated plaintiffs. The district court refused. On appeal, the Second Circuit held that the district court had the "inherent powers" to consolidate and appoint lead counsel . . .[347]

By equating "general counsel" with "lead counsel," the Ninth Circuit made a colossal mistake.[348] The general counsel contemplated in *MacAlister* had only the managerial powers that liaison counsel exercise today. Cases decided after *Vincent* carried forward the Ninth Circuit's error.[349]

4. Reconsidering the Inherent Power to Appoint Lead Attorneys

Because the belief that federal courts have IP to appoint lead attorneys is based on a misreading of the seminal case, the practice must be reconsidered, and the analysis of its legality must begin by recognizing that federal courts have no general IP to force lawyers

347. Vincent v. Hughes Air W., Inc., 557 F.2d 759, 774 (9th Cir. 1977).

348. The Fifth Circuit made the same blunder in *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1014 (5th Cir. 1977) (mischaracterizing *MacAlister* as "the leading case on the court's power to appoint and rely on lead counsel"). Even the Second Circuit has conflated general counsel with lead counsel. *See* Farber v. Riker-Maxson Corp., 442 F.2d 457, 459 (2d Cir. 1971) (incorrectly stating that "in *MacAlister* . . . we described the salutary and indeed essential functions performed by lead counsel . . . in supervising and coordinating the conduct of a consolidated or class action").

349. *See, e.g.*, *In re* Oclaro, Inc. Derivative Litig., No. C-11-3176 EMC, 2011 WL 4345099, at *2 (N.D. Cal. Sept. 14, 2011) ("[T]he Ninth Circuit has held that a court has the inherent power to consolidate actions and appoint lead counsel to supervise and coordinate prosecution of a case."); La. Mun. Police Emps. Ret. Sys. v. Wynn, No. 212CV509JCMGWF, 2012 WL 12965932, at *2 (D. Nev. June 6, 2012) (repeating this language from *Vincent*); *In re* Bendectin Litig., 857 F.2d 290, 297 (6th Cir. 1988) (citing *Vincent*, 557 F.2d 759) ("In complex cases, it is well established that the district judge may create a Plaintiffs' Lead Counsel Committee."); Sexton *ex rel.* Jones Soda Co. v. Van Stolk, No. C07-1782, 2008 WL 1733242, at *1 (W.D. Wash. Apr. 10, 2008) (citing *Vincent*, 557 F.2d 759) ("[C]ourts have the inherent power to consolidate actions and appoint lead counsel in order to supervise and coordinate the prosecution of a derivative action.").

upon litigants. In the criminal context, judges cannot require *pro se* defendants to accept representation they do not want, the Court having held that the Constitution entitles them to represent themselves.[350] And in both the civil and criminal realms, federal courts have repeatedly emphasized the importance of representation by counsel of choice.[351] Knowing that "lawyers are not fungible," judges have long been reluctant to take steps that would deprive parties of their retained attorneys.[352]

In keeping with the analysis in Part I, MDL courts can have IP to appoint lead attorneys only if doing so is essential to their functioning. This condition is not met, however, because consolidated lawsuits can be managed, and have been managed, in other ways. For example, plaintiffs' lawyers can work together cooperatively without having leaders forced upon them by courts.[353] Rheingold reports that attorneys "set up litigation groups involving such diverse products as tampons, Ford transmissions, . . . fuel tanks, Jeeps, Syntex baby foods, Agent Orange, Bendectin and DES."[354] The *Manual for Complex Litigation* agrees. It recognizes that "attorneys [may] coordinate their activities without the court's assistance" and adds that "such efforts should be encouraged."[355]

The Roundup MDL provides a contemporary example of plaintiffs' lawyers' ability to coordinate organically. When applying for appointment as lead counsel, Aimee Wagstaff explained that

350. Faretta v. California, 422 U.S. 806 (1975).

351. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (holding that the erroneous disqualification of criminal defendant's counsel of choice violated the Sixth Amendment and required a new trial); Venegas v. Mitchell, 495 U.S. 82 (1990) (requiring payment of a contingent fee that exceeded the fee award because a larger fee was needed to secure representation by the chosen attorney); Ambush v. Engelberg, 282 F. Supp. 3d 58, 62 (D.D.C. 2017) (noting that disqualification motions are disfavored because they deprive parties of representation by counsel of choice).

352. *See* United States v. Hughey, 147 F.3d 423, 433 (5th Cir. 1998); *see also* Nw. Nat. Ins. Co. v. Insco, Ltd., 866 F. Supp. 2d 214, 221 (S.D.N.Y. 2011) ("Courts in this district have long acknowledged that disqualification has an immediate adverse effect on the client by separating him from counsel of his choice. Moreover, I understand that . . . lawyers are not fungible."); United States v. Gonzalez-Lopez, 399 F.3d 924, 928–29 (8th Cir. 2005), *aff'd and remanded*, 548 U.S. 140 (2006) ("Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney."); United States v. Mendoza-Salgado,964 F.2d 993, 1015–16 (10th Cir. 1992) (same).

353. *See* Rheingold, *Litigation Groups*, *supra* note 337, at 1; Paul D. Rheingold, *The MER/29 Story – An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968).

354. Rheingold, *Litigation Groups*, *supra* note 337, at 1.

355. MANUAL, *supra* note 26, at § 10.22.

she and other lawyers had voluntarily worked as a team, starting more than a year before the MDL was created:

> A team of Plaintiffs' attorneys across the nation has been working together to advance this litigation. This team filed the first Roundup® cases, filed most of the federal cases on file as of the date of PTO 1, has extensive experience leading and participating in MDLs generally, and is comprised of experienced trial attorneys with vast experience in mass torts and bellwether trials. . . . The attorneys comprising this team developed the factual and legal pleadings that underlie this litigation, successfully briefed and argued the motions to dismiss filed by Monsanto in federal districts (and also in two state actions), have selected a document vendor and are jointly reviewing documents, and have retained experts. Our team has a proven track record of working collaboratively and efficiently in large, complex cases with one another and with opposing counsel, and in this particular case we have worked together seamlessly and collaboratively for the past 13 months. We have met dozens of times to advance the speedy and just adjudication of these cases. We have created a joint litigation fund, housed in Denver at Andrus Wagstaff, and are mindful of containing expenses. We believe the team's efforts have succeeded to date, evidenced by the fact that, to our knowledge, all firms with cases on file as of this filing support appointment of the team in the proposed positions.[356]

No court ordered the lawyers to cooperate. They did so because working together was advantageous. The collaboration operated so smoothly that when the time came to appoint lead counsel in the Roundup MDL, Wagstaff's application was unchallenged and unopposed.[357]

The ability of MDL *defendants* to cooperate without having lead attorneys foisted upon them provides additional evidence that private orderings can succeed. As Professor David Noll reports,

356. Letter from Aimee H. Wagstaff, *In re* Roundup Prods. Liab. Litig., No. 16-md-02741 (N.D. Calif. Oct. 20, 2016).

357. *See* Plaintiffs' Case Management Statement, *In re* Roundup Prods. Liab. Litig., No. 16-md-02741 (N.D. Calif. Oct. 27, 2016); *see also* Pretrial Order No. 236: Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage at 3, *In re* Roundup Prods. Liab. Litig., No. 16-md-02741 (N.D. Calif. June 21, 2021) (reporting that the selection of lead attorneys was easy because the candidates had formed a single slate).

"leadership appointments on the defense side are rare."[358] Judges refrain from appointing lead defense attorneys even when many defendants are sued. In the Opiates MDL, defendants number in the hundreds or possibly thousands, but the court-approved structure on the defense side includes only liaison counsel and steering committees.[359] The MDL has proceeded in orderly fashion even so. On matters of common interest or concern, the defendants have self-organized into groups that are led by the largest entities. For example, the three largest distributors, AmerisourceBergen, McKessen, and Cardinal Health, draft motions and replies that the smaller ones join.

In sum, the practice of appointing lead attorneys who displace plaintiffs' retained lawyers lacks a compelling basis in federal courts' IPs. It is founded upon an incorrect reading of *MacAlister v. Guterma*, which approved the appointment of only counsel with managerial powers. And the IP cannot be derived from first principles because MDL courts can satisfy the need for coordinated action by non-coercive means.

D. The MDL Statute Confers No Authority to Appoint Lead Attorneys

When considering whether the MDL statute empowers federal judges to appoint lead attorneys, analysis must begin with two facts. First, this law says almost nothing about transferee judges' powers. Second, on the lone occasion when the statute mentions MDL judges' powers, it indicates that they possess only the usual complement. Paragraph (b) of 28 U.S.C. § 1407 states that "[the] judge . . . [to whom transferred] actions are assigned, . . . may exercise *the powers of a district judge* in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings."[360] The import of the phrase "the powers of a district judge" is plain. If the statute had endowed MDL

358. Noll, *supra* note 333, at 458.

359. *See* The Manufacturer and Distributor Defendants' Joint Motion Regarding Appointment of Steering Committees and Defendants' Co-Liaison Counsel, *In re* Nat'l Prescription Opiate Litig., No. 17-md-02804 (N.D. Ohio Nov. 4, 2022) (requesting the appointment of liaison counsel and steering committees); Order [non-document] Granting Physician Defendants' and Manufacturer and Distributor Defendants' Motions to Approve Liaison Counsel and Steering Committee (Related Doc #23, 24), *id.* (Dec. 29, 2017).

360. 28 U.S.C. § 1407 (emphasis added).

courts with special capacities, other language, such as "the powers conferred herein," would have been required.

Two other considerations also weigh heavily against the possibility of deriving the authority to appoint lead attorneys from the statute. One is that the class action provided a model for placing lead counsel in charge of a mass proceeding that could have been adapted for use in MDLs but was not. The other is that Congress enacted the law in 1968, the first edition of the *Manual* appeared in 1969, and the same judges contributed to both.[361] The *Manual's* failure even to mention lead attorneys, therefore, clearly indicates a consensus that MDL judges had no power to appoint them.

The implication just stated is irresistible. The need to coordinate the actions of plaintiffs and lawyers in MDLs was at the forefront of the minds of the judges who pressed for the legislation. Even so, the statute conferred no appointment power that district court judges did not already possess. Professor Andrew Bradt's historical study explains why. If plaintiffs' attorneys had known they would lose control of their cases, they would have blocked the statute.[362] To gain passage, the judges compromised, and their decision must frustrate any attempt to derive the power to appoint lead counsel from the statute today.

E. The Federal Rules of Civil Procedure Do Not Empower Judges to Appoint Lead Attorneys

When appointing lead attorneys, MDL judges often purport to derive their authority from Rules 16 and 42 of the FRCP. Whether these rules confer this power must therefore be considered. Intuitively, the answer should be no because a denial of representation by retained lawyers would violate the Due Process Clause. As the Court stated in *Powell v. Alabama*: "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to

361. Andrew Bradt, "*A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 838, 903–04 (2017) [hereinafter Bradt, *Radical Proposal*] (explaining that Judge William H. Becker of the Western District of Missouri was one "of the statute's two principal drafters" and that he "[took] the lead in the first draft of what would become the *Manual for Complex and Multidistrict Litigation*").

362. *Id.* at 839 ("The papers reveal the judges devised a political answer to th[e] problem [of the norms of party control and decentralized district courts]: consolidation for pretrial proceedings with eventual remand for trial. Such a 'limited transfer' structure would insulate the statute from both the resistance of plaintiffs' lawyers who might fear loss of control over their cases (and their fees) and district judges who might fear invasion of their jurisdiction.").

hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."[363]

One could argue that the denial of representation by counsel of choice is not arbitrary because consolidating power in the hands of lead attorneys is essential to the management of MDLs. Judges have often offered this rationale when appointing lead attorneys in Rule 42 consolidations. They could also cite it to support appointment orders issued pursuant to Rule 16(c)(2)(L), which authorizes federal courts to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve . . . multiple parties."[364]

One problem with the assertion that judges cannot manage MDLs without appointing lead counsel was identified above. Lawyers can and have coordinated their efforts organically, that is, without having lead attorneys forced upon them. The practice of appointing lead attorneys without giving lawyers an opportunity to plan for the efficient management of MDLs assumes that coercion is required when it may not be.

A deeper problem with grounding the power to appoint lead attorneys in the FRCP stems from the practice of treating MDLs as representative proceedings in which such attorneys act with binding effect for all plaintiffs, including those who are not their clients. The practice reflects the tendency to analogize MDLs to class actions, which are the paradigmatic representative proceedings. The resemblance between the two procedures is so strong that many judges have taken to calling MDLs "quasi-class actions" and have supported their assertions of power by citing Rule 23.[365]

Unfortunately, the practice of treating MDLs as representative proceedings ignores distinctive features of class suits. One is that Rule 23 expressly empowers federal courts to appoint class counsel.[366] Neither Rule 16 nor Rule 42 contains a similar provision.[367] Another is that in MDLs but not class actions, judicial orders appointing lead

363. Powell v. Alabama, 287 U.S. 45, 69 (1932).

364. FED. R. CIV. P. 16(c)(2)(L).

365. *See* Silver & Miller, *supra* note 16.

366. *See* FED. R. CIV. P. 23(g).

367. *Compare* FED. R. CIV. P. 23(g) *with* FED. R. CIV. P. 16 *and* FED. R. CIV. P. 42.

attorneys deprive many plaintiffs of representation by counsel of choice. All plaintiffs who hire non-lead lawyers suffer this fate. A third is that non-lead lawyers' clients have no assurance that lead attorneys will represent them adequately because neither Rule 16 nor Rule 42 imposes the protections that class members enjoy. The habit of treating MDLs as quasi-class actions ignores these differences or, at least, gives them no weight.[368]

A final and crippling problem with the analogy is that because MDLs are not class actions, the FRCP cannot empower judges to treat them as representative proceedings. In *Taylor v. Sturgell,*[369] the Supreme Court "signaled the demise of *all* versions of virtual representation" (VR) except the class suit.[370]

In its classic form, VR occurs when a judgment in a suit brought by one individual is deemed to bind a different person with similar interests who was neither a party to the prior action nor in privity with the plaintiff. In MDLs, VR reaches more broadly. The steps that lead attorneys take are deemed to satisfy the participatory rights of all claimants, including those who are not their clients. For example, a deposition conducted by a lead attorney is treated as having been taken by all plaintiffs, and this attorney's argument on a motion for summary judgment counts as though all plaintiffs had an opportunity to be heard. MDLs serve their intended purpose, which is to conserve resources by eliminating repetition and duplication, by applying VR broadly.

368. *See* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 NYU L. REV. 296 (1996) (contending that the class action paradigm, in which plaintiffs agree to be represented by lead counsel, cannot easily be applied to MDLs wherein plaintiffs retain their hired lawyers—and that this difference creates thorny problems for courts in allocating attorneys' fees).

369. Taylor v. Sturgell, 553 U.S. 880, 901 (2008).

370. *See* Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemmas*, 84 NOTRE DAME L. REV. 1877, 1878 (2009); *see also* Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 71 (2013) ("The Supreme Court has made it abundantly clear that it intends to police the line, at least for purposes of non-party preclusion, between class actions certified under Rule 23, and other actions that involve merely 'virtual' representation.") (citing *Taylor v. Sturgell*). Post-*Taylor* cases agree. *See, e.g.*, Briscoe v. City of New Haven, 654 F.3d 200, 203 (2d Cir. 2011) ("*Taylor* enumerated the six recognized categories of nonparty preclusion, . . . but rejected . . . an exception for instances of 'virtual representation.'"); *In re* Consol. Salmon Cases, 688 F. Supp. 2d 1001, 1008 (E.D. Cal. 2010) ("The Supreme Court has [] rejected 'virtual representation' as a basis for finding privity in the preclusion context.") (citing *Taylor*).

Because MDLs are not class actions, however, they fall outside the exception the Court recognized in *Sturgell*. They also run afoul of the Court's specific prohibition of "a common-law kind of class action" that

> would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in . . . Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to "create *de facto* class actions at will."[371]

By drawing analogies to class actions, that is precisely what MDLs' judges do—create common law representative proceedings. If it is true that courts cannot manage MDLs without appointing lead attorneys to speak for non-lead lawyers' clients, then the procedure always denies due process and must be discontinued.

The problem just described stems from the failure of MDL's proponents on the bench and in the academy to attend to the need for attribution, which occurs when lawyers' statements and actions bind their clients.[372] In conventional lawsuits, attribution happens so routinely as to be invisible. An attorney's receipt of notice satisfies a client's right to service. A lawyer's argument on a motion satisfies a client's right to be heard. The law treats these actions and infinitely many others as though litigants perform them directly because parties authorize attorneys to speak and act for them with binding effect. But non-lead lawyers' clients do not hire lead attorneys. Consequently, no legally recognized ground exists for attributing lead attorneys' actions to these plaintiffs. The practice of treating MDLs as representative proceedings is a failed attempt to create one.

Many rejoinders might be offered to the point just made. One might contend, for example, that virtual representation helps plaintiffs because lead attorneys are vastly better than non-lead lawyers. Even assuming the truth of the factual assertion, this argument fails because the actions of an outstanding attorney who lacks authority to speak for a plaintiff cannot satisfy the latter's right to be heard.

371. *Taylor*, 553 U.S. at 901 (quoting Tice v. Am. Airlines, Inc., 162 F.3d 966, 973 (7th Cir. 1998)).
372. RESTATEMENT (THIRD) OF AGENCY Intro. Note (2006).

Alternatively, one might argue that MDLs do not saddle plaintiffs with VR because, by failing to object, retained lawyers adopt lead attorneys' actions as their own. Consent might also be inferred when retained lawyers refrain from supplementing lead attorneys' filings, an option that case management orders usually preserve.

The adoption rejoinder has several defects. First, it infers far too much from retained lawyers' silence. If they could prevent lead attorneys from usurping their roles, their failure to act might meaningfully reflect a desire to cede control. But they cannot. Retained counsel can neither prevent MDL judges from appointing lead attorneys, tell lead attorneys what to do, avoid having lead attorneys' actions and filings attributed to their clients, nor insist on being able to handle their clients' matters personally.[373] Because retained lawyers can accomplish nothing of importance by objecting, their silence is meaningless.

Second, retained attorneys have a non-delegable fiduciary responsibility to exercise subjective judgment for the benefit of their clients. "Lawyers are not fungible."[374] By hiring one lawyer rather than another, a client expresses the desire to benefit from the former's judgment. The duty to make discretionary calls personally is non-delegable for this reason. A retained lawyer who wants a court-appointed attorney to make decisions requiring the application of judgment must obtain a client's consent before transferring the responsibility.[375] But in MDLs, clients' consent is never sought. The "silence implies consent" rejoinder thus puts all retained lawyers in violation of a core professional responsibility. Clients' consent is required, not the tacit agreement of their lawyers.

373. *See, e.g.*, *In re* Korean Air Lines Co., Ltd., 642 F.3d 685, 701 (9th Cir. 2011) ("A district court's case management orders are generally not appealable on an interlocutory basis."); *In re* Zyprexa Prod. Liab. Litig., 594 F.3d 113, 117 (2d Cir. 2010) (denying interlocutory review and mandamus relief on a challenge to a district court's case management order requiring a holdback from settlement funds to compensate lead attorneys); *In re* Westwood Shake & Shingle, Inc., 971 F.2d 387, 389 (9th Cir. 1992) (denying interlocutory review of a case management order appointing counsel in a bankruptcy proceeding).

374. United States v. Gonzalez-Lopez, 399 F.3d 924, 928 (8th Cir. 2005), *aff'd and remanded*, 548 U.S. 140 (2006) (quoting United States v. Mendoza-Salgado, 964 F.2d 1014, 1015–16 (10th Cir. 1992)).

375. The prohibition on delegation without principals' permission applies to all agents. *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 274 (4th ed. 1851) ("A principal employs a broker from the opinion he entertains of his personal skill and integrity; and a broker has no right, without notice, to turn his principal over to another, of whom he knows nothing.").

Third, a hallmark of VR is that represented persons cannot control litigation affecting their interests. For example, absent class members cannot tell class counsel what to do.[376] Plaintiffs whose cases are consolidated in MDLs cannot give lead attorneys orders either. They cannot even rely on lead attorneys to protect their interests because, with the support of MDL judges, lead attorneys deny owing them a fiduciary responsibility. In this respect, MDLs are inferior to, and more dangerous than, class actions, where the fiduciary responsibilities of class counsel are solidly established.

In sum, *Sturgell* prohibits the application of VR in non-class proceedings "shorn of the procedural protections prescribed in . . . Rule 23."[377] Because MDLs lack these protections, due process is denied when lead attorneys' actions are treated as binding retained lawyers' clients. To solve this problem, MDL judges must allow retained lawyers to represent their clients in the usual way, as the Second Circuit expected when it recognized the power to appoint liaison counsel in *MacAlister*.[378]

F. Federal Judges Lack Inherent Power to Compensate Lead Attorneys

MDL judges claim to possess IP to regulate lawyers' fees and do so extensively. They free up funds with which to compensate lead attorneys by reducing non-lead lawyers' fees. Sometimes, they cut non-lead lawyers' fees even further when, in their assessment, contracted-for payments are excessive.[379] These practices serve MDL judges and lead attorneys well by giving the former extraordinary leverage over the lawyers who appear before them and enabling the latter to collect billions of dollars in fees annually. Although initially novel and controversial, these practices quickly became settled, as MDL judges built up a corpus of supporting common law decisions, and appellate courts showed great reluctance to disturb practices that were disposing of cases en masse.

376. The status and powers of named plaintiffs and absent class members are discussed in Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1484.

377. Taylor v. Sturgell, 553 U.S. 880, 901 (2008).

378. *See supra* notes 343–349 and accompanying text.

379. *See* Cirino v. City of New York (*In re* World Trade Ctr. Disaster Site Litig.), 754 F.3d 114, 126–27 (2d Cir. 2014) (sustaining the trial court's discretionary decision to decrease plaintiffs' attorneys' fees from 33% to 25% of the settlement amount) (citing *In re* Goldstein, 430 F.3d 106, 110 (2d Cir. 2005)).

Then, in mid-2021, Judge Vincent Chhabria declared that the emperor had no clothes. After raising the possibility that judges "are too quick to assume that MDL courts can do whatever they want," he carefully examined the justifications offered in defense of the practice of compensating lead attorneys and found most of them wanting.[380] Neither the MDL statute, the common fund doctrine, nor the existence of free-riders, he concluded, empower MDL judges to holdback funds from non-lead lawyers' fees for the purpose of paying lead attorneys.[381] He questioned the need for supplementation too, pointing out that the lead attorneys are "likely making so much from settling their own 'inventories' that they can each afford to buy their own island" and adding that, because of their positions, their cases command higher values and generate larger fees than those being handled by non-lead lawyers.[382] Until Judge Chhabria's opinion appeared, only MDL critics made points like these.[383]

In the end, however, Judge Chhabria accepted the contention that MDL courts have IP to transfer funds. Even then, he broke with tradition by emphasizing the power's limits. Judges could use it only as needed to manage cases in federal MDLs, not to reach lawyers with related state court cases as the lead attorneys wanted and other courts had done.[384] He also stressed that the power exists only if and to the extent that lead attorneys' efforts enhance a monetary award, and that it has nothing to do with the IP to regulate lawyers, which concerns misconduct.[385]

Judge Chhabria's opinion is so clear and such an important addition to MDL jurisprudence that we are reluctant to suggest that it has any flaws. But even though his analysis of MDL judges' IP to compensate lead attorneys is vastly better than any other judicial treatment, it left an important matter unexplored. Judge Chhabria accepted uncritically the belief that MDL judges have IP to appoint

380. Pretrial Order No. 236: Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage at 27, *In re* Roundup Prods. Liab. Litig., No. 16-md-02741 (N.D. Calif. June 21, 2021) [hereafter Chhabria Order].

381. *Id.*

382. *Id.* at 29.

383. *See* Silver & Miller, *supra* note 16.

384. Chhabria Order, *supra* note 379, at 32.

385. *Id.* at 33.

lead attorneys, even though the practice rests on a gross misreading of *MacAlister v. Guterma*, as shown in Part II.C.3.

He also erred by agreeing that the IP to appoint lead attorneys implies the power to pay them. A typical statement of this idea appears in the opinion awarding common benefit fees in *In re Chinese-Manufactured Drywall Prod. Liab. Litig*.

> [T]he Court [] finds authority to assess common benefit attorney fees in its inherent managerial authority . . . The Fifth Circuit has long recognized that a court's power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison counsel and to compensate them for their work. . . .[386]

Descriptively, this statement is correct. In *In re Air Crash Disaster at Florida Everglades*, the Fifth Circuit did state that a district court's power to appoint lead attorneys would be "illusory if it [depended] upon lead counsel's performing the duties desired of them for no additional compensation."[387] The problem is that the Fifth Circuit was wrong.

It is plain that a court's need for managerial assistance does not logically entail a power to compensate attorneys who provide it. Judges could fill plaintiffs' steering committees with lawyers who agree to serve as volunteers.[388] In *Florida Everglades*, the Fifth Circuit recognized this possibility but dismissed it on the policy ground that claimants could have no assurance that uncompensated lawyers would perform well.[389] One problem with this assertion is that it focuses attention on adequacy of representation rather than judges' ability to manage their proceedings. IPs exist to facilitate the latter, not to guarantee the former. Another problem is that state court judges have managed many large consolidations successfully without awarding common benefit fees. Their experience shows that the option of having lead attorneys serve as volunteers is practical, not fanciful.

386. *In re* Chinese-Manufactured Drywall Prod. Liab. Litig., 424 F. Supp. 3d 456, 496 (E.D. La. 2020). The final sentence in this passage also supports our contention that lead attorneys are expected to use their powers for the benefit of all plaintiffs, not just those who are their signed clients.

387. *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1016 (5th Cir. 1977).

388. Silver & Miller, *supra* note 16, at 158.

389. *Florida Everglades*, 549 F.2d at 1020–21.

To illustrate, in California, which is often ravaged by fires, courts have created many Judicial Council Coordination Proceedings (JCCPs) to deal with the resulting multitudes of lawsuits. In many of these JCCPs, lead attorneys have served while receiving fees from their signed clients only. The JCCPs created in the aftermath of the 1993 Guejito Fire, the 2007 San Diego Fires, the 2013 Powerhouse Fire, the 2015 Butte Fire, the 2017 North Bay Fires, and the 2018 Woolsey Fire all operated this way.[390] In New Mexico, the 2011 Las Conchas Fire Consolidated Litigation, which lasted six years and included a jury trial, was also managed without the payment of common benefit fees.[391]

Texas judges also have extensive experience with MDLs. Following the enactment of legislation authorizing transfers of related cases, "Texas MDL has been used to consolidate thousands of cases into scores of MDL proceedings."[392] The subject matters covered include insurance coverage for losses inflicted by storms, opioid abuse, fraudulent marketing of vehicles with diesel engines, failures to pay royalties to owners of oil-bearing lands, wildfires, pipeline taxes, the Deepwater Horizon disaster, and many others.[393]

Texas's rules are highly detailed. They give judges[394] authority to decide "all pretrial matters," including "jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions *in limine*), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment,

390. Email from Gerald Singleton, Singleton Law Firm, to Charles Silver (Oct. 21, 2020, 10:37 AM) (on file with the authors). One of us (Silver) provided an expert report in support of Mr. Singleton's opposition to the entry of a common benefit order in the JCCP created to handle the Southern California Fire Cases. *See* Expert Report of Professors Andrew Kull and Charles Silver on Management of Attorneys' Fees, Southern California Fire Cases, No. 4965 (Cal. Super. Ct. June 25, 2020).

391. *In re* Las Conchas Fire v. Jemez Mountains Elec. Coop., Inc., No. D-1329-cv-201201665 (N.M. Dist. Ct. filed Aug. 3, 2012). Docket available at *Case Lookup*, N.M. CTS., https://caselookup.nmcourts.gov/caselookup/app?component=cnLink&page=SearchResults&service=direct&session=T&sp=SD-1329-CV-201201665 (last visited Oct. 2, 2020).

392. D. Theodore Rave & Zachary D. Clopton, *Texas MDL*, 24 LEWIS & CLARK L. REV. 367, 368 (2020); s*ee also* Stephen G. Tipps, *MDL Comes to Texas*, 46 S. TEX. L. REV. 829 (2005).

393. For a list of Texas MDLs, see *Available Multidistrict Litigation Cases*, TEX. JUDICIAL BRANCH, https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/available-multidistrict-litigation-cases/ (last visited Oct. 2, 2020).

394. These courts are referred to as "pretrial courts." *See* Tex. R. of Jud. Admin. 13.2(e) (2019).

and settlement)."[395] They also spell out the MDL court's managerial powers and duties. For example, they instruct judges to conduct hearings for the purpose of creating case management orders "at the earliest practical date" and advise them to address in their orders "all matters pertinent to the conduct of the litigation," including dates for "settling the pleadings," "scheduling preliminary motions," "issuing protective orders," and nine other topics.[396] The rules even authorize MDL judges to set dates at which cases will be tried in transferor courts after being remanded.[397]

Missing from the details, however, is any mention of common benefit fee awards. Judges are expressly authorized to "appoint[] organizing or liaison counsel" but are given no power to pay them.[398] Because the practice of granting common benefit awards was well-established in both federal MDLs and federal and state class actions when Texas enacted its MDL rules, the failure to provide for them in Texas's MDL statute is telling.

In keeping with the rules' silence, Texas judges have run many MDLs without common benefit awards. The list includes: In re: Ford Motor Company 6.0L Diesel Engine Litigation;[399] In re: Volkswagen Clean Diesel Litigation: Consumer Case;[400] In re: Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, and Products Liability Litigation;[401] In re Farmers Insurance Company Wind/Hail Storm Litigation; In re State Farm Lloyds' Hidalgo County Hail Litigation; In re Allstate Lloyds' and Allstate Fire and Casualty Company Hidalgo County Hail Litigation; and many others.[402] The lawyers

395. *See id.* at 13.6(b); *see also id.* at 13.8 (providing that orders entered by MDL judges are binding on trial courts after remand).

396. *Id.* at 13.6(c).

397. *Id.* at 13.6(d).

398. *Id.* at 13.6(c)(7).

399. *In re* Ford Motor Co. 6.0L Diesel Engine Litig., No. 14-0907 (Tex. Dist. Ct. filed Nov. 6, 2014). *See* Email from Craig Patrick, Plaintiffs' Co-Lead Counsel/Co-Liaison Counsel to Charles Silver (Oct. 27, 2020, 5:14 AM) (on file with the authors).

400. *In re* Volkswagen Clean Diesel Litig., No. D-1-GN-16-000449 (Tex. Dist. Ct. filed Jan. 28, 2016). *See* Email from Craig Patrick, Plaintiffs' Lead Counsel, to Charles Silver (Oct. 27, 2020, 5:14 AM) (on file with the authors).

401. *In re* Chrysler-Dodge-Jeep Ecodiesel, No. DC-17-14447 (Tex. Dist. Ct. filed Oct. 18, 2017). *See* Email from Craig Patrick, Plaintiffs' Lead and Liaison Counsel, Consumer Plaintiffs, to Charles Silver (Oct. 27, 2020, 5:14 AM) (on file with the authors).

402. Information on all Texas MDLs involving wind- or hail-related lawsuits listed in the text was provided by Gregory Cox of the Mostyn Law Firm, who held lead or liaison

with experience in Texas MDLs who helped us compile this list identified only one proceeding in which a fund to pay common benefit fees was created.[403]

Although not an MDL, the consolidated litigation arising in the aftermath of the October 2017 mass shooting in Las Vegas provides another example of lawyers' ability to work together without court-mandated common fund awards. Three law firms represented most of the decedents, injured victims, and relatives with tort claims against MGM Grand, the company that owned the Mandalay Bay Hotel from which the victims were shot. The law firms formed a working committee and jointly won an $800 million settlement.[404]

positions in all of them. Email from Gregory Cox, Mostyn Law Firm, to Charles Silver (Nov. 3, 2020, 8:42 AM) (on file with the authors). In addition to the proceedings identified in the text, Mr. Cox also stated that no common benefit fees were awarded in the following Texas MDLs: *In re* Farmers Insur. Co. Wind/Hail Storm Litig., No. 2016-cv2-002017-D5 (Tex. Dist. Ct. filed July 27, 2016) (Leadership Role: Amber Mostyn and Gregory Cox served as Plaintiffs' Liaison Counsel); *In re* Farmers Insur. Co. Wind/Hail Storm Litig., No. 048-000002-16 (Tex. Dist. Ct. filed Sept. 29, 2016) (Leadership Role: Amber Mostyn and Gregory Cox served as Plaintiffs' Liaison Counsel); *In re* Farmers Insur. Co. Wind/Hail Storm Litig., No. 2015-27067 (Tex. Dist. Ct.) (Leadership Role: Amber Mostyn and Gregory Cox served as Plaintiffs' Liaison Counsel); *In re* Farmers Insur. Co. Wind/Hail Storm Litig., No. 2015-cv2-002272-D5 (Tex. Dist. Ct. filed July 1, 2015) (Leadership Role: Amber Mostyn and Gregory Cox served as Plaintiffs' Liaison Counsel); *In re* Farmers Insur. Co. Wind/Hail Storm Litig., No. 048-000001-15 (Tex. Dist Ct. filed June 23, 2015) (Leadership Role: Amber Mostyn and Gregory Cox served as Plaintiffs' Liaison Counsel); *In re* S. Vanguard Insur. Co. et al. Mar. 29, 2012 & Apr. 20, 2012 Hail Storm Litig., No. 13-0130 (Tex. Sup. Ct. filed Feb. 22, 2013) (Leadership Role: Amber Mostyn served as Plaintiffs' Liaison Counsel); *In re* Wellington Insur. Co. et al. Mar. 29, 2012 & Apr. 20, 2012 Hail Storm Litig., No. 13-0123 (Tex. Sup. Ct. filed Feb. 15, 2013) (Leadership Role: Amber Mostyn served as Plaintiffs' Liaison Counsel); and *In re* Cypress Texas Lloyds MDL Hurricane Litigation, No. 2012-38531 (Tex. Dist. Ct) (Leadership Role: Amber Mostyn served as Plaintiffs' Liaison Counsel). *Id.*

403. Agreed Order Regarding Payment of Allocated Fees and Expenses to Plaintiffs' Steering Committee and Distribution of Same, *In re* Toyota Unintended Acceleration Litig., No. 2010-46354 (Tex. Dist. Ct. Aug. 8, 2014). Gregory Cox also identified a Texas MDL in which a motion to approve the creation of a common benefit fee fund was filed but not entered. *In re* Farmers Insur. Co. Wind/Hail Storm Litig., No. 2015-37067 (Tex. Dist. Ct.). Email from Gregory Cox, Mostyn Law Firm, to Charles Silver (Nov. 3, 2020, 9:11 AM) (on file with authors). The motion was opposed by other lawyers with cases in the MDL and was withdrawn when the lead firm settled its cases. *Id.*

404. *See, e.g.*, *The Latest: Attorneys Say MGM Deal Settles Most Lawsuits*, AP NEWS (Oct. 3, 2019), https://apnews.com/article/ap-top-news-us-news-shootings-las-vegas-lawsuits-66f2d2ae94d445f78b65fc3d78376bee (stating that three attorneys represented 4,400 people with claims against MGM in connection with the shooting); Press Release, Robinson Calcagnie, Robinson Calcagnie Lawyers and Co-Counsel Secure Final Approval of $800 Million Settlement for Victims of Las Vegas Mass Shooting (Sept. 30, 2020), https://www.prnewswire.com/news-releases/robinson-calcagine-lawyers-and-co-

There is, then, a substantial track record establishing that judges can manage large consolidations without paying lead attorneys extra. Consequently, the asserted IP to award common benefit fees cannot be essential to the exercise of judicial power. Even if judges have IP to appoint counsel with substantive responsibilities, which we deny, they exceed their powers by forcing other lawyers to pay lead attorneys anything, let alone tens or hundreds of millions of dollars.

Although lawyers' willingness to serve as lead attorneys without additional compensation may seem surprising, it is easily explained. Lawyers who represent tens, hundreds, or thousands of signed clients, as the attorneys leading the Roundup MDL did when the proceeding commenced,[405] have sizeable financial interests in the conduct of their cases. They may value control as a means of maximizing their clients' recoveries and, relatedly, their fees. Lead attorneys' cases tend to settle for higher values than those handled by non-lead lawyers, as Judge Chhabria observed. [406]

Attorneys with large client inventories are also contractually obligated to make the sizeable financial outlays that litigation requires. They may, therefore, willingly serve as lead counsel without additional compensation because they will already have to (1) perform most of the required services, such as drafting complaints, responding to dismissal motions, and taking discovery; and (2) bear most of the required expenses, such as those associated with hiring experts and maintaining document repositories.

Service as lead counsel also confers other substantial benefits. These include prestige and reputational enhancement, increased case referrals, the ability to communicate directly with the court, the opportunity to plan the conduct of litigation, the psychological rewards that come with standing at the head of a group of mass tort lawyers, and control of settlement negotiations.

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counsel-secure-final-approval-of-800-million-settlement-for-victims-of-las-vegas-mass-shooting-301142405.html (referring to the leadership law firms of Robinson Calcagnie, Inc., Eglet Adams, and Panish Shea & Boyle LLP).

405. *See* Memorandum in Support of Motion to Approve Order Establishing a Common Benefit Fund to Compensate and Reimburse Attorneys for Costs and Expenses Incurred and Services Performed for MDL Administration and Common Benefit at 4, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741 (N.D. Cal. Dec. 16, 2016) (reporting that "the MDL Leadership members represent the overwhelming majority of cases that will be subject to the proposed common benefit order").

406. Chhabria Order, *supra* note 379, at 16.

No one doubts that MDLs generate serious management problems. But these needs can be met, and have been met, without forced fee transfers. Therefore, the asserted IP to move money from non-lead lawyers to lead attorneys is not essential. It is, at most, a beneficial power. Consequently, federal judges can properly assert it only with Congress's approval.

G. Federal Judges Lack Inherent Power to Reduce Non-Lead Lawyers' Contingent Fees

MDL courts routinely force non-lead lawyers to pay lead attorneys by withholding dollars from the formers' contingent fees. Sometimes, judges go even further and cap non-lead lawyers' fees at percentages below those that are needed to free up the funds that common benefit fee awards require.[407] In the Vioxx MDL, Judge Fallon capped all non-lead lawyers' gross fees at 32 percent even if their contracts entitled them to more, and he required these lawyers to pay the lead attorneys' common benefit fees out of this amount. "[T]he 32 percent cap on total charges implie[d] that the [non-lead lawyers would] net fees of 24 percent."[408]

When capping fees, MDL judges claim to be exercising IP to police the legal profession and ensure that lawyers comport themselves ethically. Consider what Judge Fallon wrote in the Vioxx MDL:

> First, any court presiding over a mass tort proceeding possesses equitable authority to examine fee arrangements. The Federal Rules of Civil Procedure expressly grant this power to district courts in class actions. . . . While an MDL is distinct from a class action, the substantial similarities between the two warrant the

407. For a discussion of this practice and a critique of judges' reliance on ethics rules when capping fees, see Ratner, *supra* note 369. For a critique of courts' characterization of MDLs as "quasi-class actions," see Silver & Miller, *supra* note 16. Judges presiding over class actions have also claimed to derive the power to cap lawyers' fees from the duty imposed by FRCP 23 to protect absent class members from being exploited. Order Setting Caps on Individual Attorneys' Fees at 1–2. *In re* Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010, No. 12-968, 2012 WL 2236737 (E.D. La. June 15, 2012). We disagree with this assertion, which involves the use of a procedural rule to alter lawyers' substantive contractual rights in violation of the Rules Enabling Act, 28 U.S.C § 2072(b). We do not discuss this subject further because it falls outside of the scope of this project.

408. Silver & Miller, *supra* note 16, at 136. Professor Silver served as consulting counsel for lawyers involved in the Vioxx MDL, who objected to the manner in which the court regulated attorneys' fees.

> treatment of an MDL as a quasi-class action. . . . Accordingly, this Court found that "the Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness." . . .
>
> Second, the Court recognized that inherent authority, and a concomitant duty, exists to review contingent fee arrangements *sua sponte,* especially where there is a built in conflict of interest. . . . In the instant case, the Court recognized that the claimant's attorneys were unlikely to question the propriety of their own fees, and the defendant had no incentive to jeopardize the settlement agreement by raising the issue. Accordingly, the Court found it necessary to exercise its inherent authority to protect the large number of elderly Vioxx claimants by capping contingent fee agreements. . . .
>
> Further, past MDL courts have deemed it appropriate to cap contingent fees even though no claimants had challenged the reasonableness of their agreement. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.,* MDL No. 05–1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) ("[T]his Court has the inherent right and responsibility to supervise the members of its bar in both individual and mass tort actions, including the right to review contingency fee contracts for fairness."); *see also In re Zyprexa Prods. Liab. Litig.,* 424 F.Supp.2d 488, 492 (E.D.N.Y.2006) ("A federal court may exercise its supervisory power to ensure that fees are in conformance with codes of ethics and professional responsibility even when a party has not challenged the validity of the fee contract.").[409]

The kitchen-sink approach exemplified by this passage is characteristic of fee-related opinions issued in MDLs. Courts offer all justifications that might conceivably support their actions, presumably because they are uncertain that any of them is right.[410]

Skipping over the quasi-class action rationale, which we have already addressed, the arguments regarding the protection of elderly plaintiffs and the inherent power to ensure compliance with state bar rules remain. The first is a makeweight. Not all

409. *In re* Vioxx Prod. Liab. Litig., 650 F. Supp. 2d 549, 553–54, 557 (E.D. La. 2009) (citations omitted).

410. For additional examples, see, e.g., *In re* Nat'l Football League Players' Concussion Injury Litig., No. 2:12-md-02323, 2018 WL 1658808, at *2 (E.D. Pa. Apr. 5, 2018); *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591, 2018 WL 6839380, at *3–4 (D. Kan. Dec. 31, 2018).

plaintiffs with Vioxx-related claims were elderly, and none were declared incompetent. To the contrary, Judge Fallon assumed their competency by allowing them to sign binding settlement agreements. The fee cap was not limited to engagements involving elderly clients either. Judge Fallon imposed it across the board. Finally, he showed neither that older claimants agreed to pay higher fees than younger ones nor that the market for legal services in which elderly clients shopped for counsel was other than competitive.

The remaining argument—that federal courts possess IP to enforce state bar rules—violates the constitutional limitation on IPs. As explained in Part I, IPs exist to help federal judges fulfill the mandate to exercise the judicial function, which they do by adjudicating cases. Sometimes, the need to manage their dockets, maintain decorum, deal with abusive tactics, or address other problems requires them to take steps to keep lawyers in line. But in the absence of obstructive conduct, they need never concern themselves with attorneys' contingent fees. Judge Fallon's assessment of the ethicality of the fee agreements was slap-dash as well. He found neither that the fees were unreasonable when negotiated, that the lawyers exerted undue influence on Vioxx plaintiffs, nor that the contracts required the plaintiffs to pay more than the lawyers' usual and customary rates. He simply thought that the fees were too high and reduced them to a level he liked.

If proof is needed that federal judges can decide cases and manage their dockets efficiently without tinkering with, much less slashing, lawyers' contingent fees, one can again look to the state courts in Texas. They process large consolidations even though, according to knowledgeable attorneys, they have never imposed fee reductions and even though, according to Texas precedent, they lack the power to cut lawyers' fees *sua sponte*.[411] The asserted power can therefore only be beneficial, not indispensable, and can properly be exercised only when authorized by Congress. Because Congress has never given federal courts a roving commission to enforce state bar rules, the courts have no business asserting such a novel IP on their own initiative.

411. *In re* Polybutylene Plumbing Litig., 23 S.W.3d 428, 435 (Tex. App. 2000).

H. Federal Judges Lack Inherent Power to Review Settlements

The FRCP authorize courts to explore settlement possibilities when conferring with parties at pretrial meetings, and many judges do so routinely. Some have gone further and threatened, implicitly or explicitly, to punish parties or lawyers who refuse to settle on what to judges seem like reasonable terms.[412] These strong-arm tactics have elicited criticism.

The need for judges to encourage settlements has never been clear. On the prevailing economic account of the litigation dynamic, the opportunity to conserve litigation costs should motivate parties who estimate trial outcomes similarly to resolve disputes by agreement. Judges might accelerate the process by sharing their thoughts about the central issues, but they should not have to intervene at all, much less do so muscularly or coercively.

The standard economic model has many limitations, one of which is that it does not describe the litigation dynamic in MDLs. With few exceptions, cases folded into MDLs cannot be tried because the statute empowers transferee courts to handle only pretrial proceedings. Until cases are remanded, which they rarely are, there is no expected trial result for the parties to predict, and the main source of leverage in settlement negotiations disappears. Plaintiffs are left with the ability to threaten defendants with enormous litigation costs, revelation of unflattering information, and interference with business operations. Defendants can return fire by threatening to delay trials indefinitely, demonstrating their willingness to bear costs, and forcing plaintiffs to bear costs of their own.[413]

Because there can be no day of reckoning in a transferee court, judges who preside over MDLs must work especially hard to convince parties to settle. Their main weapon is the threat to keep cases bottled up until both sides collapse. Judge William G. Young described this tactic in *DeLaventura v. Columbia Acorn Tr.*[414] After observing that "the 'settlement culture' for which the federal courts

412. *See supra* notes 172, 183, 231–236 and accompanying text.

413. MDL courts can dismiss, and occasionally have dismissed, plaintiffs' cases on pretrial motions, but they cannot grant plaintiffs victories. Being able to lose but not to win should affect plaintiffs' leverage in settlement negotiations straightforwardly.

414. DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 150–52 (D. Mass. 2006).

are so frequently criticized is nowhere more prevalent than in MDL practice," he added that

> it is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial. This, in turn, reinforces the unfortunate tendency to hang on to transferred cases to enhance the likelihood of settlement. Indeed, MDL practice actively encourages retention even of trial-ready cases in order to "encourage" settlement.[415]

Judge Young then explained how judges' refusal to remand cases affects parties' settlement leverage.

> Some, believing that any settlement is preferable to any trial, may consider this [inability to try cases] a desirable outcome. In actuality, however, this marginalization of juror fact finding perversely and sharply skews the MDL bargaining process in favor of defendants. Consider: All litigants bargain in the shadow of trial. Those averse to the inevitable uncertainties of the direct democracy of the American jury will factor the risks of trial into their settlement postures. Failure to arrive at a mutually acceptable settlement should, and in most cases does, result in a trial. In MDL practice, however, it is solely the transferee judge who controls the risk of trial. The litigant who refuses to settle can never get back to his home court to go before a local jury unless the transferee judge agrees.
>
> Once trial is no longer a realistic alternative, bargaining shifts in ways that inevitably favor the defense. After all, a major goal of nearly every defendant is to avoid a public jury trial of the plaintiff's claims. Fact finding is relegated to a subsidiary role, and bargaining focuses instead on ability to pay, the economic consequences of the litigation, and the terms of the minimum payout necessary to extinguish the plaintiff's claims. Commentators generally agree that MDL practice favors the defense.[416]

Judge Young's criticism has (at least) two important implications. One is that there is little reason to expect settlements struck in MDLs to reflect the legal and factual merits of claims. The other is that the settlement culture that pervades the MDL world has corrupted federal judges' understanding of their role.

415. *Id.*
416. *Id.* at 152–55.

Instead of being adjudicators first and settlement-nudgers second, MDL judges let the desire to resolve cases *en masse* determine their approach to adjudication.[417]

In view of the point just made, the recommendation endorsed by many scholars that MDL judges involve themselves even more deeply in the settlement process can only seem odd. Typically, commentators want judges to review the adequacy of settlements, the belief being that informed assessments will promote corrective justice,[418] protect vulnerable plaintiffs,[419] or produce information of value to regulators.[420] But given the extent to which MDL courts participate in the settlement process already, it seems unlikely that judicial review would have much value.

Whatever their merit, calls for judicial policing of settlements assume that judges have IP to provide this service, which neither the FRCP nor the MDL statute confer.[421] This assumption has not been tested against the relevant jurisprudence. Neither writers who endorse judicial review of settlements nor judges who perform these assessments have shown that the required IP exists.

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417. With the laudable goal of addressing the nationwide crisis, Judge Polster announced "[d]uring the first hearing in [the Opiates MDL]" that he would put litigation efforts on hold, and he ordered the parties and their attorneys "to prepare for settlement discussions immediately." Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html. He had greater success after he changed strategies and put the parties' feet to the fire. The threat of facing a jury in a bellwether trial generated several settlements. *See* Dietrich Knauth, *Rite Aid Reaches Opioid Litigation Ceasefire in $10.5 Million Settlement*, REUTERS (July 14, 2022), https://www.reuters.com/legal/government/rite-aid-reaches-opioid-litigation-ceasefire-105-million-settlement-2022-07-14/; Eric Sagonowsky, *J&J, with $20M Settlement, Becomes Latest Drugmaker to Sidestep Bellwether Opioid Trial*, FIERCE PHARMA (Oct. 2, 2019), https://www.fiercepharma.com/pharma/20m-settlement-johnson-johnson-becomes-latest-drugmaker-to-sidestep-bellwether-opioid-trial; Bryan Mann & Colin Dwyer, *Opioid Trial: 4 Companies Reach Tentative Settlement With Ohio Counties*, NPR (Oct. 21, 2019), https://www.npr.org/sections/health-shots/2019/10/21/771847539/opioid-trial-4-companies-reach-tentative-settlement-with-ohio-counties.

418. Linda S. Mullenix, *Designing a Compensatory Fund: In Search of First Principles*, 3 STAN. J. COMPLEX LITIG. 1, 5 (2015). Professor Mullenix also raises the possibility that extensive power to oversee non-class settlements can be derived from the All Writs Act. Mullenix, *Policing MDL Non-Class Settlements*, *supra* note 324, at 129.

419. Bradt & Rave, *The Information-Forcing Role*, *supra* note 341, at 1306–07.

420. David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U.L. REV. 545, 606 (2017).

421. Mullenix, *Policing MDL Non-Class Settlements*, *supra* note 324, at 162 ("Judge Weinstein could just have easily decided to intervene in the *Zyprexa* fee arrangements by invoking his inherent powers, without having to create the quasi-class action to do so.").

It also seems unlikely that courts have this power. Both the FRCP and several federal statutes require judges to review settlements in identified contexts. The FRCP mandate judicial approval of settlements in class actions, derivative suits, and cases involving receivers. [422] Statutes require review, for example, in antitrust cases brought by the U.S. government.[423] If federal courts have IP to assess all settlements, these specific empowering rules and statutes are superfluous. Judges also allow the vast majority of settlements to proceed without their approval. If the review power were an IP, they would have to employ it far more often.

The difficulty of deriving a general review IP from first principles is obvious too. IPs exist to help federal courts exercise their judicial power. But if there is one thing that duty does not require, it is review of settlements, which eliminate the need for adjudication and remove cases from judges' dockets. Courts can enter orders dismissing cases without saying a word about the reasonableness of settlements, their desirability, or anything else having to do with them.

Professor Howard Erichson, who knows as much about aggregate settlements and their shortcomings as anyone in the field, framed the question precisely. Using the 9/11 responders' litigation as an example, he noted that the presiding judge, Alvin Hellerstein, rejected a proposed settlement with an estimated value of $575 million to $657.5 million. Had Hellerstein not done so, the settlement would have resolved thousands of cases. In fact, it resolved none. Judge Hellerstein's rejection forced the parties to resume bargaining. They eventually proposed a richer settlement, which Judge Hellerstein approved.

After reviewing these facts, Erichson writes:

> To many observers, there may be something quite appealing about the court's intervention. . . . What I wonder is where the judge got the power to "approve" or "reject" the settlement. I understand, of course, why a judge might *wish* he had that power. Overseeing a case gives a judge a strong investment in the outcome as well as a sense of what outcome might be just. But settlement is not adjudication. A settlement is a contract in which a claimant agrees to release a claim in exchange for something offered by the defendant. There are special circumstances that

422. FED. R. CIV. P. 23(e) (class actions), 23.1 (derivative suits), and 66 (receiverships).
423. 15 U.S.C. § 16(e) (2000).

> require judicial approval of negotiated resolutions; these circumstances turn settlements into something akin to adjudication. But the September 11 clean-up litigation deal was not a class action settlement. It was not a consent judgment in which the parties sought the court's ongoing supervision. It was not a settlement by minors or others legally incompetent to make their own decisions. Nor was it a shareholder derivative action or an action in which a receiver had been appointed. Rather, it was a settlement of individual claims, albeit in the context of a complex mass dispute.[424]

Erichson then examined the arguments pro and con and concluded that "[u]nlike the judge overseeing a class action, . . . the judge overseeing non-class litigation has no general power to accept or reject a settlement. . . . [This] decision belonged to the litigants."[425]

The 9/11 responders' litigation was a consolidation mandated by Congress, not an MDL. The difference is immaterial. In a co-authored article published after the settlement, Judge Hellerstein recognized that the "underlying problems" in the responders' litigation and MDLs "are similar."[426] Moreover, the question at hand is whether federal judges have IP to review settlements. If they do, they can invoke it in all proceedings.

When defending his actions, Judge Hellerstein recognized that the FRCP provided no basis for them.[427] Instead, he claimed to have "possessed inherent judicial authority to review the settlement and, if necessary in the interests of fairness, to reject it."[428] But the section of his article that "discusses [his] authority to reject the settlement" ignores IP doctrine completely.[429] Instead, the crucial paragraph reads as follows:

> Judge Hellerstein [] had recourse to only two federal rules [Rules 23 and 41], neither of which he could apply sensibly to the litigation. Given this vacuum, he struck a balance. He approved

424. Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1016 (2013).

425. *Id.* at 1025–26.

426. Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 177 (2012).

427. *Id.* at 168 ("This was not a class action in which Rule 23 of the Federal Rules of Civil Procedure gives trial judges authority to pass on the fairness of a settlement."); *see also id.* (acknowledging that no power to review the settlement was conferred by FRCP 41).

428. *Id.* at 157–58.

429. *Id.* at 159.

> the essential structure of an elaborate settlement agreement but set aside those portions that he believed were manifestly unfair to plaintiffs. He certainly had sufficient factual grounds for his selective challenge to, and revision of, some aspects of the agreement. . . . Judge Hellerstein was privy to information about the litigation that gave him a unique perspective. Having played a managerial role in bringing about the settlement discussions, he was invested to see that the process leading to settlement was fair. In this regard, he had reason to believe that it might not have been—that the plaintiffs' lawyers were not sufficiently pressured to obtain the best deal for their clients.[430]

Apparently, the argument is that Judge Hellerstein possessed IP to review the settlement because he helped bring about the negotiations, invested a great deal of time and effort in the litigation, and was well versed in the facts.

It is obvious that Judge Hellerstein exercised a beneficial power, not an essential one. He felt a pressing need to assess the adequacy of the two proposals and indulged it. He did not even attempt to show that without the power, he would have been unable to manage his docket. The fact is that reviewing the proposals made his job harder. The decision to reject the first settlement kept alive thousands of cases that would otherwise have been voluntarily dismissed. And both assessments occupied swaths of his time that could have been used to adjudicate other matters. The possibility that the responders' attorneys "were not sufficiently pressured to obtain the best deal" changes nothing, even if true. Congress has not given federal courts a general license to evaluate lawyers' performance, and IP to do so can exist only when the quality of representation is so poor that a judgment may not be binding. When he rejected the first proposed settlement of the 9/11 responders' litigation, Judge Hellerstein made no such contention.

Like so many other IPs claimed by MDL judges, then, the power to review settlements has no valid legal basis. It is yet another example of unchecked judicial overreach.

I. Recommendations to Limit Abuses of Inherent Powers in MDLs

Since the Court has allowed federal judges to use IPs willy-nilly in MDLs, it should take the lead in curbing the improper and

430. *Id.* at 168–69.

unlawful invocation of such powers. Unfortunately, because one of the main abuses by MDL judges is coercing settlements rather than remanding cases back to their original courts for trial, opportunities to appeal final judgments arise infrequently. The Court should therefore be receptive to either hearing such rare appeals or granting writs of mandamus that challenge MDL procedures. If the Court fails to do so, or if Congress at any time chooses to exercise its Article I powers, Congress should amend the MDL statute to provide that MDL courts cannot invoke their IPs to (1) independently appoint lead attorneys; (2) deprive plaintiffs of representation by their chosen counsel; or (3) force these retained lawyers to pay lead attorneys' fees.

CONCLUSION

The Supreme Court has lost sight of the fundamental principle that the Constitution permits the use of IPs only when indispensably necessary to the proper exercise of "judicial power." Instead, the Court has allowed federal judges to invoke "inherent powers" as a catch-all phrase to justify any actions they wish to take—whether strictly necessary, merely beneficial, or even contrary to federal statutes, procedural rules, or the Constitution.

This excessive resort to IPs has had pernicious effects. In MDLs, it has enabled judges to assume near-dictatorial control and to deprive parties and their chosen counsel of substantive and procedural legal rights, including rights guaranteed by the Due Process Clause. The Court or Congress must rein in MDL judges.

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The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal

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I. INTRODUCTION

The preferred way of handling mass tort lawsuits in the federal courts has long been for the Judicial Panel on Multi-District Litigation ("JPML") to transfer and consolidate the cases in a single federal district court.[1] Federal judges have handled over one thousand multi-district litigations ("MDLs"), the biggest of which have involved tens of thousands of plaintiffs with billions of dollars in liability claims.[2]

1. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 185–86 (2001) [hereinafter Hensler, *Revisiting the Monster*]; Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 895 (2001) [hereinafter Hensler, *The Role of Multi-Districting*].

2. The Diet Drugs MDL encompassed over 18,000 personal injury lawsuits, as well as a class action with 6 million members. *In re* Diet Drugs, 282 F.3d 220, 225 (3d Cir. 2002). The settlement required the defendant to pay over $6 billion, of which more than $600 million was awarded to MDL counsel and class counsel combined. *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 553 F. Supp. 2d 442, 456–59 (E.D. Pa. 2008) [hereinafter *In re* Diet Drugs Prods. Liab. Litig.]. The Vioxx MDL encompassed approximately 50,000 claimants. The settlement cost $4.85 billion. *See, e.g.*, Daniel Fisher, *Will the Vioxx Settlement Work?*, FORBES.COM, Nov. 13, 2007, http://www.forbes.com /2007/11/12/merck-vioxx-lawsuits-biz-health-cz_df_1112vioxx.html; *Morning Edition: Merck Reaches $4.8 Billion Settlement in Vioxx Case* (NPR radio broadcast Nov. 9, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=16147998. The lead attorneys in the MDL and related state court actions have requested 8 percent of the settlement fund, $388 million, in

Given this wealth of experience, one would expect MDL procedures to be highly developed, carefully considered, and transparent. In some respects, they are.[3] But procedures that are central to the operation of MDLs on the plaintiffs' side are rudimentary and opaque. These procedures also raise serious policy concerns that have not previously been identified or addressed. Consider four examples.

Appointment of Lead Attorneys. Judges appoint the lawyers who run MDLs on the plaintiffs' side. Their choices can be puzzling. For example, judges sometimes give lead positions to lawyers with few or no clients in an MDL, passing over other lawyers whose clients number in the hundreds or thousands. Judges also wield the appointment power with unfettered discretion. They need not explain why they choose some lawyers rather than others, and rarely do. They face no known risk of appellate review or reversal: no appointment decision seems ever to have been challenged, much less reversed.

Compensation of Lead Attorneys. Over the long history of MDLs, judges have awarded lead attorneys billions of dollars in fees and cost reimbursements. Typically, fee awards range from 4 percent to 6 percent of total recoveries, but smaller and larger percentages can be found.[4] This practice supposedly rests on the common fund doctrine, a creature of the law of restitution which undergirds fee awards in class actions. Yet the Supreme Court has never said the doctrine applies in MDLs, which are consolidations rather than class suits, and the American Law Institute's *Restatement (Third) of the Law of Restitution and Unjust Enrichment* suggests otherwise: "By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles."[5]

Neutralized Opposition. Because MDL judges select lead attorneys and control their compensation, lead attorneys rarely challenge them. In practical effect, MDL judges are lead lawyers'

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common benefit fees. The Settlement Channel, The Vioxx Settlement. What Does It Mean and What Happens Next?, http://thesettlementchannel.squarespace.com/the-settlement-channel-blog/2007/11/10/the-vioxx-settlement-what-does-it-mean-and-what-happens-next.html (Nov. 10, 2007, 09:11 EST).

3. For example, MDL judges now plan openly and successfully for inter-court cooperation, which makes pre-trial discovery proceed more smoothly. *See* Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 49–50 (2007).

4. *See* William B. Rubenstein, *On What A "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATT'Y FEE DIG. 87, 88–90 (Mar. 2009) (reporting fee award percentages for twenty-one MDLs).

5. RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft No. 3, 2004).

clients.[6] Fee-related concerns also cause non-lead lawyers to fear MDL judges, who take from them the money lead lawyers receive. By challenging an MDL judge, a non-lead lawyer must be willing to risk retribution in the form of a heavy fee tax. Because judges leave the size of forced fee transfers open until litigation ends, obedience is the prudent course for non-lead lawyers until an MDL formally concludes—or even longer when non-lead lawyers have cases in other MDLs being handled by the same judge.

Ungrounded Regulation. MDL judges not only tax non-lead lawyers; they also cut non-lead lawyers' fees. For example, an MDL judge might order a non-lead lawyer with a 40 percent contingent fee contract to give 8 percent to the lead attorneys and to rebate another 8 percent to the client. The lawyer would end up with a 24 percent fee, meaning that the contractual fee was cut almost by half. Although judges justify forced rebates by arguing that MDLs reduce non-lead lawyers' costs, they make no serious effort to connect the amount rebated to the amount saved. A rigorous econometric analysis of scale economies in MDLs would require an expert armed with data and a model. Judges never consult such experts. They invent numbers instead.

Obviously, these fee reductions give lawyers involved in MDLs another reason to be deferential. The price of impertinence may be an exceptionally large fee cut. Less apparent is the impact fee cuts have on non-lead lawyers' incentives. By rendering contingent fees unpredictable, judges discourage non-lead lawyers from providing services that would help clients. A downward spiral is predictable: fee cuts discourage lawyers from working hard, leading judges to demand larger rebates because they see lawyers slacking off. The spiral will primarily benefit defendants, who will face fewer claims and enjoy cheaper settlements when plaintiffs' lawyers find litigation less profitable.

The four practices just described—judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts—jointly constitute the emerging "quasi-class action" approach to MDL management. Picking up on an idea first advanced by the Fifth Circuit in the mid-1970s, several judges have recently ruled that MDLs are "quasi-class actions."[7] The label is apt,

6. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2129 (2000) ("Judges now have the power of payment, serving more like clients and consumers . . . .").

7. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2009 WL 2408884, at *3 (E.D. La. Aug. 3, 2009); *In re* Zyprexa Prods. Liab. Litig., No. 04-MD-1596, 2008 WL 2511791, at *1

they contend, because a judge presiding over an MDL enjoys the same broad equitable powers as a judge presiding over a class action, including the power to implement the four practices just described. Writing in 2000, Professor Judith Resnik observed that judges were "reluctant to delve too deeply" into fee-related matters in mass tort cases.[8] In the past decade, they overcame that reluctance. Judges now regulate mass tort MDLs extensively and assert particularly expansive power over fees.

Although the judges' intentions are exemplary—they are trying to fashion tools with which to resolve complicated, multi-party cases in reasonable time and at reasonable cost—the quasi-class action approach has serious downsides. By managing MDLs as they have, judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs' lawyers' incentives to serve clients well.

This Article is the first to examine systematically the rules and norms that govern the appointment, powers, compensation, and monitoring of lead attorneys in MDLs.[9] After analyzing and critiquing existing practices, it proposes a new MDL management approach. The proposal would establish a default rule requiring an MDL judge to appoint a Plaintiffs' Management Committee ("PMC") made up of lawyers with valuable client inventories: often, but not necessarily, lawyers with the largest numbers of signed clients. The PMC would then select, set compensation terms for, and monitor a group of

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(E.D.N.Y. June 19, 2008). The roots of the quasi-class action doctrine extend back to *In re Air Crash Disaster at Florida Everglades*. 549 F.2d 1006, 1012 (5th Cir. 1977) (observing that "the number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large.") [hereinafter *Everglades Crash*]. Judge Weinstein appears to have first enunciated the idea in *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480–81 (1994) ("What is clear from the huge consolidations required in mass torts is that they have many of the characteristics of class actions . . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions. Obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations.").

8. Resnik, *supra* note 6, at 2121–22. Even at the start of the decade, however, "judges ha[d] begun to reserve some of the money (formerly conceived to 'belong' to individual attorneys) to pay common benefit lawyers." *Id.* at 2175.

9. Many scholarly writings address MDLs as an important species of litigation and discuss examples of their use. *See, e.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007); Hensler, *Revisiting the Monster*, *supra* note 1; Hensler, *The Role of Multi-Districting*, *supra* note 1; Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245 (2008); Resnik, *supra* note 6. However, no prior writing discusses the pros and cons of the quasi-class action approach to MDL management or the specific procedures identified in the text.

common benefit attorneys ("CBAs") who would perform the common benefit work ("CBW") MDLs require. CBW is legal work beneficial to all plaintiffs, such as discovery relating to factual issues common to all plaintiffs' claims.[10] PMC members would receive only fees from their signed clients, but this should motivate them to select, incentivize, and monitor CBAs with care because good CBW will make their client inventories more valuable. CBAs would draw fees on a *pro rata* basis from all lawyers with cases in an MDL. Having the largest client inventories, PMC members would pay the most. This would motivate them to obtain the best combination of quality and price from the available CBAs. Attorneys not on the PMC would benefit automatically from the PMC members' efforts to help themselves.

This approach would act as a default rule, which judges would follow in the absence of an agreement among the PMC and other lawyers on a different governance structure. Allowing consensual agreements to displace the default rule ameliorates the problem of forcing all consolidations into a single mold. It also gives attorneys the option of using governance structures with duties that are well-established under the law governing partnerships, corporations, or other joint ventures to address known problems, such as the possibility that lawyers in charge of an MDL will exploit attorneys in lesser positions.

The presiding judge's involvement in the management of the plaintiffs' side of an MDL would ordinarily end with the appointment of the PMC. The judge would be available to adjudicate any claims of mismanagement or wrongful behavior and, as now, to ensure that non-lead lawyers receive appropriate opportunities to develop unusual or unique aspects of their clients' cases. Because the judge would have limited control over the choice of PMC members and would otherwise be removed from compensation issues on the plaintiffs' side, both the lawyers' and the judges' independence would be restored. Our proposal would also promote objectivity and transparency, harmonize the interests of lead attorneys and plaintiffs, reduce disputes over lawyers' fees, and improve monitoring of CBW. Lastly, it would foster good incentives by fixing lead attorneys' compensation in advance.

MDL judges could adopt most elements of our proposal directly. They already appoint lead attorneys. The proposal simply gives them criteria to apply when doing so and requires them to make appealable findings of fact. In these respects, the proposal resembles the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which requires a

10. For a more detailed discussion of the nature of CBW, see *infra* Part III.A and accompanying notes.

trial judge handling a securities class action to appoint as lead plaintiff the party with the largest financial stake in the litigation. This proposal has more potential than the PSLRA to improve the conduct of litigation, however. Only some investors put in charge of securities fraud class actions have the expertise, knowledge of the case, and financial interests needed to manage large lawsuits effectively. Under our proposal, all PMC members will have these attributes, for all will be successful lawyers with valuable client inventories.

This Article is structured as follows: Part II describes the MDL management practices used in three recent cases—*Guidant*, *Vioxx*, and *Zyprexa*—all of which endorse the "quasi-class action" doctrine. Part III characterizes the economic problem these control rules address—the optimal production of CBW—and critiques the manner in which the practices are applied. Part IV sets out our proposal and defends it against various objections. Part V concludes.

II. THE QUASI-CLASS ACTION MODEL OF MDL MANAGEMENT

The cases we discuss in this Article involve large numbers of lawsuits—sometimes tens of thousands—which are consolidated for pre-trial litigation purposes in a single federal court.[11] These MDLs resemble class actions in one obvious respect: many plaintiffs claim to have suffered harm from a common action or course of conduct, such as the manufacture and sale of a pharmaceutical. But the MDLs we discuss are *not* class actions: they are not brought pursuant to Federal Rule of Civil Procedure 23; they are not certified under the Rule 23 standards of commonality, typicality, numerosity, adequacy of representation, predominance, and superiority; there is no representative plaintiff; and there is no attorney appointed by the court as counsel for the entire class. The MDLs simply aggregate individual lawsuits in a single court pursuant to 28 U.S.C. § 1407 for the sake of convenience and efficiency.

Like many other MDLs involving defective product claims, the MDLs we discuss are not class actions for good reason. They are mass tort cases in which differences in exposure, background health conditions, knowledge, and other factors preclude class certification

11. A federal MDL typically includes all related cases filed in federal courts, but fails to catch cases that were filed in state courts from which they could not be removed. When significant state court litigation exists, inter-court coordination may occur. *See* Elizabeth J. Cabraser, *In Rem, Quasi* In Rem, *and Virtual* In Rem *Jurisdiction Over Discovery*, 10 SEDONA CONF. J. 253, 261 (2009) ("[F]ederal courts have increasingly recognized the great advantages of active federal/state court coordination, particularly in multi-jurisdictional mass torts.").

under the standards set forth in *Amchem Products, Inc. v. Windsor*[12] and *Ortiz v. Fibreboard*,[13] cases in which the Supreme Court rejected attempts to resolve complex claims for personal injury due to asbestos exposure by means of a class action structure.[14] In some of these MDLs, the presiding judge denied a motion for class certification, establishing clearly that a class action could not proceed.[15]

Even so, the judges presiding over these MDLs referred to the proceedings as "quasi-class actions." The attraction of the label is understandable. Judges have considerable power to manage class actions as they wish, and judges overseeing MDLs want the same powers. But the label is also dangerous. Class action procedures may not be necessary or appropriate in MDLs.

A. MDL Basics and Three Selected Aggregations

In 1968, Congress authorized the JPML to transfer related cases pending in diverse federal courts to a single forum for pre-trial processing. The object was to "promote the just and efficient conduct of [the] actions"[16] by taking advantage of scale economies and creating opportunities for global settlements.[17] The JPML has been active ever since.[18] As of 2009, it "ha[d] considered motions for centralization in over 2,000 dockets involving . . . millions of claims . . . . These dockets encompass[ed] litigation categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability

12. 521 U.S. 591, 628 (1997).

13. 527 U.S. 815, 864 (1999).

14. The Federal Judicial Center found that the rate at which mass tort cases were certified as class actions for trial declined after *Amchem* and *Ortiz*, while the frequency of certification for purposes of settlement increased. THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS 4 (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/amort02.pdf/$file/amort02.pdf.

15. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 461–63 (E.D. La. 2006).

16. 28 U.S.C. § 1407(a) (2007).

17. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) ("One of the values of multidistrict proceedings is that they . . . . afford a unique opportunity for the negotiation of a global settlement."); Resnik, *supra* note 6, at 2149 (observing that "the MDL impulse to aggregate" reflects concerns "about waste and inefficiency").

18. Not everyone is happy about this. For a thoughtful discussion of many problems associated with expanded use of JPML's power to consolidate lawsuits, see Marcus, *supra* note 9.

cases; patent validity and infringement; antitrust price fixing; securities fraud; and employment practices."[19]

The largest MDLs encompass thousands of cases filed by legions of attorneys.[20] Unfortunately, precise statistics are not available. Neither the JPML, the Administrative Office of the U.S. Courts, nor any other organization collects much data on MDLs.[21] We therefore constructed a picture of contemporary MDL management in the product liability area by studying three major MDLs.[22] We selected *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation* ("*Guidant*"), *In re Vioxx Products Liability Litigation* ("*Vioxx*"), and *In re Zyprexa Products Liability Litigation* ("*Zyprexa*") for several reasons. First, all are products liability cases, the most common type of MDL.[23] The management of these cases should therefore reflect the wisdom of the federal judiciary accumulated over many MDLs and many years. Second, these MDLs arose recently and around the same time. About a year-and-a-half separates the earliest JPML transfer date (April 4, 2004—*Zyprexa*)

19. United States Judicial Panel on Multidistrict Litigation, An Overview of the United States Judicial Panel on Multidistrict Litigation, http://www.jpml.uscourts.gov/General_Info/Overview/overview.html (last visited Nov. 12, 2009).

20. Lawyers with large inventories of signed clients often work in teams or groups.

21. JPML gathers some data and produces cursory reports, which are available at United States Judicial Panel on Multidistrict Litigation, Statistical Information, http://www.jpml.uscourts.gov/General_Info/Statistics/statistics.html (last visited Nov. 12, 2009). JPML also produces specialized reports for a fee. Neither the reports themselves nor an index of them is publicly available. E-mail from Ariana Estariel to Charles Silver (July 10, 2008, 02:51:00 CST) (on file with author). The JPML is also so short of staff that it cannot even produce a list of its data fields for an independent researcher to examine. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, New York University Law and Econ. Working Paper 6 n.18 (N.Y. Univ. Law & Econ. Working Papers, Paper No. 174, 2009), *available at* http://lsr.nellco.org/nyu_lewp/174/.

22. Fees have been managed in similar or identical ways in other cases. *See, e.g.*, *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. M.05-CV-01699-CRB, 2006 WL 471782, at *2–11 (N.D. Cal. Feb. 28, 2006).

23. The JPML currently divides cases into the following categories: air disaster, antitrust, contract, common disaster, employment practices, intellectual property, miscellaneous, products liability, sales practices, and securities. It has used other categories in the past. The categories do not necessarily track doctrinal lines. *See* Mark Merrmann & Pearson Bownas, *Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?*, 8 CLASS ACTION LITIG. REP. 110, 111 n.4 (2007). Williams et al. report that "Only 20 percent of all MDL proceedings involve products liability claims, but the overwhelming majority of cases that are considered and transferred by the Panel involve such claims." Margaret S. Williams, Richard A. Nagareda, Joe S. Cecil, Tom Willging, Kevin M. Scott & Emery G. Lee, The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical Investigation 13 (Aug. 3, 2009) (unpublished manuscript, *available at* http://ssrn.com/abstract=1443375). More than 90 percent of cases in MDLs involve products liability claims. *Id.*

from the latest (November 7, 2005—*Guidant*).[24] The cases thus collectively provide a detailed snapshot of contemporary MDL management techniques. Third, all three cases are pure consolidations, meaning that none was handled as a class action. This simplifies the study of the MDL control rules because we need not account for complications that arise when (as sometimes happens) both aggregation procedures are employed concurrently.[25] Fourth, the judges who handled these cases, Judges Donovan Frank (*Guidant*), Eldon Fallon (*Vioxx*), and Jack Weinstein (*Zyprexa*), are the principal authors of the emerging doctrine defining MDLs as "quasi-class actions." The cases therefore present an opportunity to assess a developing doctrinal innovation. Fifth, all three judges employed the control rules of greatest interest to us. Each judge appointed lead[26] and liaison[27] attorneys, set these lawyers' compensation, and heavily regulated the fees all lawyers could charge. Finally, all three cases produced enormous settlements. *Vioxx* was the largest, at $4.85 billion; *Zyprexa* came in second at $700 million; and *Guidant* trailed the field at $195 million. These are large sums, even by the standards of group litigation.

Although the three MDLs are quite similar, they differ in some interesting respects. First, the judges handling them have different amounts of experience with MDLs. Judge Weinstein is a seasoned veteran, with eight terminated MDLs under his belt and two active MDLs on his docket.[28] Judges Frank and Fallon, on the other hand,

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24. The Vioxx litigation was transferred on February 16, 2005. *In re* Vioxx Prods. Liab. Litig., MDL Docket No. 1657, 2007 WL 3354137, at *4 (E.D. La. Nov. 9, 2007).

25. For a case exemplifying these complications, see *In re* Diet Drugs Prods. Liab. Litig., *supra* note 2. For discussions of the differences between aggregate procedures, see, for example, Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1773–84 (2005); Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991).

26. Lead Counsel handles "substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221; *see also id.* § 10.224 (discussing the court's role in managing and overseeing counsel); *id.* § 22.62 (regarding the organization and designation of counsel by the court).

27. Liaison Counsel, usually a local attorney, handles "administrative matters, such as communications between the court and other counsel . . . , convening meetings of counsel, advising parties of developments, and . . . managing document depositories and . . . resolving scheduling conflicts." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

28. In the world of complex litigation, Judge Weinstein is a living legend and a continuing source of inspiration to many, including us. Many of his cases have become the focus of scholarly

are relative newcomers. Neither has completed a single MDL, although both have handled complex lawsuits of other types. The proceedings thus present an opportunity to see how closely less seasoned judges hew to the path blazed by their senior colleague. As readers will see, although there is a strong tendency to follow the leader, there also are important points at which Judges Frank and Fallon have struck out on their own.

Second, *Zyprexa*, the earliest of the three MDLs, involved claimants who were psychologically handicapped. The claimants used Zyprexa because they had schizophrenia or bipolar disorder. One might therefore reasonably believe the *Zyprexa* claimants had a special need for protection, including perhaps protection from the lawyers they retained. Feelings of paternalism certainly and strongly colored Judge Weinstein's conduct of the case. No similar basis for concern existed in *Guidant* or *Vioxx*, as no mental illness or like deficiency afflicted the claimants in these MDLs. The *Guidant* and *Vioxx* claimants suffered serious injuries, including heart attacks and strokes; they were, however, typical plaintiffs. Many tort cases involve plaintiffs with devastating injuries, yet these plaintiffs are deemed responsible adults and are treated as such.[29] We know of no physical basis on which to distinguish the *Guidant* and *Vioxx* claimants from other plaintiffs with serious injuries.

Third, although all three MDLs encompassed large numbers of claimants, the volume of litigation varied greatly. About 4,000 lawsuits alleging injuries from defective defibrillators were pending when *Guidant* settled.[30] The *Zyprexa* settlement resolved about 8,000 cases, approximately 75 percent of the litigation faced by Eli Lilly, the manufacturer.[31] By comparison, the withdrawal of Vioxx from the market triggered an avalanche of lawsuits. "As of December 2007, there were approximately 26,600 Vioxx cases involving 47,000 individual 'plaintiff groups' . . . . Approximately 25,800 claimants were in the federal MDL and 15,850 in proceedings in the New Jersey

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articles and books. *See, e.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987).

29. *See, e.g.*, David M. Studdert et al., *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2026 (2006) (studying random sample of medical malpractice cases and finding that 80 percent involved injuries that caused significant or major disability or death).

30. Gordon Gibb, *Guidant Settles 4,000 Claims, Avoids Trial - For Now*, LAWYERSANDSETTLEMENTS.COM, July 30, 2007, *available at* http://www.lawyersandsettlements.com/articles/01194/guidant-settles.html.

31. Alex Berenson, *Lilly to Pay $690 Million in Drug Suits*, N.Y. TIMES, June 10, 2005, at C1, *available at* http://www.nytimes.com/2005/06/10/business/10lilly.html?scp =1&sq=lilly%20to%20pay%20%24690&st=cse.

Superior Court; an additional 14,100 claimants had entered into Tolling Agreements with Merck. This indicates a total of 60,100 potential claims in the settlement as of December 2007."[32]

In theory, differences in size could affect judges' behavior. Judges may give plaintiffs' attorneys a freer hand in smaller MDLs, which involve fewer lawyers. Judges may also reduce non-lead lawyers' fees less in smaller MDLs because these proceedings generate fewer economies of scale. Whether these differences or others influenced the judges remains to be seen.

B. Selection and Empowerment of Managerial Attorneys

The need to centralize control arose in all three MDLs. However, instead of asking the claimants' attorneys to create a unified governance structure, all three judges did so themselves.[33] Each appointed a small number of lead and liaison attorneys to an executive committee and a larger number of attorneys to a Plaintiffs' Steering Committee ("PSC").[34] As the cases progressed, each judge also created additional committees for specific purposes, such as conducting settlement negotiations or coordinating with attorneys handling state court cases. Most often, the members of these specialized committees were also lead or liaison attorneys or PSC members. Sometimes, however, the judges appointed lawyers who previously held no formal responsibilities. This was true of the *Vioxx* Fee Allocation Committee and the *Vioxx* Negotiating Committee, both of which encompassed attorneys with state court cases who had not previously been involved in the MDL.

The judges selected lead attorneys from pools of volunteers. They did not explain their choices, even though, as discussed below, some of their selections were puzzling. The judges were free to pick the lawyers they wanted because the standards governing appointments of attorneys to managerial positions are extremely weak and the risk of reversal is essentially nil. There appears to be no reported case in which a disappointed lawyer appealed an unfavorable appointment decision from an MDL judge, let alone one in which an

32. Kritzer Aff. ¶ 62, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Mar. 31, 2009) (citing Joint Report No. 30 of Plaintiffs' and Defendants' Liaison Counsel 8 (Dec. 12, 2007)).

33. The *Manual for Complex Litigation* encourages judges to impose governance structures. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.22, 10.224, 22.62.

34. In *In re Zyprexa*, Judge Weinstein created two PSCs as a result of settlements that required restructuring the plaintiffs' control structure. *See* Zyprexa MDL *Judge Gives A Bit More In Fees, But Denies Multipliers, Disbursement*, 13-12 MEALEY'S EMERGING DRUGS & DEVICES 7 (2008) ("A second PSC is now representing plaintiffs not included in the initial settlement with Lilly.").

appointment order by an MDL judge was reversed.[35] The *Manual for Complex Litigation* advises MDL judges to consider lawyers' qualifications, competence, interests, resources, and commitment, but these criteria are so vague that, as a practical matter, judges appoint the lawyers they want for reasons known only to them.[36]

In theory, the dearth of challenges to judicial appointments could indicate that lawyers are satisfied with judges' selections. In fact, anyone with experience in MDLs knows this is not so. Lawyers relegated to non-lead positions often chafe mightily. They refrain from appealing partly because they do not wish to alienate MDL trial judges, who have considerable power to make life unpleasant for them.[37] Also, as a practical matter, the option of appealing is closed. The legal standards are vague, the facts concerning lawyers' abilities are inherently subjective, and judges usually appoint well-qualified lawyers to lead positions. Consequently, a lawyer denied a lead position would likely find an abuse of discretion impossible to prove.

Once chosen, lead attorneys receive plenary control over MDLs. For example, the order Judge Frank entered in *In re Guidant Corp.* empowered the lead attorneys to:

> Determine . . . and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) . . . the position of the Plaintiffs on all matters arising during pretrial proceedings . . . ; . . . [c]oordinate the initiation and conduct of discovery on behalf of Plaintiffs . . . ; . . . [c]onduct settlement negotiations on behalf of Plaintiffs . . . ; . . . [d]elegate specific tasks to other counsel in a manner to ensure that pretrial preparation for the Plaintiffs is conducted effectively, efficiently, and economically; . . . [e]nter into stipulations, with opposing counsel, necessary for the conduct of the litigation; . . . [p]repare and distribute to the parties periodic status reports; . . . [m]onitor the activities of co-counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; . . . [p]erform such other duties as may be incidental to proper coordination of Plaintiffs' pretrial activities or authorized by further Order of the Court; and . . . [s]ubmit, if appropriate, additional committees and counsel for designation by the Court.[38]

By putting particular attorneys in charge of these matters, Judge Frank relegated other attorneys to more passive roles. He also created relationships of dependency. A group of disabled attorneys had to rely on a coterie of litigation managers to develop their clients' cases. The disabled lawyers' clients also lost control. They were at the mercy of lawyers they never hired and could not discharge.

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35. This is based on a Westlaw search.

36. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224.

37. *See infra* note 118 (discussing the penalties Judge Fallon imposed on lawyers who challenged his handling of fees in the *Vioxx* MDL).

38. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2005 WL 3704679, at *1 (D. Minn. Dec. 20, 2005).

The *Manual for Complex Litigation* recognizes the vulnerable position of disabled lawyers[39] and their clients. To protect them, it subjects lead attorneys to a fiduciary duty, requiring them to "act fairly, efficiently, and economically in the interests of all parties and parties' counsel."[40] The injunction would be unnecessary if the interests of managerial lawyers, non-lead lawyers, and claimants were always the same. But their interests may conflict, and often do. As shown below, lead lawyers frequently encounter opportunities to enrich themselves at others' expense. The fiduciary duty requires them to "act . . . in the interests of all parties and parties' counsel" in these situations.[41]

C. The Common Fund Doctrine as Applied to MDLs

Given that MDL judges can appoint managerial attorneys, it may seem a foregone conclusion that they can compensate managerial attorneys too. Judges certainly think so: they often comment that the power to appoint would be "illusory" without the power to remunerate.[42]

The source of an MDL judge's power to remunerate is not obvious, however.[43] The MDL statute says nothing about fees.[44] The federal class action rule provides no authority either. It permits a

39. We use the labels "non-lead lawyer," "limited lawyer," and "disabled lawyer" interchangeably.

40. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22.

41. *Id.*

42. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 682174, at *5 (D. Minn. Mar. 7, 2008) (memorandum opinion and amended order regarding attorney's fees) (quoting *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1005, 1016 (5th Cir. 1977)); *see also In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., No. 99-20593, 2002 WL 32154197, at *17 (E.D. Pa. Oct. 3, 2002) ("As a corollary to this appointment, the court must be permitted to compensate fairly the attorneys who serve on such a committee.").

43. An interesting question, beyond the scope of this article, is whether federal or state law regulates fee awards in MDLs containing cases over which the federal courts have jurisdiction based on diversity of citizenship. Because fee awards affect substantive rights, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245–46 (1975), one might contend, per Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938), and subsequent cases, that state law applies. However, this could pose serious administrative difficulties in MDLs, which often draw cases from many states. One might therefore contend that this is an appropriate context in which to develop a federal common law of procedure. MDL judges seem to have reached this conclusion, though without arguing for it explicitly.

44. One could argue that the statute empowers judges to create a federal common law of fees. *Cf.* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 450–51 (1957) (inferring federal courts' power to fashion federal law for the enforcement of collective bargaining agreements). Thus far, no federal court has made this argument.

federal judge to grant fee awards "that are authorized by law."[45] The question at hand, which Rule 23 does not answer, is whether any "law" authorizes fee awards to lead attorneys in MDLs.

Judges contend that the common fund doctrine authorizes fee awards to lead lawyers in MDLs.[46] Fee awards in class actions rest on this doctrine.[47] But MDLs are not class actions, and on close inspection one sees that, for many reasons, the attempt to invoke the common fund doctrine in MDLs must fail.

The *Restatement (Third) of Restitution and Unjust Enrichment* agrees. It observes that the "predominant rationale [for fee awards in consolidations] is not unjust enrichment but administrative convenience."[48] This comment goes to the heart of the matter. The common fund doctrine applies only when claimants are unjustly enriched. To be unjustly enriched, however, more is required than that claimants benefit from the efforts of others—much more. People often receive spillover benefits produced by others—called positive externalities—which the law of restitution allows them to enjoy free of charge. The few contexts in which restitution is required meet a host of other requirements. When one examines these requirements, it is clear that the common fund doctrine does not apply to MDLs.

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45. FED. R. CIV. P. 23(h).

46. *See In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (setting fee caps at 35 percent of client's recovery for attorneys involved in the MDL, subject to individual increase or decrease at discretion of Special Masters); *see also In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 607 (E.D. La. 2008) (awarding 32 percent of common fund to attorneys involved in the *Vioxx* MDL); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at *19 (capping fee awards for attorneys in this MDL at 20 percent, subject to individual increase by petition to the Special Masters). Some commentators agree. *See, e.g.*, Mary Katherine Bedard, *Attorney Fee Awards and the Common Fund Doctrine: Hands in the Plaintiffs' Pockets?*, PLAINTIFF MAG. 1, 2 (2008) ("It is without question that a court has the power to award fees from a common fund to designated counsel who performed tasks on behalf of the group."); Mark G. Boyko, *The Role of Judges and Special Masters in Post-Settlement Claims Administration*, 11 MEALEY'S EMERGING DRUGS & DEVICES 33 (2006) ("While MDL plaintiffs are represented by counsel of their choosing, and likely have contingency fee agreements with them, those retail attorneys and their clients benefit collectively from the work of those on the plaintiffs steering committee, and, therefore, owe at least some portion of their settlement share to the leading plaintiff's counsel who oversaw uniform discovery, argued motions and otherwise protected the interest of all cases in the MDL."); Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services when Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 430 ("At the conclusion of such litigations, when attorney fee payments come into play, the equitable common fund doctrine enables judges to supervise the payment of fees and costs to attorneys.").

47. For a detailed examination of the restitutionary basis for fee awards in class actions, see Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1990–1991); *see also Alyeska Pipeline*, 421 U.S. at 245–46 (describing origins and justification for the common fund doctrine).

48. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft No. 3, 2004).

1. The Enrichment Requirement

One condition for restitution is that after receiving benefits produced by others, claimants must be better off than they would have been on their own. This requirement is easily met in class actions that yield payments, for without the class action many, most, or all class members would have recovered nothing. As the Supreme Court observed in *Amchem*:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[49]

Class actions typically aggregate claims worth little or nothing in conventional lawsuits.

MDLs have a different, and even contrary, core purpose. Every claimant caught up in an MDL has a claim large enough to warrant a conventional lawsuit. In fact, every claimant has already sued. Every claimant also has an attorney who is aggressively pushing his or her case toward resolution in a favorable court. If the primary purpose of the class action is to remedy a litigation drought, the purpose of an MDL is to deal with a litigation flood. When a torrent of lawsuits threatens to overwhelm the courts, judges protect their limited resources by diverting the flow into an MDL. After all, the MDL's core purpose is "administrative convenience," as the *Restatement* rightly observes.[50] But the predictable effect of such "convenience" is to make plaintiffs worse off by denying them the advantages of decentralized litigation under the control of their own attorneys.

"Commentators generally agree that MDL practice favors the defense," as Judge William G. Young observed in *DeLaventura v. Columbia Acorn Trust*.[51] This is partly because "MDL practice is slow, very slow."[52] Plaintiffs usually favor early trials. Defendants prefer to put off the day of reckoning. By forcing plaintiffs to incur substantial delays, MDLs reduce the value of their claims.

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49. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)).

50. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b. (Tentative Draft No. 3, 2004); *see also* Silver, *supra* note 47, at 664–65 (setting out conditions for the application of the common fund doctrine in class actions); Silver, *supra* note 25, at 497–500 (explaining differences between class actions and consolidations that make it difficult to apply the common fund doctrine in the latter).

51. 417 F. Supp. 2d 147, 155 (D. Mass. 2006).

52. *Id.* at 150.

A bigger problem is that MDL judges cannot try cases transferred to them. They can only prepare these cases for trial.[53] This limitation on MDL courts declaws plaintiffs in transferred cases by depriving them of the weapon that pressures a defendant to pay a reasonable amount in settlement: the threat of forcing an exchange at a price set by a jury.[54] The standard economic model of settlement implies this result directly.[55] Under this model, parties settle for the plaintiff's expected gain at trial because the plaintiff can credibly threaten the defendant with an equivalent loss. A plaintiff who cannot get to trial can threaten a defendant only with additional litigation costs or other secondary costs. As Judge Young wrote:

> Once trial is no longer a realistic alternative, bargaining shifts in ways that inevitably favor the defense. After all, a major goal of nearly every defendant is to avoid a public jury trial of the plaintiff's claims. Fact-finding is relegated to a subsidiary role, and bargaining focuses instead on ability to pay, the economic consequences of the litigation, and the terms of the minimum payout necessary to extinguish the plaintiff's claims.[56]

In theory, a plaintiff caught up in an MDL can threaten a defendant with a trial in the original forum. Once a case is fully prepared, an MDL judge is supposed to send it back to the transferor court. In fact, however, remand is exceedingly unlikely. "[I]t is almost a point of honor among transferee judges . . . that cases . . . shall be settled rather than sent back to their home courts for trial."[57] Even Judge Fallon, a proponent of MDLs, admits that "the centralized forum can resemble a 'black hole,' into which cases are transferred

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53. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

54. The same problem arises in so-called "settlement-only classes," where returns are often meager because class counsel cannot credibly threaten defendants with class-wide judgments at trial. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 399 (2000) (arguing that claimants and class counsel are "disarmed" in settlement-only classes because they cannot threaten the defendant with a class-wide judgment at trial). The U.S. Supreme Court made the same point in *Amchem Products, Inc. v. Windsor*, pointing out that a consequence of "permitting class designation despite the impossibility of litigation" would be that "class counsel . . . would be disarmed." 521 U.S. 591, 621 (1997).

55. John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

56. *DeLaventura*, 417 F. Supp. 2d at 155.

57. *Id.* at 150, 152. An empirical study conducted by the Federal Judicial Center reports that 82.5 percent of all non-asbestos products liability cases closed in the MDL courts to which they were referred. Emery G. Lee, Margaret Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging & Kevin M. Scott, *The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical Investigation* 48 (Aug. 3, 2009), *available at* http://ssrn.com/abstract=1443375. Although this implies an 11.5 percent remand rate, the figure is misleading. Six MDLs account for the vast majority of the remands. *Id.* at 17–18. Unless an entire MDL fails, a plaintiff involved in an MDL has little chance of obtaining a remand.

never to be heard from again."[58] Being stuck forever in a court that cannot preside over a trial and that wants a global settlement at all costs, plaintiffs caught up in MDLs have little bargaining leverage. No wonder "[d]efendants generally want centralization; plaintiffs generally don't."[59]

2. The Implied Consent Requirement

Differing purposes also explain why claimants can opt out of class actions but not MDLs. Allowing opt-outs in class actions enables class members with viable claims to proceed separately when this strategy is best for them. It is therefore consistent with the core purpose of the class action, which is to help claimants who are better off as part of a group. By contrast, allowing opt-outs would defeat the core function of the MDL, which is to conserve resources by consolidating as many lawsuits as possible in a single forum. Because MDLs disadvantage claimants, many would head for the exits if opt-outs were allowed.

The bar on opt-outs also undermines attempts to apply the common fund doctrine in MDLs, as the *Restatement (Third) of Restitution and Unjust Enrichment* observes.[60] By voluntarily remaining in a class when given the right to opt out, class members lend a degree of consent to the requirement of paying fees. "The class members' right . . . to opt out . . . tends to resolve, insofar as practicable, remaining objections on the score of forced exchange."[61] No implication of consent arises in MDLs because no opt-out right exists.[62]

3. The Impracticability of Bargaining Requirement

The law of restitution bars forced compensation when producers and recipients can bargain directly. When bargaining is

58. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008).

59. *DeLaventura*, 417 F. Supp. 2d at 156.

60. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft No. 3, 2004) ("By comparison with [fee awards in] class actions, court-imposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles, since litigants may have no choice but to accept and pay for certain legal services as directed by the court.").

61. *Id.* However, the idea of implied consent appears largely fictional in this context, given that most class members fail to opt out because of simple inertia.

62. Silver, *supra* note 25, at 499.

practicable, producers who wish to be paid for their services must negotiate for payments.[63]

In class actions, bargaining normally is impracticable. Claims are too small to justify the cost of negotiating, and claimants' identities and whereabouts are unknown. The numerosity requirement highlights this difficulty. As the *Restatement* explains:

> The fundamental premise of class certification—that the class is too numerous to permit individual joinder—tends to support a critical element of the restitution claim in these circumstances, namely, that the claimant was justified in proceeding in the absence of contract with the defendant (here, the individual class member or common-fund "beneficiary").[64]

No analogue to the numerosity requirement applies to MDLs. Nor, if one existed, would it be met. All plaintiffs' names and addresses are known because all have sued. The names and addresses of all lawyers are known too, making it practicable for lead lawyers and limited lawyers to bargain face-to-face.[65]

A corollary of the impracticability of bargaining requirement is the doctrine that a provider who could have negotiated with all beneficiaries but chose to negotiate only with some is fully compensated when in receipt of the contracted-for fee the willing beneficiaries agreed to pay. As the *Restatement* observes:

> A further difficulty [with claims for common fund compensation] stems from the fact that the lawyer's involvement . . . usually has a contractual basis from the outset, in the agreement with the clients by whom the lawyer is retained. The lawyer's subsequent claim to recover an additional fee from nonclients, over and above what the clients have agreed to pay, will therefore encounter the objection that there is no unjust enrichment if the [lawyer] has been compensated, pursuant to contract, for the performance in question; no entitlement to restitution in respect of incidental benefits resulting from compensated employment that the claimant is free to undertake or to decline.[66]

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63. "The law's strong preference for contractual over restitutionary liability accounts for the general rule by which a person who seeks compensation for benefits conferred on another . . . must ordinarily found the claim on an agreement with the recipient." RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30 cmt. f (Tentative Draft No. 3, 2004).

64. *Id.* § 30 cmt. b ("The fundamental premise of class certification—that the class is too numerous to permit individual joinder—tends to support a critical element of the restitution claim in these circumstances, namely, that the [fee] claimant [here, class counsel] was justified in proceeding in the absence of contract with the defendant (here, the individual class member or common-fund 'beneficiary').").

65. MDLs may create some bargaining impediments that do not exist in their absence. For example, in an MDL, lead lawyers and limited lawyers are caught up in a bilateral monopoly. Once appointed by a court, lead lawyers are the only sellers of CBW and limited lawyers are the only buyers. Efficient exchanges are difficult to negotiate in this environment. Before an MDL is created, this problem does not exist. Any lawyer can offer to provide CBW, and any lawyer can agree to buy it.

66. *Id.* § 30 cmt. a.

The intuition is simple. If the fees the signed clients agreed to pay were insufficient to cover the work required to represent them, the lawyer had the option of negotiating to receive additional fees from other claimants or attorneys. Because the lawyer failed to do that, an inference arises that the signed clients' fees were large enough to justify the work required to represent them. This weakens the case for forcing supplemental payments.

In MDLs, the possibility of forming larger litigation groups voluntarily is clear. Many or most plaintiffs participate in such groups. For example, about two thousand clients were represented by lawyers belonging to the Vioxx Litigation Consortium ("VLC"), a group of cooperating attorneys. Other lawyers also represented large client groups. Nothing prevented the lawyers from joining forces to create even bigger groups. In fact, enormous coalitions sometimes form. In *In re Polybutylene Plumbing Litigation*,[67] forty-nine law firms collectively represented about thirty-seven thousand plaintiffs, with a single firm taking the helm on most claimants' behalf. The firms shared fees pursuant to contractual referral fee agreements. When mergers fail to occur, then, the logical inference is that the lawyers see too little advantage. They expect the groups they represent separately to generate sufficient recoveries and fees to justify the work.

4. The Passive Beneficiary Requirement

The common fund doctrine generally disallows demands for forced payments from claimants who hire their own attorneys.[68] Only

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67. 23 S.W.3d 428 (Tex. App.-Houston [1 Dist.] 2000). The famous MER/29 litigation provides another example of managing mass litigation contractually. *See* Paul D. Rheingold, *The MER/ 29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 123 (1968) (describing mass defective products litigation in which 288 lawyers or law firms formed a group to finance discovery and other litigation activities).

68. *See, e.g.*, Vincent v. Hughes Air West, Inc., 557 F.2d 759, 770 (9th Cir. 1977) ("[A]s a general rule, if the third parties hire their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney's fees."); *id.* at 771–72 ("[T]he reimbursement of the representative attorneys beyond the terms of their individual contracts was limited to that portion of the fund allocated to beneficiaries which had not participated in the suit [by hiring attorneys of their own]."); Nolte v. Hudson, 47 F.2d 166, 168 (2d Cir. 1931) ("[W]here [litigants] are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other [litigants]." (citation omitted)); Blue Cross and Blue Shield of Alabama v. Freeman, 447 So. 2d 757, 759 (Ala. Civ. App. 1983) (The common fund doctrine does not apply to "one who joins as a party in the suit, assists in the prosecution or contributes toward the expense of the recovery of the fund . . . ."); Valder Law Offices v. Keenan Law Firm, 129 P.3d 966, 972 (Ariz. Ct. App. 2006) (holding common benefit fees could not be assessed on party "[b]ecause of the presence of counsel, actively involved on behalf of [the client]"); Draper v. Aceto, 33 P.3d 479, 484 (Cal. 2001) (" '[A] court may award attorney's fees from a common fund to an attorney who has succeeded in preserving a fund when equity requires it,' but . . . 'this cannot be done when there are multiple

claimants who sit on their hands, as absent class members normally do, can be made to pay. As the *Restatement (Third) of Restitution and Unjust Enrichment* explains:

> Common-fund recovery is rarely available from a party who has retained and paid his own legal counsel. While the difficulty of comparing the lawyers' respective contributions is presumably part of the explanation, the more influential fact is simply that such a party cannot be characterized as a passive recipient of benefits provided by others.[69]

There are no "passive recipient[s] of benefits" in MDLs because all claimants are outfitted with lawyers.[70]

The passivity requirement plays two roles. First, it identifies free-riders, i.e., people who could help bear the cost of producing a common benefit but choose not to, knowing they will enjoy the benefit whether they contribute or not. Obviously, claimants who hire attorneys are not free-riders. They agree to bear the cost of producing their gains. Nor are claimants' disabled lawyers free-riders. The lawyers do not choose to refrain from performing CBW when offered the chance. They are prevented from doing so by MDL judges and lead lawyers, who force them to the sidelines.

Second, the passivity requirement frees judges from having to decide how much any individual lawyer contributed to the outcome. Entirely lost in the quasi-class action cases—where judges may

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beneficiaries of the fund and all—or substantially all—are represented by various counsel.' " (quoting Estate of Korthe, 88 Cal. Rptr. 465, 466 (Cal. Ct. App. 1970)); Steinberg v. Allstate Ins. Co., 276 Cal. Rptr. 32, 34 (Cal. Ct. App. 1990) ("The [common fund] doctrine does not apply . . . when each party has retained counsel, and each counsel actively prosecuted the case or actively participated in creation of the settlement."); Estate of Korthe, 88 Cal. Rptr. 465, 467 (Cal. Ct. App. 1970) (explaining that the accepted rationale for common-fund recovery "applies only where a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries sit on their hands"); Means v. Montana Power Co., 625 P.2d 32, 37 (Mont. 1981) ("[O]nly inactive or passive beneficiaries should be forced to bear the costs of litigation under the common fund doctrine."); Estate of Kierstead, 237 N.W. 299, 300 (Neb. 1931) (denying recovery, notwithstanding "substantial benefit" conferred on defendants, where claimants "were notified that the defendants had employed another as their attorney"); Hurst v. Cavanaugh, No. 90-J-7, 1992 WL 208918, at *5 (Ohio Ct. App. Aug. 21, 1992) (holding that common fund doctrine cannot apply to persons represented by counsel who were active in the litigation); Traveler's Ins. Co. v. Williams, 541 S.W.2d 587, 590 (Tenn. 1976) (The common fund doctrine "is never applied against persons who have employed counsel on their own account to represent their interests."); DuPont v. Shackelford, 369 S.E.2d 673, 677 (Va. 1988) (explaining there are no "free rides" where all parties are represented by counsel); *see also* Jean F. Rydstrom, Annotation, *Construction and Application of "Common Fund" Doctrine in Allocating Attorneys' Fees Among Multiple Attorneys Whose Efforts Were Unequal in Benefiting Multiple Claimants*, 42 A.L.R. FED. 134 § 2b (2005) (explaining that the common benefit doctrine does not "permit the allowance of fees from a fund created where all parties interested are represented by counsel of their own selection, *each counsel in such case being required to look to his own client for compensation*") (emphasis added).

69. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. e (Tentative Draft No. 3, 2004).

70. *Id.*

oversee the division of fees among more than one hundred law firms—is that when many hands contribute to a successful result, courts of equity typically refuse to ask how much each person contributed. The common fund doctrine reflects this traditional constraint. It applies only when "the beneficiary, whether in person or by counsel, has made *no significant contribution* to the transaction by which the common fund is created, preserved, or enlarged."[71] When everyone contributes something of importance, no one receives restitution from anyone else.

In class actions, the "many hands" problem rarely arises. Most class members are entirely passive. They do not have lawyers and, *a fortiori*, they do not have lawyers who contribute in any significant way to the eventual result. Class counsel does all the work and deserves all the credit.

In MDLs, by contrast, "[t]he common benefit lawyers simply do not do 100% of the legal work."[72] All lawyers contribute to the final result. Although lead attorneys understandably cast themselves as heroes, non-lead attorneys provide essential services too.[73] To see this, one need only consider the sources of bargaining leverage plaintiffs have in MDLs, perhaps the most significant of which are the number of claims and their quality. Non-lead lawyers help create this leverage by identifying and activating potential clients, evaluating their claims, contracting with them, and filing lawsuits for them. For example, the VLC reviewed 30,000 potential claimants, of whom it agreed to represent only 2,000. The screening process consumed 126,000 work hours by staff and paralegals, 10,000 hours by nurse practitioners, 23,300 hours by attorneys, and 850 hours by physicians and other medical experts. The VLC's out-of-pocket cost was $13.5 million.[74] It is impossible to know how much the VLC's efforts strengthened the position of the plaintiffs in the negotiations that produced the global settlement, but they clearly added something.

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71. *Id.* § 30(3)(c) (emphasis added).

72. William B. Rubenstein, *On What A "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATT'Y FEE DIG. 87, 89 (2009).

73. Prevailing practices in MDLs recognize this by reimbursing many non-lead lawyers for expenses incurred in connection with services deemed to be of common benefit to all claimants. *See* Pre-Trial Order No. 51, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Sept. 23, 2009), *available at* http://vioxx.laed.uscourts.gov/Orders/PTO51.pdf (same); Transcript of Status Conference at 43, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Sept. 17, 2009) (on file with author) (indicating that 112 lawyers applied for reimbursement of common benefit costs).

74. Affidavit of Walter Umphrey, Memorandum in Support of Motion for Reconsideration/Revision of Order Capping Contingency Fees and Alternatively for Entry of Judgment at 31, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Dec. 10, 2008).

Non-lead lawyers may also create bargaining leverage by keeping clients out of MDLs. This strategy, which forces defendants to do battle on several fronts, preserves the possibility of obtaining trial verdicts in state courts chosen by plaintiffs. For example, by keeping their clients' cases *out* of the *Vioxx* MDL, non-lead lawyers forced Merck to defend thirteen trials "before juries in state courts in New Jersey, California, Texas, Alabama, Illinois, and Florida."[75] Some of these trials produced enormous verdicts, pressuring Merck to pay more in settlement.[76]

Non-lead lawyers also provide valuable services that are more mundane. They develop the history of each client's exposure to or use of a product and the details of each client's injury. In *Vioxx*, for example, the MDL court required plaintiffs claiming cardiovascular injury to provide medical information and to authorize the release of medical records. Disabled lawyers helped clients with these tasks. Disabled lawyers must also ensure that lead attorneys obtain discovery and brief legal issues bearing on unique aspects of their clients' claims, such as causation of illnesses that are relatively uncommon. Finally, they also advise clients about the costs and benefits of settling and help those who wish to settle to file claims.

Because many hands contribute to the success of MDLs, doling out shares in common fund fee awards is unavoidably messy. Each fee-seeking attorney casts himself or herself in the best possible light and minimizes the contributions of others.[77] Matters are even worse when, as often happens, a global settlement resolves cases pending in diverse courts, for judges may then have to evaluate contributions made by lawyers in other forums.

As stated, the law of restitution generally refuses to ask judges to allocate credit equitably. It may authorize transfers from a free-riding lawyer to a hardworking attorney, but not from one hardworking attorney to another. This is true even if one lawyer

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75. Fallon, Grabill & Wynne, *supra* note 58, at 2335.

76. *See, e.g.*, *Vioxx Jury Adds $9 Million in Punishing Merck* (National Public Radio broadcast Apr. 11, 2006), *available at* http://www.npr.org/templates/story/story.php ?storyId=5336787&ps=rs (reporting that a New Jersey jury added $9 million in punitive damages to a $4.5 million compensatory award in favor of a Vioxx plaintiff); Aaron Smith, *Jury: Merck negligent*, CNN MONEY, Aug. 22, 2005, http://money.cnn.com/2005/08/19/news/ fortune500/vioxx/index.htm (reporting that a Texas jury ordered Merck to pay $253 million in compensatory and punitive damages to a Vioxx plaintiff).

77. Fee applications always make attorneys' efforts seem heroic. For a standard example of the genre, see Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses at 52–66, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Jan. 20, 2009), and see also Curtis & Resnik, *supra* note 46, at 448, who state that "assessing the value of contributions of a multitude of attorneys to a particular outcome is very difficult."

"performed the greater part of the work."[78] The massive allocation schemes found in MDLs today—schemes that transfer funds among tens or hundreds of lawyers, each of whom may have made important contributions—go well beyond the traditional bounds of equity. MDL judges are presiding over sizeable business ventures, not doling out restitution.

The seminal case supporting the application of the common fund doctrine in MDLs, *In re Air Crash Disaster at Florida Everglades on December 29, 1972* ("*Everglades Crash*"),[79] does not justify these reallocations. The Fifth Circuit's decision to affirm an award of about $270,000 turned on two facts: the trial judge allowed all lawyers with cases in the MDL to help develop the litigation (i.e., no lawyers were disabled), and only lawyers who elected to free-ride when given the opportunity to help were required to pay. "[T]he [trial] court . . . made clear . . . that all counsel were free to participate in discovery"; the lawyers taxed to pay the lead attorneys "conceded" that they allowed others to do the work.[80] "The district judge . . . exclud[ed] . . . attorneys who continued to be active" in the litigation from having to pay.[81] Limiting the tax to lawyers "who elected not to participate in the pre-trial activities" made the forced exchange more palatable and limited the burden to true free-riders.[82]

Everglades Crash provides little authority for modern MDL practices. Today, judges prevent many or most lawyers from helping with discovery or performing other CBW. They then tax all lawyers—including those who provide no, little, or much CBW—to create a fund from which common benefit fees can be paid. They then decide which lawyers provided how much CBW (including lawyers who performed beneficial work outside an MDL, such as by trying stand-alone cases to verdicts) and how much each lawyer's effort is worth. The *Everglades Crash* trial judge addressed a simple problem of unjust enrichment created when two lawyers voluntarily chose to free-ride instead of rolling up their sleeves and pitching in.[83] Today's MDL judges run businesses which they design and control, allocating responsibilities and rewards as they deem appropriate.[84]

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78. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30(3)(c), cmt. e, illus. 21 (Tentative Draft No. 3, 2004).

79. 549 F.2d 1006, 1014–15 (5th Cir. 1977) [hereinafter *Everglades Crash*].

80. *Id.* at 1009.

81. *Id.* at 1019.

82. *Id.* at 1020.

83. *Id.* at 1011.

84. Despite the limited precedential value of *Everglades Crash*, the 8 percent fee awarded by the trial judge appears to be taking on a life of its own. In the *Vioxx* MDL, also pending in the

D. Using Control of an MDL to Increase One's Compensation

As explained, lead attorneys are fiduciaries who must put the interests of claimants and non-lead lawyers ahead of their own. Recently, however, lead attorneys have used their control of settlement negotiations to increase their compensation. They have built favorable fee and cost-reimbursement provisions into global settlements and have required claimants and non-lead attorneys to waive any objections they may have to these provisions as a condition for participating. Judges know about this behavior but have not condemned it. Some have even approved these self-enriching acts.

To understand the lead attorneys' strategy, some background is required. Seeking a firmer foundation for fee awards in MDLs, some judges required limited lawyers to sign fee transfer agreements. The agreements required that moneys be set aside from claimants' settlement payments for common benefit fees. The amount set aside was usually small, such as 2 percent for common benefit fees and 1 percent for reimbursement of costs. The agreements also recited the limited lawyers' desire to be "legally bound."[85]

From almost every angle, the strategy of using imposed agreements to legitimate fee and cost transfers was poorly conceived. The most obvious problem was that the exchanges were forced. Disabled lawyers could neither choose the managerial lawyers they wanted nor bargain over terms nor refuse to deal. The less obvious problem was that the use of agreements undermined the common fund doctrine, which grants a right to payment only when contracting is

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Fifth Circuit, the lead attorneys also request a fee award of 8 percent and cite *Everglades Crash* in support. Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses at 50–51, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Jan. 20, 2009). Any serious regulator would reject this effort to use the earlier case as a template for the later one, the two MDLs presenting radically different production problems. *Everglades Crash* involved a small number of persons killed in an airplane accident, a handful of lawyers, and a common fund fee request for $275,000. 549 F.2d at 1008–09, 1011. The *Vioxx* MDL contains tens of thousands of persons claiming to have been injured by a defective drug, lawyers by the hundred, and a demand for over $300 million in common fund fees. *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2009 WL 2408884, at *4–5 (E.D. La. Aug. 3, 2009).

85. Judges Fallon and Frank promulgated such agreements in *Guidant* and *Vioxx*. Agreement (Full Participation Option) at 1–5, Pre-Trial Order No. 19, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Aug. 4, 2005). Judge Weinstein does not appear to have used form agreements in *Zyprexa*. Other judges have done so, however. *See, e.g.*, *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. MDL 1699, 2006 WL 471782, at *2 (N.D. Cal. Feb. 27, 2006) (J. Breyer) ("For all cases whose counsel have agreed within 90 days of this Order to cooperate with the MDL by signing an appropriate agreement . . . the assessment in such cases shall be two percent (2%) as fees and two percent (2%) as costs . . . of the 'gross monetary recovery.' ").

impracticable, as previously explained. If the form "agreements" really were binding contracts, the common fund doctrine had to go. Of course, if the "agreements" were not binding, their existence changed nothing.

In practice, however, a different problem emerged: the lead attorneys wanted more money than the agreements entitled them to collect. To get around the agreements, which the MDL judges promulgated at their request, the lead attorneys might have sought orders increasing the amounts set aside for common benefit compensation.[86] But this direct approach had an obvious downside: it would have deprived the fee set-aside of its consensual gloss. Hoping to preserve the impression that moneys were being withheld by agreement, the lead attorneys devised a different strategy. They wrote provisions into the global settlement agreements increasing the set-asides, and they required disabled lawyers and their clients to waive objections to these provisions as a condition for enrolling in the settlements. In short, they used their control of settlement negotiations to make more money available for themselves.

The strategy worked in *Guidant*. Although the form agreements promulgated in that MDL limited the charge for CBW to 4 percent, Judge Frank ordered that 18.5 percent of the $240 million settlement be set aside for common benefit fees and expenses, including 14.4 percent ($34.5 million) in common benefit fees.[87] When limited lawyers cried foul, Judge Frank observed that the *Guidant* master settlement agreement ("MSA") authorized him to determine the size of the common benefit fee award.[88] To him, this meant that even if the 4 percent cap once was binding, "the terms of the MSA contracted around it."[89]

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86. This approach was taken in *Bextra*. *See* Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund at 4, *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. MDL 1699 (N.D. Cal. July 7, 2008) (amending Pretrial Order No. 8 and increasing the set aside for common benefit fees from 4 percent to 8 percent).

87. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 451076, at *1 (D. Minn. Feb. 15, 2008). The order set aside $10 million in cost reimbursements, only $3.5 million of which was slated to cover the managerial attorneys' out of pocket expenses. *Id.*

88. *In* re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 682174, at *12 (D. Minn. Mar. 7, 2008) (observing that "a common benefit payment from the Settlement Fund is expressly contemplated by the terms of the MSA").

89. *Id.* Judge Frank also argued that the form agreements allowed the managerial lawyers to apply for more than 4 percent in "class action attorneys' fees." *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 682174, at *11 (D. Minn. Mar. 7, 2008). The observation was irrelevant, however, because no class action was certified, or even sought to be certified, in the *Guidant* MDL, as Judge Frank knew. *Id.* (observing that "the Plaintiffs did not ultimately seek class certification"). Judge Frank's real

Judge Frank's analysis is troubling. The *Guidant* MSA neither mentioned the 4 percent cap nor gave any indication that it would be exceeded. Because the MSA was silent, the limited lawyers appear to have been blindsided. They did not know they had consented to a common benefit fee increase when they enrolled clients in the settlement, assuming they had indeed consented.

A more fundamental concern is that by "contracting around" the form agreements, the lead attorneys used their control of settlement negotiations to enrich themselves. This was opportunistic behavior that violated their fiduciary duty to put others' interests ahead of their own. Instead of rewarding the managerial attorneys for "contracting around" the agreements, Judge Frank should have chastised them. Worse, by involving Boston Scientific Corporation, the defendant, in the process of increasing the 4 percent ceiling, the lead attorneys gave the defendant bargaining leverage. Boston Scientific knew the lead lawyers needed its help to obtain a fee increase. Presumably, it conditioned its agreement on some concession it would not otherwise have obtained.

When a lawyer representing a plaintiff bargains with a defendant over fees, a conflict arises.[90] This is well understood in class actions. When a defendant controls the amount class counsel is paid, the defendant can offer "red-carpet treatment on fees" in return for favorable terms elsewhere.[91] In other words, the defendant can trade higher fees for lower relief. Class counsel is willing to play along because class counsel receives the fee, not the relief. Courts and commentators have highlighted this conflict repeatedly.[92] Professor

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point was that he never expected the form agreements to limit his powers. *Id*. (observing that "the Court . . . contemplate[d] additional common benefit payments in the event of settlement").

90. Lester Brickman, *Contingency-Fee Con-Men*, WALL ST. J., Sept. 25, 2007, at A18 ("It is beyond cavil that plaintiffs' lawyers negotiating their fees directly with, and separately payable by, a defendant . . . breach lawyers' fiduciary obligations to clients."). Like most conflicts, this one may be waived by an informed client. In MDLs, the conflict is not even acknowledged, let alone waived.

91. *In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 728 (3d Cir. 2001); Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991).

92. Multiple judicial decisions condemned the conflict. *See, e.g.*, Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1327 (9th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000) ("A client who employs a lawyer to litigate against a third party has a legitimate interest in having his lawyer refrain from taking the third party's money in exchange for throwing the fight."). Academic commentary likewise abounds. *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714 (1986) ("Often, the plaintiff's attorneys and the defendants can settle on a basis that is adverse to the interests of the plaintiffs. At its worst, the settlement process may amount to a covert exchange of a cheap settlement for a high award of attorney's fees."); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 42–43

Coffee framed it as problem of "structural collusion" in which class counsel and a defendant naturally settle on terms that are good for the negotiators but bad for the class.[93]

Structural collusion also occurs in MDLs when lead attorneys use settlement negotiations to "contract around" their "agreements" with non-lead lawyers. The lead attorneys want the fee increase. The defendant is happy to offer them "red-carpet treatment on fees"—higher common benefit fees cost the defendant nothing—in return for other things, such as a smaller settlement fund, a later funding date, or a higher participation threshold. An exchange that is mutually advantageous for the negotiators occurs naturally. When secrecy makes it difficult for non-participants to monitor negotiations, as typically is true in MDLs, the conflict is especially "pronounced."[94] Only persons not at the bargaining table are harmed. Here, those persons are claimants and non-lead attorneys.

Emboldened by the success of the lead attorneys in *Guidant*, the lawyers in charge of the *Vioxx* MDL used their control of settlement negotiations to write extensive fee-related provisions into the MSA.[95] One raised the cap on common benefit fees from 3 percent to 8 percent, expressly superseding Judge Fallon's order setting the 3 percent cap, and provided that the entire 8 percent would be deducted from lawyers' contingent fees.[96] Another provision authorized a separate award of common benefit expenses.[97] And yet another required limited lawyers and their clients to agree to the first two

(2002) (discussing various forms sweetheart deals can take in class actions and mass tort cases); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145 (2001) (describing class action practice as "a world in which lawyers make fabulous fees for achieving very little," while "defendant-corporations make sweetheart deals to dispose of serious liability at bargain-basement rates"); Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1016 (2008) ("Self-interested class counsel are willing to settle on the cheap in exchange for generous attorneys' fees."); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 933 (1996) (observing that class counsel can "entice defendants to reduce their total payments by providing counsel with generous fees but affording inadequate compensation to the class").

93. John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 647–48 (1986–87) (describing how opportunities for structural collusion arise in class actions); Coffee, *supra* note 92, at 718.

94. *In re* Mark M. Hager, 812 A.2d 904, 912 (D.C. 2002).

95. Interestingly, in *Bextra* the managerial lawyers did not "contract around" their agreements, but asked the court for an order raising the common benefit set aside instead. *See supra* note 86. This was the proper way to proceed, because it did not involve an abuse of the lead attorneys' control of settlement negotiations.

96. Master Settlement Agreement § 9.2.1, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Nov. 9, 2007).

97. *Id.* § 9.2.2.

provisions as a condition for enrolling in the settlement.[98] These provisions made almost $400 million available to pay for CBW, about $240 million more than was available under the 3 percent cap, and insulated the lead attorneys' self-enriching gambit from attack.

The lead attorneys' object is to give the forced fee transfer a consensual veneer. A memorandum supporting the lead attorneys' request for $388 million in common benefit fees makes this explicit. It contends that claimants and non-lead attorneys agreed to the fee increase by enrolling in the settlement.[99] The argument is laughable. The lead lawyers' job was to build a bridge from litigation to settlement for the benefit of all claimants and attorneys. They built the bridge, but they then forbade anyone from crossing it without paying them a toll. Were a lawyer for a single client to use a settlement negotiation to extract a fee increase from the client, the violation of the fiduciary duty would be patent. That the lawyers who used their control of settlement negotiations to enhance their fees were lead attorneys in an MDL changes nothing. They used their position to benefit themselves at the expense of those they were charged to represent.[100] Conduct of this sort establishes a predicate for fee forfeiture, not for fee enhancement.[101]

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98. *Id.* § 1.2.4. By including this provision in the MSA, the lead attorneys in *Vioxx* breached their fiduciary duties a second time, the first time being when they used their control of settlement negotiations to increase the fund available to pay their fees. The lead attorneys thought the settlement was the best option for many claimants. They therefore knew that limited attorneys would be ethically bound to enroll at least some clients in the settlement, even though a lawyer enrolled even a single client had to waive any and all objections to the common benefit fee and cost provisions. In practical effect, the lead lawyers used limited lawyers' professional responsibilities to render limited lawyers powerless to oppose their opportunistic gambit.

99. Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses, *supra* note 77, at 22.

100. Judge Alice Gibney, the trial judge presiding over the state court consolidation of Kugel Mesh cases in Rhode Island, recently made the conflict that arises when plaintiffs' lawyers bargain separately over relief for their clients and fees for themselves a fixture of the negotiations in that case. She expressly authorized the lead attorneys to negotiate a "payment from [the] defendants . . . separate from and in addition to any payment made to any plaintiff, which separate payment(s) is intended to be for common benefit attorneys' fees and expenses". *In re* All Individual Kugel Mesh Cases, No: PC-2008-9999 (Superior Court, Providence, R.I.), Assented to Assessment Order (R.I. Aug. 11, 2009). The order is ill advised.

101. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) ("A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.").

E. Caps on Contingent Fees

In *Vioxx*, it is not known whether the managerial attorneys will receive the entire $388 million or some lesser amount. Judge Fallon has yet to rule on their compensation. However, he has ruled that limited lawyers will provide all the money for common-benefit fees, meaning that claimants will not pay extra for it. In an order capping all lawyers' charges at 32 percent, he held that fees for CBW "[would] be deducted from the individual plaintiffs' attorneys' fees."[102] Assuming Judge Fallon awards the full 8 percent in common benefit fees, the 32 percent cap on total charges implies that the limited lawyers will net fees of 24 percent.

Judge Fallon's order caught most lawyers by surprise. He provided neither notice nor a hearing before capping their fees, even though his action cost the lawyers about $390 million.[103] Even so, a disinterested observer might have predicted this move. Judge Fallon was using *Guidant* and *Zyprexa* as models, and lawyers' fees were also reduced in those cases. Judge Weinstein capped contingent fees at 20 percent for clients who were to receive $5,000 lump-sum payments and at 35 percent for clients who were to receive more.[104] Judge Frank initially set contingent fees at 10 percent for managerial attorneys (who would also receive common benefit fees)[105] and at 20 percent for limited lawyers (who would not).[106] These caps sparked a rebellion, which Judge Frank ultimately dealt with by setting the total

102. *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 607 (E.D. La. 2008).

103. This assumes an average retainer agreement providing for a fee of 40 percent plus costs. In failing to give adequate notice, Judge Fallon also followed Judge Frank, who capped disabled lawyers' contingent fees in an order the main purpose of which was to set the common benefit fee award. When the disabled lawyers protested, Judge Frank defended himself by asserting that a footnote to the PSC's fee award submission gave all attorneys notice that their fees might be reduced. Order Regarding Requests for Motions to Reconsider the Court's March 7, 2008 Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees at 3, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708 (D. Minn. Mar. 28, 2008). The footnote, which merely pointed out the Court's power to evaluate contingent fee agreements, was plainly inadequate. It neither said limited lawyers' fee agreements were unreasonable nor asked the Court to impose a fee cap. Judge Frank also stated that the lawyers who complained of lack of notice "should [have been] well aware of the case law supporting the Court's inherent right and responsibility to review contingency fee contracts for fairness." *Id.* at 3 n.2. Obviously, the knowledge that a court can review a contingent fee is no substitute for notice that it will do so at a particular time.

104. *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490–91 (E.D.N.Y. 2006).

105. Order Regarding Determination of the Common Benefit Attorney Fee Amount at 5, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708 (D. Minn. Feb. 15, 2008).

106. Memorandum Opinion and Amended Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees at 48, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708 (D. Minn. Mar. 7, 2008).

allowable charge for any client, including the cost of CBW, at the lesser of the contractual fee, the state-imposed fee limit, or 37.18 percent of the client's gross recovery.[107] He rejected an across-the-board cap of 25 percent proposed by two Special Masters.[108]

Noticeably, the caps varied greatly. Judge Weinstein's 35 percent cap was considerably higher than Judge Fallon's 24 percent cap. The caps set or recommended in *Guidant* fell between these extremes. One might think the caps varied because the judges tailored them to the unique facts of their MDLs. The procedures they employed eliminate this possibility. The caps differed for no better reason than that the judges chose different numbers.

The stated reason for capping fees in MDLs is that aggregation reduces lawyers' costs by generating economies of scale.[109] This is plausible. Standing alone, however, scale economies do not justify fee cuts. To see why, one must understand two things: first, aggregation is predictable; second, lawyers compete for clients in competitive markets. In combination, these factors should cause lawyers to pass the benefits of scale economies onto clients without any prodding from judges.

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107. Thirteen law firms urged Judge Frank to reconsider his ruling. *Id.* at 1–2 n.1. Notably, the group of objectors included the entire Lead Counsel Committee (LCC). *Id*. Judge Frank stuck to his guns. Thereafter, sixty-seven attorneys or law firms filed requests with the Court's Special Masters to increase their fees from 20 percent to 33 percent, as Judge Frank had allowed them to do. This group also included members of the LCC. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 3896006, at *3 n.8 (D. Minn. Aug. 21, 2008). Overwhelmed by the flood of requests, the Special Masters urged Judge Frank to raise the cap to 25 percent for all lawyers across the board. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 3896018, at *1 (D. Minn. June 30, 2008). Judge Frank rejected their recommendation because it would have required some clients to pay more in total fees than their contracts required. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 3896006, at *10 (D. Minn. Aug. 21, 2008). To ensure that no client paid more than the contract price, he imposed the cap described in the text.

108. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 3896006, at *10 (D. Minn. Aug. 21, 2008).

109. *See In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006) ("[M]uch of the discovery work [limited lawyers] would normally have done on a retail basis in individual cases has been done at a reduced cost on a wholesale basis by the plaintiffs' steering committee."); *see also In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) ("Because of the mass nature of this MDL, the fact that several firms/attorneys benefited from economies of scale, and the fact that many did or should have benefited in different degrees from the coordinated discovery, motion practice, and/or global settlement negotiations, there is a high likelihood that the previously negotiated contingency fee contracts would result in excessive fees."); Order & Reasons at 19, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Aug. 27, 2008) ("[T]he Court must assess the reasonableness of the contingent fees in light of the fact that the economies of scale have led to a global settlement offering considerable benefit to the attorneys.").

Regarding predictability, when widely sold drugs or other products impose harms on large populations, claimant groups always form.[110] MDLs are also predictable.[111] Every experienced lawyer knew the JPML would designate MDL courts to handle the cases involving Vioxx, Guidant defibrillators, and Zyprexa.

That the market for legal services is highly competitive any mass tort lawyer can also attest. When news breaks of a possible mass tort, advertising lawyers shift into high gear, referral networks activate, and competition for clients begins. Over 1,100 law firms participated in the Vioxx litigation alone.[112] Barriers to entry are low. Any lawyer can advertise on a website or in a newspaper, and many do. Potential plaintiffs can easily use the Internet to find law firms willing to handle drug-related cases. They can also comparison shop by allowing multiple firms to compete for their cases.[113] In an expert report submitted in the Vioxx MDL, Professor Joshua D. Wright reported that 1,832 different firms participated in products liability MDLs from 2004 to 2008.[114] He concluded that market failure was not a practical possibility.[115]

As a matter of economic theory, then, scale economies (assuming they exist) provide no justification for fee cuts. Market pressure should force lawyers competing for products liability cases to price their services efficiently. Even if the theoretical case were less clear-cut, however, it would remain to determine how large judicially imposed fee reductions should be. To answer that question, one would have to quantify the extent to which prices were inflated. In an antitrust case alleging overcharges for goods or services, this determination would require testimony from an expert economist or

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110. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

111. It is common knowledge that "the MDL panel . . . overwhelmingly favors the procedure it administers. Thus, once the MDL panel decides to consider a matter pursuant to Section 1407(a), transfer is more than likely." DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150 (D. Mass. 2006). One study finds that transfer and consolidation are overwhelmingly likely in products liability cases with multiple cases filed when the defendant supports the motion. Mark Herrmann & Pearson Bownas, *Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?*, 8 Class Action Litig. Rep. (BNA) 110 (Feb. 9, 2007).

112. Status Conference at 22, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Dec. 10, 2008).

113. *See, e.g.*, An Attorney for You, http://www.anattorneyforyou.com (last visited Nov. 12, 2009) (website enabling consumers to obtain offers of representation from competing law firms).

114. Affidavit of Joshua D. Wright, Memorandum in Support of Motion for Reconsideration/Revision of Order Capping Contingency Fees and Alternatively for Entry of Judgment at 10, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Dec. 10, 2008).

115. *Id.*

accountant based on an established methodology.[116] Yet, when concluding that lawyers' fees were hundreds of millions of dollars too high, Judges Fallon, Frank, and Weinstein considered no evidence of this type—or any other. They appear to have thought that a court exercising its inherent power needs neither a sound methodology nor competent evidence when cutting fees. This cannot be right. The efficient price for legal services is an empirical matter, and judges cannot properly resolve empirical matters by means of armchair speculation.

The variation in fee caps across the three MDLs thus reflects mainly the judges' differing intuitions about the fees disabled lawyers can reasonably charge. The variation may also reflect other considerations, such as the size of the reduction each judge thought the limited attorneys in his MDL would accept without making a fuss.

Although the fee caps varied, the judges' desire to protect plaintiffs from excessive charges served as a constant theme in all three cases. Each judge wanted to reduce plaintiffs' litigation costs. When combined with the desire to pay the managerial attorneys, this meant that all three judges had to cap limited lawyers' fees at levels low enough to free up the money they thought the managerial lawyers deserved. Other things being equal, a larger payment for CBW required a lower cap on fees.

In combination, the fee caps and forced payments for CBW substantially reduced limited lawyers' earnings.[117] In *Guidant*, Judge Frank calculated that his three-part cap allowed a limited lawyer with a 40 percent retainer agreement to collect 28 percent of a client's gross recovery, a discount of 30 percent.[118] This understates the impact of

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116. THOMAS V. VAKERICS, ANTITRUST BASICS § 3.03 (2009).

117. To challenge fee caps, lawyers must be willing to run considerable risks. When the VLC challenged the fee cap in Vioxx, Judge Fallon issued a sua sponte order appointing the Civil Litigation Clinic at the Tulane Law School to represent their clients' fee-related matters. Order, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Dec. 19, 2008), *available at* http://vioxx.laed.uscourts.gov/Orders/TulaneClinic.pdf. He also ordered the VLC lawyers to send their clients copies of his order, thereby fomenting animosity between the lawyers and their clients which did not previously exist. *Id.* After holding a hearing, Judge Fallon then reaffirmed his original fee cap order, giving no weight whatever to or even mentioning the evidence and arguments the VLC submitted. Order, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Aug. 3, 2009). Finally, he entered two further orders the net effect of which was to place all and only the VLC lawyers' fees in escrow until their challenge to the 32 percent order was resolved, including the 24 percent fee to which their entitlement was undisputed. Pre-Trial Order No. 49, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Sept. 23, 2009), *available at* http://vioxx.laed.uscourts.gov/Orders/PTO49.pdf; Pre-Trial Order No. 50, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Sept. 23, 2009), *available at* http://vioxx.laed.uscourts.gov/Orders/PTO50.pdf. It is difficult to find a legitimate purpose for any of these measures.

118. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 3896006, at *9–10 (D. Minn. Aug. 21, 2008).

his ruling. Under his cap, a plaintiff's total fee burden could not exceed 37.18 percent of the gross recovery. If the common benefit fee equaled 15 percent, simple subtraction shows that the most any limited lawyer could charge was 22.18 percent. If that is right, then Judge Frank's cap actually cost a lawyer with a 40 percent contract 45 percent of his fee.

The 32 percent cap set in *Vioxx* is slightly less draconian, even assuming Judge Fallon awards the entire 8 percent set aside to the managerial attorneys. To make room for the 8 percent payment under the 32 percent cap, a lawyer with a 40 percent contingent fee agreement would have to charge 24 percent. That amounts to a substantial 40 percent discount on the contractual rate.

Cuts of 40 to 45 percent fundamentally change the economics of mass tort representations. Although the matter has not been studied empirically, it seems obvious that reductions of this magnitude will influence lawyers' behavior. Presumably, they will have the same impact as other price and wage controls, which, when set below market-clearing levels, cause the quantity and quality of goods and services to decline.[119] This will harm claimants by making representation harder to find and by reducing the value of their cases. Tort reform groups (and the politicians they sponsor) support limits on contingent fees for this reason.[120] They know that claimants who cannot hire lawyers cannot sue.[121]

Having said that fee caps dampen lawyers' incentives, we nonetheless agree that claimants should not have to pay extra for CBW. All lawyers with clients in an MDL accepted the wages set in their contracts as compensation for providing all the legal services

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119. Caps on prices and wages are the subject of a large literature. For a review of the use of price controls in the United States, see HUGH ROCKOFF, DRASTIC MEASURES: A HISTORY OF WAGE AND PRICE CONTROLS IN THE UNITED STATES 1–4 (1984). *See also* Hugh Rockoff, *Price Controls*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2007), http://www.econlib.org/library/Enc/PriceControls.html ("Price ceilings . . . cause shortages."); Thomas Sowell, *An Ancient Fallacy: Price Controls*, CAPITALISM MAG., June 27, 2002, http://www.capmag.com/article.asp?ID=1684 ("It is not just the quantity supplied that declines under price controls. Quality also declines.").

120. *See, e.g.*, Terry Carter, *Tort Reform Texas Style*, A.B.A. J., Oct. 2006, at 30, 34 (reporting that Texas Governor Rick Perry, a proponent of tort reform, proposed a cap on contingent fees); Patrick Danner, *Lawyers' Fees Come Under Fire*, MIAMI HERALD, Jan. 3, 2004, at 1E (reporting that the Florida Medical Association backed a constitutional amendment capping contingent fees in medical-liability cases).

121. On the importance of access to counsel as a condition for suing, see Charles Silver & David A. Hyman, *Self-Representation in Paid Bodily Injury Claims in Texas, 1988–2005* (paper presented at ABA Section of Litigation Symposium on Access to Civil Justice, Dec. 4–5, 2008) (on file with ABA) (finding that less than 1 percent of paid bodily injury claimants filed lawsuits without retaining attorneys).

their clients reasonably required. This compensation should cover the effort CBW requires. The problem with fee caps is that they reduce lawyers' fees below market-clearing levels without either a theory of market failure or empirical evidence of inflated charges—not because CBW consumes a fraction of the fees claimants agreed to pay.

F. Allocating CBW Payments among Managerial Attorneys

Once the dollars available to pay for CBW are fixed, it remains to allocate them among the lead attorneys. This can be a messy process in which lawyers, including lawyers with cases outside an MDL, compete for shares of a limited fund.[122] In *Guidant* and *Vioxx*, Judges Frank and Fallon appointed fee allocation committees charged with deciding which lawyers' efforts were worth how much.[123] The conflicts were horrendous. The committees had to value their own members' work, including work by managerial lawyers with few or zero signed clients for whom common benefit fees would be the only reward.[124] They also had to evaluate contributions by lawyers whose work was done outside the MDL. The *Guidant* allocation committee was not up to the task. Its report provoked so many complaints that Judge Frank abandoned it.[125]

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122. Lawyers with cases in state courts share in common benefit fees because global settlements involve their clients as well as claimants in an MDL. Sometimes, these lawyers must subject themselves to regulation by an MDL judge as a condition for enrolling their clients in a global settlement. For example, Sections 9.2.3–9.2.5 of the *Vioxx* Master Settlement Agreement provided that Judge Fallon would oversee distribution of common benefit fees, after appointing a fee allocation committee and in cooperation with other identified judges. Settlement Agreement §§ 9.2.3–9.2.5, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007), *available at* http://www.browngreer.com/vioxxsettlement/images/pdfs/mastersa.pdf.

123. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 451076, at *1 (D. Minn. Feb. 15, 2008); *see also* Settlement Agreement §§ 9.2.4, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007), *available at* http://www.browngreer.com/vioxxsettlement/images/pdfs/mastersa.pdf (granting Judge Fallon authority to establish the Fee Allocation Committee). The allocating committees' recommendations were subject to judicial review.

124. In *Guidant*, Judge Frank appointed six lawyers to a Common Benefit Attorney Fee and Cost Committee: four members of the PSC and two lawyers with cases in both the MDL and the Minnesota state courts. *Guidant*, 2008 WL 451076, at *1. In *Vioxx*, Judge Fallon named nine lawyers to an Allocation Committee: three members of the Plaintiffs' Executive Committee; two PSC members; and four attorneys with state court cases. Pre-Trial Order No. 32 at 1–2, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 20, 2007), *available at* http://vioxx.laed.uscourts.gov/Orders/vioxx.pto32.pdf.

125. Order of United States District Court Judge Donovan W. Frank at 1, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB) (D. Minn. May, 27, 2008), *available at* http://www.mnd.uscourts.gov/MDL-Guidant/Pretrial_Minutes/2008/080527ord05md1708.pdf.

By involving themselves in the fee allocation process, judges again use class action procedures as models for MDLs. In the famous *Agent Orange* case, Judge Weinstein used the lodestar method to calculate the fee award.[126] His decision specified the amount each member of the PSC would receive based upon the time each lawyer put into the case. However, the PSC members had previously agreed to pool the award and reallocate it according to a plan of their own devise, the purpose of which was to reward lawyers who rescued the case from disaster by contributing financial capital late in the day.[127] This naturally meant that lawyers who logged many hours but contributed no capital would receive less than Judge Weinstein awarded, while lawyers who contributed capital but logged few hours would receive more. David Dean was one of the lawyers who wound up on the short end of the stick. He challenged the reallocation on appeal, and the Second Circuit sided with him, holding that the ultimate allocation cannot deviate substantially from the trial court's award.[128]

The Second Circuit's opinion provoked an obvious criticism: plaintiffs' attorneys know how to finance large lawsuits better than judges do, and "fee-splitting agreements that seem outrageous to a reviewing court may have strong efficiency justifications."[129] When it comes to fee allocations, the right regulatory stance in both class actions and MDLs is probably "benign neglect."[130] But judges are missing the opportunity to handle MDLs correctly because they are importing class action procedures whole-hog. In MDLs, lead attorneys can allocate fees contractually. They do not need the help of judges, and judicial interference with their arrangements is likely to do claimants more harm than good.

* * *

The discussion in this Part illustrates how Judges Fallon, Frank, and Weinstein gave in to the gravitational pull of the class action model, progressively adapting to MDLs control rules that evolved in litigation under Rule 23. The judges appointed counsel to managerial positions, oversaw their performance of those responsibilities, and set attorneys' fees for members of the quasi-class—all of which are activities undertaken by judges supervising class action litigation. Judges have missed the fact that MDLs differ

126. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 216, 221 (2d Cir. 1987).

127. *Id.* at 218.

128. *Id.* at 222–23.

129. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 903 (1987).

130. *Id.*

from class actions in respects that often render class action procedures inappropriate.

III. OPTIMIZING MANAGERIAL LAWYERS' INCENTIVES

This Part uses simple microeconomic analysis to clarify the role fee transfers can play in encouraging the optimal provision of CBW. It also explains why judges are unlikely to regulate managerial lawyers' incentives correctly and identifies other problems that arise when judges regulate lead lawyers' compensation.

A. The Basic Economics of CBW

Lead lawyers perform CBW. This category of effort includes all litigation-related services displaying a property known as jointness: when produced or performed once, many plaintiffs can use such services without reducing their value for any other plaintiff. A deposition of a fact witness could be an example of CBW. Once one attorney deposes a witness thoroughly, any number of plaintiffs can use the transcript when developing their claims; the witness need not be interrogated again. Pleadings, motions, briefs, deposition summaries, document reviews, electronic databases, document repositories, trial notebooks, and stipulations can all be examples of CBW.

Because CBW consists of joint goods and services, its production raises a problem of collective action. Rather than bear the cost of CBW, each claimant would prefer to wait for someone else to produce it and then use it free of charge. If everyone free-rides, however, everyone suffers, as no CBW is produced. Fortunately, the problem may have at least a partial solution. Claimants who refuse to pay for CBW can be denied access to it. Because lawyers do not have to share their work product with non-clients, they can use contracts to discourage free-riding.

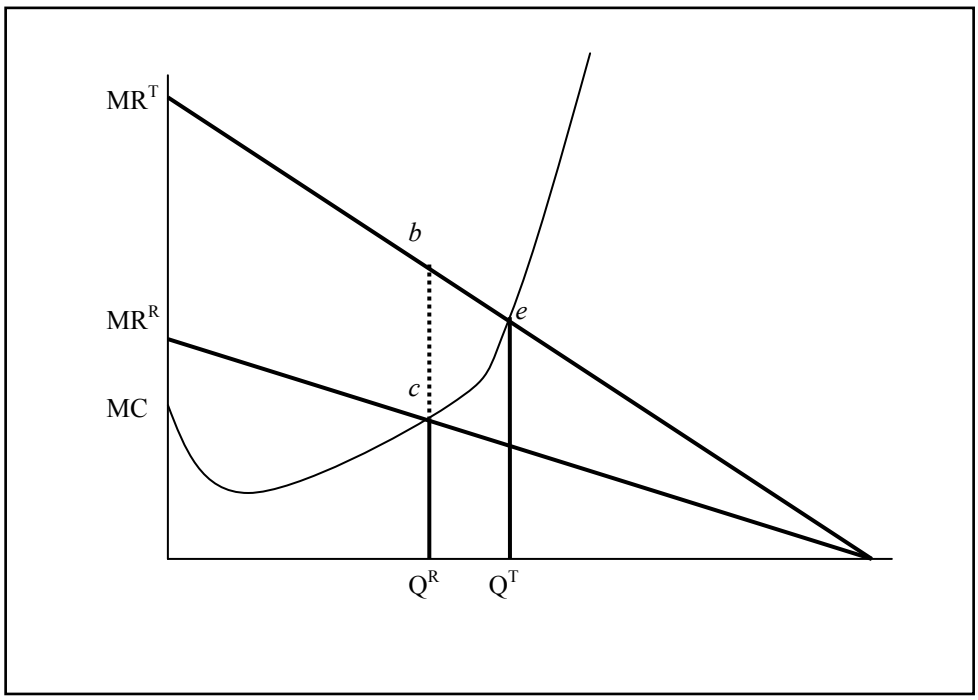
Contracts are imperfect solutions, however, as they contain two important defects. First, it is impossible to prevent free-riding completely. Once a pleading, motion, or other document is filed with a court or otherwise made publicly available, anyone can obtain it without paying legal fees. Other work product, even if not publicly available, may be leaked to persons not entitled to it. Free-riders can even benefit from CBW they do not physically possess. For example, suppose Lawyer L produces a new legal theory that strengthens her clients' claims. This theory may make the defendant willing to pay more to settle all pending cases, not just Lawyer L's, even if other

lawyers do not know about that theory. The defendant may pay more across the board because it expects other lawyers to find out about Lawyer L's theory or because it expects settlement values to become publicly known. Because Lawyer L gets no share of others' gains, her incentive to develop legal theories is diminished.

Second, when claimants form multiple litigation groups, no single group may want the level of CBW that would be optimal for all claimants as a whole. Figure I describes this problem. It assumes the existence of a total population T of identical claimants and a subgroup R whose members are represented by a common attorney. MR^T and MR^R are the marginal return curves for, respectively, T and R. The total marginal return to T or R from any unit of CBW is the sum of the marginal gains enjoyed by the claimants who belong to each group.[131] These curves slope downward to the right, reflecting the assumption that the marginal value of CBW for each claimant declines as the supply of CBW increases. The marginal cost ("MC") curve for CBW falls initially as economies of scale are realized, then rises at higher levels of production as diseconomies set in. Part of the MC curve lies below MR^R and MR^T, reflecting the assumption that a positive level of CBW is optimal for both groups.

131. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 388 (1954).

FIGURE I. OPTIMAL PROVISION OF COMMON BENEFIT WORK



Q^R, the point where MR^R and MC intersect, is the optimal quantity of CBW for R. This is the amount of CBW a contract that harmonizes the interests of R's members and their lawyer would encourage the lawyer to provide. However, Q^R would be a suboptimal level of CBW for T. Q^T, the optimal quantity of CBW for group T, is identified by the point at which MR^T and MC intersect. Because $MR^T \geq MR^R$, $Q^T \geq Q^R$.

In theory, cooperation could ameliorate these difficulties. By joining forces, claimants (or, more realistically, their attorneys) could form all-encompassing aggregations producing optimal incentives. In practice, cooperation occurs on an impressive scale but tends to be far from complete. In *Guidant*, *Vioxx*, and *Zyprexa*, attorneys established working groups with thousands of clients. But no one group formed to coordinate all the work, and many small clusters of claimants remained. This incomplete cooperation poses problems for defendants and courts, as well as plaintiffs. When thousands of claimants form tens or hundreds of working groups, defendants and judges must perform the same or similar work repeatedly. This duplication is expensive even if not all repetitive efforts can be characterized as waste.

The possibility identified in Figure I, however, is merely that—a possibility. Whether untapped economies of scale are available in MDLs is an empirical question. Instead of facilitating the production of CBW at an optimal level for an entire group, forced aggregation may saddle claimants with agency costs by putting them at the mercy of lawyers they cannot control or discharge. MDLs may also undermine plaintiffs' ability to bargain for payments by saddling them with lengthy delays and making trials impracticable. By saying that, in theory, consolidation may provide an opportunity for judges to improve incentives, we make a limited claim.

B. Judicial Manipulation of Incentives

Figure I greatly simplifies the economics of producing CBW, but it makes the relevant point. In theory, MDLs have the potential to improve upon cooperation by aggregating more cases than cooperation can reach. In terms of Figure I, an MDL creates an opportunity to move from Q^R toward Q^T by making it economically rational to pay a plaintiffs' attorney for a higher level of production. The opportunity is not all upside, however. Forced aggregation carries risks as well.

The first point to appreciate is that the lawyer for subgroup R has a preexisting incentive to provide Q^R units of CBW. If R's lawyer was given control of an MDL containing all members of T and was prohibited from extracting supplemental fees from anyone, R's lawyer would still find it advantageous to produce Q^R units of CBW because of the expected fees from R's members. If all MDL claimants were allowed to use the CBW, the group as a whole would realize outcome *b* in Figure I. In other words, T would enjoy a positive level of CBW with no supplemental payment.

The second point, related to the first, is that the incentive to produce Q^R remains as long as the members of R pay what they agreed, even if members of T who are not in subgroup R are allowed to use the CBW for free. There may be good reasons to charge members of T for access to CBW produced at the expense of subgroup R, but an incentive to produce CBW for all claimants in an MDL would exist even without forced transfers.

When it decided *Everglades Crash*, the Fifth Circuit appears to have understood that fee transfers are meant to build upon lawyers' pre-existing incentives.[132] There, the lawyers opposing the forced fee transfer asked "why [they should have to] pay [the managerial lawyers]," who had sixty cases in the MDL, "for doing what they would

132. Everglades Crash, 549 F.2d 1006, 1017 (5th Cir. 1977).

have done anyhow on behalf of their own clients?"[133] The question posed the economic issue squarely: Why was a supplemental incentive needed? The Fifth Circuit answered as follows:

> It is uncertain that [the managerial] lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage. *The [managerial lawyers'] 60 cases may affect the amount paid them as lead counsel* but not the power of the court to require payment.[134]

Obviously, the first sentence missed the point. The objecting lawyers did not dispute the managerial lawyers' right to control discovery. They questioned the need to pay them extra for conducting discovery, arguing that the lead lawyers would have expended the same effort for the benefit of their signed clients anyway. From an economic perspective, the proper response was that a supplement was needed (assuming one was) because the lawyers' pre-existing incentives were suboptimal. The second sentence hits much closer to the mark. It suggests that MDL judges should take account of incentives to produce CBW provided by lawyers' signed clients, transferring less money when fees expected from signed clients are larger. This is what judges would do if their object was to move from Q^R to Q^T.

In fact, MDL judges almost never take account of lawyers' pre-existing incentives in any explicit way. A rare exception is an opinion Judge Weinstein issued in *Zyprexa* in response to the PSC's request for a second fee award. In the course of denying most of the second request, he pointed out that three law firms with positions on the PSC "derived substantial fees from representing individual clients who settled their claims in the first phase of the [MDL]: Burg Simpson, Douglas & London, and Seeger Weiss earned $23.5 million, $21.9 million and $78.5 million, respectively."[135] The total is just shy of $124 million. Judge Weinstein seems to have thought that the PSC members had sufficient incentives to provide CBW without additional fees because their signed clients had paid them so handsomely.

Judge Weinstein may also have given weight to payments from signed clients when he evaluated the *Zyprexa* PSC's first application for fees, which he approved in full. If he did, however, he neither said so explicitly nor explained how he took account of this information when deciding how much money to transfer. In these respects, his behavior is typical. Despite the Fifth Circuit's observation in *Everglades Crash* that fees from signed clients bear on the size of

133. *Id.*

134. *Id.* (emphasis added).

135. *In re* Zyprexa Prods. Liab. Litig., No. 04-MD-1596, 2008 WL 1844000, at *5 (E.D.N.Y. Apr. 22, 2008).

forced fee transfers, there is no practice of requiring managerial attorneys to disclose what their signed clients will pay.[136] Nor does any doctrine tell judges how to use this information should they happen to have it. "[N]o specific rules" govern the size of common benefit fees in MDLs, as the judge presiding over the multi-billion dollar *Diet Drugs* settlement observed in 2002.[137] Awards need only be "fair and reasonable."[138]

This doctrinal vagueness reflects a failure on the part of judges to articulate a coherent theory of fee transfers in MDLs. Instead of thinking about MDLs on their own terms, judges have borrowed the fee jurisprudence of class actions, as previously explained.[139] Yet the analogy to class actions again turns out to be strained. In MDLs, lawyers often have valuable client inventories. The attorneys on the *Vioxx* PSC collectively stand to collect more than $300 million from their signed clients, even without a common benefit fee award. The pre-existing incentives of class counsel, by contrast, are usually much weaker. Class counsel typically has a few signed clients whose claims, standing alone, scarcely justify the cost of litigation. The problem in class actions is to create incentives from whole cloth; in MDLs, it is to enhance pre-existing incentives that may already be quite strong. For this reason, side-by-side comparisons of fees in class actions and MDLs are misleading: they ignore the (often substantial) fees managerial attorneys in MDLs receive from their signed clients. Even so, judges sometimes justify MDL fee awards by comparing them to class action awards.[140]

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136. In *Zyprexa*, Judge Weinstein learned about the fees the lead attorneys received from their signed clients indirectly. A special master obtained this information for him. *See id.* at *5 nn.12–13 (indicating use of Special Masters in collecting evidence).

137. *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 553 F. Supp. 2d 442, 492 (E.D. Pa. 2008); *see also* Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 9, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596 (JBW) (RLM) (E.D.N.Y. Dec. 29, 2006) ("fees awarded in common fund cases may not exceed what is 'reasonable' under the circumstances") (quoting Goldberger v. Integrated Res., Inc., 209 F.3d 43, 47 (2d Cir. 2000)).

138. *In re Diet Drugs*, 553 F. Supp. 2d at 492.

139. *See id.* (applying factors developed for use when awarding fees in class actions while observing that the "factors … do not strictly apply to the MDL because we are not dealing with a class settlement fund."); *see also In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *16 (D. Minn. Mar. 7, 2008) (applying multi-factor approach endorsed by the Eighth Circuit in a class action) (citing *In re* Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig., 364 F. Supp. 2d 980, 992–93 (D. Minn. 2005)).

140. *See, e.g.*, Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 11–12, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596 (JBW) (RLM) (E.D.N.Y. Dec. 29, 2006) (approving the PSC's request for 4 percent of the settlement fund partly because it compared favorably with the fees awarded in identified class actions with large settlement funds).

Several factors increase the probability that judges will misestimate the fee transfers needed to close the gap between Q^R and Q^T. The distance between Q^R and Q^T varies both across cases and with the makeup of managerial attorney groups. Neither Q^R nor Q^T can be directly observed. Accurate assessments of their values would require serious study by expert economists and open court procedures allowing cross examination of their testimony. Once appointed, managerial lawyers have incentives to maximize fee transfers by understating Q^R and overstating Q^T. Judges lack incentives to set transfers correctly and have other agendas, such as reducing plaintiffs' contingent fees.

Judges may even use the wrong formula when paying for CBW. In the vast majority of plaintiff representations, attorneys work for contingent percentage fees set before any significant work is done. In MDLs, by contrast, judges pay managerial lawyers for CBW by the hour at rates set ex post after reviewing their time sheets. They also apply fee multipliers. The only apparent justification for using this compensation approach is that judges like it. A justification tied to plaintiffs' welfare would be more compelling, given that the object of compensation arrangements is to motivate lawyers to serve clients well.

C. Judicial Selection of Managerial Attorneys

When Congress enacted the Private Securities Litigation Reform Act ("PSLRA") in 1995, it gave lead plaintiffs the power to "select and retain" class counsel and relegated trial court judges to the back seat.[141] Congress's decision reflected its belief that a sophisticated plaintiff with a large financial interest in the outcome of a lawsuit has an incentive to hire a good attorney at a reasonable rate. A judge, by contrast, has less information, more limited access to the legal services market, and no "skin in the game."[142]

In MDLs, however, judges select lead attorneys. The *Manual for Complex Litigation (Fourth)* advises MDL judges "to take an active part in the decision on the appointment of counsel," and it specifically

141. 15 U.S.C. § 78u- 4(a)(3)(B)(v) (2007); *see also* Cohen v. U.S. Dist. Ct. for N. Dist. of Cal., No. 09-70378, 2009 WL 3681701, at *4 (9th Cir. Nov. 5, 2009) ("The logical interpretation of the statute's failure to provide an intricate procedure for the district court to follow after rejecting the lead plaintiff's selection is that the power to select lead counsel remains in the hands of the lead plaintiff.").

142. Warren Buffett is thought to be the author of this phrase. *See, e.g.*, Answers.com, http://www.answers.com/topic/skin-in-the-game (last visited Nov. 12, 2009).

discourages them from letting attorneys select their own leaders.[143] It offers two reasons for judicial activism: the desire to ensure adequate representation, and the need to police lead attorneys' fees.[144] Neither is compelling. By selecting inferior lead lawyers or overpaying for CBW, lawyers with cases in an MDL would harm their clients and themselves.[145] One should therefore expect them to hire good managerial attorneys at reasonable rates. Limited lawyers also know their contemporaries well and interact with them frequently. This should enable them to make good choices, to monitor performance effectively, and to set appropriate rates.[146] The need for stringent judicial policing of lead attorneys fees is far from clear.

A skeptic might argue that judicial control actually benefits judges, who crave interesting, challenging, and high-profile MDL assignments. The best way to get more assignments from the JPML is

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143. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.244 (2004).

144. *See id.* ("Deferring to proposals by counsel without independent examination . . . invites problems down the road if designated counsel turn out to be unwilling or unable to discharge their responsibilities satisfactorily or if they incur excessive costs.").

145. Collusion could lead to excessive charges for CBW, as discussed above. *See supra*, Part II.D.

146. Commenting on a prior draft of this article, one reader observed that judicial regulation of lead lawyers' fees in MDLs is a continuing response to the many fee abuses that have occurred when lawyers were left unsupervised. The reader specifically mentioned the infamous *Fine Paper* case, in which a circus erupted after the lead attorney accused other lawyers of committing various forms of billing fraud in an effort to win as much of the $50 million settlement for themselves as possible. Following lengthy hearings and a thorough audit, the outraged trial judge found that the fee applications were "grossly excessive" and cut the total amount requested by 80 percent. *In Re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 68 (E.D. Pa. 1983); *see also* Coffee, *supra* note 129, at 907–10 (discussing the controversy relating to attorneys' fees in *Fine Paper*).

Fine Paper shows quite clearly that lawyers cannot be allowed to set their own fees. Insofar as limited lawyers are concerned, this is not a problem in MDLs because their fees are regulated contractually. The same would be true if fees for CBW were regulated by agreements among attorneys. Judge Kozinski made a similar point in his dissent in *In re FPI/Agretech Securities Litigation*, 105 F.3d 469, 477 (9th Cir. 1997), also an MDL. The question there was whether the district court judge erred by refusing to enforce a fee sharing agreement among the lead attorneys. Although Kozinski agreed that judicial control of fees is "entirely appropriate" when attorneys apply for fee awards from common funds, he thought the fee sharing agreement was a valid contract and should have been enforced. *Id.* Noting that "[l]awyers, no less than any others, are entitled to arrange their affairs by private contract," Kozinski argued that judges must evaluate common fund fee requests because these requests lack natural bounds. *Id.* By contrast, judicial regulation has no place when a valid contract establishes a fee sharing arrangement and enforcement of the contract would not impact the total amount paid in fees.

Properly considered, *Fine Paper* actually weighs against the quasi-class action method and in favor of our proposal. Under existing arrangements, judges rely on lead attorneys to recommend amounts for common benefit fee awards in MDLs. This encourages abuses of the type that occurred in *Fine Paper* and necessitates careful judicial scrutiny of fee requests. Under our proposal, described in further detail below, lead lawyers' fees would be set upfront by other lawyers who would suffer if lead lawyers were to overcharge. This would substantially reduce the need for judicial monitoring.

by handling prior assignments well.[147] To judges, this means achieving global settlements that save other judges from having to preside over follow-on trials, as previously explained. MDL judges may use many tools to accomplish this end, not just those identified as components of the quasi-class action method. For example, they may refuse to rule on motions to remand cases to transferor courts or to state courts from which they were removed. By leaving remand motions pending, MDL judges encourage mass tort defendants to remove all state court cases, increasing the number of cases consolidated in MDL courts and expanding the reach of judges' power.

The hope of ending all litigation may explain why judges sometimes give important positions to lawyers with few or no signed clients.[148] In *Zyprexa*, Judge Weinstein named Melvyn I. Weiss chair of the PSC. Weiss's firm had no clients in the MDL, but he was a consummate settlement architect.[149] In *Vioxx*, Judge Fallon gave the position of liaison counsel to Russ Herman, whom he also put on the PSC and the Plaintiffs' Negotiating Committee and made chair of the Fee Allocation Committee. When the MDL began, Herman had fewer signed clients than many other lawyers, but he too was an experienced deal-maker.

Conflicts can arise when lawyers with few or no clients hold important positions. Clientless lawyers depend entirely on judges' largesse. Beholden more to judges than to plaintiffs, they can be expected to prefer the former over the latter when interests collide. This may put them at odds with lawyers with valuable client inventories, causing friction on the plaintiffs' side. The desire of lawyers with few or no clients to maximize fee transfers is also a predictable source of strain. Contingent fee lawyers with valuable inventories have some interest in maximizing recoveries, but clientless lead lawyers who charge by the hour have none. Their interest lies in billing as much time as a presiding judge will allow. Having done that, a clientless lawyer will rationally want to settle on any terms a defendant will offer. After all, the lawyer has no stake in the MDL's upside potential, but will suffer greatly if negotiations fail.

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147. The criteria that formally govern the JPML's choices of transferee fora are discussed in David F. Herr, Multidistrict Litigation Manual ch. 7 (2008). According to Herr, "[t]he [JPML] undoubtedly considers the ability and reputation of a judge" when making assignments, and also "look[s] specifically to prior experience as a transferee judge in MDL proceedings." *Id*. § 7.11.

148. *See Everglades Crash*, 549 F.2d 1006, 1017 (5th Cir. 1977) (commenting that "[i]n the next case the best available lead counsel may have one case out of 100").

149.Original PSC's Memorandum of Law in Support of Its Motion for an Award of Attorneys' Fees and Reimbursement of Expenses at 2 n.2., *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596 (JWB) (RLM) (E.D.N.Y. Oct. 18, 2006).

Judicial control of appointments and fees compromises judges' independence as well. By appointing managerial attorneys, an MDL judge begins an iterated relationship with the attorneys that lasts until the proceeding ends and the lawyers are paid. Every step in the pre-trial process can build a sense of reciprocity. As the distance narrows between the judge and the appointed lawyers, it becomes more and more difficult for the judge to act objectively, which may mean sending the lawyers home empty-handed or slashing their fees.[150] One might have to involve MDL judges so deeply in plaintiffs' affairs if there were no better alternative. "You can't beat something with nothing," as the saying goes. But there are other options, as we show in Part IV.

D. The Impact of Judicial Fee Regulation on the Profitability of CBW

Because Q^T is unobservable, it is important to know whether judges regulate managerial lawyers' compensation in a way that incentivizes them to optimize production of CBW. It seems they do not. In *Zyprexa*, for example, Judge Weinstein disallowed most of the PSC's supplemental request for $6.5 million in attorneys' fees. Evidently, he concluded that the PSC had expended more time on CBW than it should have. If Judge Weinstein was right to deny the submitted hours, then the method he used to calculate pay for CBW encouraged attorneys to overproduce, requiring careful oversight to protect limited attorneys from overbilling.[151]

The likely culprit is the policy of paying for CBW by the hour.[152] This compensation method makes time spent on CBW especially profitable because it enables managerial lawyers to collect for the same effort twice. *Zyprexa* provides an apt example. There, Judge Weinstein capped lawyers' contingent fees on large cases at 35 percent, granted in full the lead attorneys' request for over $30 million in common benefit fees and expenses, and generated the money needed to pay them by imposing a tax against the entire settlement

150. Reciprocity is deeply engrained in humans. *See generally* ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (exploring how cooperation strategies developed and using game theory to predict results). Even trivial gifts like coffee mugs and pens have been found to influence decisions.

151. Judicial orders rejecting fee requests from managerial attorneys ex post can, however, deter managerial lawyers from logging excessive hours in future cases.

152. *See, e.g.*, Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 6, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596 (JBW) (RLM) (E.D.N.Y. Dec. 29, 2006) (observing that the PSC submitted "detailed time records" for review); *id.* at 11 (noting that the PSC requested compensation for more than "65,283 hours working for the common benefit of all plaintiffs").

fund. The managerial lawyers thus collected 35 percent of the gain CBW generated for their signed clients *plus* $30 million from all settling claimants. The latter group included the lawyers' signed clients. Not only did the lawyers collect for the same work from two sources; they charged their own clients twice for the same work.[153]

The ability to collect from multiple sources makes CBW more profitable than it would otherwise be. The magnitude of the increase depends on the facts. Imagine Lawyer L, who, outside an MDL, represents 100 identical clients pursuant to 40 percent contingent fee agreements. Now assume that between Time 1 and Time 2, L expends 1,000 hours on CBW and that this effort increases the expected value of the signed clients' cases by $2.5 million. L's expected fee on the CBW is therefore $1 million ($2.5 million * .4 = $1 million), or $1,000 per hour. Assuming a competitive market, this level of compensation should not enable L to collect any rents.[154]

Now assume the following: (1) at Time 1, L's 100 cases are consolidated in an MDL with 900 identical cases; (2) L is appointed lead counsel; (3) L devotes the same 1,000 hours to CBW between Time 1 and Time 2 with the same effect on L's clients' cases; (4) the court awards L $1,000/hour for this time, or $1 million; and (5) as in *Zyprexa*, the court generates money to pay L by taxing every claimant $1,000. L's total fee for CBW is the sum of his receipts from his signed clients and the payment awarded by the court, or $1,960,000 ((($2,500,000 - $100,000) * .4) + $1,000,000 = $1,960,000). This is almost double the amount L would have received from his signed clients alone. L's hourly rate for CBW has increased from $1,000 to $1,960.

When L's fees and the court-imposed tax are combined, this arrangement costs L's signed clients more than their contracts require. The signed clients pay L $960,000 and they pay the court $100,000, yielding a total of $1,060,000. To protect the clients, a judge might follow Judge Frank's lead in *Guidant* by capping their fees at the contract amount. This would require L to rebate $60,000, and would reduce his total compensation for CBW to $1,900 per hour. Obviously, this is still far more than his signed clients alone would have paid and an excessively profitable rate.

A judge could also follow Judge Fallon's example. In *Vioxx*, Judge Fallon capped all clients' fees at 32 percent and required

153. This assumes that time expended on CBW increased the value of claims by more than $30 million.

154. Rents are payments exceeding wage earners' long-run opportunity costs. See A. Ross Shepard, *Economic Rent and the Industry Supply Curve*, 37 S. ECON. J. 209, 209 (1970), for a further brief explanation of "economic rent."

managerial lawyers' fees to come out of this amount. On this approach, L's signed clients would have to pay at most $800,000 ($2.5 million * .32 = $800,000), meaning that L could charge them only $700,000, assuming no change in the $100,000 tax imposed by the court. L's total compensation would then be $1.7 million, still 70 percent more than he would have collected outside the MDL.

CBW would have been a profit center even under the cap Judge Frank first applied in *Guidant*. This cap allowed managerial lawyers to charge their clients 10 percent of the amounts they netted after 15 percent of the fund was set aside to pay common benefit fees. Under this cap, L could have collected $250,000 ($2.5 million * .1 = $250,000) from his signed clients plus $1 million from the court, yielding $1.25 million in total compensation and an hourly rate of $1,250.

Because the fee transfer mechanism makes time spent on CBW more profitable, it changes the equilibrium allocation of lawyers' time, increasing the hours devoted to CBW and decreasing the time expended on other services. When representing only his signed clients, a profit-maximizing L would cease producing CBW when the expected marginal fees from it and other forms of work were equal. In the example, this point was assumed to be reached when the marginal return from CBW was $1,000. When appointed lead counsel, L performs the same comparison but, because CBW is more profitable, L cuts back on other activities and invests the free time in CBW. If CBW is worth $1,250 per hour (or any amount that generates rents), L rejects all other employment opportunities and produces CBW full time. This incentive persists as long as court-awarded compensation is flowing; neither Q^T nor any other quantity provides a natural stopping point. The profitability of CBW also creates an incentive to fabricate hours and to characterize as CBW time actually spent on other things. The potential of the hourly rate to encourage billing fraud is well-known.

Because neither judges nor anyone else can observe Q^T, the profitability of CBW under the standard arrangement will predictably lead to overcompensation of lead attorneys. Judges appoint lawyers to lead positions and, having appointed them, rely on them for advice concerning the amount of time CBW requires. Because the standard arrangement makes CBW excessively profitable, however, lead lawyers' assessments will be biased. They will always prefer higher levels of CBW to lower ones, and will advise judges accordingly. Claimants' attorneys will have little power to counter lead attorneys' estimates. Their self-interest in reducing fee transfers will be apparent; their disagreements with lead attorneys will be subjective;

and their influence on the court will be weakened by their status as back-benchers.

To avoid making CBW excessively profitable, a judge would have to prohibit a lawyer from charging his signed clients for any of their gains attributable to CBW produced during time for which the lawyer received payment from the court. Calculating this offset would be difficult. Plaintiffs' attorneys may not know how much value an increment of CBW added to their clients' claims. The value of claims at any given time can only be guessed. Even if they did know, they would have incentives to misreport because doing so would increase their fees. In theory, judges could make their own assessments guided by court-appointed expert economists—an expensive and cumbersome process that would produce educated guesses, at best.

E. Factors that Matter Other than Fees

To this point, we have focused on fees to the exclusion of other forces that influence lawyers' willingness to produce CBW. Real lawyers' motives are complex. Most attorneys, in our experience, genuinely care about their clients. Even when clients number in the hundreds or thousands, they want to obtain justice for them and to see them do well.[155] Most plaintiffs' lawyers, again in our experience, also dislike the defendants they sue. They think drug companies, device manufacturers, and other producers make obscene profits by deceiving regulators and exploiting vulnerable consumers. In addition, many plaintiffs' attorneys enjoy publicity and prestige. They desire higher standing in their profession for its own sake and because it enhances their ability to gain clients. Finally, plaintiffs' attorneys also value opportunities to build litigation skills, to work with other attorneys, and to develop reputations for winning big cases.

MDLs afford many of the opportunities plaintiffs' attorneys crave, which is one reason why lead counsel positions are much sought and highly prized.[156] Lead attorneys meet in chambers with judges,

155. Lawyers and clients may also believe that gaining justice includes using MDL settlements to strengthen policies that protect consumers from defective products. In other words, private litigation may supplement regulation, which claimants or plaintiffs' attorneys may think is too weak. We do not consider this motivation in this section, but do not mean to deny its existence.

156. Lawyers chosen for lead positions routinely advertise the fact. The *Vioxx* case provides many examples. *See, e.g.*, About Russ Herman, http://www.hhkc.com/apg_a9_Russ_M_Herman.aspx (last visited Nov. 12, 2009) ("Liaison Counsel and Member of PSC Executive Committee and In Re Vioxx: MDL1657."); Attorney Profile: Andy D. Birchfield, Jr., http://www.beasleyallen.com/attorney/Andy-Birchfield/ (last visited Nov. 12, 2009) ("In April of 2005, Andy was chosen to co-lead the Plaintiff's Steering Committee for the federal Vioxx

work with the most successful plaintiffs' lawyers in the country, handle communications within plaintiff groups, meet with lawyers and judges handling unconsolidated cases, converse directly with defendants' most influential officers, and talk with the press. Sometimes, they testify before congressional committees, participate in Supreme Court cases, or work with high-profile mediators. They are regularly invited to speak at continuing legal education programs and conferences, to lecture law students, and to publish articles describing their experiences in law reviews. Lead attorneys control the flow of large volumes of business to settlement administrators and expert witnesses. They may also meet with lawyers and claimants across the country to provide information, address concerns, and take credit for their accomplishments. To hold a lead position in a large MDL is to participate in civil litigation at the highest level.

Lead attorneys also enjoy opportunities to build important skills. They strategize, develop legal theories, argue motions, coordinate discovery, take apex depositions, prepare experts, and design settlement structures. They build document repositories and create trial notebooks. They preside over or participate in organizations of claimants' attorneys that may be bigger and wealthier than their own law firms. These skills and experiences help lawyers attract future clients and referrals, and obtain judicial appointments in future MDLs and class actions. They also enhance lawyers' chances of being invited to collaborate with other attorneys on large cases.

Lead lawyers in MDLs may also enjoy opportunities to seem unusually successful. Judicially ordered aggregation can improve the odds of settling by concentrating lawsuits in a small number of forums, placing them under unified control, and facilitating cooperation across courts. Consolidation can thus enable a group of lead attorneys to claim that their efforts produced an exceptional outcome that was actually due in some measure to other causes.[157]

In theory, these non-monetary factors can reduce the need to pay managerial lawyers for CBW. They can also affect the need to monitor their actions. Judges are, however, poorly placed to decide how much weight these factors deserve. The policy of setting managerial lawyers' fees ex post also ties judges' hands by making it

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Litigation MDL."); Firm Overview and History, http://www.lfsblaw.com/overview.jsp (last visited Nov. 12, 2009) ("Partner Arnold Levin . . . continues to serve on Plaintiffs' Steering Committees and Executive Committees of many important cases including . . . the Vioxx Products Liability Litigation").

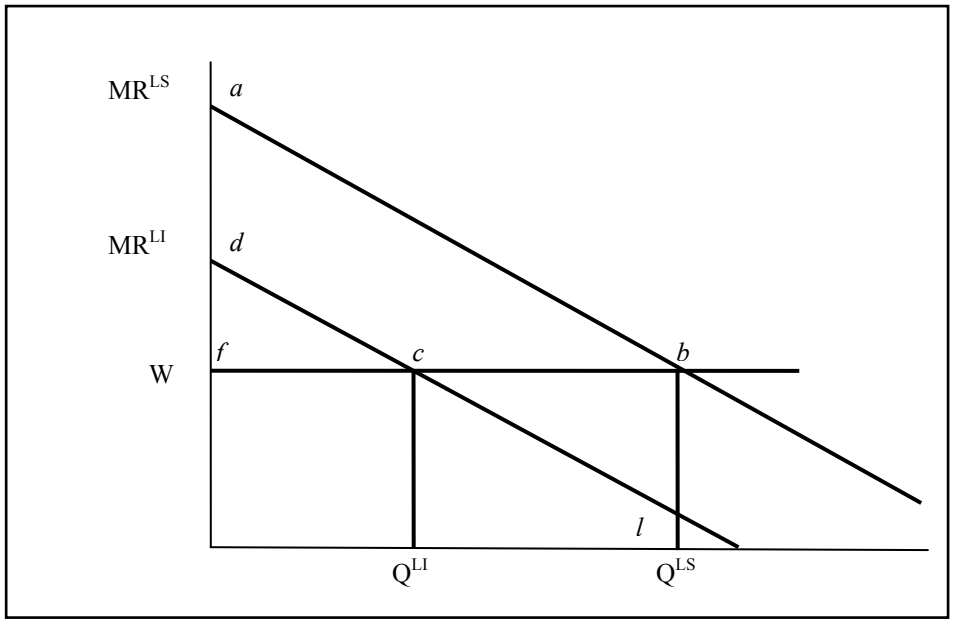
157. Distinguishing between returns for which an agent is responsible and returns attributable to other causes, usually described as "nature," is a core problem for principals.

impossible for them to comparison-shop. Having previously appointed a group of attorneys and allowed them to negotiate a global settlement, a judge cannot fire the group on the ground that other lawyers would have charged less because they were more strongly motivated by other considerations. Realistically, a judge cannot even reduce a fee award on this ground. Having appointed a group of attorneys without setting their rates in advance, a judge is bound to accept their usual and customary charges.

F. Enriching the Economics of Producing CBW: The Choice of Counsel Matters

The choice of managerial attorneys affects claimants. Some attorneys are better litigation strategists, negotiators, legal theorists, advocates, or risk-takers than others. Some teams of attorneys are better than others, too. Their members respect each other, like each other, trust each other, cooperate, and avoid unnecessary costs. Figure II casts the difference between superior and inferior representation as a difference in the marginal return to T per unit of CBW. L^S is the superior lawyer or lawyer-group, and its marginal return on effort is higher. L^I is the inferior lawyer or lawyer-group, and its marginal return is lower. Both are assumed to be paid the same hourly wage (W).

FIGURE II. IMPACT OF LAWYER QUALITY ON VALUE OF CBW



With L^I in charge, the claimant group fares best when Q^{LI} of CBW is produced. The net gain to the group after paying L^I is the triangle *dcf*. With L^S in charge, the optimal level of CBW is Q^{LS}, which is larger than Q^{LI} in reflection of L^S's higher marginal return on effort. The net gain to the group after paying L^S is triangle *abf*, which obviously exceeds *dcf* in size. Given the quality difference, it clearly matters to claimants whether L^I or L^S has control of the case.

Judges, however, have no particular interest in putting MDLs in the hands of attorneys who are superior providers of CBW. This should not be surprising: the procedural system does not give judges a stake in the size of plaintiffs' recoveries. But it does bestow prestige upon judges who resolve complex cases. Consequently, a judge overseeing an MDL will want to manage the litigation successfully.[158] Unless the judge is inclined to dismiss all claims, the judge will want to achieve a global settlement. One must therefore expect a judge to keep lawyers' settlement-related abilities in mind when deciding which lawyers will control an MDL.

A judge who wished to appoint a team of superior lawyers would also face a second hurdle: the judge might not know which lawyers are best. MDL judges do not scour the continent looking for attorneys offering the best combination of quality and price. They usually draw managerial lawyers from a pool of volunteers that includes mainly lawyers with cases in the MDL (as well as others who may never have appeared in the MDL court before). If the best managerial lawyer is not in the pool, the lawyer will not be appointed.[159] Even within the pool, judges may not know some or many of the lawyers or have any other solid basis on which to gauge their abilities.

Even if judges could reliably identify the best lawyers, they would not know how to incentivize them. Although judges claim the inherent authority to regulate lawyers' fees, they do not know how or how much lawyers should be paid. The manner of regulating lead lawyers' compensation reflects this. Judges pay lead attorneys contingent hourly rates. In the market for legal services, plaintiffs

158. For a discussion of the possibility that the JPML keeps judges' ability to settle complex cases in mind when deciding where to locate MDLs, see Marcus, *supra* note 9, at 2288–89.

159. As previously stated, MDL judges occasionally appoint client-less attorneys to lead positions. These lawyers seem to always be local attorneys who are known to the court. Judges' reasons for appointing these lawyers are unknown, but they may be following the MANUAL FOR COMPLEX LITIGATION (FOURTH). After explaining that the role of liaison counsel is to handle "administrative matters," the Manual adds that "[l]iaison counsel will usually have offices in the same locality as the court." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221. Computers and electronic communications have surely rendered this instruction obsolete.

rarely use this arrangement. They pay lawyers contingent percentage fees. Referral fee arrangements also use this structure. Other work-sharing arrangements use different arrangements, but contingent hourly rates are only one possibility and, although evidence is hard to come by, they do not appear to be preferred.[160] Where cooperating plaintiffs' attorneys tailor compensation and cost-sharing arrangements to their needs, MDL judges use a "one-size-fits-all" approach. Judges also prohibit lead attorneys from reallocating time-based income streams, even though reallocations might reasonably be expected to help plaintiffs by aligning attorneys' interests with theirs.[161]

We do not mean to exaggerate the points made in this Section. As a historical matter, judges have often given control of MDLs to outstanding attorneys. Because judges enjoy working with successful lawyers, this should not be surprising. Many lead lawyers have also had large numbers of signed clients and have represented all claimants well, which should not be surprising either. Lead lawyers face considerable pressures from multiple sources to do well. Our point is not that existing appointment procedures fail routinely; it is that they have certain systematic defects. They are opaque, and they are designed to serve judges' interests, not claimants'. Judges should consider a range of options before settling on those currently in place. In the next Part, we propose what we believe to be a better way to manage common benefit work in MDL cases.

IV. THE PMC PROPOSAL

Using a simplified account of the microeconomics of producing CBW, Part III identified a problem that MDLs have the potential to address. That problem, as discussed, is also difficult for MDL judges to resolve. This Part proposes an alternative to judicial control that seems likely to produce superior results.

160. In the MER/29 litigation, which occurred in the time before MDLs, cooperating lawyers supported the production of CBW by making a $100 initial payment, a $200 supplement, and an assessment capped at $1,000 that varied with the number of cases a lawyer was handling. Rheingold, *supra* note 67, at 123.

161. *See, e.g.*, *In re* Agent Orange Prods. Liab. Litig., 818 F.2d 216, 218 (2d Cir. 1987) (striking down a fee sharing agreement entered into by members of the class action's PMC that reallocated the time-based fee award).

A. The Proposal

The portion of the proposal intended as a default rule builds on the existing model for selecting attorneys in securities class actions. The PSLRA entitles the so-called "most adequate plaintiff"—presumptively, the plaintiff with the largest financial stake in the case—to select and retain counsel for all claimants. In many cases, the most adequate plaintiff is an institutional investor such as a pension fund, as discussed in an influential article by Professors Elliot Weiss and John Beckerman.[162] An institutional investor—having both business sophistication and a lot of money at stake—can be relied on, at least in theory, to hire a skilled attorney at a competitive price and to use a fee structure that motivates the lawyer to maximize the net recovery. Empirical evidence tends to confirm that securities litigation under the PSLRA framework reduces fees in securities cases without adversely affecting quality.[163]

A PSLRA-style mechanism would not be an appropriate way to select a lead attorney in an MDL like *Guidant*, *Vioxx*, or *Zyprexa*. The plaintiffs in these cases are individuals, not businesses, and their ability to evaluate and bargain with attorneys is limited. Compared to institutional investors in securities fraud cases, their stakes are minuscule.[164]

Weiss and Beckerman's intuition can be adapted to MDLs, however. One need only see that plaintiffs' *attorneys* can act as plaintiffs' bargaining agents. A lawyer representing 2,000 identical signed clients with 40 percent contingent fee agreements has a financial interest equal to that of 800 clients. Such a lawyer stands to collect 40 percent of the clients' marginal gains when production of CBW increases from Q^R to Q^T in Figure II. Plaintiffs' attorneys also know the best lawyers (or can easily learn who they are), have access to the entire legal services market, understand the risks and gains associated with mass tort litigation, and have incentives to bargain for competitive fees. Furthermore, they possess the necessary sophistication to monitor the production of CBW.

Because a lawyer with a large inventory of signed clients should rationally want a superior lawyer to provide CBW at a

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162. Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2105 (1995).

163. Weiss & Beckerman, *supra* note 162, at 2090 (reporting that the mean share of the settlement accounted for by the largest single claimant in twenty cases studied was 13.1 percent).

164. *Id.*

reasonable rate, the proposal relies on such a lawyer to select and retain common benefit counsel ("CBC") for an MDL. After allowing all lawyers with cases in an MDL to apply, a judge would appoint a Plaintiffs' Management Committee ("PMC") comprised of the lawyer or group of cooperating lawyers with the most valuable client inventory. The PMC would then select a lawyer (or lawyer-team) outside the PMC to provide CBW for the entire MDL. The PMC would also set the CBC's compensation, which would be funded by a tax on the MDL recovery, for the payment of which claimants would receive a credit against their own attorneys' fees. The CBC's fee would thus be spread across all lawyers with clients in an MDL in proportion to the value of the clients' claims. Having the most valuable inventory of cases, the PMC would have a sizeable stake in both the cost and quality of CBW. In other words, the PMC would have an incentive to obtain the CBC offering the best combination of quality and price.

Of course, these desirable incentives and capacities would not necessarily generate positive results if the PMC members could simply appoint themselves to perform CBW. Self-appointment would re-create the conflicts of interest that exist in MDLs today. The harmful consequences of self-appointment might even outweigh the improvements in quality and efficiency the proposal is supposed to afford. Accordingly, the proposal would generally exclude PMC members from performing CBW except at their own expense.[165] Their role, instead, would be to (1) select others to do the CBW, (2) set the CBC's compensation, and (3) monitor the CBC's performance of that work. If members of the PMC do no CBW, their incentives are closely—but not perfectly—aligned with those of the claimants and other attorneys in the case.[166]

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165. PMC members need not always be excluded from providing CBW. Occasionally, a PMC attorney could be uniquely qualified for a particular job. The proposal might allow exceptions in these situations, with the consent of other PMC members and the approval of the court. Presumably, the order granting the exception would identify the services to be performed and set appropriate limits on its scope. The requirement that PMC members may not perform CBW except at their own expenses could be waived by agreement among all attorneys.

166. Ex ante, the PMC's incentives would be imperfect because situations could exist in which the PMC would profit by foregoing opportunities beneficial to claimants. For example, suppose the PMC could spend $10 million on a CBC expected to generate a $50 million recovery or $20 million on a CBC expected to produce a $60 million recovery. The claimants, who one may assume are obligated to pay 40 percent contingent fees, would prefer the latter option, which generates a net recovery of $36 million to the former, which nets only $30 million. But the PMC would prefer the latter, which generates a net fee (after paying the CBC) of $10 million ($20 million – $10 million), to the former, which pays them only $4 million ($24 million – $20 million). After the CBC is hired, however, the PMC's interests would fully align with the claimants'. Both would ignore the cost of CBW and desire the largest possible recovery.

The proposal would also allow PMC members to participate (generally on an unpaid basis) in settlement negotiations without specific prior judicial authorization. Settlement often is the single most important event in the life of an MDL, and the proper analysis of settlement opportunities requires an overview of the litigation as a whole. With many clients depending on them, PMC members would have appropriate incentives to work effectively on behalf of all claimants when negotiating global settlements. To be clear, the PMC could assign responsibility for settlement negotiations to the CBC. But it could also retain control of negotiations for itself or give control to other attorneys. The proposal gives the PMC maximum flexibility.

A judge could also exercise a degree of discretion in selecting the PMC, subject to the general constraint of assigning control to a lawyer or lawyer-group with a valuable client inventory. The PSLRA provides an analogy here. That statute creates a rebuttable presumption that the candidate with the largest financial interest is the "most adequate plaintiff."[167] A trial judge, however, may give control to a different candidate (presumably, the named plaintiff with the second largest stake) if the largest stakeholder "will not fairly and adequately protect the interests of the class."[168] The statute identifies one potential cause of inadequate representation—unique defenses—but does not exclude other possible causes.

The proposal for MDLs could contain a similar backstop. Representatives who serve on the PMC would have to demonstrate their ability to provide adequate and loyal services for the benefit of all plaintiffs. If a judge believed that a volunteer lacked the capacity to perform effectively as a member of the PMC, the court would not have to appoint that person but would have to give reasons for excluding an otherwise-qualified candidate. For example, in theory, a conflict of interest could exist between an identifiable set of plaintiffs and the winner of the competition for control of the PMC. This might be true if the winner represented no clients of the identified type and, consequently, had little incentive to develop evidence bearing uniquely on their claims. Some flexibility in the joints may be needed to address problems like these. As a condition for competing, judges could require candidates for the PMC to demonstrate comprehensive representation of all discrete plaintiff groups after setting out the groups' identities in an order.[169] Obviously, inadequate representation could also be

167. 15 U.S.C. § 78u-4(a)(3)(B)(ii) (2006).

168. *Id.* § 78u-4(a)(3)(B)(iii)(II)(aa).

169. The Supreme Court has long been concerned about conflicts of interests in class actions that threaten to saddle segments of a class with inadequate representation. *See, e.g.*, Ortiz v.

threatened if the winner of the competition were to die or otherwise become incapacitated. Ad hoc arrangements could handle problems like these.[170]

The court could also exercise discretion in deciding who, among competing applicants, has the most valuable client inventory. Ordinarily, size should be a reliable guide. When competing lawyers have similar mixes of clients and seem otherwise indistinguishable, the one with the most clients would win. But size may not always be dispositive for two reasons. First, cases have a range of expected payoffs and are not necessarily evenly distributed among attorneys. Some mass tort lawyers specialize in cases with severe injuries, such as asbestos lawyers, who represent only clients with mesothelioma; other lawyers assemble large blocks of cases in which less serious injuries predominate. Some lawyers screen clients carefully before agreeing to represent them; others accept requests for representation more readily. And even when cases seem similar, some lawyers obtain higher values than others. Qualitative factors like these can make the value of competing lawyers' inventories difficult to compare. Second, a mechanical rule requiring the appointment of the attorneys with the largest number of plaintiffs might encourage lawyers to accumulate clients regardless of the quality of their claims or the severity of their injuries.[171] The fear of an influx of plaintiffs with baseless claims is not imaginary. Mass tort suits and settlements have attracted multitudes of persons whose claims were questionable, frivolous, or fraudulent.

These problems, while real, are also manageable. Indeed, judges in MDL cases have already devised workable procedures to address the problem of inventory cases with low litigation or settlement value. In the welding fumes cases, for example, the MDL judge developed a simple mechanism for identifying and excluding

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Fibreboard Corp., 527 U.S. 815, 856 (1999) (stating that present and future claims must be divided into subclasses with separate representation to prevent conflicting interests of counsel); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) (stating the need for individuals whose sole duty is to represent members of that subgroup, not the entire class); Hansberry v. Lee, 331 U.S. 32, 44 (1940) (finding that parties who challenged an agreement were adequately represented when the agreement was formed). Adequate representation is equally important in MDLs. *See* PROJECT ON THE PRINCIPLES OF AGGREGATE LITIG. (2003–present), http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7.

170. For example, a judge could appoint a group of lawyers to a PMC subject to the condition that they join forces with another attorney whose inventory contains claimants with identified injuries.

171. *See* Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1232–35 (2008) (describing procedures used by lawyers to accumulate massive inventories of asbestos cases).

weak cases.[172] Judge Kathleen O'Malley entered a case management order requiring each plaintiff to provide a Notice of Diagnosis certifying that a licensed medical doctor had examined the plaintiff and diagnosed a manganese-induced neurological disorder.[173] This led to the dismissal of about 25 percent of the pending claims.[174] If "piling on" is a problem at the outset of MDLs, it should often be possible to use a procedure like Judge O'Malley's to exclude many weak claims.[175]

Even with appropriate screening mechanisms, however, differences in client quality are likely to remain. But courts can deal with this type of distinction. An analogous problem arises in class actions brought under the PSLRA. Although the statute requires the court to determine which person competing for the role of lead plaintiff has "the largest financial interest in the relief sought by the class," it does not provide a formula for making this assessment.[176] Nor is the right way of proceeding necessarily self-evident. One applicant may have suffered the largest absolute loss (measured in terms of dollars paid out and received when securities were bought and sold), but another may claim to have lost the most money during the period when the fraud is thought to have occurred. A good deal of litigation would be required to resolve close calls in PSLRA cases with a high degree of certainty. Instead of calculating the size of an applicant's financial interest in a rigorous and demanding way, judges have developed a rough and ready multi-factor approach that relies on certain basic information.[177] Once the pool is narrowed to a group of

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172. This paragraph is adapted from Brickman, *id. at* 1294–97. *See also* Ralph A. Davies, *A Balanced Perspective: The Welding Fume Litigation*, FOR DEF., Aug. 2007, at 14, 17, http://forthedefense.org/CD/Public/FTD/2007/August/2007%20August%20FTD%20-%20Welding%20Fume%20Litigation.pdf (last visited Nov. 12, 2009) (discussing Judge O'Malley's method for weeding out weak cases).

173. Brickman, *supra* note 171, at 1303 (citing *In re* Welding Fume Prods. Liab. Litig., MDL No. 1535, Case No. 1:03-CV-17000, at 6 (N.D. Ohio Mar. 31, 2006) (case administration order)).

174. Brickman, *supra* note 171, at 1294 (citing *In re* Welding Fumes Prods. Liab. Litig., MDL No. 1535, Case No. 1:03-CV-17000 (N.D. Ohio Nov. 8, 2005) (report of proceedings of jury trail)).

175. Plaintiffs can also "pile on" after settlement. The settlement of the *Diet Drugs* litigation provides an example. Although medical evidence led the defendant to predict about 36,000 claims, over 87,000 were submitted. *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 226 F.R.D. 498, 505, 508 (E.D. Pa. 2005). Back-end piling on, however, while a significant problem for the administration of MDL cases, would not affect our proposal for the selection of PMC members, which we anticipate will be done at the beginning of the case.

176. *In re* Enron Corp. Sec. Litig., 206 F.R.D. 427, 440 (S.D. Tex. 2002) ("The PSLRA does not delineate a procedure for determining the 'largest financial interest' among the proposed class members.").

177. *Id.* ("The four factors relevant to the calculation are (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs.").

applicants with similar financial stakes, a court might as well require them to draw straws. All can be expected to do the job well.

Under our proposal, judges should evaluate lawyers' client inventories the same way. The object is to put MDLs under the stewardship of lawyers who will take seriously the task of providing CBW because they have a lot of money at stake. Success in this endeavor does not depend on quantifying a lawyer's financial interest to the nearest thousand dollars, or even to the nearest ten thousand dollars. It is probably more important to develop clear valuation rules than highly accurate ones so as to avoid pointless litigation. Thus, the court would make a preliminary inquiry into the value, as well as the number, of claims. Applicants for a position on the PMC would have to make a showing to the court, documenting the number of clients they represent and arraying the clients by injury groups. However, the court would not need to conduct a "mini-trial" on this question; it usually should be sufficient to derive an ordinal ranking of the value of applicants' inventory. If subsequent events demonstrate that an applicant has distorted or exaggerated the value of his or her inventory, the court has ample authority to impose sanctions, which could include exclusion from the PMC or monetary penalties such as forfeiture of fees earned as a PMC member.

As mentioned, PMC members would normally work without additional compensation, meaning they would receive only the fees their signed clients agreed to pay, minus a proportionate share of the cost of CBW. This arrangement could be altered by agreement. Lawyers not on the PMC who thought it advantageous to offer supplements would be free to do so. For example, all lawyers might agree to reimburse the costs PMC members incur when handling administrative functions, such as the functions liaison counsel normally performs. These tasks include distributing notices, orders, filings, and other documents. Web-based services like LexisNexis have made it easy to perform these ministerial functions. Limited lawyers might often agree to reimburse PMC members for the actual out-of-pocket costs, the alternative being to reimburse the CBC and possibly to pay more for CBW. Limited lawyers might also reimburse PMC members for expenses incurred when negotiating global settlements or performing other services.

Although the PMC's presumptive fee award would be zero dollars, the trial court would retain discretion to order a payment (but would use the power sparingly). The primary role of PMC lawyers is to provide general oversight and input on strategy. One might think of them as an MDL board of directors, the members of which are paid solely in options or shares. PMC lawyers will not ordinarily attend

depositions, immerse themselves in discovered documents, or write briefs. They will be litigation leaders and will enjoy the reputation, prestige, and publicity incident to that role. When combined with the fees received from their signed clients, these non-pecuniary benefits should ordinarily eliminate the need for separate compensation.

Ideally, the trial court will decide whether and how much supplemental compensation the PMC will receive before its members are appointed. The court could, for example, make known its intention to set aside a small percentage of any ultimate settlement or judgment—say half of 1 percent—as compensation for the PMC attorneys in the event the case results in a recovery for plaintiffs within the MDL framework. With fees set so low, the danger associated with judicial errors would be relatively slight. Such a percentage fee would have the same desirable qualities of any percentage fee in terms of aligning the interests of attorneys and those they serve and also reducing the need for burdensome auditing of hours claimed on a lodestar basis. Advance notice would additionally enable all lawyers with cases in an MDL to offer their services and to volunteer to accept less compensation. Willingness to accept a smaller transfer might then provide a basis for choosing between lawyers with similar client inventories.

How would the CBC be compensated? In our proposal, the PMC would negotiate a retainer agreement with the CBC—similar to a retainer agreement for ordinary litigation. Presumably the CBC would be given a contingent fee, but issues such as the percentage, the use (or not) of a (rising or falling) sliding scale of percentages, adjustments tied to events in the litigation (such as motions to dismiss, summary judgments, or appeals), and the allocation of responsibility for the payment of costs and expenses, would all be left to private bargaining. Judicial review would be available only to police fraud or other abuses.[178]

One compensation question is unique to the MDL context, however. Not all MDLs resolve all pending cases—indeed, the MDL process is not intended for the final resolution of controversies, being instead (at least in theory) a pretrial procedure. A few MDLs have, in

178. When commenting on drafts of this article, several readers identified reciprocal agreements between the PMC and the CBC as a potential source of corruption. The PMC in Case 1 would hire a particular CBC at a high wage with the understanding that the CBC would return the favor in Case 2, where the CBC would attempt to become PMC. To discourage such arrangements, judges could require lawyers chosen as PMC or CBC to disclose prior appointments to these roles and to disavow any side deals. Judges could also impose prophylactic rules limiting the frequency with which lawyers can swap positions.

fact, ended when pretrial preparations were complete, at which point active cases were returned to the forums from which they came.

If the possibility of remand is to be more than a mirage, however, a plan must be in place for taxing cases returned to transferor courts. This issue arises under existing procedures as well as under our proposal, but may be more successfully managed under the latter. For one thing, our proposal may facilitate consensual arrangements to govern fee sharing in remanded cases. For another, when bargaining with the CBC, the PMC could establish scales in which the CBC's fees would depend on how remanded cases fared. For example, the CBC might receive a higher fee on cases that settled soon after remand and a lower fee on remanded cases that were resolved after trials. Arrangements like these would reflect the value of the CBC's efforts and preserve lawyers' incentives to prosecute cases zealously after remand.

Having described the proposal in detail, we reemphasize its status as a default rule which can be supplanted by agreement of the PMC and other attorneys with cases in an MDL. To appreciate the value of the default rule approach, it helps to conceptualize the plaintiffs' side of an MDL as a group of investors (lawyers representing clients with valuable claims) who pool their assets to pursue a common goal (the maximization of claim values and, thereby, contingent fees). The investors place their assets under the control of a common group of agents or managers, who receive compensation for working for the common good. Collectively, the investors and managers operate as a firm.

Under the quasi-class action approach to MDL management, the governance structure for the firm is determined in an odd way. The investors hand over all control rights to a government official—a judge, who has, at best, no interest in the performance of the firm or, at worst, interests at odds with those of the investors. The judge cannot be replaced, cannot be incentivized monetarily to want the best outcome for the investors, and suffers none of the constraints that normally apply in labor markets, such as the requirement of possessing or demonstrating the knowledge, skill, and trustworthiness needed to convince investors to hand over assets. The judge may also reshuffle the investors' interests in the firm at any time, meaning that ex ante contributions may not reliably predict ex post payouts. The manner of designing a governance structure embodied in the quasi-class action approach to MDL management has no analogue in the

capitalist world,[179] and for good reason: investors do not use it because it cannot reasonably be expected to produce optimal governance for any firm. Our default proposal improves on the quasi-class action approach by putting governance in the hands of a controlling investor (or a group of cooperating investors) with a large stake in the outcome of litigation.

Although our proposal is a step in the right direction, for two reasons it may be improved by allowing attorneys with cases in an MDL the option of designing a governance structure they prefer. First, MDLs differ in ways that seem likely to bear on the design of optimal governance structures. For example, some MDLs involve far more claimants or attorneys than others. If the severity of monitoring problems correlates with the number of participants, different governance structures may be needed in the two contexts. As one governance structure may not work best in all MDLs, it is reasonable to give attorneys freedom to design structures that are custom-made for particular consolidations.

Second, placing complete control of an MDL in the hands of a PMC may create unforeseen opportunities for the PMC to exploit other investors. Exploitation is a recognized problem in real firms run by majority stakeholders. For this reason, the law governing corporations and other business ventures safeguards minority investors' interests in a variety of ways. Of particular importance are common law duties that require majority stakeholders to treat minority owners fairly. Lawyers in an MDL might find it advantageous to borrow these protections by forming corporations, limited partnerships, or other organizations where the duties of investor-managers are well known. For example, by providing contractually for the application of Delaware law and the arbitration of disputes, a group of investor-attorneys might avoid a good deal of uncertainty about the PMC's rights and responsibilities.

The observation that MDL lawyers might find it attractive to use established business forms raises several questions. One is whether state bar rules or other laws would force lawyers to use forms, such as partnerships or limited liability partnerships, recognized as permissible vehicles for the delivery of legal services to the public. We would not impose this constraint. As long as lawyers practice in firms that are approved structures, we see no reason to

179. When calling for greater judicial oversight of fees in mass tort cases, Professor Resnik identified some of the many difficulties of setting fees correctly. Resnik, *supra* note 6, at 2177–80. Yet, she offered few reasons for believing that judges would regulate lawyers' compensation well. In a prior article, Professor Resnik also acknowledged that serious conflicts and information problems hamper judicial regulation of fees. Curtis & Resnik, *supra* note 46, at 452–53.

limit the range of options they can use to organize the delivery of CBW in an MDL. Another question is whether transactions costs or other impediments will prevent lawyers from designing optimal structures or possibly from organizing spontaneously at all. The answer is sure to be "yes" on some occasions, but this shows only that the proposal is imperfect, not that the quasi-class action approach is better. A final question is whether voting rules other than unanimity may suffice to displace the default rule. In other words, might the default rule be displaced by a coalition containing fewer than all lawyers with cases in an MDL? As structured, the proposal does not require unanimity. We would allow the court to establish decision-rules for determining whether the default organization proposed in this paper will be displaced by some other structure. We predict that, once the proposal is in place, informal norms governing the formation of coalitions will arise, and bargaining over control will become more structured.

B. The Proposal's Advantages

The proposed mechanism has attractive features: it provides a superior mechanism for selecting, monitoring, and compensating counsel; it safeguards judicial independence; and it tends to achieve fairness and reduce distrust and animosity among plaintiffs' counsel.[180]

1. Selection of Counsel

The proposal involves two selection stages: (a) selection of the PMC by the court, and (b) selection of the CBC by the PMC. In both stages, our proposal offers advantages over the current system. Judges will be limited to selecting PMC members under explicit standards and on the basis of written applications. The unreviewable discretion and lack of transparency that characterize the current practice will be replaced by objectivity, clarity, and sensible selection criteria. This will alleviate the existing concern that judges appoint CBC for inappropriate reasons.

PMCs, in turn, will be well-positioned to select the CBCs. Having valuable client inventories from which they hope to receive

180. Some MDLs contain class actions. We have not tailored the proposal for use in these proceedings. One possibility would be to award fees separately for class counsel and the CBC, as was done in *Diet Drugs*. 226 F.R.D. at 504. This might be workable if the tasks to be performed by class counsel and the CBC were divided upfront, for the PMC could then negotiate with the CBC knowing which tasks the CBC would perform. This seems both awkward and artificial, however. Class counsel and the CBC have the same job: providing CBW.

substantial contingent fees, PMC attorneys will have much to gain from the effective provision of CBW. In this respect, their incentives will align strongly with those of all plaintiffs.[181] PMC members will also have excellent information on which to select the CBC. They will often have worked with candidates for the CBC position and thoroughly appreciate their backgrounds and capacities. Unlike judges, who observe work product of teams of attorneys, members of the PMC will often have observed the work product of individual attorneys. They will know, much more than judges, details about interpersonal relationships, personality characteristics, and work habits—issues that can play an important role in the practical conduct of litigation. PMC members will also be better equipped than judges to negotiate retainer agreements with candidates for the CBC position and to ensure that those agreements contain appropriate safeguards for the protection of the plaintiffs as a group.

Finally, PMC lawyers who know little about other attorneys initially will always have incentives to learn which lawyers are best at particular tasks. By finding lawyers who are good at taking discovery and performing other pretrial tasks, they will increase the value of their clients' claims and increase their fees. Judges have no analogous incentive.

2. Compensation of Counsel

Judges are also less suited to setting and allocating fees for CBW. Judges gain nothing when CBC's fees are low, lose nothing when CBC's fees are high, and have no direct financial stake in the quality of CBW. Self-interest thus provides judges no incentive to ensure that the CBW fees are reasonable. Moreover, the evidence suggests that judges have not, in fact, done a particularly scientific job at setting fees. As shown in Part II, common benefit fees appear to have been set on a largely ad hoc basis, possibly according to considerations such as the politics of the plaintiffs' group or the judge's prediction of the level of dissatisfaction a particular fee will create among the limited attorneys. Sometimes judges appear to

181. An example will make the PMC's incentives clear. Suppose that all claimants in an MDL are identical, that the PMC represents half of them pursuant to 40 percent contingent fee agreements, and that PMC can hire Lawyer A or Lawyer B as CBC. Both lawyers want the same fee, 5 percent of the gross recovery, but A is the better pick and will generate an expected recovery 10 percent larger than B ($110M vs $100M). If A is hired, the PMC's fee will be ($110M)(.5)(.4) – ($110M)(.05)(.5) = $19.275M. If B is hired, the PMC will earn less—($100M)(.5)(.4) – ($100M)(.05)(.5) = $17.5M. By hiring the inferior lawyer, the PMC would harm itself. This will be true as long as the PMC promises the CBC less than its entire contingent fee. Obviously, the PMC also does better by bargaining down A's fee.

award particularly generous fees without reference to market prices; at other times they extract concessions with a bludgeon, as Judge Frank did in *Guidant* by setting lead attorneys' hourly rates below market levels.[182] Judges have no particular background or expertise in negotiating fee agreements with counsel; this is not part of their judicial function, and memories of having performed this role in practice may be distant and unhelpful.

Our proposal will permit the use of innovative combinations of incentives and monitoring to encourage the production of high-quality CBW at the lowest possible expense. This flexibility is important because every MDL is different. *Vioxx* involved more than five times as many claimants as *Zyprexa* and more than ten times as many claimants as *Guidant*. Only *Zyprexa* claimants had serious psychological disabilities. *Guidant* claimants, all of whom had implanted defibrillators, were in much poorer health prior to use of the product than *Vioxx* claimants. *Guidant* also involved a medical device, not a drug. These and countless others differences could affect the way MDLs should be funded and developed. Experienced lawyers know what to make of these things, but judges likely do not. Judges go from one MDL to another calculating CBW the same way—that is, at hourly rates for amounts of time lead attorneys deem reasonable. The reason for preferring this "one-size-fits-all" approach is not apparent.

PMC members could also use non-monetary incentives to their advantage. Serving as CBC in a high-profile products liability MDL is a plum assignment. Lead attorneys gain prestige, enhance their ability to obtain clients and referrals, develop valuable skills, and so on. Recognizing the desirable nature of the CBC assignment, PMCs could use non-monetary benefits to obtain CBCs who offer a superior combination of quality and price. PMCs could also use competition among attorneys to maximize this advantage. For example, innovative judges have carried out auctions of the lead counsel role in class action cases.[183] Although this strategy has been criticized, especially for

182. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *15 (D. Minn. Mar. 7, 2008) (capping lead lawyers' rates at $400 per hour and paralegals' rates at $150 per hour, when the highest submitted charges were $745 and $290, respectively).

183. *See, e.g.*, *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467, 470–73 (N.D. Cal. 1994) (comparing three firms competing to be class counsel); *In re* Oracle Sec. Litig., 132 F.R.D. 538, 542–47 (N.D. Cal. 1990) (analyzing three bids for lead counsel). For general discussion of auctions as means for addressing agency costs in class action cases, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105–16 (1991).

securities fraud cases,[184] it appears in some cases to have significantly reduced fees without sacrificing quality.[185] Members of a PMC could experiment with an auction approach for selecting CBCs. They might also require a CBC to "buy into" an MDL. Mass tort litigation often requires attorneys to bear significant costs upfront. The members of a PMC may believe that a CBC can be properly incentivized only if he or she has a share of the sunk costs.

The proposal also allows fees for CBW to exceed their historical levels. Although we have pointed out factors that seem likely to cause lead attorneys to be overpaid, in any given instance the presiding judge may pay them too little. Judges often cut lead attorneys' fee requests, reducing their hours or their hourly rates or disallowing claimed services entirely. Presumably, lead attorneys know judges' predilections and refrain from performing services for which judges will not award sufficient compensation. When CBW is reasonably expected to increase claimants' recoveries on net, judges do not help claimants by being overly parsimonious.

3. Monitoring

Judges are at a disadvantage when it comes to monitoring the performance of CBW in MDLs. Judges are busy individuals with many cases on their dockets. Their exposure to any single proceeding, even one as complex and interesting as a products liability MDL, tends to be episodic. They are not equipped, nor do they wish, to audit the quotidian work of CBC. Even if they could observe this work—and generally they cannot—they are poorly equipped to determine whether work is being performed in a cost-effective manner. Our proposal would improve monitoring of CBW by placing this task in the PMC, expert attorneys with high expectations, immediate access to

184. *See In re* Cendant Corp. Litig., 264 F.3d. 201, 278–79 (3d Cir. 2001) (rejecting auction approach in private securities litigation); Lucian Arye Bebchuk, *The Questionable Case for Using Auctions to Select Lead Counsel*, 80 WASH. U. L.Q. 889, 891–99 (2002) (criticizing the use of auctions for selecting class counsel); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 695–702 (2002) (arguing that optimality of auctions depends on key assumptions that are not met when selecting class counsel). *But see* Geoffrey Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 643–50 (2003) (advocating ex post auctions for lead counsel rights at the time of settlement).

185. *See* Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions* 23 (St. John's Legal Studies Research Paper No. 06-0034, 2006) (finding that fees in securities class actions tend to be lower when lead counsel rights are auctioned), *available at* http://papers.ssrn.com/sol3/papers. cfm?abstract_id =870577#.

work product, and strong incentives to see that the work is done well. The PMC members will lose the most if the CBC performs poorly or overcharges.

Members of the PMC would have excellent sources of information with which to perform these monitoring tasks. Unlike the institutional investors who are frequently chosen as lead plaintiffs in securities class actions, the members of the PMC will all be attorneys. Their training and professional experience qualify them to monitor the work product of those who are chosen to carry out the CBW. PMC members are, moreover, attorneys for clients with cases in the litigation, and thus can be presumed to have case-specific knowledge and expertise. Because they will presumptively be the attorneys with the most valuable client inventories, they have multiple exposures to the key issues in the litigation. With many clients, they have the opportunity to observe general themes or features of the litigation that might not be apparent to an attorney with a small number of clients. Accordingly, they would be expected to be excellent monitors of the CBC attorneys.

4. Preserving Judicial Independence

Existing practices compromise judicial independence by placing judges in uncomfortably tight relationships with members of the PSC.[186] The current regime of unfettered judicial discretion naturally sparks concerns, whether or not justified, that judges are too closely associated with the attorneys they appoint to leadership roles. The concern goes both ways: some may worry that the lead attorneys may be too influential with the judge, while others may consider that the judge's enormous power over the selection and compensation of counsel makes the lawyers occupying the leadership posts too subservient to the judicial will.

Our proposal addresses both concerns. It adds transparency by substituting objective standards for the current discretionary regime. If and when judges pass over attorneys with large and valuable client inventories, they will have to state reasons for putting lawyers with few or no clients in charge. This will alleviate the appearance of favoritism. The recommended procedures for compensating CBCs provide even greater assurance of independence. Judges would no longer be in the position of awarding hundreds of millions of dollars for CBW, on the basis of little analysis and no objective justification.

186. For a discussion of how existing practices compromise judges' independence, see *supra* text accompanying notes 126–129.

The fees for the PMC attorneys would be either zero or a small percentage of the MDL recovery. Meanwhile, fees for the CBC would be established, not by the judge, but by the PMC members. No adverse inferences about judicial independence could be drawn from this process.

5. Improving Fairness and Trust among Plaintiffs' Attorneys

We have also seen that existing practice tends to foment distrust, anger, and dissention among plaintiffs' attorneys. Some attorneys are richly rewarded for serving in leadership roles or performing common benefit work; others see their expected profits from privately negotiated fee agreements evaporate as judges tax them for common benefit work done by others. Attorneys who assemble large inventories by advertising for clients tend to be denigrated as crass mercenaries whose only role is to free-ride on the efforts of others—an attitude that resonates with long-standing suspicion of advertising and marketing of legal services.[187]

The quasi-class action approach gives control of MDLs to lawyers skilled at managing lawsuits and providing CBW. It also rewards these lawyers lavishly, while capping other lawyers' fees at sub-market rates. The quasi-class action model thus punishes plaintiffs' attorneys whose main contribution is "rainmaking" and devalues the service of reaching potential clients and getting them to assert claims. In placing lawyers "who do the work" above lawyers "who troll for clients," the quasi-class action approach reflects the (unwarranted) disdain many judges, lawyers, bar associations, politicians, and others have for lawyers who advertise. This Article does not debate the merits of attorneys' efforts to market legal services,[188] but it is appropriate to note, first, that judges may discourage lawyers from reaching out to potential clients by reducing compensating for this service, and, second, that judges have no special insights into the amount of marketing that is good for society or the reputation of the legal profession.

This proposal will award control of the PMC on the basis of inventory value. It follows that judges will (and should) give control to

187. This tendency is reflected in many policies regulating lawyers, including restrictions on advertising and referral fees.

188. Opponents of lawyer advertising contend that it damages the profession's reputation. Empirical studies have not borne this out. Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503, 514 (1998); Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315, 333–34 (1998).

attorneys who advertise for clients some percentage of the time. Advertising should not disqualify a lawyer from serving on the PMC. Attorneys with valuable inventories of cases have the most to gain—and the most to lose—from the activities of the CBC. It is, accordingly, appropriate that they be given a leadership role in the selection, compensation, and monitoring of these attorneys. An advertising attorney who is incapable or unwilling to do the job properly will gain financially by joining forces with superior case managers. The possibility that incompetent lawyers will exercise control is not an equilibrium result.

The proposal may also enhance relationships among lawyers by encouraging the formation of large cooperating groups. As explained, the proposal will award control of an MDL to the lawyer or lawyer-group with the most valuable client inventory. If control is valuable or if lawyers prefer to be part of control groups for other reasons, incentives will exist for lawyers to improve their odds of winning competitions by teaming up with others. At the limit, a grand coalition of all lawyers with cases in an MDL would arise. Such a coalition would regulate all lawyers' responsibilities for common benefit fees and expenses contractually, eliminating the need for coerced fee sharing. Even if grand coalitions are unlikely, it is plausible that coalitions representing more than half the claimants would form. Coalitions of this size, which would meet the "minimum winning" threshold identified by game theorists, would reduce the need for forced transfers, even if they would not eliminate it.[189]

Although our proposal has yet to be applied in any MDL, judges have sometimes left the task of organizing the production of CBW in consolidations to attorneys, with good results. The famous MER/29 litigation is one example.[190] The litigation against Tenet Healthcare stemming from unnecessary heart surgeries at its Redding, California hospital is another. Although the investigation into Tenet's practices and the resulting litigation received extensive coverage in the media,[191] the story of the cooperation among plaintiffs' lawyers is less well-known.[192]

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189. WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS 32 (1962).

190. *See* Rheingold, *supra* note 67, at 123–24 (1968) (describing the operation of the plaintiffs' lawyers).

191. *See, e.g.*, Christian Berthelsen & Victoria Colliver, *Tenet Settles Surgery Probes: Hospital Giant Agrees to Pay $54 Million*, S.F. CHRON., Aug. 7, 2003, at B1 (Tenet settling federal investigation); Reuters, *$395 Million Payment to Settle Unnecessary-Surgeries Suits*, N.Y. TIMES, Dec. 22, 2004, at C10 (Tenet settling private claims).

192. The details that follow were provided in two memoranda by Richard Frankel, an attorney involved in the litigation. We are grateful for the information Mr. Frankel provided and

In the Tenet Healthcare litigation, over seven hundred plaintiffs filed lawsuits in a California state court. Three California law firms represented about 90 percent of them. The remaining plaintiffs were divided among several firms, each of which had a small number of clients. In what might seem a surprising move, two of the California firms with large client groups paired up with two Texas firms to develop the litigation. The Texas lawyers, who formerly served as co-counsel with one of the California firms, had previously scored a large success in litigation against Tenet. Working together, the California and Texas lawyers survived Tenet's efforts to get the cases dismissed and secured a $395 million settlement. No fee transfers occurred—the lawyers collected fees only from their signed clients. The firms shared common expenses by agreement. The law firms with few clients enjoyed the lead lawyers' work product without charge, but the lead lawyers were happy to share. They gained by having almost complete freedom to manage the litigation as they wished.

V. CONCLUSION

MDLs are an important feature of the American litigation landscape. Unfortunately, the control structures that govern these massive proceedings are poorly designed. With good intentions, judges have taken to characterizing these cases as "quasi-class actions" and have used the authority the label confers to exercise unfettered control over the selection and compensation of lead attorneys. Existing practices lead to the selection and compensation of counsel on the basis of opaque and arbitrary criteria; threaten judicial independence; draw unfair and unreasonable distinctions among groups of counsel on the plaintiffs' side; and permit the arbitrary, capricious, or unreasonable exercise of judicial power.

This Article proposes a simple, workable, and effective alternative to the existing system. It recommends implementation of a default mechanism, inspired by the PSLRA, that would place MDLs under the control of management committees composed of attorneys with valuable client inventories. These attorneys would possess the right incentives and expertise to properly manage the common benefit work. The management committee would then select, retain, and monitor other attorneys who perform the common benefit work under privately negotiated fee agreements. The court would stand back from

for his views on the economics of mass tort representations and cooperation among groups of attorneys.

the process, exercising only a limited authority to prevent potential abuse. This system would foster fairer, more efficient, and more appropriate management of complex MDLs in American courts.

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December 12, 2023

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

Re: *Proposed Amendments to Civil Rules 16 and 26 Related to Privilege Logs*

Dear Members of the Committee:

I write in response to the proposed amendments to Federal Rules of Civil Procedure 16(b) and 26(f).

I am a partner at a large plaintiffs' law firm that represents consumers and investors in complex class action litigation in the areas of securities fraud, antitrust, and consumer fraud. In my practice, I specifically focus on the electronic discovery issues across the various cases handled by my firm. I am actively involved in The Sedona Conference Working Group on Electronic Document Retention and Production, having served on its Steering Committee and participated in several brainstorming groups and drafting teams, and serve on the advisory boards for other organizations that educate attorneys and judges on electronic discovery, including the National eDiscovery Leadership Institute (NeLI), ASU-Arkfeld eDiscovery Law and Technology Conference, San Diego ESI Forum, Complex Litigation eDiscovery Forum (CLEF), and Electronic Discovery Reference Model (EDRM). I have been actively engaged in the dialogue regarding privilege reviews and privilege logging for several years.

The currently proposed amendments to Rules 16(b) and 26(f) recognize the importance of the parties' discussion and agreement on the timing and method of privilege logging. I agree that these rules are a productive way to eliminate disputes or expedite the resolution of disputes over privilege logs. The Advisory Committee's consideration of the responses to the 2021 Invitation for Comment on Privilege Log Practice, which overwhelming opposed changes to Rule 26(b)(5), is evident. Although some members of the defense bar are still encouraging drastic changes to Rule 26(b)(5), I believe the Committee's more measured approach is the right one. I have read the agenda books outlining the Advisory Committee and Discovery Subcommittee's discussions, as well as observed the Committee meetings, and I know that this issue has been thoroughly discussed and that various viewpoints have been duly considered.

There is only one issue raised in the Advisory Committee Notes to the proposed rules that I find objectionable. The Committee Notes seem to posit that a document-by-document log may not be appropriate when there are a large number of documents withheld on the basis of privilege. I would argue quite the opposite. The more documents that are withheld the more important it is that the responding party be able to assess the claims of privilege. I cannot imagine that the Advisory Committee would mean to encourage over-withholding of documents in order to obscure the responding party's ability to assess the claim of privilege. Without revisiting the details of all the comments on Privilege Log Practice submitted in 2021, I will remind the Committee that many of the examples of over-withholding and privilege log disputes expressed in the comments were in cases where there were large amounts of documents withheld on the basis of privilege. Therefore, I strongly urge the Committee to strike the reference in the proposed 2023 Advisory Committee Notes to Rule 16 that could be read to limit the types of cases where document-by-document listings are appropriate to those "involving a limited number of withheld items" and to strike the language in the proposed 2023 Advisory Committee Notes to Rule 26 that reiterates the 1993 Committee Note indicating that a more detailed log may only be appropriate "if only a few items are withheld." There is no basis for this sort of limitation and it would encourage exactly the type of gamesmanship that leads to time-consuming privilege log disputes. With these minor adjustments, I believe the proposed amendments are likely to lead to productive discussions between the parties and result in the positive changes envisioned by the Committee.

I will briefly respond to some of the recent public comments that continue to advocate for far-reaching substantive changes to Rule 26(b)(5). These comments are no different than the handful of comments supporting changes to Rule 26(b)(5) that were submitted in 2021, which the Committee has already considered. The proposals advanced by these comments should continue to be rejected for several reasons.

- The burden of reviewing documents for privilege and making accurate assessments of such privilege should not be confused or conflated with the burden of logging for privilege. Any logging process should not impact the process used to determine whether or not a document is privileged. If the producing party wishes to relax the review process, they should avail themselves of Federal Rule of Evidence 502(d), which was meant to remove the barriers to an expedient review and production of documents.

- Many, if not all, requesting parties do, in fact, carefully review privilege logs and find them necessary for determining whether or not designations of privilege should be challenged and to narrow which specific documents warrant a challenge.

- The fact that a producing party has withheld a large amount of documents on the basis of privilege, or the fact that a litigation is "asymmetrical," should not eradicate the receiving party's ability to have sufficient information to understand what is being withheld, on what basis, and to assess the claims of privilege for withheld documents.

- Non-traditional logs such as metadata logs and categorical logs cannot be presumptively appropriate under Rule 26(b)(5) for all documents in all cases. Parties may agree to use non-traditional privilege logs for withheld documents, or a subset of withheld documents, but the suggestion that non-traditional logs should be deemed presumptively appropriate for all cases is unreasonable for all the reasons set forth in the 2021 responses to the Invitation for Comment on Privilege Log Practice.

- Categorical logs do not reduce the burden of privilege logging, do not provide any useful information as to whether or not any particular document is being properly withheld under the designated category, and only increases the receiving party's (and the court's) burden of assessing the claim of privilege.

- Metadata logs may reduce the burden of privilege logging because they do not require any human input, but they may not provide sufficient insight into the basis of privilege. Metadata fields can help supplement a privilege log, often filling in the gaps of otherwise deficient descriptions, but may not be sufficient on their own. This will shift the burden to the receiving party and lead to delays while the producing party supplements log entries. If combined with email thread suppression, metadata logs are wholly insufficient since they may not provide accurate information regarding who sent and received the privileged information or when. In addition, without a requirement of human input, metadata-only logs may increase the risk that documents are improperly withheld in the first instance and only reviewed if challenged by the receiving party.

- None of the comments supporting substantive changes to the privilege log rules address the evidence of over-designation of privilege expressed by many receiving parties in response to the Committee's Invitation for Comments on Privilege Log Practice. In fact, their proposed changes would increase the likelihood of over-designation and increase the privilege disputes addressed by the court.

- Finally, the comments arguing that the timing of privilege log discussions and productions should be delayed until later in the document review process will lead to a significant disadvantage for receiving parties and will likely disrupt court schedules with disputes over privilege emerging closer to the end of discovery. As with many

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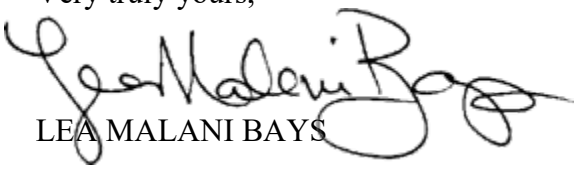
> of the topics covered under Rule 26(f), the parties may not have all relevant information related to privilege issues during the initial conference. Discussions regarding privilege logs may last longer than one initial meeting, as the parties more thoroughly explore issues related to discovery. If a privilege log issue arises in the Rule 16 conference, the courts are well within their rights to send the parties back to investigate more or discuss further, when appropriate.

The Committee clearly recognizes that there is no one-size-fits-all approach to privilege logs. The currently proposed rules rightly allow the parties the opportunity to work together to determine a way to comply with Rule 26(b)(5) in a manner that is appropriate for the needs of the case.

Very truly yours,



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COMMENT ON PROPOSED FED. R. CIV. P. 16.1

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Since Congress created the Multidistrict Litigation ("MDL") procedural vehicle in 1968,[1] MDLs have become an increasingly prominent feature of federal civil litigation. Instead of promoting judicial efficiency and speedy resolution of cases, as Congress intended, however, MDLs now often – and in mass torts, usually − have the opposite effect. The large volume of mass-tort lawsuit filings has created complex factual and procedural issues far beyond what Congress anticipated. MDL courts, overwhelmed with thousands, tens of thousands, and now even hundreds of thousands of actions, cannot focus on any individual case. Thus, in MDLs individual cases, except for the vanishingly small percentage selected for bellwether trials, are not handled speedily and often are not addressed at all. Most MDL cases linger for years longer than if they had been litigated individually.

The overwhelming caseload in mass-tort MDLs has led to a wholesale abandonment of the Federal Rules of Civil Procedure ("FRCP"), which are largely premised on individual case adjudication. The result is enormous delay and expense, as cases that transferor courts could have adjudicated in months instead sit for years in bloated MDL dockets. The inefficient and untimely handling of the vast bulk of cases is the core problem with MDLs. The proposed rule 16.1 falls far short of addressing the real reasons the Federal Rules of Civil Procedure ("FRCP") are failing in the MDL context.

According to the Federal Judicial Center's most recent statistics, the number of individual actions in MDLs has increased to nearly 80 percent of the total pending federal civil caseload.[2] The 24 largest MDLs (and 35 of the top 39) are all product liability related.[3] In 2023, the MDL "tail" wagged the federal judicial system "dog," in that the annual change in case filings – an eight percent decline – "occurred largely because of a reduction in multidistrict litigation (MDL) cases directly filed in a ***single*** district.[4]

Currently, none of the FRCP specifically addresses the unique adjudicatory and administrative problems caused by hundreds, thousands, and even hundreds of thousands of simultaneously pending MDL individual actions. Conversely, MDLs are not supposed to be an exception to the FRCP.[5] Faced with this procedural vacuum, adherence by MDL courts to the

[1] 28 U.S.C. §1407.
[2] The Federal Judicial Center's 2023 annual "Federal Judicial Caseload Statistics" report put the total federal docket at 583,543 pending actions (available at https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023). The current total of "actions now pending" in the 186 currently open MDLs is 464,724. JPML, Oct. 16, 2023 MDL Statistics Report − Distribution of Pending MDL Dockets by Actions Pending (available at https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-16-2023.pdf).
[3] *Id.* The top 24 product-liability MDLs currently include 418,801 pending actions, which constitute 98.2% of all currently pending MDL actions. *Id.*
[4] Fed. Jud. Ctr., "Federal Judicial Caseload Statistics 2023." Likewise, the change in 2023 product liability and pharmaceutical filings were both dominated by MDL. *Id.*
[5] FRCP exceptions are listed in Rule 81.

existing FRCP is spotty at best. While an occasional appellate court has cautioned that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance,"[6] that is precisely what many MDLs have become, to the detriment of claimants and defendants alike.

This situation primarily stems from the FRCP not clearly addressing to the unique and complex nature of MDL proceedings. That is unsurprising since the FRCP were largely crafted decades before the MDL statute was passed – and long before mass tort litigation, as it exists today, proliferated. That is why MDL-specific federal rules are needed. Proposed Rule 16.1, with no mandatory provisions, has no teeth, and thus cannot possibly fill this yawning gap. At best, it sets a precedent that an MDL-specific federal rule can exist, while kicking all the numerous procedural cans down the road, for future Rules Committees to deal with when this Rule 16.1 predictably fails to accomplish anything of substance.

Instead of applying the FRCP, MDL courts have simply abandoned case-specific application of existing rules in favor of improvisational and *ad hoc* procedural practices to manage massive MDL proceedings.[7] The absence of uniform civil rules in MDLs produces significant unpredictability, confusion, and procedural abuses. Although the federal MDL statute supposedly "promote[s] the just and efficient conduct of such actions,"[8] and the FRCP generally are intended "to secure the just, speedy, and inexpensive determination of every action and proceeding,"[9] cases transferred to MDLs pile up, languish for years, and if defendant does not succumb to settlement pressure, these cases return to transferor courts with little or case-specific discovery and issues barely, if at all, addressed.[10]

While "neither §1407 nor Rule 1 remotely suggests that, whereas the [FRCP] are law in individual cases, they are merely hortatory in MDL ones,"[11] that is in fact what often happens. Invented MDL practices, such as direct filing, that do not exist anywhere else, have replaced the

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[6] *In re National Prescription Opiate Litigation*, 956 F.3d 838, 844 (6th Cir. 2020).

[7] Behrens, Mark and Appel, Christopher, *Federal Civil Rule Reform: An Update*, 9 (2020), available at: https://www.shb.com/-/media/files/professionals/b/behrensmark/iadc-journal-article-on-federal-rule-reform-update.pdf?la=en.

[8] 28 U.S.C. §1407(a).

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

[10] Examples of post-remand case-specific litigation over fact and expert witnesses are legion. A few recent examples are: *Donalds v. Ethicon, Inc.*, No. 22-1737, 2023 WL 2446703, at *2 (4th Cir. March 10, 2023) (affirming *Donalds v. Ethicon, Inc.*, 2021 WL 6126297, at *7-8 (D. Md. Dec. 28, 2021)); *Arevalo v. Mentor Worldwide LLC,* No. 21-11768, 2022 WL 16753646, at *7-8 (11th Cir. Nov. 8, 2022); *Madsen v. C.R. Bard, Inc.*, No. 20-CV-02345, 2022 WL 4483910, at *8 (N.D. Ill. Sept. 27, 2022); *Thornton v. Ethicon, Inc*., No. CV-20-00460-TUC-JCH, 2022 WL 3211453, at *3-4 (D. Ariz. Aug. 9, 2022); *Imhoff v. Ethicon, Inc*., No. 3:20-CV-00380-AR, 2022 WL 4239171, at *6 (Mag. D. Or. July 15, 2022), *adopted*, 2022 WL 4237145 (D. Or. Sept. 14, 2022); *Parks v. Ethicon, Inc.,* No. 20CV989-LL-RBB, 2022 WL 2239339, at *2 (S.D. Cal. June 22, 2022); *Parks v. Ethicon, Inc.,* No. 20CV989-LL-RBB, 2022 WL 1812299, at *9 (S.D. Cal. June 2, 2022); *Enborg v. Ethicon, Inc.*, No. 2:20-cv-02477-AWI-BAK, 2022 WL 1300569, at *4-5 (E.D. Cal. April 29, 2022); *Robinson v. Ethicon, Inc.*, C.A. No. H- 20-3760, 2021 WL 4034131, at *3 (S.D. Tex. Sept. 2, 2021), *reconsideration denied*, 2022 WL 2159836 (S.D. Tex. June 15, 2022); *Blackwell v. C.R. Bard*, No. 2:19-CV-180-Z, 2021 WL 2355393, at *3-4, 6 n.5 (N.D. Tex. June 9, 2021*); Kieffaber v. Ethicon, Inc.*, C.A. No. 20-1177-KHV, 2021 WL 847996, at *1-2 (D. Kan. March 5, 2021); *Thompson v. C.R. Bard, Inc.*, C.A. No. 6:19-cv-17, 2020 WL 3052227, at *3-4 (S.D. Ga. June 8, 2020); *Rolandson v. Ethicon, Inc.*, No. 15-cv-537 (ECT/DTS), 2020 WL 2086279, at *8-9 (Mag. D. Minn. April 30, 2020).

[11] *National Prescription Opiate*, 956 F.3d at 844.

territorial limitations ordinarily imposed by Rule 4(k).[12] This problem is real and, as noted above, felt on both sides of the proverbial "v."

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In the MDL context, large portions of the FRCP have been ignored or superseded. That is not proper. The FRCP "have the force of a federal statute."[13] The MDL statute requires procedures "not inconsistent with … the Federal Rules of Civil Procedure."[14] MDL courts, like other judges, "must find efficiencies within the Civil Rules, rather than in violation of them."[15] The FRCP "may not be tossed out the window in an MDL case."[16] This comment discusses those Rules that MDL transferee courts have most frequently disregarded, diminished, or supplanted, none of which are addressed by the current proposal.

I. Rule 3: Commencing an Action

Rule 3 states that "[a] civil action is commenced by filing a complaint with the court." What seems to be a straightforward directive is subject to circumvention in the MDL context, usually when MDL courts provide claimants with alternative methods of garnering the benefits of commencing an action, while not actually filing a complaint – a concept not contemplated by the FRCP.

One of these non-rules-based filing alternatives is an "MDL census," or "census registry," which typically requires would-be claimants merely to "register" their claim with a third-party claims administrator pursuant to an MDL-created process, by identifying the relevant product and the claimed injury. These *ad hoc* MDL procedures allow claimants to obtain benefits normally associated with filing a complaint, but without filing and without paying the usual filing fee, despite the statutory fee requirement.[17] A pilot project testing out these claims filing substitutes is currently underway in three major MDLs.[18]

The impact of this disregard for Rule 3 was on display when the target defendant in the *Combat Arms Earplug* MDL[19] moved to require "census" claimants to pay the legally required

[12] *E.g.*, *Looper v. Cook, Inc.*, 20 F.4th 387, 391 (7th Cir. 2021) (direct filing resulted in surprise waiver of defendant's jurisdictional rights); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 356-57 (5th Cir. 2017) (rejecting waiver under similar circumstances); *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation*, C.A. No. H-10-271, 2011 WL 1232352, at *6-10 (S.D. Tex. March 31, 2011) (similarly finding no waiver).
[13] *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941); *accord*, *e.g.*, *National Prescription Opiate*, 956 F.3d at 844 (FRCP "are binding upon court and parties alike, with fully the force of law").
[14] 28 U.S.C. §1407(f).
[15] *National Prescription Opiate*, 956 F.3d at 845.
[16] *In re Korean Air Lines Co*., 642 F.3d 685, 700 (9th Cir. 2011) (discussing Rule 15).
[17] 28 U.S.C. §1914(a).
[18] *In re 3M Combat Arms Earplug Products Liability Litigation*, MDL No. 2885, 2019 WL 13126350 (N.D. Fla. Oct. 22, 2019); *In re Zantac Ranitidine Products Liability Litigation*, MDL No. 2924, 2020 WL 1640021 (S.D. Fla. April 2, 2020); *In re Juul Labs, Inc., Marketing, Sales Practices, & Products Liability Litigation,* MDL No. 2913, minute order (N.D. Cal. Oct. 25, 2019) (the *Juul* census order replaces Rule 3 with merely some agreed-upon process, not even memorialized by court order).
[19] MDL No. 2885. This is the same MDL that the 2021 "Federal Judicial Caseload Statistics" identified as single-handedly responsible for the previously mentioned 150% increase in federal tort filings in 2021.

filing fee.[20] The defendant pointed out that, "[u]nlike other cases filed in federal courts, no filing fees were required, no *pro hac vice* fees, no service of process, no vetting of claims. All that was required to start a federal action in this MDL proceeding was a form complaint that named the plaintiff and identified alleged injuries from a list of options."[21] Not only was this attempt to enforce Rule 3 denied, the defendant rebuked for "having no concept of" the burden on the court associated with moving filings from an administrative docket to an active docket.[22] This MDL rapidly became the largest in history, aided by total disregard of Rule 3 and related requirements.[23] This MDL moved so far from the FRCP that even raising Rule 3 was viewed as a "frivolous motion" that would "not 'winnow' frivolous cases."[24] Rule 3 supposedly did not apply because the MDL's "administrative" docket – nowhere authorized by any rule – was simply an "*organizational* tool" and "all plaintiffs previously recorded on the administrative docket will have either transitioned to the MDL docket (and paid the requisite fee) or dismissed their claim in the coming months."[25]

The *Zantac* MDL's registry did not require filing of any lawsuit at all.[26] Its entirely informal process made it difficult for even the Federal Judicial Center's to keep accurate MDL statistics, since none of some 150,000 unfiled claimants was even counted.[27] For well over two years, this *Zantac* "registry" existed, without its claimants being required to commit to the minimal step of eventually filing an action in federal court.[28] Neither the roster of registrants, nor their claims, nor even their injuries were "finalized" during this two year period.[29] Predictably, when plaintiffs suffered litigation setbacks in the *Zantac* MDL, nothing prevented them from abandoning federal court.[30]

MDL courts' refusal to follow Rule 3 effectively eliminates any barriers to asserting claims. Claimants get the benefits of commencing an action – chiefly tolling the statute of limitations – without having to comply with any FRCP, or even to pay a filing fee. The lack of a Rule 3 complaint essentially freezes each MDL claimant's suit, since the filing of a complaint is what triggers the application of other FRCP. With no complaint filed, there is nothing to dismiss, and thus no effective sanction against a claimants' failure to disclose essential information, or,

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[20] *In re 3M Combat Arms Earplug Products Liability Litigation*, "Defendants' Motion to Require Payment of Filing Fees" (filed April 5, 2022) (PACER No. 2941).
[21] *Id.* at p. 1.
[22] *In re 3M Combat Arms Earplug Products Liability Litigation*, MDL No. 2885, 2022 WL 2841717, at *1 (N.D. Fla. April 6, 2022).
[23] *Id.* at pp. 11-12. As of July, 2022, the *Combat Arms Earplug* MDL had 272,416 claimants (not counting any unfiled). Fed. Jud. Ctr., "Federal Judicial Caseload Statistics 2021."
[24] *Combat Arms*, 2022 WL 2841717, at *4.
[25] *Id.* at *1 (emphasis original).
[26] *In re Zantac (Ranitidine) Products Liability Litigation*, 546 F. Supp.3d 1192, 1198 (S.D. Fla. 2021) ("this Court has created a Census Registry where tens of thousands of claimants who have not filed lawsuits have registered their claims"). *In re Zantac (Ranitidine) Products Liability Litigation*, MDL No. 2924, 2021 WL 5415027, at *1 (S.D. Fla. Nov. 19, 2021) ("As of the date of this Order, in excess of 150,000 Claimants have registered their claims.").
[27] *See* JPML, Oct. 16, 2023 MDL Statistics Report − Distribution of Pending MDL Dockets by Actions Pending (listing *Zantac* as involving only 14,990 actions in its history).
[28] *In re Zantac (Ranitidine) Products Liability Litigation*, MDL No. 2924, 2022 U.S. Dist. Lexis 35168, at *155, 157 (S.D. Fla. Feb. 28, 2022).
[29] *Id.* at *158-59, 164-65.
[30] "Lawsuits Surge in Philadelphia's Zantac Mass Tort Program as More Plaintiffs Turn to State Courts," Legal Intelligencer (Nov. 2, 2022).

indeed, to do anything such claimants do not wish to do. Such voluntary registries also pressure MDL judges to make pro-plaintiff MDL rulings, to avoid the unfiled claimants from departing from an MDL *en masse*, when, as in *Zantac*, substantive MDL rulings favored defendants.

Rule 3 (among other Rules) has "the effect of requiring early (including pre-filing) due diligence by defining the standards that courts are expected to apply to claims. The evidence gathered pursuant to that due diligence helps defendants make informed decisions about case risks and valuation."[31] Without uniform application of Rule 3 in MDL proceedings, meritless claims remained parked in MDLs for long periods of time, without the suit progressing and without defendants having any opportunity to weed out bogus claims via dismissal. The proposed Rule 16.1 does nothing to preserve Rule 3.

II. Rule 7: Pleadings Allowed

Rule 7(a) states that "[o]nly [the following types of] pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer." Despite Rule 7's expressly exclusive list of the only pleadings permitted, MDL courts frequently create other types of filings not enumerated under Rule 7(a), such as "short form" or "master" complaints, and treat them as operative pleadings, at least until defendants move against them. In non-MDL litigation, filing improper "pleadings" in violation of Rule 7 can be sanctionable.[32]

Repeatedly, MDL transferee courts have departed from Rule 7 by allowing "master" complaints. Some excuse master complaints from compliance with the Federal Rules by viewing them as mere "administrative tools" or "procedural devices" to which the ordinary rules of pleading do not apply.[33] The predictable result has been large numbers of unvetted plaintiffs remaining in MDLs for years, bloating the number of claims in these MDLs and, by virtue of sheer numbers, increasing the pressure on MDL defendants to settle cases that would be meritless under the normal rules of pleading.[34] This "administrative" approach to master complaints is a misapplication of the law that a rules change could fix. The first decisions viewing master complaints as "administrative" did not involve pleading or, indeed, the Fed. R. Civ. P. at all, but

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[31] Lawyers for Civil Justice, Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee, *Better Information and an Earlier Start: How MDL Judges Would Benefit from a New Tool for Informing Organizational Decisions and Reducing the Delay Between Coordination and Initial Discovery While Preserving Judicial Discretion*, 8 (March 8, 2022) available at: https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_mdl_sketch_rule_draft_3-8-22.pdf.

[32] *Langer v. Monarch Life Insurance Co*., 966 F.2d 786, 809-10 (3d Cir. 1992).

[33] *E.g.*, *In re Zantac (Ranitidine) Products Liability Litigation*, 339 F.R.D. 669, 681 (S.D. Fla. 2021) (presence of both master and individual complaints in an MDL caused difficulty in deciding when dismissals were final and appealable); *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, MDL No. 2272, 2012 WL 3582708, at *3-4 (N.D. Ill. Aug. 16, 2012).

[34] For example, in the *Phenypropanolamine* MDL more than 300 motions to dismiss were stricken, not because they were unmeritorious, but because they would have required "examining the plaintiffs' individual complaints and applying the applicable state law." *In re Phenypropanolamine Products Liability Litigation*, MDL No. 1407, 2004 WL 2034587, at *1 (W.D. Wash. Sept. 3, 2004). Adopting a "narrow role for an MDL transferor court," the court refused to dismiss any action, requiring instead that Rule 8 motions "be refiled with the transferor court upon remand," *id.* at *2, which never took place.

rather arose in the choice-of-law context.[35] Pleading was only implicated after loose language in *In re Trasylol Products Liability Litigation*,[36] involving the particularity of fraud allegations under Rule 9(b).[37]

The omission of "short form" or "master" complaints from Rule 7(a), leaving no guidance on how they should be treated, also introduces unnecessary complexity into when dismissals become final orders,[38] since appellate courts have to determine whether such filings are merely administrative tools, suggesting that dismissal has no effect, or an operative and legally-binding "pleading" that merged the various claims and was subject to dismissal for pleading deficiencies.[39] This lack of clarity on what "short form" or "master" complaints are stems from the same general problem – refusal to follow the FRCP − since many MDLs feature "pleadings" that, under Rule 7, do not exist. If anything, proposed Rule 16.1 exacerbates this problem, as it refers to use of "consolidated pleadings" in MDLs[40] without any corresponding change, or even reference, to Rule 7(a)'s exclusive list of allowable "pleadings" and the absence any reference to consolidated pleadings in either Rule 7's text or Committee Notes.[41]

III. Rule 8: General Rules of Pleading

Rule 8(a) sets forth what a pleading that adequately states a claim for relief must contain − a "short and plain" statement, including the: (1) grounds for the court's jurisdiction; (2) pleader's entitlement to relief; and (3) demand for the relief sought.

In *Bell Atlantic Corp. v. Twombly*, the U.S. Supreme Court held that Rule 8(a) required all plaintiffs' pleadings to include "enough facts to state a claim to relief that is plausible on its face."[42] Moreover, *Twombly* reiterated that a claim failing to "nudge [the plaintiffs'] claims across the

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[35] *See In re Mercedes-Benz Tele Aid Contract Litigation*, 257 F.R.D. 46, 56 (D.N.J. 2009); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 489 F. Supp.2d 932, 935-36 (D. Minn. 2007); *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450, 454 (E.D. La. 2006); *In re Propulsid Products Liability Litigation*, 208 F.R.D. 133, 141-42 (E.D. La. 2002). These decisions treated MDL master complaints as "administrative" conveniences so that issues ordinarily determined by the law of the forum where individual plaintiffs originally filed suit could not be circumvented by direct filing. More recent choice-of-law decisions do the same. *See In re Biomet M2a Magnum Hip Implant Products Liability Litigation*, MDL No. 2391, 2019 WL 110892, at *1 (N.D. Ind. Jan. 3, 2019) ("I told the parties that I intended to leave sticky questions of state law to the courts that would try the cases"); *In re Fresenius Granuflo/NaturaLyte Dialysate Products Liability Litigation*, 76 F. Supp.3d 294, 300-05 & n.11 (D. Mass. 2015).

[36] MDL No. 1928, 2009 WL 577726, at *6-7 (S.D. Fla. March 5, 2009).

[37] In *Trasylol*, the actual holding, as opposed to the *dictum*, was that "leniency must not overreach so as to effect a negation of the policy behind Rule 9." 2009 WL 577726, at *9. Thus, "a broad claim that a Plaintiff or a Plaintiff's physicians relied on fraudulent or misleading statements, absent some recitation of what oral or written statement a particular drug representative made to a specific physician . . ., is an insufficient basis for allowing Plaintiffs to proceed." *Id.* Thus, the motion to dismiss in the *Trasylol* MDL was actually decided on its merits.

[38] *See In re Zantac (Ranitidine) Products Liability Litigation*, 339 F.R.D. 669, 682 (S.D. Fla. 2021) ("the undersigned, like other MDL judges who have entered agreed-upon pretrial orders [concerning master complaints] wishes that she had a better appreciation of the significance of the language").

[39] *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 (2015); *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586 (6th Cir. 2013).

[40] Proposed Rule 16.1(c)(5).

[41] Fed. R. Civ. P. 7(a) ("Only these pleadings are allowed. . . .").

[42] 550 U.S. 544, 570 (2007).

line from conceivable to plausible" must be dismissed.[43] Two years later, the Court clarified in *Ashcroft v. Iqbal* that the pleading standard set forth in *Twombly* "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'"[44]

Despite *Twombly* and *Iqbal* being the law for over a decade, it is not uncommon for MDL judges to preclude individualized *Twombly*/*Iqbal* motions that are routine in individual civil actions and critical to policing insufficiently pleaded claims. Such rulings evade Rule 8, as they do Rule 7, by treating master complaints as mere "administrative tools," even where plaintiffs fail to allege "plausible" facts to support their claims. The most common justification is that enforcing Rule 8 is just too much work for transferee MDL judges with hundreds, or thousands, of individual actions before them. "[T]he Court does not intend to engage in the process of sorting through thousands of individual claims at the present time to determine which claims have or have not been properly presented."[45] "With more than 549 individual actions ... [t]he proper court to hear dispositive motions concerning the sufficiency of plaintiff-specific allegations is the transferor court."[46] Both "[c]ausation" and the statute of limitations are "case-specific issue[s] which we cannot handle in the MDL ... and will have to await the attention of the transferor courts after remand."[47] "[C]ase-specific rulings are neither the purpose, nor the forte, of a court presiding over a multi-district litigation."[48] "The MDL procedure is instead designed to maximize efficiency and fairness by minimizing both the sheer number of rulings required."[49]

Refusal to apply Rule 8 to MDLs is only getting worse. Recently, an MDL special master effectively nullified Rule 8 altogether by treating plaintiff fact sheets – which are not "pleadings" in any sense – as supplying essential facts omitted from MDL "master" and "short form" complaints, that themselves are not pleadings either. The master complaints unquestionably alleged "no ***specific*** facts about any ***specific*** plaintiffs or ***specific*** injuries" and only "conjectural injuries."[50] Nor did the short form complaints "allege that using the recalled devices caused their alleged injuries."[51] Notwithstanding that fact sheets are not pleadings, and are not cognizable under Rule 8, the MDL decision relied on them to hold that the complaints satisfied Rule 8.

> The Plaintiff Fact Sheets provide the kind of detail that [defendant] contends is missing from the Short Form Complaint. . . . [T]the Fact Sheets serve the purpose

[43] *Id.*
[44] 556 U.S. 662, 684 (2009).
[45] *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 965 (E.D. La. 2011), *aff'd on other grounds*, 745 F.3d 157 (5th Cir. 2014).
[46] *Zimmer Nexgen*, 2012 WL 3582708, at *4.
[47] *In re Factor VIII or IX Concentrate Blood Products Litigation*, 169 F.R.D. 632, 641 n.13 (N.D. Ill. 1996).
[48] *In re Nuvaring Products Liability Litigation*, MDL No. 1964, 2009 WL 4825170, at *2 & n.3 (E.D. Mo. Dec. 11, 2009) (refusing to rule on over 200 motions to dismiss; viewing the "goal" of the MDL solely in terms of "expeditious and efficient discovery"). *See In re Nuvaring Products Liability Litigation*, MDL No. 1964, 2009 WL 2425391, at *1 (E.D. Mo. Aug. 6, 2009) (misapplying *Trasylol* "leniency" dictum to deny all individualized motions to dismiss). To avoid a defense appeal, the *Nuvaring* MDL court ultimately eliminated the master complaint altogether. *See In re Nuvaring Products Liability Litigation*, MDL No. 1964, 2009 WL 3427974 (E.D. Mo. Oct. 23, 2009).
[49] *Phenypropanolamine*, 2004 WL 2034587, at *2.
[50] *In re Philips Recalled CPAP, Bi-Level PAP, & Ventilator Products Litigation*, No. 2:21-MC-1230, 2023 WL 7019287, at *4 (W.D. Pa. Sept. 28, 2023) (emphasis original).
[51] *Id.* (emphasis original).

> of providing the information [defendant] contends is missing from the Master and Short Form Complaints.[52]

The result of such rulings, depriving defendants of their right to file case-specific Rule 8 motions in the name of case management, effectively immunizes MDL plaintiffs from Rule 8 scrutiny of the adequacy of their factual allegations, and thus prevents the early vetting of claims that is routine in non-MDL litigation. By refusing to require that each plaintiff meet the minimal pleading standards necessary for a case to survive a motion to dismiss, MDL courts once again open the door to an unlimited number of plaintiffs who cannot establish viable cause of actions, and thus distort the true scope of MDL litigation. Once again proposed Rule 16.1 does nothing to put a stop to the current rampant refusal to follow Rule 8 in MDLs.

IV. Rule 12: Defenses and Objections

Rule 12(b) authorizes defendants to seek dismissal of complaints for enumerated deficiencies including, under Rule 12(b)(6), the failure of a complaint to state a viable legal claim. "Allowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants …, delay resolution of disputes …, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system."[53] Despite Rule 12(b)'s critical gatekeeping role, MDL courts have postponed or even refused to consider defendants' Rule 12(b) motions, despite the Rule not providing for postponements or rejections, in either MDL proceedings or any other civil litigation.[54]

It took a rare mandamus proceeding for an appellate court to hold that, in an MDL with "more than 2,700 cases" pending, "the law governs an MDL court's decisions just as it does a court's decisions in any other case."[55] A transferee judge could not refuse a properly filed Rule 12 motion and leave the viability of newly-added claims to be addressed solely through post-discovery summary judgment motions. The belated claims themselves were themselves in violation of Rule 16(b).[56] However, "Rule 12(b) states that 'a party may assert' the defenses enumerated therein 'by motion,' which means that the district court may *not* refuse to adjudicate motions properly filed under that Rule."[57] It was a "mistake … to think [an MDL judge] had authority to disregard the Rules' requirements."[58]

But rather than adhering to the FRCP in considering Rule 12(b) motions, particularly when defendants challenge "short form" complaints, MDLs frequently impose *ad hoc* limits on such motions, such as requiring defendants to seek prior discretionary leave of court before presenting

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[52] *Id.*
[53] *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367-68 (11th Cir. 1997).
[54] *Cf.* In re School Asbestos Litigation, 977 F.2d 764, 793-95 (3d Cir. 1992) (criticizing similar refusal of MDL judge to consider properly filed summary judgment motions).
[55] *National Prescription Opiate*, 956 F.3d at 844, 846.
[56] The claims at issue in *National Prescription Opiate* were filed 19 month after the previously set Rule 16(b) deadline and required "good cause." *Id.* at 843. "[A]pplication of Rule 16(b)'s good-cause standard is not optional." *Id.* (quoting *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 716 (8th Cir. 2008)).
[57] *National Prescription Opiate*, 956 F.3d at 846 (emphasis original).
[58] *Id.* at 844.

such motions.[59] Nonetheless, proposed Rule 16.1 does nothing to ensure that Rule 12 is enforced in MDLs.

V. Rule 16: Amendments to Pleadings

Another *National Prescription Opiate* decision pushed Rule 16 "right to the edge."[60] Despite that Rule's requirement that scheduling orders must "limit[] the time to join other parties [and] amend the pleadings,"[61] plaintiffs in cases selected as "bellwether" candidates were permitted to amend their pleadings, including joining new defendants, whenever a case might be designated a bellwether, with "no cutoff date."[62] Only because plaintiffs did not actually "name new defendants after discovery concluded, or even on the eve of trial" did this "unconventional" order escape being found "a judicial usurpation of power" or "clear" abuse of discretion.[63]

VI. Rule 26: Duty to Disclose

Rule 26(a)(1)(A) states that, "[e]xcept as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties" certain information about the claimants and claims for inspection by the defendants. Notably, MDL proceedings are not included in Rule 26(a)(1)(B)'s list of "Proceedings Exempt from Initial Disclosure." Nevertheless, in some MDLs plaintiffs have been excused from making Rule 26 disclosures entirely.[64] Indeed, One decision even suggested that "it is fair to say" that an MDL court may "tacitly excuse[] Rule 26 disclosures altogether."[65]

Likewise, some MDL rulings have redirected the "proportionality" requirement of Rule 26(b)(1) from its focus on discovery in a particular case, as the rule requires, to encompass an entire MDL, effectively making all discovery against defendants "proportional." Such results misapply the FRCP. "[T]he question whether discovery is "proportional to the needs of the case" under Rule 26(b)(1) must − per the terms of the Rule − be based on the court's determination of the needs of the particular case in which the discovery is ordered."[66] "[P]roposed discovery is not proportional to the needs of the case" when it depends on "mere conjecture" that somewhere some

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[59] *In re Ethicon Physiomesh Flexible Composite Hernia Mesh Products Liability Litigation*, MDL No. 2782, "Practice & Procedure Order No. 2 – Master Pleadings; Direct Filing; Short Form Complaints; Service of Process; Motions," slip op at 11 ¶V(B)(3-4) (N.D. Ga. Aug. 22, 2017) (PACER No. 219); *In re Ethicon Physiomesh Flexible Composite Hernia Mesh Products Liability Litigation*, MDL No. 2782, "Practice & Procedure Order & Notice of Initial Conference," slip op. at 5-6 ¶4(d) (N.D. Ga. June 21, 2017) (PACER No. 148).

[60] *In re National Prescription Opiate Litigation*, No. 21-4051, 2022 WL 20701236, at *1 (6th Cir. Nov. 10, 2022).

[61] Fed. R. Civ. P. 16(b)(3)(A).

[62] *National Prescription Opiate*, 2022 WL 20701236, at *1.

[63] *Id.* (observing that the petitioner "had been a party to the MDL," if not the particular matter, for several years).

[64] *See Weidenhof v. Zimmer, Inc.*, C.A. No. 1:16-cv-2105, 2018 WL 7106980, at *1 (Mag. M.D. Pa. Dec. 28, 2018) (claim that did not even involve an MDL product remained in MDL for two years without any product identification discovery), *adopted*, 2019 WL 330176 (M.D. Pa. Jan. 25, 2019).

[65] *Kieffaber*, 2021 WL 847996, at *1.

[66] *National Prescription Opiate*, 956 F.3d at 846. *Accord In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, MDL No. 2672 CRB (JSC), 2017 WL 4680242, at *1 (N.D. Cal. Oct. 18, 2017).

affiliate of a defendant might have made an "inconsistent" statement," regardless of its relevance to any particular case.[67]

Disregard for Rule 26 – to the point where some MDLs dispense with its requirements altogether – undermines the important role the Rule plays in assessing the legitimacy of claims at an early stage in proceedings. Without any form of automatic claim vetting, and without case-specific "proportionality" limits to discovery, MDLs have ballooned with wholesale inclusion of meritless claims, and inordinate discovery costs.

Other than obliquely, via a couple of references to discretionary discovery "plans" and "how and when the parties will exchange information,"[68] the proposed Rule 16.1 does not these abuses of Rule 26 in MDLs, let alone propose anything concrete that would require compliance with the existing Rule.

VII. Rule 56: Summary Judgment

To prevent defendants from seeking summary judgment, a recent MDL order refused to enforce the affidavit requirement imposed by Rule 56(d). This rule mandates that summary judgment cannot be opposed on the ground that discovery is incomplete without the non-movant supplying an "affidavit or declaration that, for specified reasons, [a party] cannot present facts essential to justify its opposition" to summary judgment.[69] Citing only the purported "procedural peculiarities of multidistrict litigation," the decision declared that "a more lenient approach to Rule 56(d) may be appropriate in some circumstances."[70] Otherwise procedurally appropriate and factually supported summary judgment motions were denied globally as "ill-suited for collective resolution" even though none of the non-moving plaintiffs submitted affidavits to that effect as required by Rule 56(d).

Proposed Rule 16.1 does nothing to prevent MDL proceedings from ignoring the supposedly mandatory FRCP to prevent defendants from seeking summary judgment on individualized grounds − something an individual plaintiff could not avoid in a non-MDL matter. Thus, MDLs will remain havens for factually and legally baseless claims, but for their being in an MDL, would otherwise be dismissed.

Conclusion

As detailed above, in MDL after MDL the existing FRCP are being ignored, which flies in the face of why the Federal Rules were adopted in the first place. With MDLs now comprising nearly 80% of the federal courts' civil docket, the necessary effect is, that in a large majority of the current federal caseload, the rules are no longer mandatory, but instead apply, or do not, depending on the attitude of individual judges. Proposed Rule 16.1 should accordingly be revised to reject *ad hoc* "procedural tool" deviations from the FRCP based on the supposedly "peculiar" nature of MDLs. The comments, as well, should clearly state that the rules that this Committee

[67] *In re Bard IVC Filters Products Liability Litigation*, 317 F.R.D. 562, 566 (D. Ariz. 2016) (Campbell, J.).
[68] Proposed Rule 16.1(c)(4, 6).
[69] Fed. R. Civ. P. 56(d).
[70] *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Products Liability Litigation*, No. 1:17-MD-2775, 2023 WL 4564628, at *6 (D. Md. July 13, 2023).

has painstakingly developed over decades of work cannot be avoided whenever a particular judge believes some other procedure might be preferable in a particular MDL.

Given the enormity ubiquity of the problem – that the FRCP effectively no longer apply in MDLs unless individual judges, in their discretion, so choose – it is questionable whether proposed Rule 16.1, phrased solely in terms of a list of suggestions, is worth the effort. The current draft imposes no mandatory requirements and does nothing to restore the rest of the FRCP to their intended, mandatory application as provided by the Rules Enabling Act.[71] The only beneficial effect of the current proposal is that it sets a precedent recognizing the need for MDL-specific rules of civil procedure. Beyond that diffuse effect, the current proposal is so toothless that it: (1) will likely accomplish nothing, and instead (2) will become an excuse for further delay in ever restoring the primacy of the FRCP in multidistrict litigation.

The Advisory Committee and its MDL Subcommittee should go back to the drawing board and devise an MDL rule that mandates, in accordance with existing precedent, that parties to an MDL have a right to rely on the existing FRCP and that MDL judges do not have the discretion to dispense with what the current rules require, or to prevent motion practice FRCP-compliant motion practice. If specific deviations from the FRCP are seen as desirable, then concrete changes should be specified in place of the current vague and totally discretionary laundry list of topics in the current proposal.

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

FEDERAL MAGISTRATE JUDGES ASSOCIATION

COMMENTS ON THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE AND CIVIL PROCEDURE SET FORTH IN THE PRELIMINARY DRAFT DATED AUGUST 2023

The Administrative Office of the United States Courts published an invitation for comment on proposed rule changes. Several proposed changes are of interest to the Federal Magistrate Judges Association ("FMJA") because they address rules that come up frequently in matters before Magistrate Judges. Accordingly, the FMJA Rules Committee has considered these proposed rule changes and, with the full support of the FMJA board, provides the following comments for consideration.

I. PROPOSED REVISION OF FEDERAL RULES OF CIVIL PROCEDURE 16(b)(3) and 26(f)(3) (PRIVILEGE)

The proposed amendment to Rule 16(b)(3) prompts a court's scheduling order to include agreements for complying with Rule 26(b)(5)(A)—the privilege log. The corresponding proposed amendment to Rule 26(f)(3) directs parties to describe and report to the court their plan for complying with Rule 26(b)(5)(A) as well. Additionally, "and Management" are added to the title of Rule 16(b) in recognition that the court will often do more than simply establish a schedule at the initial case management conference.

FMJA Rules Committee members are in full agreement with the proposed changes, including the flexibility it allows for parties and the Court to determine the best process for addressing privilege on a case-by-case basis to determine how best to minimize the burden and expense of privilege logging. Many cases do not involve complex privilege issues and are candidates for categorical logs or short document-by-document logs. Other cases may call for a hybrid approach, using a combination of categorical logging and document-by-document logging for specific subject areas, custodians or time periods. Still other cases may benefit from a categorical log with a metadata log. This comment is not meant to endorse any particular methodology for privilege logging but rather to applaud the proposed Rule's flexibility as to approach and call for privilege issues to be discussed at the outset of a case.

The FMJ Rules Committee members also agrees with the Rules' recognition that a court can often provide guidance and resolve privilege disputes early in the case. Importantly, a court's order for complying with Rule 26(b)(5)(A) does not rely on party agreement, though great weight will be given to the parties' preferences. This approach is consistent with active case management and a court's obligations under Rule 1.

II. PROPOSED NEW RULE 16.1 (MULTIDISTRICT LITIGATION)

Proposed new Rule 16.1 aims to provide a flexible framework for initially managing multidistrict litigation ("MDL") cases. It addresses challenges that may not be present in every MDL case. For example, the initial management conference that subsection (a) proscribes may be unnecessary in some cases. As a result, subsections (a), (c), and (d) use the verb "should" instead of "must".

The FMJA Rule Committee members fully endorse the new rule and its flexible approach. In particular, the explicit recognition that a court may appoint "coordinating counsel" prior to appointment of any leadership counsel is a helpful case management tool. Indeed, appointment of coordinating counsel will assist the court and parties to prepare for the initial conference and map out a preliminary plan, including preliminary issues such as extensions of time to answer and discovery stays. Appointment of cording counsel allows additional time to ensure the court has a full appreciation of any differences between and among plaintiffs and the different strengths and skill sets of potential leadership counsel.

The FMJA Rules Committee members strongly endorse the recognition that Magistrate Judges can be of great assistance with management of MDLs with respect to discovery, conduct of bell weather trials and settlement. Magistrate Judges, who come at no cost to the parties, have full knowledge of applicable Local Rules and Federal Rules of Civil Procedure, and have been vetted by a Merit Selection Panel and selected by the District Judges based on their experience and skills can help expedite resolution of MDLs. Indeed, empirical studies show that MDLs with special masters lasted 66 percent longer than those managed within the court, regardless of size and complexity of the MDL case. Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129, note 33, at 2182-85 (2020); see also Judge George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 Fed. Cts. L. Rev. 35, 37 (2015). Magistrate Judges also comply with the Judicial Code of Ethics such that use of Magistrate Judges obviates any concerns about self-dealing or bias of a privately funded special master, as well as any concerns that judicial authority is being unnecessarily delegated. In fact, Federal Rule of Civil Procedure 53, which authorizes appointments of a special master, establishes a presumption in favor of the assignment of a Magistrate Judge to assist with the management of complex cases, including MDLs. Finally, Magistrate Judges enjoy working on complex cases and often come to the court with a background litigating such cases and have strong knowledge of ediscovery issues.

THE FMJA

The Federal Magistrate Judges Association is a voluntary association comprised of active, fulltime, parttime, recalled, and retired Federal Magistrate Judges. These comments were prepared by the FMJA Rules Committee, which consists of 26 active Magistrate Judges from districts of all sizes across the country. The comments were approved by the FMJA Board of Directors.

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December 29, 2023

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

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

Dear Members of the Rules Committee:

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

My firm and I have represented plaintiffs and served as Co-Lead Counsel, members of Plaintiffs' Executive Committees, and members of Plaintiffs' Steering Committees in numerous MDLs. In this space, I frequently chair or co-chair law and briefing committees. Currently, I am Co-Chair of the law and briefing committee in *In re: Aqueous Film-Forming Foams Products Liability Litigation,* MDL No. 2873 (D.S.C.) and *In re Zantac Products Liability Litigation*, MDL No. 2924 (S.D. Fla.).

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

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

Proposed Rule 16.1 is unnecessary.

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

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[1] LCJ Comment to the Advisory Committee on Civil Rules at 1 (Sept. 18, 2023) [Comment ID SC-RULES-CV-2023-0003-0004].

[2] *See* James M. (Bexis) Beck, *CPAP MDL Overinflates Plaintiffs' Claims* (Dec. 4, 2023), available at https://www.druganddevicelawblog.com/2023/12/cpap-mdl-overinflates-plaintiffs-claims.html.

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

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

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

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

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

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

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

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

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

The Committee Notes are overbroad, and some are inaccurate

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

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

I also take issue with the comment to Rule 16.1(c)(11). The rule addresses "whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them." However, the Comment veers into "avoiding overlapping discovery" and the "fair arrangement" of allocating common benefit funds. These tangential and speculative concerns are troublesome in a Committee Note. I recommend the removal of this Comment.

Conclusion

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

Respectfully,

/S/

FREDERICK S. LONGER

Comment ID
USC-RULES-CV-2023-0003-0020

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January 2, 2024

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

Re: Proposed New Rule 16.1 on MDL Proceedings

Dear Members of the Advisory Committee:

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

I. PURPOSE OF THE FEDERAL RULES

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

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

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

II. MULTIDISTRICT LITIGATIONS

A. AREAS OF AGREEMENT AND SUPPORT

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

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

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

B. AREAS OF DISAGREEMENT AND CONCERN:

1. Subsection (b): Designation of Coordinating Counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. PRIVILEGE LOGS

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

Sincerely,

Emily T. Acosta

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

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

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January 2, 2024

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
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Re: Comment on Proposed Federal Rule of Civil Procedure 16.1

Dear Members of the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] Lawyers for Civil Justice, *A Rule, Not an Exception: How the Preliminary Draft of Rule 16.1 Should Be Modified to provide Rules Rather than Practice Advice and to Avoid the Confusion of Enshrining Practices into the FRCP*

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

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

> [T]he evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action. Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action.[8]

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

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

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

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

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

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

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

Very Truly Yours,

Lee Mickus

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

[10] 28 U.S.C. §1407.

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

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January 2, 2024

Mark P. Chalos
Partner
mchalos@lchb.com

BY EMAIL

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

RE: Proposed Amendments to Rule 16.1

Dear Committee:

Thank you for opportunity to address the Committee.

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

I. Flexibility

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

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

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

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

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

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

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

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

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

II. Designating Coordinating Counsel

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

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

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

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

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

* * *

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

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

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

* * *

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

Sincerely,

Mark P. Chalos

GIRARD SHARP

January 2, 2024

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

Re: Proposed New Federal Rule of Civil Procedure 16.1

Dear Members of the Advisory Committee on Civil Rules:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) ***Consolidated pleadings.***

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

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

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

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

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

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

****

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

Respectfully submitted,

/s/ Dena C. Sharp

Dena C. Sharp
GIRARD SHARP LLP

EXHIBIT 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

This Document Relates to:
ALL ACTIONS

Case No. 19-md-02913-WHO

PRETRIAL ORDER #1

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

1. APPLICABILITY OF ORDER

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

2. COORDINATION

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

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

3. MASTER DOCKET FILE

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

4. FILING

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

5. APPEARANCES

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

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

6. LIAISON COUNSEL

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

7. LEAD COUNSEL & PLAINTIFFS' STEERING COMMITTEE

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

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

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

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

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

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

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

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

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

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

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

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

8. DATE OF INITIAL STATUS CONFERENCE AND CONFERENCE AGENDA

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

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

9. POSITION STATEMENT

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

10. INITIAL CONFERENCE APPEARANCES

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

11. RESPONSE EXTENSION AND STAY

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

12. PRESERVATION OF EVIDENCE

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

13. COMMUNICATION WITH THE COURT

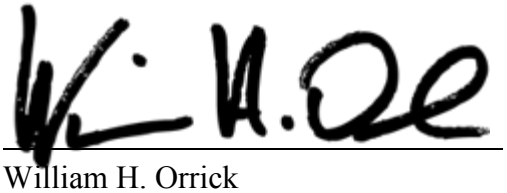
Unless otherwise ordered by this Court, all substantive communications with the Court shall be in writing and e-filed. The Court recognizes that cooperation by and among plaintiffs' counsel and by and among defendants' counsel is essential for the orderly and expeditious resolution of this litigation.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

14. DATE OF INITIAL CASE MANAGEMENT CONFERENCE

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

IT IS SO ORDERED.

Dated: October 2, 2019



William H. Orrick
United States District Judge

3391 Peachtree Road, NE, Suite 300
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USC-RULES-CV-2023-0003-0024

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ATTORNEYS AT LAW

January 3, 2024

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

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

Dear Members of the Rules Committee:

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

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

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

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

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

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

1. Practical considerations

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

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

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

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

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

2. Fairness considerations

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

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

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

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

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

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

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

Respectfully submitted,

Michael L. McGlamry

Comment ID
USC-RULES-CV-2023-0003-0025

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January 2, 2024

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

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

Dear Mr. Byron:

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

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

I. Coordinating Counsel vs. Leadership Counsel

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

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

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

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

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

A. Topics at Issue

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

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

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

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

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

Respectfully submitted,

/s/Lisa Ann Gorshe

Lisa Ann Gorshe, Esq.
Partner
Johnson Becker PLLC

RABIEJ LITIGATION
LAW CENTER

MASS-TORT MDL INITIAL-MANAGEMENT CONFERENCE GUIDELINES AND BEST PRACTICES[1]
[Work-in-Progress]

September 16, 2023

GUIDELINE MDL-§ 1: Every MDL, but particularly a mass-tort MDL, raises unique procedural case-management challenges for the court, and input from the lawyers on fashioning case-management procedures can be useful especially at the beginning of the litigation when the judge must make key decisions that will have far-reaching effects. Permanent No. MDL-§ 9.

Multi-district litigation, especially mass-tort MDLs, raise significant complex issues and procedural problems that require special case management.[1] In virtually every mass-tort MDL, the transferee judge holds an initial-management conference early to begin structuring the litigation and consult with lawyers on a range of topics, particularly matters that need early attention from the judge.[2] The primary objective of the conference is to begin developing an initial case-management plan and order, which are issued, updated, and modified as the litigation unfolds for the "just, speedy, and inexpensive determination" of the litigation.[3]

The initial-management conference launches the process of managing an MDL.[4] In their orders scheduling an initial-management conference, transferee judges have directed the lawyers to address 30-40 case-management topics listed in certain sections of the MANUAL FOR COMPLEX LITIGATION and FED. R. CIV. P. 16 as well as stand-alone topics. Many of these topics do not necessarily require immediate action, but early consideration is prudent to prevent future problems from developing. Following the conference, the judge issues an initial case-management plan, which serves as a blueprint for how all pretrial activities will be conducted and managed in the MDL, making it one of the most important orders that is entered in the MDL's lifespan.

On August 15, 2023, the Advisory Committee on Civil Rules published for public comment proposed Fed. R. Civ. P. 16.1, which will govern proceedings in an initial-management MDL conference. If all goes smoothly, the rule will take effect on December 1, 2025.

Proposed new Rule 16.1(a) states that one of the first steps a transferee court should take is "schedule[ing] an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings."[5] Rule 16.1(d) further states that the purpose of the initial case-management plan is to "control[] the course of the MDL proceedings" until modified by the court.[6] The rule reflects existing practices and provides guidance and greater uniformity regarding the initial-management conference.

No one-size-fits-all model for the initial-management conference and the initial case-management plan is appropriate for mass-tort MDLs. Recognizing that the initial-management conference "should be shaped by the needs of the particular litigation,"[7] proposed Rule 16.1 is couched largely in discretionary terms. It provides options and a non-exhaustive list of case-management topics that may be addressed at the initial-management conference.

The following guidelines and best practices provide a catalogue of case-management topics, drawn from those listed in the MANUAL and Fed. Civ. P. 16 as well as more detailed guidance, based on existing practices. They are primarily directed at large scale mass-tort MDLs, but most of it may be pertinent for other MDLs.

> **Best Practice MDL-§ 1(a):** The transferee court should schedule an initial-management conference to be held within 35 days of the JPML's centralization order. Permanent No. MDL-§ 9(a).

Under proposed Rule 16.1(a), the transferee court should schedule an initial-management conference after the JPML orders the transfer of actions. Courts have scheduled the initial-management conference as soon as one day after the JPML transfer order and held the conference as early as 16 days later. The median time for holding the initial-management conference is approximately 40 days after the JPML order, though earlier in more recent mass-tort MDLs.

The transferee court is immediately faced with a barrage of pressing case-management decisions, which require prompt attention, starting with staying proceedings in the transferor courts. The lawyers in the MDL can help the court oversee the initial organization of the

proceedings and assist the court in making its initial-management order to guide the future course of the MDL proceedings.

The sooner the transferee court holds the initial-management conference, the sooner it becomes better informed about the range of case-management decisions and their relative urgency in making its case-management decisions. The downside to an early conference is the absence of officially approved leadership counsel, who typically are appointed after the initial-management conference with a median time of 70 days after the JPML order. Final decisions on certain matters might have to be deferred until interim lead or lead counsel has been appointed, nonetheless the conference can alert the court to potential problems as well as help the court begin to develop its preliminary case-management planning.

> **GUIDELINE MDL-§ 2**: A single informative report submitted by the parties in advance of the initial-management conference on case-management topics and procedures, which likely will arise in the litigation, focuses the discussions at the initial-management conference. Permanent No. MDL-§ 10.

At the outset of the litigation, providing a means for effective and coordinated discussion by the parties on the scope of the large-scale litigation and the necessary case-management procedures is critical. Under proposed Rule 16.1(b), a transferee court may direct the parties to submit before the initial-management conference a report on case-management topics that will help it develop an initial-management order and a case-management plan. The parties submit a single report, although divergent views may be included.[8] The transferee judge will not necessarily address every topic in the report in the subsequent initial-management order, but the information will better inform the judge in making later case-management decisions.[9]

Unlike most Rule 26(f) conferences and Rule 16 scheduling orders, MDL courts generally do not (and cannot) take a one-size-fits-all approach to initial MDL pretrial conferences and case-management plans. Instead, an MDL initial-management conference, and more importantly an MDL initial case-management plan, "should be shaped by the needs of the particular litigation."[10] For instance, some MDLs may benefit from staying all discovery at the outset of the proceedings pending a decision on a threshold legal issue that could lead to the speedy and efficient resolution of large groups of cases within the MDL, if not the entire litigation.[11] Other MDLs may benefit from staged or bifurcated discovery

designed to address common issues, such as general causation, before getting to more case-specific issues.[12]

> **Best Practice MDL-§ 2 (a):** The transferee judge in a mass-tort MDL should direct the parties[13] to seek a consensus on their own and submit a report on case-management topics designated by the judge as well as topics identified by the parties before the initial-management conference. Permanent No. MDL-§ 10(a).

The prosecution of a mass-tort MDL involves outlays of millions of dollars, commitment of thousands of hours of work, and deferred reimbursement of expenses and payment of compensation for five to ten years, but payable only if successful. The lawyers and law firms who are willing and have the financial wherewithal to prosecute a mass-tort MDL often meet informally before the motion to centralize is filed with the JPML to strategize whether to centralize, where and, if appropriate, before which judge to recommend JPML assignment. Oftentimes, an informal leadership structure develops organically because lawyers that have been heavily involved in the litigation are readily acknowledged.

Transferee judges in mass-tort MDLs have recognized this de facto or informal leadership and typically have directed the parties to seek a consensus on their own and report the most important case-management topics (i.e., "the needs of the particular litigation") at the initial-management conference. This is the most common and effective method of seeking guidance from the parties on how the MDL should proceed and for good reason – the parties to the litigation will have distinctive views on the key issues and ways to proceed. By allowing the parties to seek a consensus of the most important case-management topics on their own, the court increases the likelihood that it will receive balanced, unbiased input from everyone involved in the litigation, while at the same time ensuring that the most important needs of the litigation are flagged early on by those lawyers that have been most involved thus far.

> **Best Practice MDL-§ 2(a)(i):** The transferee judge in a mass-tort MDL may consider designating a single attorney to act on behalf of parties who have similar interests, but which are inconsistent with the report, and allow them to submit a separate report. Permanent No. MDL-§ 10(a)(i).

To balance the importance of having all parties' interests heard with the inefficiencies that would inevitably result if every party discussed their proposed topics at the initial-management conference, a court may direct parties with similar interests, which are inconsistent with the

submitted report, to agree on a single attorney to act on their joint behalf and discuss their proposed case-management topics at the conference.[14]

> **Best Practice MDL-§ 2(a)(ii):** Alternatively, the transferee judge may designate a specific judicial officer, special master, mediator, or individual lawyer as coordinating counsel to consult with the parties and submit a report. Permanent No. MDL-§ 10(a)(ii).

Proposed Rule 16.1(b) provides that the transferee judge "may designate coordinating counsel to assist with the conference and work with plaintiffs or defendants to prepare for the conference and prepare any report." Although appointment of a specific individual may be appropriate in some MDLs, it is not necessary. The Committee Note to proposed Rule 16.1(b) acknowledges as much stating that "In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary."

Nonetheless, several transferee courts have designated an individual attorney to work with the parties in preparing and submitting the report. Designating a third-party to consult with the parties and submit a consensus document is usually a less effective method for the transferee court to determine the unique needs of a particular MDL. Although the designated third-party is typically qualified and well-versed in MDL practice and procedure, the parties are in the best position to understand the nuances of the case-management issues and their concerns and views may get muddled or lost in the translation. Designating a third-party can add a significant layer of unnecessary expense.

The court should also be alert to concerns that such appointments may turn into permanent-leadership appointments without full vetting. To the extent that this concern is acknowledged, the court should make clear that the status of the appointment is temporary and limited to the assignment. Alternatively, other courts have designated a special master.[15]

> **GUIDELINE MDL-§ 3**: Transferee courts often direct the parties to address more than 35 case-management discrete topics in the MANUAL FOR COMPLEX LITIGATION and Federal Rule of Civil Procedure 16 as the agenda for the initial-management conference. Not all these topics may be pertinent under the circumstances, particularly for MDLs involving fewer than 100 actions. Permanent No. MDL-§ 11.

The transferee court must promptly make many early case-management decisions that will drive and affect how the litigation will be managed for years. Some of these decisions are fact driven, often involving matters that the judge is unfamiliar with, and still others bear a sense of urgency, all of which will dictate "the needs of the litigation" and prioritize the topics for consideration at the initial-management conference.

The court sets the agenda for the initial-management conference in a scheduling order early in the proceedings. Most courts direct the lawyers to address the case-management topics in the MANUAL FOR COMPLEX LITIGATION § 22.6 et. seq., while others refer to the MANUAL'S § 11.2 et. seq., still others refer to topics in Fed. R. Civ. P. 16(a), (b), and (c), or combinations. Court orders also specify a handful of additional topics, some of which became relevant only after the MANUAL'S Fourth Edition (2004).[16] In total, more than 35 case-management topics are specified. There is much overlap.[17] Proposed Rule 16.1 highlights a select list of approximately 17 discrete case-management topics that may considered at the initial-management conference, but expressly provides discretion to the court and the parties to address other topics.

Parties usually are not required to attend the conference but must be represented at the conference, often by agreeing to the extent practicable on a single attorney to act for the sole purpose of representing them at the conference. There is no settled format for the conference. Many transferee judges adopt an informal format to get useful information from as many different individuals as possible. Whatever approach is taken, the lawyers responsible for presenting the Rule 16.1(c) report to the court should have a full opportunity to present their report and answer any questions from the judge. Knowing that the other lawyers attending the conference each have their own interests and agenda, providing them with an opportunity to express their comments on matters not included in the submitted report may be useful to the judge.

A comprehensive catalogue of the MANUAL'S, Rule 16's, Rule 16.1's, and MDL orders' case-management topics includes the following:

- Developing a court website (not a cross-reference to PACER)
- Maintaining and updating a service list
    - Maintaining and updating parties' corporate disclosure statements
- Evidence preservation

- Shared online-exchange information platform
- Census or registry
    - Inactive administrative docket
- Selection of claims administrator to process claims and facilitate and expedite later lien reconciliation claims
- Structure of leadership
    - Lead counsel, Plaintiff Steering Committee, Liaison Counsel, and Other Committees
    - Qualification requirements
    - Selection method
    - Responsibilities of leaders
    - Number of leadership positions
- Master pleadings and amendment of pleadings
    - *Lexicon* waivers
    - Brief "Facts Sheets"
    - Consideration of types of remand issues that are expected to be filed
    - Categorizing and criteria for remanding actions
    - Outlining Evidence Rule 702 motion practice, "science tutorial day," and pretrial filings
- Consideration of class-action allegations and motions
- Creating a common-benefit fund
    - Method to determine amount and distribution of funds
    - Compensable common-benefit tasks
- Facilitating state-federal court coordination
- Discovery plan
    - ESI procedures
    - Deposition guidelines
    - Expert witnesses
    - Discovery dispute-resolution methods
    - Privacy laws
    - Confidentiality safeguards

    - Establishing realistic discovery deadlines
- Designating a magistrate judge to handle assigned tasks
    - Appointing a special master or mediator to handle assigned tasks
- Scheduling regular status conferences
    - Setting deadline for submission of new filings
- Method to select bellwethers
    - Establishing realistic trial dates
- Developing a trial package for transferor courts in event of remand

> **Best Practice MDL-§ 3(a):** The court should direct the parties to consider the case-management topics listed in the comprehensive catalogue, and it should specify selected topics that it wants the parties to address in a report submitted to the court before the initial-management conference. The parties should raise any additional topics and suggest procedures that will facilitate the just, speedy, and inexpensive resolution of the MDL. Permanent No. MDL-§ 11(a).

Under proposed Rule 16.1(c), the court should designate specific case-management topics listed in the rule as well as any other topic that might be useful to it for the parties to address and submit in a report before the initial-management conference. In addition to addressing the court-designated topics, the parties should also review and consider additional topics listed in the comprehensive catalogue and share with the court their views on those topics, which they believe would assist the court in effectively managing the litigation. They should explain the topics when appropriate and highlight benefits, drawbacks, and hidden problems and concerns.

The germaneness and urgency to address every specific case-management topic listed in the comprehensive catalogue will depend on the nature of the MDL, the judge's and parties' familiarity with MDLs, and the importance and necessity of input from the leadership counsel. The judge is often in a good position to act on some case-management matters based on their own experience, but for other case-management matters, the judge must rely on information from the lawyers, not only addressing specific matters but also on whether every significant matter has been raised and considered. The insights of lawyers, particularly experienced MDL practitioners, or those with experience with a specialized area of law, can provide valuable insights in planning effective management of the litigation and identifying potential problems and considerations.

> **Best Practice MDL-§ 3 (a)(i):** The parties should determine whether to address information-governance, regular communications, and the exchange of information, if not otherwise directed by the court. Permanent No. MDL-§ 11 (a)(i).

Under Rule 16.1 (c)(4), the parties may address "how and when the parties will exchange information about the factual bases for their claims and defenses" in their report to the court. Creating a homepage with links to all pretrial and case-management orders on the court's website is a common practice. Some courts link to PACER, which requires log-in and cost, though modest, which may burden the public. Other courts include a helpful short identification label describing each pretrial and case-management docket entry on the court's website to facilitate easier access.

Establishing an electronic system for regular communications among the parties is critical. Such a process can communicate key events, deadlines, and other important information to all parties. Parties typically employ a vendor specialized in the area to administer the system.[18] Electronic service of all papers requires an up-to-date service list. Liaison counsel or lead counsel is often delegated the task of maintaining a current list.

Lastly, the parties and court need information about the individual actions as soon as practicable to assess the number and location of the plaintiffs involved, the levels of injury, the types of exposure, and other factors.[19] Dynamic, shared on-line central-exchange platforms have been used in recent mass-tort MDLs, which store filings from all parties, including discovery, court orders, and other information in the litigation, so that every party has quick access to the litigation materials. Such platforms can facilitate the exchange, storage, access, search, and the analysis of voluminous data using artificial-intelligence techniques. The platforms can provide confidential access to designated parties or sides, plaintiff or defense. For purposes of its case-management plan, the court should be aware of the need for such a system but should consider deferring selecting a vendor to provide a specific shared central-information exchange platform until it appoints leadership counsel and gets their input. (Again, costs are an important factor.)[20]

Transferee courts have explored ways to efficiently and fairly screen complaints at an early stage, which identify actions that are potential candidates for early disposition. For example, preliminary-disclosure forms served within 30 to 60 days of the filing of a complaint with proof of product usage have been useful as a first step in this screening process. They and the later, more robust fact sheets have been used to identify claims that are potential candidates for early

disposition. Both discovery instruments have required not only product identification, but also minimum evidentiary documentation of exposure or product use and injury, e.g., evidence of a prescription or receipt of a product purchase or a medical diagnosis or other medical records.

Evidence of product usage is easily found in pharmacy records, prescribing physician's records or, in the case of medical devices, in the hospital chart for the implantation surgery. A plaintiff cannot proceed with a case without this information. With it, the preliminary-disclosure forms and plaintiff fact sheets provide basic information useful for case management, relevant to selecting bellwether trials, and valuable for conducting settlement negotiations.[21] Evidence of causation usually comes later in the form of expert reports.

Courts usually direct the parties to submit fact sheets within a reasonable fixed time and outline a process and procedure to resolve any alleged deficiencies. Typically, the parties are encouraged to agree and propose such a process and procedure.

The Committee Note to proposed Rule 16.1(c)(4) describes "'fact sheets' or a 'census' as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing proceedings." But plaintiff and defendant fact sheets play a far greater role and provide not only information useful for case management, including the identities of parties and their particular claims, but also information on the viability of the claim or defense asserted.

Some mass-tort transferee courts have issued a census or registry order, establishing an inactive or administrative docket to register potential claims and toll the running of statutes of limitation, while deferring their consideration until any injuries become manifest. These orders can provide useful information on the potential scope of the MDL, the number of filings, the number and variety of injuries claimed, plaintiff jurisdictions, and the number and variety of plaintiff law firms. This helps allay concerns about filing of claims that should not be filed. This case-management topic may be raised in the report to the court, but best practices indicate the court should consider deferring acting on establishing a registry until it appoints leadership counsel and gets their input.

> **Best Practice MDL-§ 3 (a)(ii):** The parties should determine whether to address the formation of a leadership structure, if not otherwise directed by the court. Permanent No. MDL-§ 11(a)(ii).

The transferee judge typically should appoint lead counsel and liaison counsel (to serve an administrative role) for the plaintiffs, and often a supporting steering committee in a mass-tort MDL. Under proposed Rule 16.1(c)(1), the parties may address the structure, appointment, and role of leadership in their report to the court. The case management of these topics varies significantly among mass-tort MDLs, because it is highly dependent on the circumstances.

Under proposed Rule 16.1(c)(1)(A), the parties should address the procedure for selecting leadership. Courts have implemented various methods ranging from individual-applications to "a slate" and various hybrid-selection methods to consider appointments to leadership. Under the slate-selection method, the lawyers propose a team, which can work together harmoniously. Under the individual-application selection method, the court instructs lawyers seeking leadership to complete a questionnaire regarding their qualifications and considers their applications separately. Under the hybrid-selection method, the court considers both applications submitted by slates and individuals. Extensive guidance on the selection process can be found in the GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS."[22]

A judge should avoid an appearance of favoritism when appointing a leadership team for an MDL made up of a single sex, race, ethnicity, sexual orientation, age range, disability, or similar prohibited basis. [23] Judges are keenly aware of the benefits and importance of appointing leadership that is diversified and highly competent. And in fact, there has been a concerted effort in recent years by the bench and bar to promote diversity in leadership appointments. While there are important benefits to decision-making by diversified counsel, including younger, less experienced lawyers, as well as representatives from the broad slice of demographics that exist, care should be given to ensure that experienced counsel also have a meaningful role. A court should not neglect the importance of selecting seasoned, experienced, attorneys when appointing leadership.

Under proposed Rule 16.1(c)(1)(B), the parties should address the structure of the leadership as well as their responsibilities in "conducting pretrial activities." By far, the lead-counsel position has the most important responsibility in managing the MDL. And the importance of their selection cannot be underestimated. Lead counsel do not have a fiduciary relationship with all plaintiffs in the MDL and owe an obligation to the court to comply with all court directions, which is superior to any duty owed to individually retained clients.

In a case involving numerous defendants, it may be necessary to appoint a leadership team for the defense as well. But in addition to lead counsel, courts have established or designated a plaintiff steering or executive committee, liaison counsel, and multiple committees to address specific topics, including attorney's fees and discovery. The parties should "provide the court with specifics on the leadership structure that should be employed," which would include the likely size of the committees.[24]

The court must determine the number of lead counsel and members of the steering committee. Although the numbers vary, typically two and no more than three lead counsel and 12-20 steering committee members are appointed. The court should also advise the parties of the qualifications for a leadership position, which often include the following; (i) willingness and ability to commit to a time-consuming litigation; (ii) current court-appointed legal commitments; (iii) ability to work cooperatively with others; (iv) professional experience in this type of litigation; (v) particular knowledge and expertise that will advance the litigation; (vi) involvement in the litigation to date; (vii) qualities that make them uniquely situated to serve in a leadership capacity in this MDL; and (viii) access to sufficient resources to advance the litigation in a timely manner. Leadership appointments should provide for a well-balanced, diverse, and qualified team.

Courts have directed counsel who apply for a leadership appointment to disclose any other mass tort in which they or their firm are presently serving in leadership, the stage of that litigation, and how an appointment in the instant action will impact the capacity of their firm. Courts have also established safeguards in their appointment orders addressing leadership settling only their own cases and then withdrawing from the litigation leaving no benefit or organized work product and leaving those remaining in the litigation scrambling and disadvantaged.

Because many MDLs have limited number of defendants, transferee judges typically do not require defendants to apply for a leadership position and instead leave it up to the defendants to appoint their own leadership. For example, in the *Bard IVC Filter* MDL, the court required plaintiffs' counsel to apply for lead counsel and liaison counsel positions but stated that it "expect[ed] defendants to designate lead counsel" on their own.[25] Similarly, in the *3M Earplug* MDL, the court found that "[d]ue to the limited number of defendants involved in this litigation, the Court does not see a need to appoint interim lead or liaison counsel for defendants at this time."[26] This is not to say that the leadership-application method is never utilized. In the *Bair*

Hugger MDL, for instance, the court received leadership applications from both the plaintiffs and defendants. [27]

> **Best Practice MDL-§ 3(a)(iii):** The parties should determine whether to address the establishment of a common-benefit fund, if not otherwise directed by the court. Permanent No. MDL-§ 11(a)(iii).

Under proposed Rule 16.1(c)(1)(F), the parties may address the potential "means for compensating leadership counsel," and compensation for work done by other lawyers for the common benefit.[28] Under protocols established by the court, parties who consent are assessed a certain percentage of their possible future settlement amounts to pay for common-benefit expenses incurred in the litigation (e.g., pay general-causation experts, general-liability discovery, etc.). The proceeds of the fund are distributed at the end of the litigation.

Transferee courts may issue an order early in the litigation, which establishes limits on the fund and its funding. It is critical that any common-benefit fund be transparent and clearly explained to all counsel in the MDL.

The ultimate cost of common-benefit work is difficult to estimate at the outset of an MDL. Courts have set a fixed percentage of an estimated settlement amount immediately, not infrequently increasing the percentage in the course of the litigation to account for higher expenses, which raises concerns with lawyers who are assessed the increased charges. Other courts have deferred the decision until the expenses are actually incurred, advising the parties periodically of the expected percentage and any adjustments.

Although the percentage may not be fixed at an early stage, it is important that counsel be informed of a common-benefit assessment at an early date, because lawyers begin working for the common benefit immediately.[29] The transferee judge typically delineates the compensable responsibilities, determines the method of compensation, specifies what records to maintain, provides guidelines for allowable fees and expenses, and requires counsel to periodically submit detailed reports of their work.

This case-management topic may be raised in the report to the court, but the court should defer issuing an order fixing the applicable percentage for the common-benefit fund until it appoints leadership counsel and gets their input. Courts have imposed a common-benefit

assessment on lawyers in state-court actions related to the MDL on consent of the lawyers and sometimes more controversially without the state-court lawyers' consent.

> **Best Practice MDL-§ 3(a)(iv):** The parties should determine whether to address filing and general pleading matters, if not otherwise directed by the court. Permanent No. MDL-§ 11(a)(iv).

Under proposed Rule 16.1(c)(5), the parties may address in their report to the court "whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings." Courts typically direct the parties to agree on and prepare a master complaint and answer. The consolidated pleadings obviously obviate the need for an individual pleading in every action centralized in the MDL.

Transferee courts typically establish a master-docket-case file designating a specific name of the MDL. Pleadings applicable to all actions are identified as such, while pleadings applicable to fewer than all cases must also include the docket number for the specific case. The courts usually require the parties provide and update corporate disclosure statements so that the judge can determine any potential conflict issues.

Lexicon waivers are necessary for the transferee judge to handle bellwether trials of actions filed in other districts. An MDL that consists of personal-injury claims in individual actions as well as class actions involving contract claims present challenging case-management issues, especially in forming and appointing lawyers to leadership positions. The parties should alert the judge to potential problems managing them. For example, different discovery approaches must be taken when certifying a class action.

> **Best Practice MDL-§ 3(a)(v):** The parties should determine whether to address discovery, if not otherwise directed by the court. Permanent No. MDL-§ 11(a)(v).

Under proposed Rule 16.1(c)(6), the parties may address in their report to the court "a proposed plan for discovery, including methods to handle it efficiently." The spartan Committee Note says only that a "major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication."

The MDL statute was enacted primarily to reduce the burden on federal district courts, make litigation more convenient for parties, and promote overall efficiency in the courts. Practically, this involves common discovery and pretrial rulings.

At the outset of an MDL, courts have issued skeleton-discovery plans listing categories and general procedures with the understanding that they will be fleshed out and revised as the litigation progresses. Though minimal, these skeleton discovery-plans provide general guidance sufficient to get the litigation off the ground.

In many MDLs, judges start by relying on standard-discovery procedures and perhaps time deadlines that the judges use in their non-MDL docket. The parties and the court work collaboratively to refine the discovery plan throughout the course of the discovery.

There are some common discovery procedures that must be addressed in the discovery plan, though the details can be added as the litigation progresses and, most importantly, after the leadership has been appointed. Some matters require immediate attention, like evidence preservation and privilege-and-confidentiality protocols, including Fed. R. Evid 502(d) orders. Other matters also need early attention.

ESI subject to discovery in mass-tort MDLs usually involves an enormous volume of data from multiple data sources. Linear review of all discoverable documents is not practical, and parties most often use some form of technology-assisted review (TAR) or other AI methods to narrow the volume of documents that is subject to human review. Determining which method and vendor to use, the review process, and managing the extent of consultation between the parties in applying TAR and other AI applications should be raised in the report to the court. Courts typically have encouraged parties to work collaboratively, from the beginning, in identifying the sources and type of relevant documents.

Another issue that may be raised in the report to the court is whether discovery should be limited to general-causation issues instead of individual-fact discovery. [30] Some MDLs may benefit from staying all discovery at the outset of the proceedings pending a decision on a threshold legal issue that could lead to the speedy and efficient resolution of large groups of cases within the MDL, if not the entire litigation.[31]

Individual states and countries have enacted privacy and data-protection laws that impose obligations on litigants, which may limit disclosure of protected information in discovery. Violations can be subject to severe penalties and compliance may entail significant burdens and expense, which the parties should alert the judge to. For example, some MDLs may involve hundreds of thousands of claimants whose individual medical condition(s) are integral to the litigation. Witnesses may reside or be located outside the United States and may or may not submit to the Hague Convention. Plaintiffs may be represented by dozens of law firms and an even greater number of lawyers from diverse areas of the country, each of whom may have a different idea of, among other things, the signature injuries, causation, damages, and the best way to prove same. Such discovery raises difficult and complex issues that the judge may be unfamiliar with and should be raised by the parties in the report to the court.

Evidence Rule 702 motion practice is often key in mass-tort MDLs. Courts have relied on the parties' input to manage the number of experts and their depositions and avoid duplication, facilitating an orderly process.

Efficient dispute-resolution methods are necessary to handle discovery disputes that are likely to arise and can inform decisions on limiting the overall expense of discovery proportional to the needs of the MDL.

Although judges are familiar with deposition practices, the number of depositions and coordination necessary in large-scale litigation can raise unique issues that the parties should alert the judge to. Third-party discovery is essential in an MDL, which often, at least, touches upon proprietary secrets, privileged information that must be located, retrieved, and then subjected to multiple levels of review prior to being produced. Third-party discovery initiated in foreign jurisdictions is particularly complicated. All these issues and topics may be appropriately included in the report to the court when the circumstances justify it.

> **Best Practice MDL-§ 3(a)(vi):** The parties should state their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues, if not otherwise directed by the court. Permanent No. MDL-§ 11(a)(vi).

Under proposed Rule 16.1(c)(3), the parties may address in their report to the court "the principal factual and legal issues likely to be presented in the MDL proceedings." Most courts have required the parties to submit a position statement for each side of not more than three pages

indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. The statements typically are not binding, do not waive claims or defenses, and may not be offered in evidence against a party in a later proceeding.[32]

For example, in the *Benicar* MDL, *3M Earplug* MDL,[33] and *Paragard IUD* MDL,[34] the courts directed the parties to each submit a brief written statement outlining their views on the primary facts, claims, and defenses involved in the litigation, as well as the critical factual and legal issues, and any other important events in the litigation.[35]

> **Best Practice MDL-§ 3(a)(vii):** The parties should determine whether to address procedures facilitating settlement, if not otherwise directed by the court. Permanent No. MDL-§ 11(a)(vii).

A defendant is entitled to deny all liability and object to all claims through the pleading stages. Both Fed. R. Civ. P. 16(c)(2)(I) and proposed Rule 16.1(c)(9) promote consideration of measures to facilitate settlement. Most transferee courts have been careful not to suggest nor apply unintended pressures on either the defendant or plaintiffs to settle unwillingly.

When the parties believe settlement should be pursued, the parties and transferee courts may consider whether appointing a settlement master or a mediator might advance the settlement process. Bellwether trials are often held with the goal of better informing the parties, which can move forward the settlement negotiations.[36] But the bellwether-selection process is challenging and developing a consensus approach is difficult, taking place later in the litigation.[37]

> **Best Practice MDL-§ 3(a)(viii):** The parties should determine whether to address the remaining topics listed in Rule 16.1(c) as well as in the comprehensive catalogue of topics, if not otherwise directed by the court. Permanent No. MDL-§ 11(a)(viii))

Under proposed Rule 16.1(c)(8), the parties may address in their report to the court "a schedule for additional management conferences with the court." All courts hold regularly scheduled conferences in mass-tort MDLs, which may be more frequent at the start of the MDL, e.g., biweekly, and less frequent as the litigation matures, e.g., monthly. Parties have provided input to the court on the frequency of such conferences as well as on the mode, whether in person or remote. The courts typically provide an online transcript of the conference. At these conferences, courts have also sought the parties' input to establish realistic deadlines for expert and fact discovery and trial dates.

Transferee courts often face motions in individual actions at the MDL's outset to remand based on the absence of federal subject-matter jurisdiction. Early identification of the specific grounds for remand can facilitate expedited consideration and resolution of actions raising similar remand issues.

Under proposed Rule 16.1(c)(12), the parties may address in their report to the court "whether matters should be referred to a magistrate judge or a master." A transferee court commonly designates a magistrate judge or a special master to handle and oversee specific tasks, including discovery and attorney's fee reports as well as general management responsibilities as assigned by the transferee judge.

Under proposed Rule 16.1(c)(10), the parties may address in their report to the court "how to manage the filing of new actions in the MDL proceedings." The filings of tag-along actions are common in mass-tort MDLs. Most courts establish provisions to allow a party outside the district to directly file an action in the transferee district without waiving any rights it would have had if it filed the action in the transferor district. If the tag-along action is filed outside the transferee district, the JPML transfers it, incurring additional costs and delay.

In accordance with Fed. R. Civ. P. 16(b)(3)(A), a "scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." In one-off actions, the rule contemplates that "at some point both the parties and pleadings will be fixed." Several courts have imposed deadlines on filings of new actions in their MDL.

Under proposed Rule 16.1(c)(1)(E), the parties may address in their report to the court "any limits on activity by nonleadership counsel." Transferee courts commonly direct lead counsel to establish processes that build consensus among nonleadership counsel as to key decisions that lead to settlement as well as to identify potential conflicts and disagreements early on between nonleadership counsel and lead counsel.

Under proposed Rule 16.1(c)(11), the parties may address in their report to the court "whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them." Effective coordination between federal and state courts in an MDL proceeding promotes cooperation in scheduling hearings, conducting and completing discovery, facilitates efficient distribution of and access to discovery work

product, avoids inconsistent federal and state rulings on discovery and privilege issues, if possible, and fosters communication and cooperation among litigants and courts that may facilitate just and less expensive resolutions.

Procedures for counsel to report on the existence, status, and progress of related state-court actions can facilitate effective coordination between federal and state courts in an MDL. The court may consider appointing liaison counsel to coordinate the reports. Extensive guidance on federal-state court cooperation can be found in the GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS.[38]

Early attention to the claims process can significantly expedite resolution and claim payments at the end of the litigation. Plaintiff leadership usually selects a claims administrator after consulting with the court on their expected responsibilities, which can include record-keeping, distribution of settlement funds to eligible parties, lien reconciliation, and investment of escrow funds. Courts have often established a Qualified Settlement Fund to handle ongoing claims resolutions. They also have instituted early procedures contacting state authorities to minimize substantial delays in distributing settlement amounts to individual parties until their liens have been reconciled, particularly Medicare and Medicaid liens.

Courts have developed and provided remand packages to transferor courts, which summarize the key activities and rulings made in the MDL. Transferor courts often follow the rulings in the MDL, especially those dealing with general discovery issues, which streamlines the process.

> **GUIDELINE MDL-§ 4:** An initial-management order addresses matters discussed at the initial-management conference. Permanent No. MDL-§ 12.

The MANUAL FOR COMPLEX LITIGATION provides a good exemplar in its Sample Orders section of an initial-management order in a mass-tort MDL.[39] What is noteworthy about the sample initial-management order is the lack of specificity in many provisions and the omission of some case-management topics listed in earlier sections. This is unsurprising because mass-tort MDLs are so varied and circumstances constantly evolve, preventing a one-size-fits-all order.

One exception is the cross reference in the sample initial-management order to five separate discovery orders, many of which are detailed and address: (i) preservation; (ii) document

depositories; (iii) confidentiality order; (iv) referral of privilege claims to special master; and (v) deposition guidelines.

> **Best Practice MDL-§ 4(a)**: The transferee court should recite all actions taken on any of the case-management topics addressed at the initial-management conference in an initial case-management order, deferring action on topics that require more time, study, or input of leadership counsel, who may not have been appointed, in follow-up case-management orders. Permanent No. MDL-§ 12(a).

Under proposed Rule 16.1(d), the transferee "court should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion." There is no requirement to set specific time deadlines or any other scheduling provision.[40] Nor is there a requirement to address every case-management topic discussed at the initial-management conference in the order. The court should defer final action on topics that require more time, study, or input of leadership counsel, who may not have been appointed.

Most MDL courts do not issue a single comprehensive case-management plan following the initial-management conference and instead issue a series of case-management orders, addressing the topics discussed at the conference. Transferee courts routinely modify their initial-management orders, especially if the initial management conference was held before the judge appointed leadership.

> **Best Practice MDL-§ 4(b)**: The transferee court should consider issuing and updating a single comprehensive case-management plan in an outline format based on the discussion of the topics considered at the initial-management conference. Permanent No. MDL-§ 12(b).

Some courts have issued a general roadmap of the MDL for the lawyers, which might better inform lawyers and parties, particularly those not in leadership.

[1] Fed. R. Civ. P. 16(c)(2)(L).
[2] MCL, § 11.21. Transferee judges hold an initial pretrial conference to begin developing the case-management plan by consulting with the lawyers on an outline of case-management topics to better inform themselves about: (i) the

nature and potential dimensions of the litigation; (ii) the major procedural and substantive problems likely to be encountered; and (iii) the procedures for efficient management.
[3] MCL, § 11.211 and § 22.61.
[4] MCL, § 11.21.
[5] Proposed Fed. R. Civ. P. 16.1(a) (August 15, 2023).
[6] Proposed Fed. R. Civ. P. 16.1(d) (August 15, 2023).
[7] MCL, § 11.211.
[8] Proposed Fed. R. Civ. P. 16.1(c), Committee Note (August 15, 2023).
[9] Proposed Fed. R. Civ. P.16.1(d), Committee Note (August 2023).
[10] MCL, § 11.211.
[11] In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation (MDL No. 3047).
[12] In re: Roundup Products Liability Litigation (MDL No. 2741); In re: Johnson & Johnson Talcum Powder Litigation (MDL No. 2738).
[13] This may be difficult, particularly for plaintiffs counsel, until formal leadership or interim leadership is formally appointed.
[14] *In re: Proton-Pump Inhibitor Products Liability Litigation* (No. II) (MDL No. 2789); *see also In re: Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Products Liability Litigation* (MDL No. 3014); *In re: Bard IVC Filters Products Liability Litigation* (MDL No. 2641); *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* (MDL No. 3047).
[15] *In re: Juul Labs, Inc. Marketing, Sales Practices & Products Liability Litigation* (MDL No. 2913. *In re: Zantac (Ranitidine) Products Liability Litigation* (MDL No. 2924). The *Juul Labs* MDL and *Zantac (Ranitidine)* MDL are two recent examples of transferee courts utilizing the third-party method. In both MDLs, the court designated a law professor.
[16] MCL, § 11.211, § 22.61, FED. R. CIV. P. 16(a), (b), and (c).
[17] MCL, § 22.6 addresses Case-Management Orders, including Initial Orders Regarding Mass Torts; MCL, § 11.2 addresses Conferences regarding Pretrial Procedure in Complex Litigation generally; and FED. R. CIV. P. 16 addresses Pretrial Conferences; Scheduling; Management regarding all civil actions.
[18] Costs are always a factor especially for the plaintiffs' counsel.
[19] Obviously more information sooner rather than later is preferred but the practicalities of litigation do not always allow for complete, accurate, meaningful information until litigation is mature.
[20] *See infra*, COMPLEX LITIGATION COMPENDIUM OF GUIDELINES AND BEST PRACTICES, Guideline B-6 (Permanent No. B-3) Rabiej Litigation Law Center (2023). "A dynamic, online central-exchange platform is a shared-document management tool tailored to case-specific needs, which is becoming indispensable in facilitating the exchange, storage, access, search, and analysis of hundreds of thousands of gigabytes of data and documents in mass-torrt MDLs.
[21] *See infra*, COMPLEX LITIGATION COMPENDIUM OF GUIDELINES AND BEST PRACTICES, Guideline B-5 (Permanent No. B-1) Rabiej Litigation Law Center (2023). Plaintiff fact sheets "were developed to provide basic information quickly about individual claimants to facilitate vetting."
[22] GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS, Second Edition, Bolch Judicial Institute, Duke Law School (September 2018)
https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1004&context=bolch
[23] INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP POSITIONS IN MDL AND CLASS-ACTION LITIGATION, James F. Humphreys Complex Litigation Center George Washington Law School (March 15, 2021).
https://www.law.gwu.edu/sites/g/files/zaxdzs5421/files/downloads/Inclusivity_and_Excellence_Master_Draft.pdf

[24] Proposed Fed. R. Civ. P. 16.1(c)(1)(B), Committee Note (August 15, 2023).
[25] *In re: Bard IVC Filters Products Liability Litigation* (MDL No. 2641).
[26] *In re: 3M Combat Arms Earplug Products Liability Litigation* (MDL No. 2885).
[27] *In re: Bair Hugger Forced Air Warming Devices Products Liability Litigation* (MDL No. 2666).
[28] "Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses." Proposed Fed. R. Civ. P. 16.1(c)(1)(F), Committee Note (August 15, 2023).
[29] "But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings." Fed. R. Civ. P. 16.1(c)(1), Committee Note (August 2023).

[30] *In re: Roundup Products Liability Litigation* (MDL No. 2741); *In re: Johnson & Johnson Talcum Powder Litigation* (MDL No. 2738).
[31] *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* (MDL No. 3047).
[32] *In re: Benicar (Olmesartan)* (MDL No. 2606); see *also In re: Proton-Pump Inhibitor Products Liability Litigation* (No. II) (MDL No. 2789).
[33] *In re: 3M Combat Arms Earplug Products Liability Litigation* (MDL No. 2885).
[34] *In re: Paragard IUD Products Liability Litigation* (MDL No. 2974).
[35] *In re: Benicar (Olmesartan)* (MDL No. 2606); An innovative approach was taken by the court in the *Benicar* MDL, where each party was directed to submit an ex parte brief outlining their preliminary understanding of the most important factual and legal issues in the litigation. This ex parte brief effectively served as a "wish list" for how each party wanted the MDL to be managed. Once the court received the ex parte briefs, the court directed all parties to confer and collaborate on submitting filed statements addressing specific agenda topics outlined by the court. The *Benicar* court then used all these data points to identify the most important topics to be addressed in various case management orders.

[36] MCL, § 22.315, the purpose of bellwether trials is to "produce a sufficient number of representative verdicts [to] enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."
[37] Various methods, as well as combinations of methods, have been used to select the best pool of actions for bellwether trials that would provide information to the parties useful in their settlement negotiations. Courts have randomly selected actions, considered lists of bellwether candidates proposed by the parties, and considered hybrid-selection methods. Whatever method the court selects, transferee courts have developed prophylactic measures to address expected plaintiff dismissals of bellwether candidates and defendant settlements of other bellwether candidates late in the process. In some MDLs, summary trials, mediation, and have been used for the same purposes.
[38] GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS, Second Edition, Bolch Judicial Institute, Duke Law School (September 2018).
[39] MCL, § 40.52.
[40] Proposed Fed. R. Civ. P. 16.1(d), Committee Note (August 15, 2023).

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January 23, 2024

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

Re: Proposed Rule 16.1 Regarding Multidistrict Litigation

Dear Committee Members,

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

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

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

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

I. PROPOSED RULE 16.1 NEEDS ADJUSTMENT

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

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

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

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

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

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

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

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

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

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

Third, without leadership in place, requiring coordinating counsel to take substantive positions in court – as items (c)(2)-(12) do – risks prejudicing plaintiffs. My firm has already had a negative experience with a protocol similar to that contained in Proposed Rule 16.1, requiring the submission of a joint report before leadership is appointed. In that MDL, there were competing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Sincerely,

W. Mark Lanier

Encl
WML/st
Cc: Dara Hegar
Sadie Turner

EXHIBIT A

2023 Litigation Statistics Series:

Multidistrict Litigation

Bloomberg Law

Introduction

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

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

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

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

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

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

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

Methodology

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

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

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

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

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

Section 1

Overview of Multidistrict Litigation

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

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

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

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

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

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

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

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

Procedural Framework

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

Panel Profile: Karen K. Caldwell, Chair

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

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

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

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

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

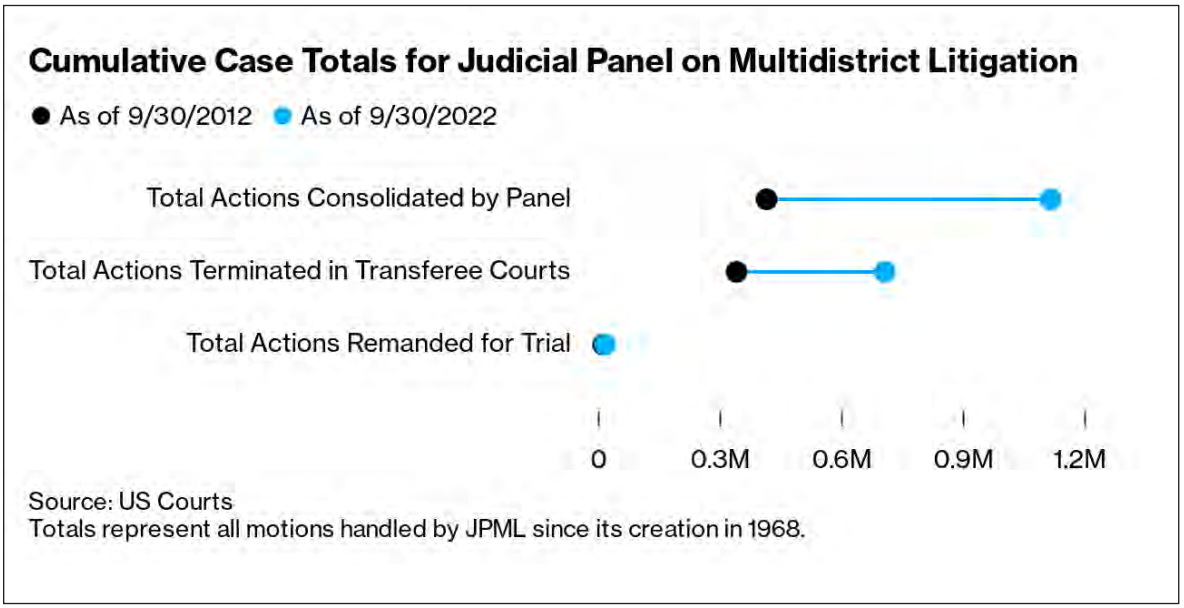
The JPML may consolidate actions on its own initiative or on the motion of any party to an action. Upon a determination that actions filed in different federal districts share common facts, the JPML **determines** whether consolidation would promote convenience and efficiency. When the panel considers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

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

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

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

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



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

Panel Members

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

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

Judicial Panel on Multidistrict Litigation: Current Members

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

Source: JPML
*Affirm rates do not include opinions that were affirmed in part and reversed in part.

Further details about the panel's members are featured in boxes throughout this report.

MDLs and Class Actions

An MDL is not the same as a class action, although it may contain class actions if the presiding judge certifies a class among the MDL plaintiffs. Still, the two procedures serve different purposes and adhere to different rules.

To be certified as a class action pursuant to **Federal Rule of Civil Procedure 23**, a class' claims and injuries must be very similar, and issues common among the class members must predominate over individual ones. MDL plaintiffs, on the other hand, need not have the same claims, and may be suing for various injuries under different laws.

Federal courts have tightened restrictions on class actions during the past 20 years, leading (according to some scholars) to an increased use of MDLs for mass torts. It's a trend worth watching in federal litigation.

Idiosyncratic Management

Despite their prominence in the federal court system, MDLs aren't currently governed by the same rules and procedures that govern other federal civil suits.

Once consolidated by the JPML, actions are subject to management that transferee court judges often improvise to fit the circumstances of the case. Features that distinguish MDL management include:

- Cases may or may not involve a consolidated complaint by groups of plaintiffs with similar claims.
- Cases may or may not have assigned lead or liaison counsel coordinating among groups of plaintiffs and/or defendants.
- Cases may or may not be designated for trial as "bellwether" cases of specific types to provide both sides with a better idea of the settlement potential and value of claims.
- Cases may or may not involve filing of master complaints.
- Discovery may be uniform among various plaintiffs (e.g., utilizing form discovery or fact sheets).
- Cases may be bifurcated into dual management streams for discovery/motions practice and bellwether trials on the one hand, and settlement discussions (possibly under distinct leadership) on the other.

Judges in transferee courts have great latitude in establishing procedures to fit what they consider to be the needs of each case.

Section 2

MDLs' Place in The Courts

As of Aug 15, 2023, there were 413,174 actions pending in 174 open multidistrict litigation matters in the US federal district court system, according to JPML data. (For comparison, Bloomberg Law dockets show that there were 16,443 open class actions in federal court on that date.)

Federal Docket Footprint of MDLs and Class Actions

Source: US Courts, JPML, Bloomberg Law dockets.
2023 totals for pending MDLs and class actions are as of Aug. 15, 2023. The 2023 total for all pending cases is as of March 31, 2023. Criminal cases are not included in the 2022 filing total for all federal cases, but are included in the 2023 pending total.

Because reporting periods from different organizations don't line up, it's difficult to compare those numbers to those reported by federal courts overall. But the US Courts reports that 686,797 cases of all types were pending in federal court as of March 31, 2023. So, it's safe to estimate that roughly 60% of all pending cases in federal courts are wrapped up in MDLs.

But the numbers overall likely reflect the length of time that complex MDL actions pend, rather than a swell in MDL filings.

A total of 265,615 civil cases were filed in US district courts during 2022. In that same year, the JPML granted just 22 motions for consolidation, which resulted in a total of 2,917 actions being consolidated during the year. (Meanwhile, 8,254 federal class actions were filed in 2022.)

That means that only about 1% of all civil actions that were filed in federal court during 2022 were consolidated into MDLs. So how can MDLs be accounting for the majority of all pending actions at the same time?

The answer can be found in a single case.

Panel Profile: Nathaniel M. Gorton

Judge Gorton serves in the US District Court for the District of Massachusetts. George H.W. Bush nominated Gorton on April 28, 1992, to a new seat. The Senate confirmed him on Sept. 23, 1992, and he received his commission the following day.

Judge Gorton was born in 1938 in Evanston, Ill. He earned an A.B. from Dartmouth College in 1960, and his LL.B. from Columbia Law School in 1966. Judge Gorton spent more than 25 years in private practice in Boston before assuming the bench.

Judge Gorton has served on the JPML since October 2018.

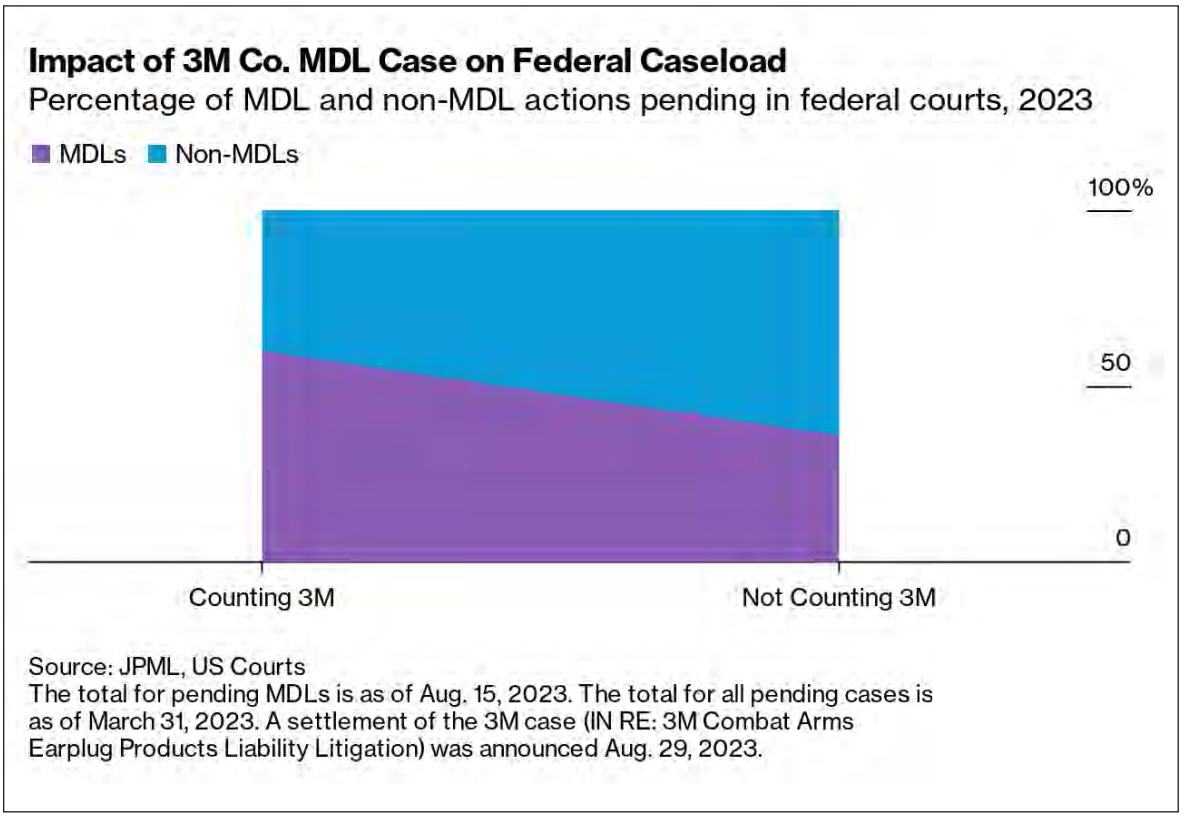
The Impact of 3M

Like a big meal moving slowly through the digestive tract of a snake, the biggest MDL ever consolidated is working its way through the US court system: a 2019 **case** alleging that combat ear plugs manufactured by a corporate subsidiary of **3M Co.** failed to protect service members' hearing.

The 3M combat ear plugs case is 10 times larger than the next-biggest MDL, comprising hundreds of thousands of actions—many involving multiple plaintiffs. Its size skews statistics and makes it more difficult to get an accurate picture of what's happening in MDLs more broadly.

As the 3M case ballooned, for example, MDLs made up around 70% of all pending federal civil cases at the end of fiscal year 2021. But at the end of 2022, as the number of actions in 3M dwindled, MDLs accounted for only around half of all cases.

Even in 2023, if the 3M ear plugs case totals were removed from the docket counts, then the total number of MDL actions pending as of Aug. 15 would amount to only about 36% of all pending federal cases, based on the official US Courts totals as of March 31.



Further details about the 3M ear plugs case, and its August 2023 settlement with plaintiffs, can be found in a case spotlight later in this report.

Smaller MDLs Are the Rule, Not the Exception

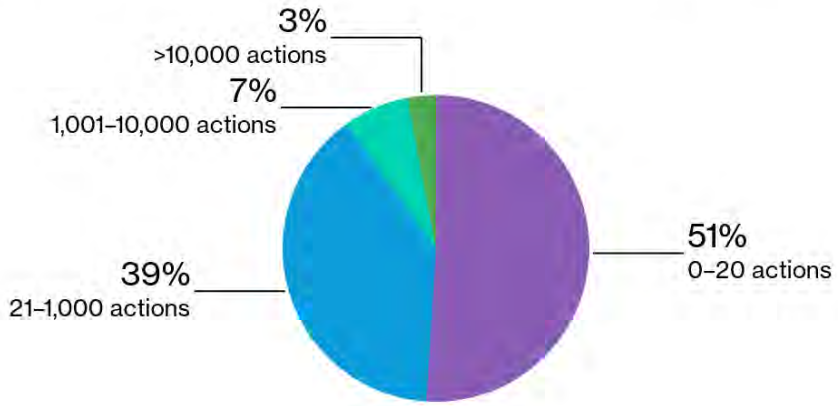
As the 3M case winds down, the actions that make up MDLs should comprise a markedly smaller share of overall federal litigation.

That's because, looking past the dominant presence of the 3M case, the general picture of

MDL activity appears to be a conservative one. Beyond the massive products liability cases that dominate the public's attention (and will be discussed later in this report), the fact is that just over 50% of the 174 consolidated MDL cases that are pending as of Aug. 15 are quite small, containing fewer than 20 actions.

At the other end of the spectrum, only 1 in 10 pending MDL cases involve more than 1,000 actions. (The remaining 39% of cases have between 21 and 1,000 actions pending.)

Size of Consolidated MDL Cases Pending in Federal Court
Number of pending actions per MDL case, as of 8/15/2023



Source: JPML

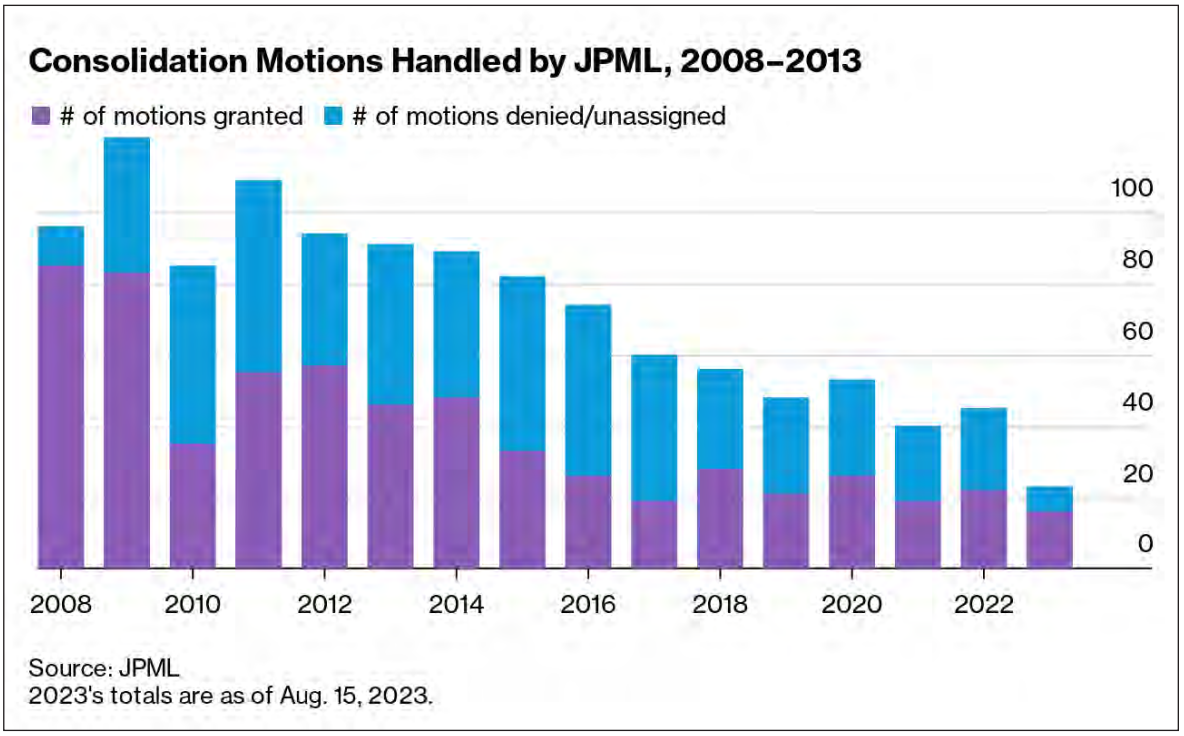
This array of case sizes suggests that MDLs are not entirely about "mass" litigation. The general public's idea of MDLs may be a picture of the giant products liability cases at the top of the size spectrum, but the vast majority of MDLs are smaller dockets.

Section 3

Trends in Consolidation Motions

The JPML granted 22 of the 45 consolidation motions it considered in 2022. This annual total is low compared to consolidations each year during the past decade, and is part of a general downward trend lower over the past 15 years.

In fact, the JPML handled fewer than half as many motions for certification of an MDL in 2022 (45) as it did 10 years earlier (94 in 2012).



So far in 2023, 23 motions to consolidate have been considered by the JPML, and the panel has granted 16 of those motions and denied seven of them.

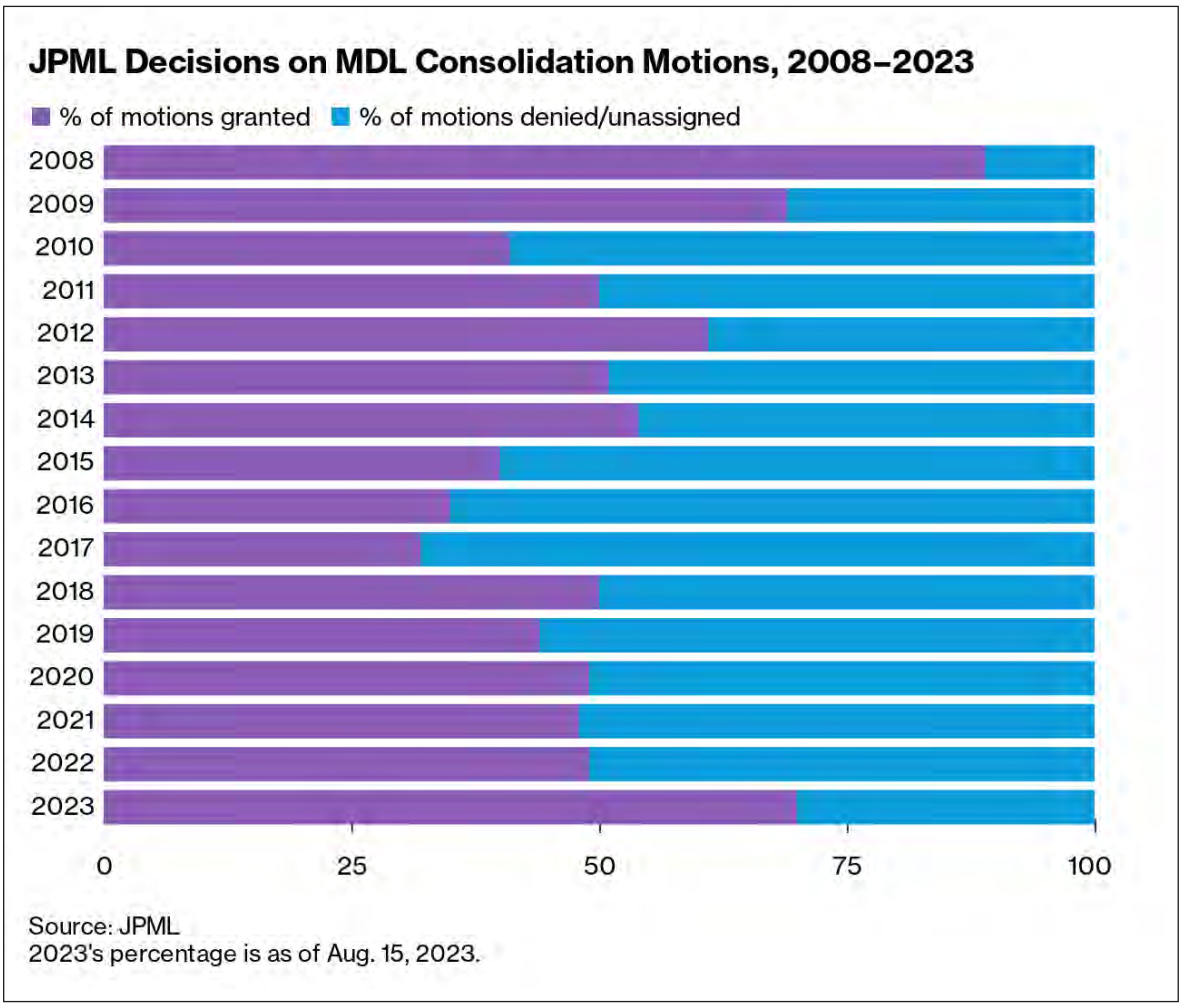
There are two more JPML hearings scheduled for 2023 (September and December). Based on the number of MDLs consolidated to date, as well as pending motions, the JPML in 2023 is on pace to once again consolidate a small number of cases, regardless of whether it finishes this year with the same or a slightly lower number of granted motions as compared to 2022.

Success Rates of JPML Filers

The 22 motions granted in 2022 constituted almost half of the 45 motions filed with the JPML that year.

Over most of the past 15 years, the percentage of motions to consolidate filed with the JPML that are ultimately granted has hovered around 50%. Indeed, the annual mean over the entire 15-year period is 50.66%.

But there was considerable variation over that period. The lowest percentage success rate for motions to consolidate occurred in 2017, when only 19 of 60 motions (32%) were granted. The highest percentage granted occurred in 2008, when the panel granted a whopping 89% of motions to consolidate (85 of 96 filed).



So far, 2023 is shaping up to be the most successful year for filers in more than a decade. The JPML has granted 16 of the 23 motions it has adjudicated this year, as of Aug. 15.

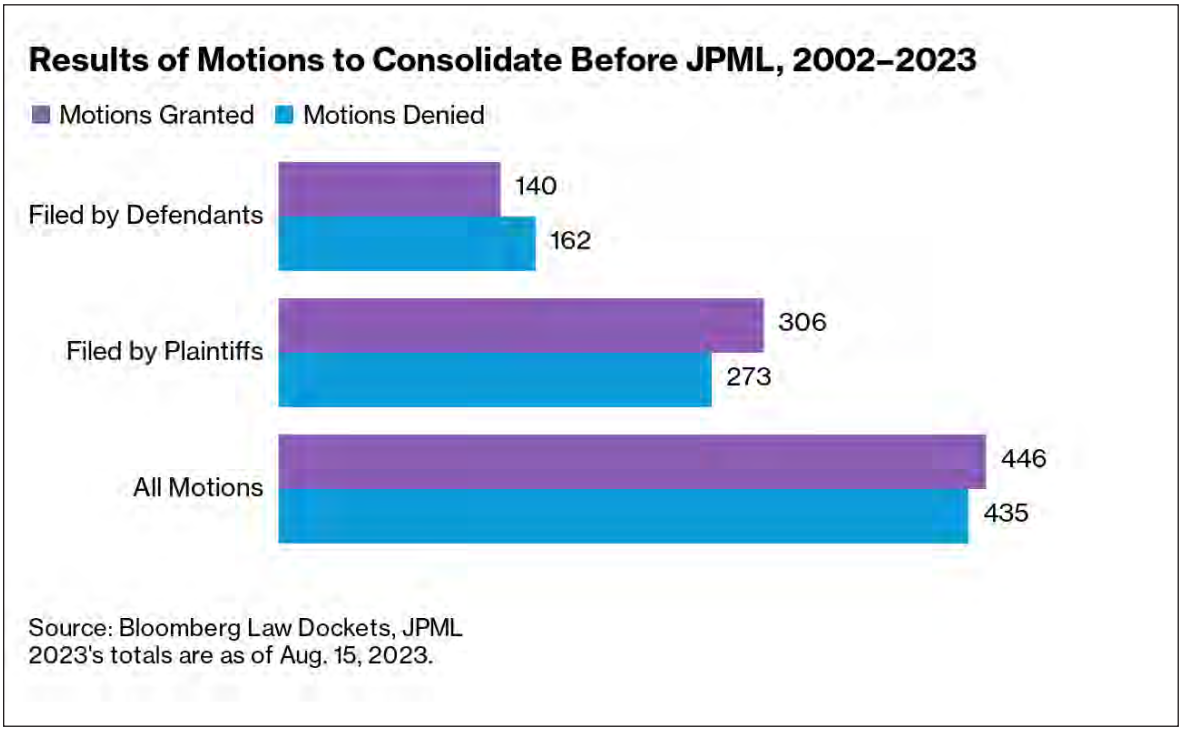
That's a 69.5% success rate for motions so far in 2023, but performance of motions heard in the remaining two JPML hearing dates of the year could alter that outcome.

Still, if the current pace holds up, this will be the first year since 2014 that the panel would have granted more motions than it denied.

Plaintiff Motions vs. Defendant Motions

Which party filed a motion to consolidate—the plaintiff or the defendant—appears to play a role in its outcome.

Among the JPML dockets in Bloomberg Law, spanning 2002 to the present, plaintiffs asked to consolidate cases at nearly twice the rate that defendants did (579 times to defendants' 302 times). Plaintiffs' motions to consolidate were granted 53% of the time, while defendants' motions were granted about 46% of the time.



In other words, the plaintiffs have been, on balance, successful in their consolidation motions before the JPML, while defendants have a losing record. But the numerical difference in their outcomes is only 7 percentage points.

Overall, regardless of who asked for consolidation, the JPML has been remarkably even-handed in its decision-making. Since the beginning of 2002, 446 (50.6%) of the 881 motions for consolidation have been granted, while 435 have been denied.

Looking only at 2023 so far (as of Aug. 15), plaintiffs have had 12 of 17 motions granted, and defendants have had four of six motions granted. So the success rate for each side in 2023 (70% for plaintiffs, and 66% for defendants) is running better than it generally has over the past 20 years.

Panel Profile: Matthew F. Kennelly

Judge Kennelly serves in the US District Court for the **Northern District of Illinois**. William J. Clinton **nominated** Kennelly on Jan. 26, 1999, to a seat vacated by Paul E. Plunkett. The Senate confirmed him on April 15, 1999, and he received his commission on April 22, 1999 Judge Kennelly assumed senior status on Oct. 7, 2021.

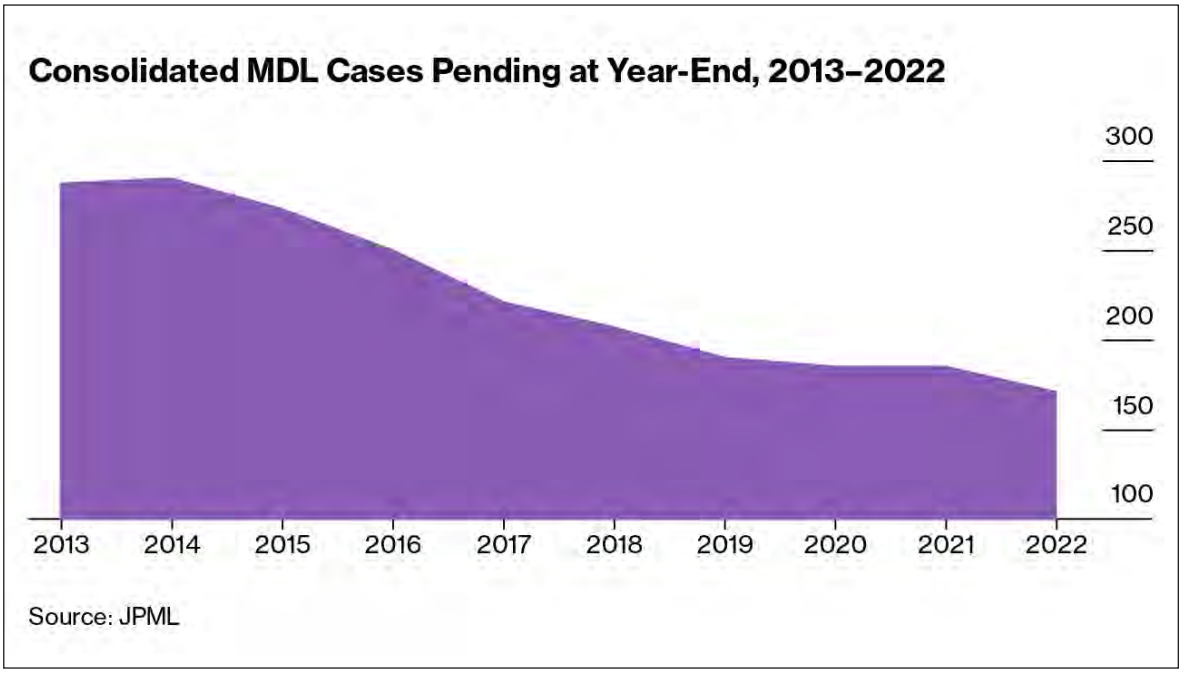
Born 1956 in Marion, Ind., Kennelly received a B.A. from the University of Notre Dame in 1978, and earned his J.D. from Harvard Law School in 1981. He clerked for Judge Prentice Marshall in the N.D. Ill. for two years, and otherwise spent his professional life, before assuming the bench, in private practice in Chicago.

Judge Kennelly joined the JPML in 2019.

Section 4

Trends in Pending Dockets

Overall, the number of consolidated MDL cases that are pending in federal courts has steadily declined in the past decade, from 287 MDLs pending at the end of 2013 to 171 pending at the end of 2022. (As of Aug. 15, 2023, there are 174 MDLs pending.)



2022 marks the eighth straight year that the federal court system has seen a decline in pending MDL cases.

As for 2023, there have been only 14 MDL dockets terminated as of Aug. 15, according to JPML records.

The longest-pending of these cases was consolidated and transferred in 2009, while only one case on the list was transferred as recently as 2022.

Panel Profile: David C. Norton

Judge Norton serves in the US District Court for the District of South Carolina. George H.W. Bush nominated Norton on April 18, 1990, to a seat vacated by Solomon Blatt, Jr. The Senate confirmed him on June 28, 1990, and he received his commission on July 12, 1990. He served as chief judge of the district between 2007-2012.

Judge Norton was born in 1946 in Washington, D.C. He earned a B.A. from the University of the South in 1968, and a J.D. from the University of South Carolina School of Law in 1975. He served as assistant deputy solicitor for the Ninth Judicial Circuit of South Carolina from 1977 to 1980, and as a city attorney for Isle of Palms, South Carolina, in 1980-1985. The remainder of his professional career was spent in private practice in Charleston.

Judge Norton joined the JPML in October 2019.

MDLs Terminated in Transferee Courts in 2023

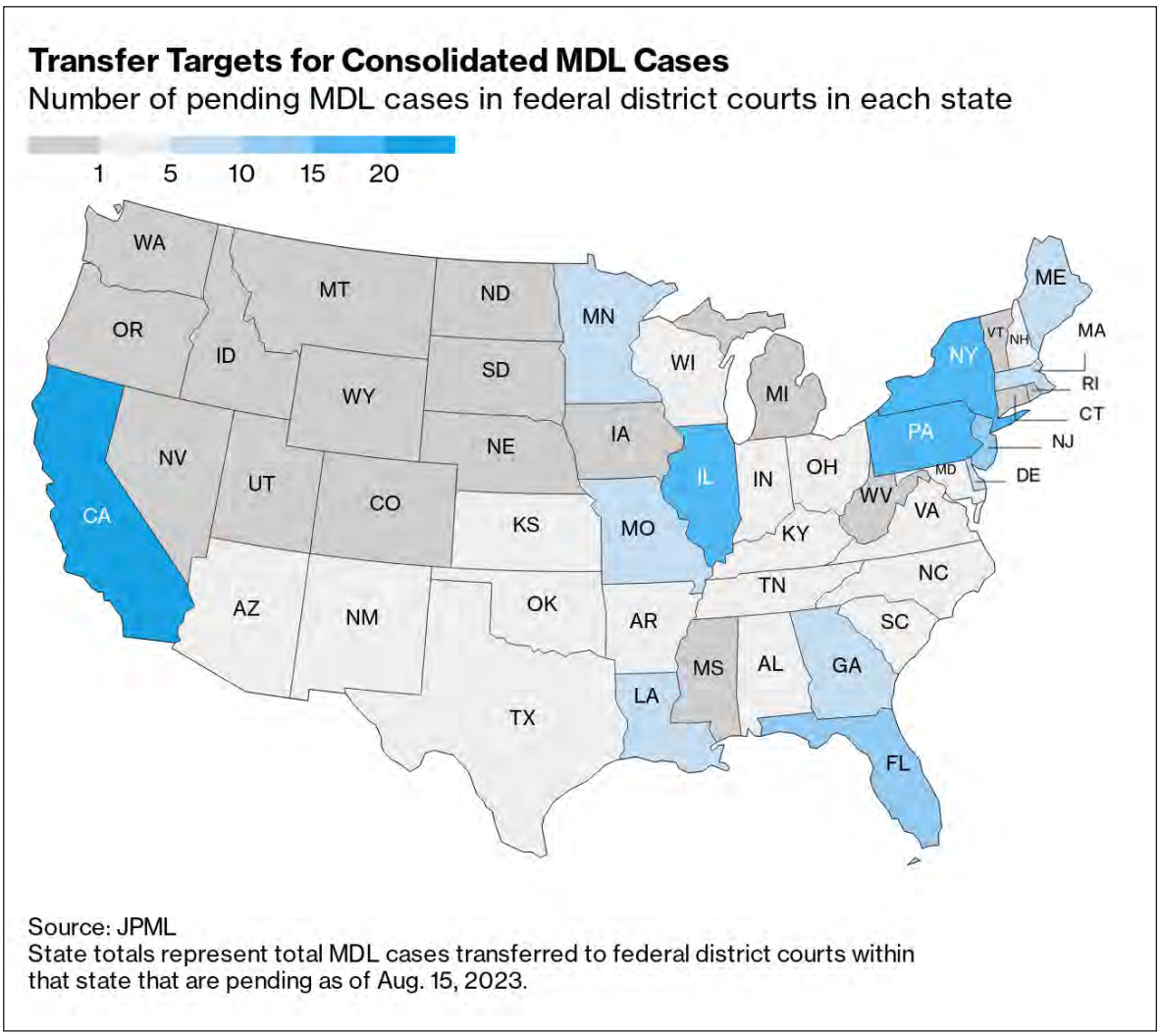
Docket	Case Type	District	Months to Close
IN RE: Blood Reagents	Antitrust	E.D. Pa.	164
IN RE: Portfolio Recovery Associates, LLC	TCPA (Miscellaneous)	S.D. Cal.	139
IN RE: Emerson Electric Co. Wet/Dry Vac	Sales Practices	E.D. Mo.	131
IN RE: Propecia (Finasteride)	Products Liability	E.D.N.Y.	129
IN RE: General Motors LLC Ignition Switch	Products Liability	S.D.N.Y.	109
IN RE: London Silver Fixing, Ltd.	Antitrust	S.D.N.Y.	105
IN RE: Invokana (Canagliflozin)	Products Liability	D.N.J.	76
IN RE: Capital One Consumer Data	Security Breach (Miscellaneous)	E.D. Va.	44
IN RE: Sitagliptin Phosphate ('708 & '921)	Intellectual Property	D. Del.	42
IN RE: Generali COVID-19 Travel Insurance	Miscellaneous	S.D.N.Y.	32
IN RE: Lowe's Companies, Inc.	Employment Practices	W.D.N.C.	29
IN RE: T-Mobile Customer Data	Security Breach (Miscellaneous)	W.D. Mo.	20
IN RE: Johnson & Johnson Sunscreen	Sales Practices/ Products Liability	S.D. Fla.	18
IN RE: Procter & Gamble Aerosol Products	Sales Practices/ Products Liability	S.D. Ohio	15

Source: JPML
List is current as of Aug. 15, 2023.

With 16 cases consolidated into MDLs by the JPML so far this year, and only 14 MDL cases fully resolved by transferee courts, 2023 could end as the first year since 2014 to register an uptick in the number of cases pending.

Where Cases Landed

The 174 consolidated cases that are currently pending in the federal court system are spread between 46 transferee districts and 145 judges (including chief judges of districts, district judges, and senior judges).



Two federal district courts are currently handling the largest number of cases: There are 17 pending MDLs in the US District Court for the **Northern District of Illinois**, and the same number pending in the US District Court for the **Northern District of California**.

However, Northern California may have the heavier workload: The 17 cases pending in that district comprise a total of 10,686 pending actions, while the number of pending actions in Northern Illinois is a relatively more manageable 1,383.

Other big targets for transferee cases are the **Southern District of New York** (13 cases, containing 1,330 pending actions), and the **District of New Jersey** (12 cases and 55,011 pending actions). **The Southern District of Florida** and the **Eastern District of Pennsylvania** each have nine pending MDLs, with Southern Florida having the heavier caseload (15,053 total actions, compared to Eastern Pennsylvania's 1,417).

(Strictly in terms of total actions in MDL cases, the district with the most to manage is the **Northern District of Florida**, whose only case transferred by the JPML is the mammoth 3M docket and its 239,388 pending actions.)

A closer look at the six districts with the most pending MDLs reveals several similarities between them.

Caseload Profiles of Top MDL Transferee Courts

	MDL Dockets Pending	Total MDL Actions Pending	Number of Judgeships	Vacancies on Bench (x Months)	Avg. Time to Disposition (Months)	Pending Cases per Judgeship
N.D. Cal.	17	10,686	14	25.4	7.1	989
N.D. Ill.	17	1,383	22	24.5	6.5	564
S.D.N.Y.	13	1,330	28	21.0	6.0	626
D.N.J.	12	55,011	17	25.8	10.8	3,732
S.D. Fla.	9	15,053	18	35.5	0	313
E.D. Pa.	9	1,417	22	57.0	7.7	371
National Mean	**4**	**8,982**	**7**	**8.1**	**14.7**	**594**
National Median	**2**	**97**	**5**	**0**	**9.6**	**459**

Source: JPML, US Courts
MDL-specific data are current as of Aug. 15, 2023; general data cover the 12 months ending June 30, 2023. "Avg. Time to Disposition" is for all civil cases completed in that district. "Pending Cases per Judgeship" includes all pending civil and criminal cases. National means and medians are for only the 46 courts with pending MDLs; the other 48 courts were not included.

In a nutshell, the districts that receive the most MDLs appear to be those that are well-equipped to handle them. All six of the most popular transferee districts have the largest benches in their circuits, in terms of judgeships—except for New Jersey (which is second to fellow list-topper Southern New York) and Northern California (which is second to Central California, also a top-10 MDL transferee court). It makes sense for the JPML to send cases where there are judicial resources available to manage them.

In fact, these top six transferee districts include three of the four district courts with the highest judgeship totals in the country. And all six of them have benches much larger than the nationwide average of seven per district.

On the other hand, all six top MDL courts have experienced serious staffing issues in the past year, with bench vacancy rates much higher than the nationwide average of 8.1 months of total judge vacancies in the 12 months ending June 30, 2023. Most districts in the country, in fact, have had no months of vacancies in the past 12 months.

Five of the 10 districts in the federal court system with the highest vacancy rates are also among the top six transferee courts for MDL cases. (The sixth, Southern New York, is still in the top 20.) If these staffing problems persist, they might begin to impact the JPML's decisions on transfer.

Another common factor among the top transferee districts is speed. Among all federal court districts, the average number of months they take to get from filing to disposition of a civil case was 14.7 in the year ending June 30, 2023. But all of the top MDL courts have track records better

than that (not including an average of zero months for civil cases at Southern Florida, according to US Courts records).

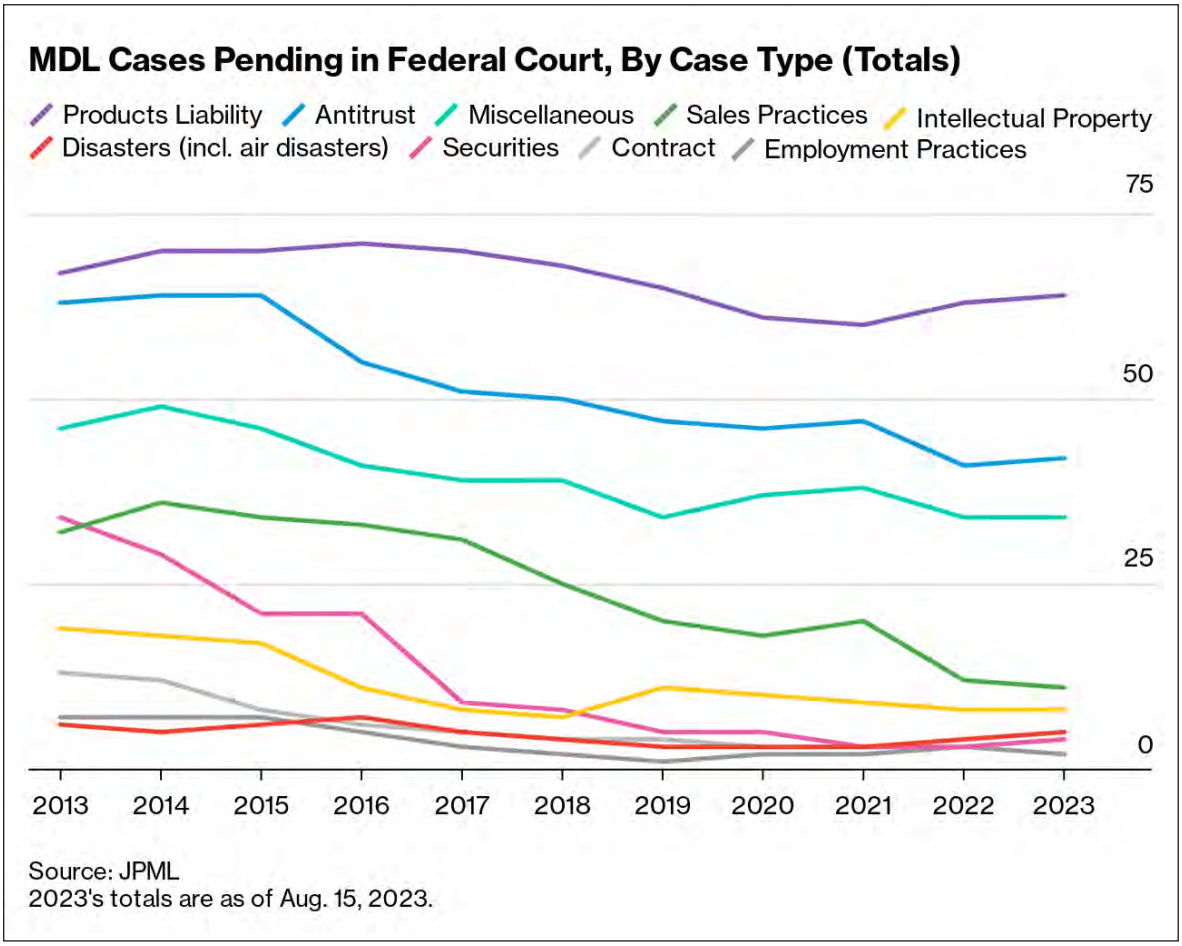
Finally, note that the top transferee districts do not have low per-judge caseloads in common. In fact, there is more variation among the top transferee districts' per-judge caseload than in the other metrics.

The number of pending cases (civil and criminal) per judgeship among the top six ranges from about 300 in Southern Florida to more than 3,000 in New Jersey. The nationwide average for this time period was 594 cases per judgeship. Again, if judicial staffing problems persist, caseloads may begin to factor more explicitly into transfer decisions.

One final note of interest about which cases are being sent where: They are not being sent to Texas. The four districts in Texas comprise a total of 52 judgeships—two of which have no vacancies at all—with case resolution speeds well below the nationwide average. And yet between all four districts, there are only three MDL dockets pending, totaling just 32 total actions.

Case Types of Pending MDLs

Products liability cases have consistently constituted the biggest single group of MDLs pending during the past decade. And that's not even taking into account the large number of actions that these types of cases typically involve. Looking only at pending dockets—not total actions—the number of pending products liability MDLs has still been remarkably stable during a decade that has seen most other types of MDLs fall off in popularity.



The total number of pending products liability MDLs has stayed between 60 and 71 each year since 2013 (it's currently at 66 cases this year), and the distance between the number of products liability MDLs and the next most common case type—antitrust—has never been higher than it is in 2023.

Speaking of antitrust cases, MDLs of this type are also not as plentiful as they used to be. The annual number of pending antitrust MDLs has fallen from 63 in 2013 to only 41 in 2022. (There are currently 42 pending antitrust MDLs in 2023.)

The fact is that every single case type has experienced a dropoff in the past decade, from a slight dip in pending products liability MDLs to steep plummets in sales practices and securities cases.

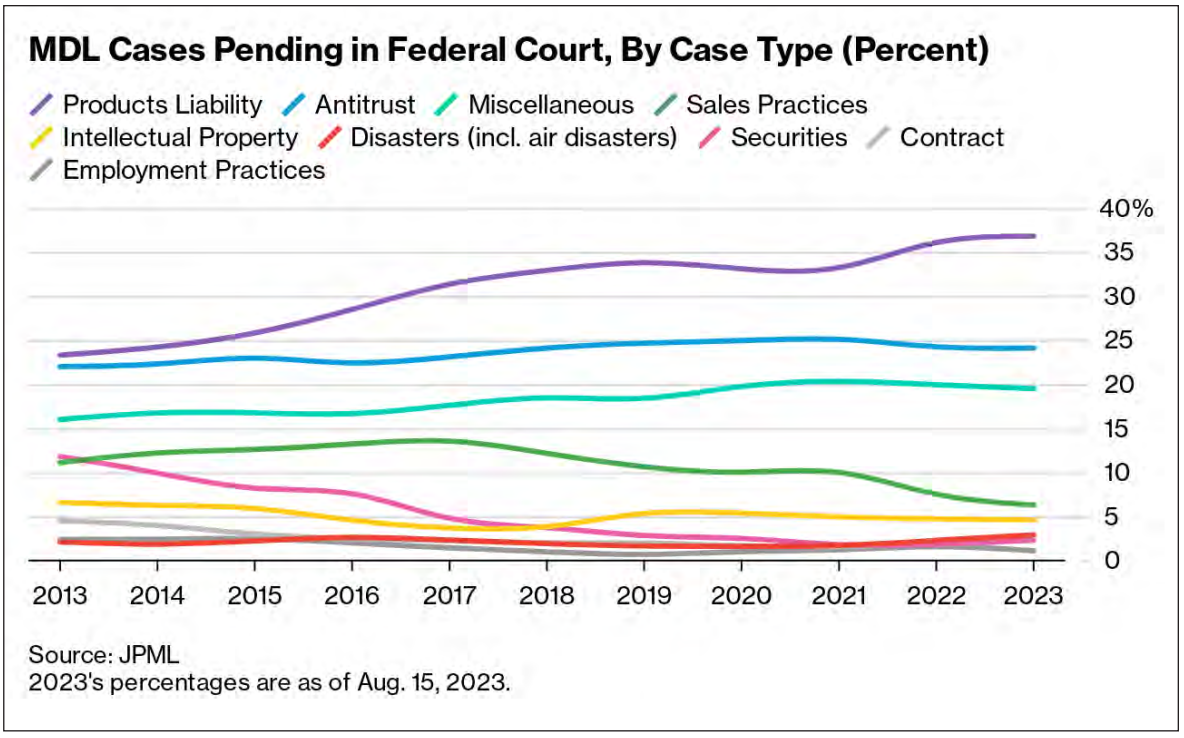
In the case of sales practices cases, many of them incorporate products liability claims and are therefore classified by the JPML as products liability cases.

But parties in securities disputes appear to have largely stopped seeking consolidation during the past decade. There are currently one-eighth as many securities MDLs pending as there were in 2013. In 2017, the number of pending securities MDLs dropped by half, and has been consistently in single digits since. In 2013, there were 34 securities MDLs pending; today there are four. One case, *IN RE: FTX Cryptocurrency Exchange Collapse Litigation* (**MDL 3076**), was consolidated in 2023; the second-newest securities MDL, *IN RE: SunEdison Inc. Securities Litigation* (**MDL 2742**), was consolidated in 2016.

There are about 40% as many IP MDLs pending as there were in 2013, but the current number of pending IP MDLs—eight—doesn't constitute the dramatic decrease over the past decade that other types have seen.

Sales practices MDLs have seen a steady decline during the past decade, from 32 pending actions in 2013 to 11 pending as of August 2023.

Percentage-wise, with so many types of MDLs in decline over the years, products liability cases have assumed a larger and larger share of the MDL docket and, due primarily to 3M's combat ear plugs case, of the federal docket overall.



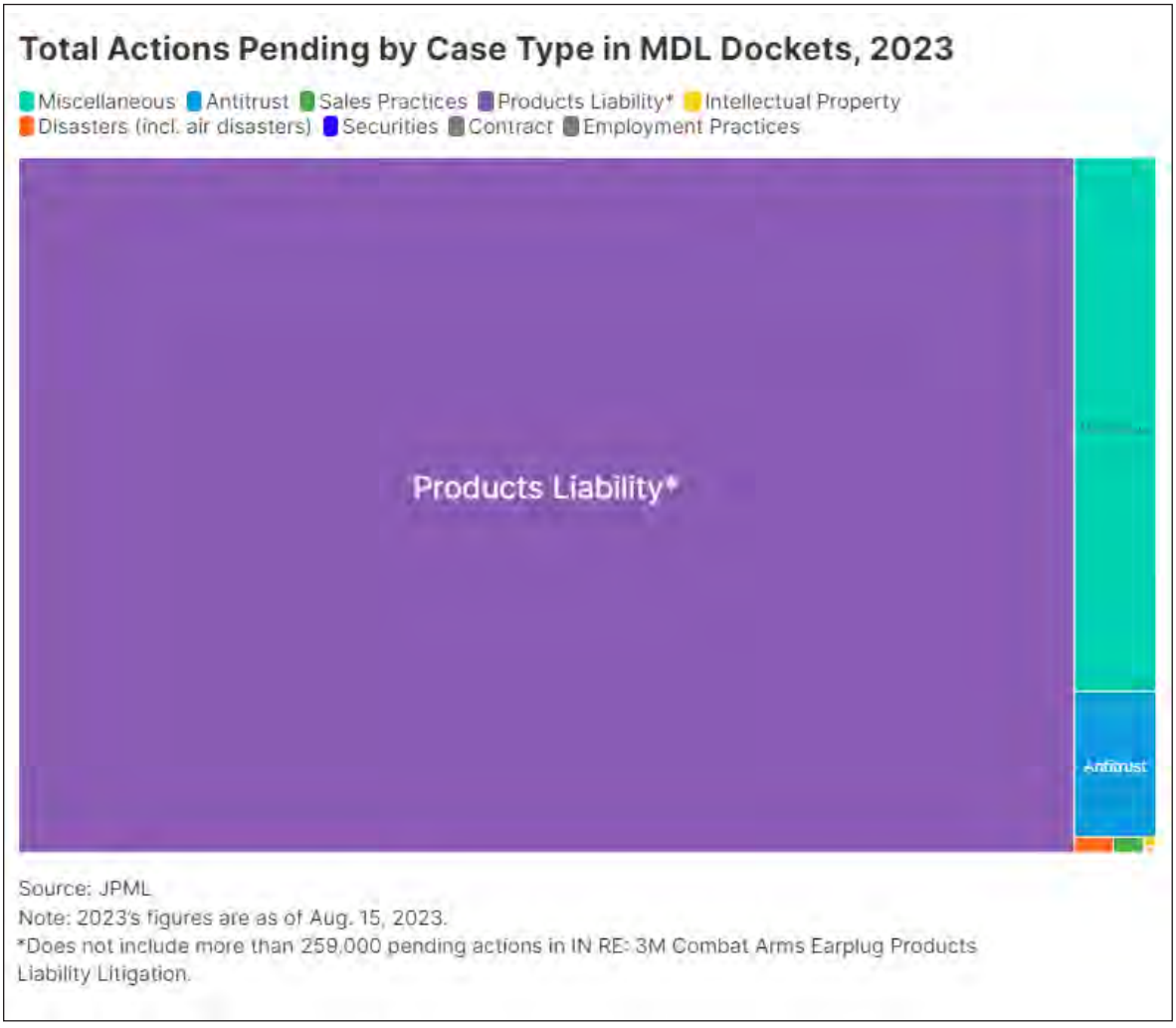
Since 2017, products liability has been the only case type with more than 30% of MDLs pending. (Between 2013 and 2016, roughly 25% of pending MDLs were classified as products liability actions.)

Products liability actions aren't unique in that regard: Despite drawing fewer cases, antitrust, miscellaneous, and disaster-related cases have maintained a relatively stable percentage of overall pending MDLs during the decade between 2013 and 2023.

Even so, there is clearly an imbalance between products liability litigation and all other types of consolidated cases.

Products liability's 66 pending cases make up more than one-third of the 174 consolidated cases still open in the courts (38%) as of Aug. 15, 2023. Antitrust is second, with almost one-quarter of all pending cases (24%), while cases categorized as "miscellaneous" account for one-fifth (20%). The remaining 18% of the dockets are shared by every other case type.

When all actions that are part of MDL cases are considered, the typically large size of products liability consolidations turns an imbalance into a colossal mismatch.



Pending actions in products liability cases currently account for more than 90% of all actions pending across the MDL landscape. And that is without counting the 259,000-plus actions that are wrapped up in the 3M ear plugs MDL, which, had they been added to this statistical analysis, would have rendered the graphic almost completely purple.

Section 5

Multidistrict Litigation's Biggest Cases

Product liability cases account for all 13 of the largest pending MDLs, and 20 of the largest 21. (The only outlier is *IN RE: National Prescription Opiate Litigation*, at No. 14, which is categorized as "miscellaneous.")

Below are details about the two largest pending product liability actions, as well as the largest pending actions in the miscellaneous, antitrust, and sales practices categories.

Largest MDL: 3M Combat Earplugs Litigation

IN RE: 3M Combat Arms Earplug Products Liability Litigation (**19-md-2885**), pending in the US District Court for the Northern District of Florida (**Judge M. Casey Rodgers** presiding), is the largest mass tort action in US history.

It has included up to 339,510 claimants historically and includes more than 259,000 actions as of Aug. 15, 2023. The cases comprising the 3M Combat Earplugs MDL constitute close to 40 percent of all pending cases in the federal court system in 2023.

Needless to say, 3M dwarfs all other MDLs.

Case History: Hundreds of thousands of former military personnel who were exposed to dangerous noise levels in combat or military training between 2003 and 2015 allege that **3M** earplugs failed to protect them and left them with hearing loss or tinnitus. The JPML consolidated the lawsuits in April 2019 before Judge Rodgers in Pensacola, Fla.

Judge Rodgers has appointed "bellwether" cases to help the parties establish a realistic idea of the value of claims and the success of defenses. She **ordered** mediation in June 2022, after 16 bellwether trials and 19 verdicts, and again in September 2022. Mediation was **unsuccessful**.

The bellwether cases resulted in 10 wins for the plaintiffs and six for the defendants, with total **damages** against 3M (after post-trial reductions) of $260.2 million. Individual plaintiff awards in the bellwether cases in which plaintiffs prevailed ranged from $1 million to $15 million in compensatory damages. The highest punitive damages award was $72 million.

in July 2022, **Aearo Technologies** (the 3M subsidiary responsible for manufacturing the ear plugs at issue) voluntarily initiated chapter 11 proceedings under the US Bankruptcy Code seeking court supervision to establish a trust, funded by 3M, to satisfy all product claims. In July 2023, the Bankruptcy Court dismissed Aearo's bankruptcy case, holding that the fully funded trust means Aearo does not face an imminent threat of failure. 3M has appealed that decision to the US Court of Appeals for the Seventh Circuit.

3M also has **appeals** of plaintiffs' verdicts in the bellwether cases pending in the US Court of Appeals for the Eleventh Circuit. In May 2023, Rodgers identified 31 cases that will serve as the first actions remanded from the MDL to their original filing courts for trial.

Settlement: On Aug. 29, 2023, 3M **announced** that it has reached a universal **settlement** of the litigation. 3M will contribute a total amount of $6.01 billion between 2023 and 2029, which is structured under the settlement to include $5.01 billion in cash consideration and $1 billion in 3M common stock.

There are really three agreements:

- a master combat arms settlement **agreement**,
- a settlement **agreement** with the verdict plaintiffs (those who went to trial against 3M and obtained a favorable verdict–14 are listed in the agreement), and
- a settlement **agreement** with the "wave plaintiffs," which are cases that the court previously identified for pretrial discovery during the litigation. (While the "wave cases" are listed in the agreement, the list has been redacted in public filings.)

It's important to note that the actual amount, payment terms, and dates of payment are subject to satisfaction of participation thresholds claimants must meet, including that at least 98% of individuals with actual or potential litigation claims must have enrolled in the settlement and released all claims involving the subject combat earplugs. 3M can also walk away if the equity portion of the settlement runs into regulatory roadblocks, or if the stock fails to sell.

Based on deadlines set in the settlement agreement, the settlement would either succeed or fail at about the end of the first quarter or early second quarter of 2024.

A 98% participation rate is a fairly high threshold, particularly considering the numbers of individual plaintiffs involved in this "opt in" agreement.

It's difficult to gauge how that settlement, if completed, will rank among past MDL settlements because many are confidential, or comprised of contributions from many defendants that went to disparate plaintiffs groups. But compared to recent settlements in the ***IN RE: National Prescription Opiate Litigation*** MDL (around **$26 billion** total) and the ***IN RE: Roundup Products Liability Litigation*** MDL (roughly **$10 billion** to date, with an additional $1.5 billion set aside by Bayer for the litigation), the 3M settlement is not historically large.

Before the 3M case, the previous largest MDL in US history was *IN RE: Asbestos Products Litigation* (**MDL 875**), which included more than 3,000 actions when consolidated in the US District Court for the District of Pennsylvania in 1991. At its **height**, the case contained 192,100 actions.

Panel Profile: Roger Benitez

Judge Benitez serves on the US District Court for the **Southern District of California**. George W. Bush **nominated** Benitez to a new seat on May 1, 2003. Confirmed by the Senate on June 17, 2004, he received his commission on June 21, 2004.

Judge Benitez was born in 1950 in Havana, Cuba. He received his A.A. degree from Imperial Valley College in 1971, and his B.A. from San Diego State University in 1974. He earned a J.D. from Western State University College of Law (now the Thomas Jefferson School of Law) in 1978.

After almost 20 years in private practice in Imperial County, Cal., Judge Benitez served as a judge in the Superior Court of California in Imperial County from 1997 to 2001. He served as a magistrate judge in the US District Court for the Southern District of California in 2001-2004 before his appointment to the Article III bench.

He assumed senior status on Dec. 31, 2017, and has served on the JPML since October 2020.

Second-Largest Products Liability MDL: Johnson & Johnson Talcum Powder Litigation

IN RE: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation (**16-md-2738**) was consolidated in October 2016 in the US District Court for the District of New Jersey (**Judge Michael A. Shipp** presiding). From a height of 38,644 actions in the consolidated case, the MDL is down to 37,770 actions pending as of Aug. 15, 2023. The case includes about 60,000 claimants, but J&J has estimated that it may face as many as 100,000 claims in total.

The cases allege that **Johnson & Johnson** knew that its talc products—particularly its baby powder—were contaminated with asbestos, and did nothing to warn consumers. The plaintiffs allege that the presence of asbestos in those products caused cancer.

In March 2023, the US Court of Appeals for the Third Circuit rejected J&J's attempts to pass its liability for the talc suits on to a subsidiary, **LTL Management LLC**, and then declare the subsidiary bankrupt.

As part of that process, J&J floated a settlement offer of $8.9 billion to settle all outstanding cases, which split plaintiffs.

The appeals court concluded that J&J did not access bankruptcy proceedings in good faith. LTL refiled, and the US Bankruptcy Court for the District of New Jersey **dismissed the petition** in keeping with the Third Circuit's decision.

With the company's bankruptcy strategy to end the litigation rejected by the court, the settlement is presumably off the table.

Largest Antitrust MDL: Generic Pharmaceuticals

IN RE: Generic Pharmaceuticals Pricing Antitrust Litigation (**16-md-2724**) was consolidated on Aug. 15, 2016, in US District Court for the Eastern District of Pennsylvania (**Judge Cynthia M. Rufe** presiding). The MDL currently contains only 131 cases pending, down from a high of 201, but the plaintiffs include attorneys general from 47 states, Puerto Rico, and the District of Columbia, along with classes of private plaintiffs suing 20 generic drug companies for allegedly agreeing to fix the prices of more than 300 drugs.

Rufe has **trimmed** the case since consolidation, dismissing claims against drug distributors and dismissing the states' claims for disgorgement under federal antitrust law. But she has so far resisted attempts to restrict damages theories, including "overarching conspiracy" claims that assert an industry-wide conspiracy.

Direct purchasers have settled with **Sun Pharmaceutical Industries Inc.** (and subsidiaries **Caraco Pharmaceutical Laboratories Ltd.**, Mutual Pharmaceutical Company Inc., and **URL Pharma Inc.**) and **Taro Pharmaceuticals USA Inc.** for $85 million (subject to provisions that could change the amount based on claims filed).

Largest Miscellaneous MDL: National Prescription Opiate Litigation

IN RE: National Prescription Opiate Litigation (**17-md-2804**) was consolidated on Dec. 12, 2017, in the US District Court for the Northern District of Ohio (**Judge Dan A. Polster** presiding). The plaintiffs in 46 actions moved to consolidate.

These cases allege improper marketing and distribution of opiate medications, leading to widespread addiction to these medications, and causing injury and death. Plaintiffs allege that the makers and marketers of opioids systematically overstated the benefits and downplayed the risks of their product, and ignored distribution patterns indicative of end-user abuse.

After five years of active MDL litigation, cases are progressing. Judge Polster tracked cases to advance as bellwethers. Extensive settlement talks have taken place, which included the US as a friend of the court in some instances. Some districts and groups have settled with some defendants. For example, **Allergan Inc.** reached a **settlement** with Ohio's Cuyahoga and Summit counties in August 2019.

There are currently 3,378 actions pending in the opiate MDL, down from a high of 3,523.

Largest Sales Practices MDL: SoClean Inc. Marketing Sales Practices

IN RE: SoClean, Inc., Marketing, Sales Practices and Products Liability Litigation (**22-mc-00152**) was consolidated on Feb. 2, 2022, before the US District Court for the Western District of Pennsylvania (**Judge Joy Flowers Conti** presiding). Plaintiffs moved to consolidate. The lawsuits arise from a 2020 FDA safety warning stating that devices marketed to clean Continuous Positive Airway Pressure (CPAP) machines and similar devices with ozone may expose users to excessive levels of ozone. On that basis, the plaintiffs allege that ozone sanitizing devices by **SoClean Inc.** pose potential health hazards to users and damage components of CPAP machines.

As of Aug. 15, 2023, IN RE: SoClean includes 41 pending actions, down from a high of 62. The parties have agreed to stay discovery pending mediation in an attempt to reach settlement.

Largest Potential Settlement Value: Aqueous Film-Forming Foams Products Liability Litigation

This MDL is just one subset of cases concerning ubiquitous contamination with per- and polyfluoroalkyl substances, or PFAS for short—cases that together have the potential to be the costliest mass tort litigation in history.

The MDL case, **18-mn-2873**, was consolidated Dec. 7., 2018, before the US District Court for the District of South Carolina (**Judge Richard M. Gergel** presiding). Defendants moved to consolidate.

These cases concern exposure to per-fluorooctanesulfonate (PFOS) and/or per-fluorooctanoicacid (PFOA), either through direct contact with aqueous film-forming foam (AFFF) in various industrial, military, or fire-fighting applications, or by exposure to contaminated water. These substances allegedly cause cancer and other health impacts.

Panel Profile: Dale A. Kimball

Judge Kimball serves on the US District Court for the **District of Utah**. William J. Clinton **nominated** Kimball on Sept. 4, 1997, to a seat vacated by David Keith Winder. Confirmed by the Senate on Oct. 21, 1997, he received his commission on Oct. 24, 1997.

Judge Kimball was born in 1939 in Provo, Utah. He earned a B.A. from Brigham Young University in 1964 and received his J.D. from the University of Utah College of Law (now S.J. Quinney College of Law) in 1967. He spent more than 20 years in private practice in Salt Lake City, and also taught at Brigham Young Law School in the 1970s.

He assumed senior status on Nov. 30, 2009. He has been a member of the panel since October 2020.

Defendant 3M attempted to consolidate cases involving non-AFFF PFAS chemicals into the MDL, but the JPML **denied** its motion. A considerable number of cases involving different chemicals and means of exposure are pending around the country, brought by states and municipalities with contaminated water or by individuals allegedly suffering impacts from exposure.

As of Aug. 15, 2023, the case was the eighth-largest pending MDL by number of actions pending with 5,614 actions (down from a historical high of 6,113). Yet the potential exposure is substantial: Estimates indicate that 600,000 service members may have been exposed to PFOS/PFOA-contaminated drinking water on US military bases alone.

3M **settled** with a class of municipalities with impacted water systems in the AFFF MDL in July 2023 for $12.5 billion. **The Chemours Co.**, **DuPont de Nemours Inc.**, and **Corteva Inc.**, three more defendants, reached a preliminary settlement with municipal water systems for a collective **$1.185 billion** in June 2023.

Because PFAS, also known as "forever chemicals," are estimated to be present in essentially every person and animal in the US, observers contend that the size of the potential exposure dwarfs the largest mass tort settlement in US history, the 1998 Tobacco Master Settlement Agreement for $206 billion.

Section 6

Potential Changes and Next Steps

MDLs have benefits in administration: less risk of inconsistent outcomes, for example, or less threat that a huge group of cases, spread throughout the federal system, will clog courts and slow down access to justice more broadly.

But there are also shortcomings to the procedure. First and foremost, the size and scope of MDLs make it more difficult for parties and the court to evaluate claims, and dispense with meritless claims, efficiently. Because MDLs are subject to idiosyncratic management, and because of their size and administrative load, some contend that MDLs often contain a high percentage of meritless cases—meaning, for example, products liability cases brought by plaintiffs who cannot demonstrate that they purchased or used the product, or that they have suffered the injury allegedly caused by the product.

Because of their size and complexity, MDLs can also result in the slow movement of cases through the justice system. Cases caught up in an MDL may languish for a considerable time while bellwethers are tried and complex discovery coordinated among many plaintiffs, for example, when any individual case could have been dealt with expediently in its transferor district.

Proposed Rules

A subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure has been working for years on potential additions to the Federal Rules of Civil Procedure to govern MDLs—which are, shockingly, currently mentioned nowhere in the FRCP.

Initially, the committee considered amendments to existing rules **16** and **26**, which govern pretrial scheduling/management and disclosures/discovery in civil litigation, to address MDLs. After comment and consideration, however, they decided to draft a new subrule, FRCP 16.1, unique to these proceedings.

In March 2023, the committee published a proposed **draft** rule for MDLs, which emphasizes in the Draft Committee Note a need to formalize "a framework for the initial management of MDL proceedings." However, the rule does not require procedures that "must" be instituted to manage an MDL; instead, it consists of a series of suggestions that "may" be used. The proposed rule amounts to a suggested set of best practices, while leaving great discretion in managing MDLs in the hands of the transferee court.

That's an unusual approach for the FRCP, which generally requires specific procedures in given circumstances. However, it makes sense for a set of proceedings that vary as much as MDLs can. Some MDLs, with only a few very similar cases involving plaintiffs who are injured in the same way by common conduct, may not require much early intervention from the court to administer them efficiently. Others, involving thousands of actions and tens of thousands of plaintiffs in varying relationships to the defendants, will require more intervention early in the process from the court and more administration.

Key Provisions

The proposed rule 16.1 recommends the following:

Potential Changes to Post-Consolidation MDL Workflow
Details of proposed Subrule 16.1 of Federal Rules of Civil Procedure

Step	Actor	Action	Details	Section
1	Transferee court	Designation of coordinating counsel	The transferee court may designate coordinating counsel to meet and confer and submit a report for the initial MDL management conference.	16.1(b)
2	Coordinating counsel	Preparation of pre-conference report	The court should order the parties to meet and confer to prepare and submit a report to the court prior to the initial MDL management conference.	16.1(c)
3	Court and parties	Initial MDL management conference	The court should schedule an initial management conference to develop a management plan for the proceedings.	16.1(a)
4	Transferee court	Initial MDL management order	The court should enter an initial MDL management order addressing the matters designated under the report and addressed in the conference, and any other matters in the court's discretion. This order controls the course of the MDL proceedings unless and until the court modifies it.	16.1(d)

Source: Judicial Conference Committee on Rules of Practice and Procedure

The proposed rule's highest level of detail centers on the report, called for in section 16.1(c). The committee envisions a report that addresses several key matters, including:

- Identifying the key factual and legal issues likely to be presented by the MDL;
- Suggesting how and when the parties will exchange information about the factual bases for claims and defenses;
- Proposing a discovery plan;
- Recommending whether leadership counsel should be appointed and, if so, how it will operate and be paid;
- Identifying the principal factual and legal issues likely to be presented in the MDL;
- Whether consolidated pleadings should be prepared;
- Whether the court should consider facilitating settlement, such as through ordering alternative dispute resolution;
- If matters should be referred to a magistrate or master; and
- Other issues, like evaluating existing scheduling orders and other orders, proposing other scheduling conferences, and management of new filings.

Potential Impact

Although the rule amounts to suggested practices, it could have an important impact on how MDLs are conducted. First, ordering the early exchange of factual information (for example, through "fact sheets" that outline basic information about each claimant and list or attach key documents like product receipts or diagnoses) would force more early due diligence on claimants and potentially efficiently sort out unfounded claims early in the MDL process.

That is important because defendants frequently complain that big MDLs contain a high percentage of claimants who have no actual evidence to support their entitlement to recover. Because of the structure and pace of big MDLs, those claims not only gum up the works and hamper processing and adjudication of meritorious claims, but also cloud a realistic understanding of settlement potential and litigation risk.

More information will also likely improve choosing bellwether cases and sorting claimants into functional groups for improved administration. MDLs, unlike class actions, don't require that common issues of fact or law "predominate" among the plaintiffs. Accordingly, an MDL may include subgroups that have very different claims and damages with some nexus. Identifying those patterns early has many potential benefits.

The proposed rule may also have greater impact among rookie MDL transferees. While some courts have adjudicated multiple MDLs and have developed administrative procedures that work for them, new jurists may benefit from a basic toolbox of proposed first steps.

The public comment period is open until **February 16, 2024**. Following the comment period, the subcommittee will consider the public's responses and potentially redraft the rule. The final proposed rule must be adopted by the Judicial Conference's Committee on Rules of Practice and Procedure, then the Judicial Conference itself, and finally the Supreme Court. As a result, the final rule may feature important differences from the current proposal and, depending on any changes, may not enter into force for years.

Panel Profile: Madeline Cox Arleo

Judge Arleo, the newest member of the JPML, serves on the US District Court for the District of New Jersey.

Barack Obama nominated Arleo on June 26, 2014, to a seat vacated by Dennis M. Cavanaugh. The Senate confirmed her on Nov. 20, 2014, and she received her commission on the following day.

Judge Arleo was born in 1963 in Jersey City, New Jersey. She received a B.A. at Rutgers College in 1985 and an M.A. in 1986. She earned her J.D. from Seton Hall University School of Law in 1989.

Judge Arleo clerked for New Jersey Supreme Court Justice Marie L. Garibaldi in 1989–90. Following 10 years in private practice in Newark, N.J., Judge Arleo served 14 years as a magistrate judge in the US District Court for the District of New Jersey from 2000 to 2014.

She joined the panel in October 2021.

About The Authors

Eleanor Tyler is a Principal Legal Analyst at Bloomberg Industry Group, with a focus on antitrust and general litigation. Before joining Bloomberg Law, Eleanor practiced law for six years, primarily as a litigation associate at Locke Lord LLP. She clerked for the Hon. Simeon Lake in the US District Court for the Southern District of Texas. She holds a JD from Georgetown University Law Center, an MA in international affairs from Johns Hopkins SAIS, and a BA from Texas Christian University.

Robert Combs is the manager of Bloomberg Law's Analysis Channel. In more than 20 years at Bloomberg Law, Robert has provided legal analysis on labor and employment issues, headed the company's knowledge services and customized research teams, and edited employment and payroll publications. Robert has an M.S. in journalism from Scripps School of Journalism at Ohio University and graduated with a B.A. in English from Denison University.

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EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF NextGen 1.7.1.1
Eastern Division

Shannon E. Hall, et al.
Plaintiff,
v.
Case No.: 1:22−cv−00071
Honorable Rebecca R. Pallmeyer
Abbott Laboratories, et al.
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, December 21, 2023:

MINUTE entry before the Honorable Rebecca R. Pallmeyer: Telephone conference held. Mead has filed motions to dismiss in certain individual member cases, arguing that Plaintiffs have not established that Mead is the manufacturer of the infant formula at issue. To determine whether Mead is in fact the manufacturer of the formula in these cases, the court directs Plaintiffs in each case at issue to serve (or re−serve) targeted requests for information from medical providers concerning the products administered to their infants. If Plaintiffs demonstrate to the court that these targeted requests yield no or only inconclusive information, Mead will be directed to confirm or deny the existence of an "exclusive contract" with the medical providers; the court recognizes that an affirmative answer to this question will not establish that the infant was in fact provided with Mead products, but will satisfy the court for purposes of a Rule 12(b)(6) challenge. Mailed notice. (cp,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

Comment ID
USC-RULES-CV-2023-0003-0028

Hollingsworth LLP
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February 1, 2024

COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Rule 16.1 Should Provide Concrete Guidance on Implementing the Merits-Driven Approach to MDL Case Management Embraced by the Proposed Rule

Dear Members of the Advisory Committee:

On behalf of Hollingsworth LLP, Robert E. Johnston* and Gary Feldon** submit this Comment in response to the Judicial Conference Committee on Rules of Practice and Procedure's ("Committee") Request for Comments on the proposed new Federal Rule of Civil Procedure 16.1 ("Preliminary Draft").

For over forty years, Hollingsworth LLP has focused its practice on complex litigation matters, handling dozens of nationally important federal multidistrict litigations ("MDLs") and analogous state proceedings. Hollingsworth LLP's decades of experience serving in leadership roles in federal MDLs provides us an additional perspective on the MDL system.[1] In addition to our unwavering advocacy for our clients, we are committed to furthering parties' and the courts' shared interest in the MDL system providing just and efficient resolution of claims.

With that shared interest in mind, we call for the Committee to include more concrete guidance to give substance to the modern, merits-driven approach to MDL case management endorsed by the new Federal Rule of Civil Procedure 16.1.

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* Robert Johnston is a partner at Hollingsworth LLP with over 20 years of experience in mass tort and complex litigation. Mr. Johnston has served as lead counsel for the defendants in *In re: Tasigna® (Nilotinib) Products Liability Litigation*, *In re: Tepezza® Marketing, Sales Practices, and Products Liability Litigation*, and *In re: Aredia® and Zometa® Products Liability Litigation* MDLs as well as representing a defendant in the *In re Pamidronate* MDL.

** Gary Feldon is a partner in Hollingsworth LLP's Complex Litigation, Pharmaceutical & Medical Device, and Toxic Torts & Products Liability groups. Before joining the firm, Mr. Feldon served at the U.S. Department of Justice, where he represented federal agencies as third parties in *In re: National Prescription Opiate Litigation* and *In re: 3M Combat Arms Earplug Products Liability Litigation*.

The views expressed in this Comment are solely those of the authors.

[1] Hollingsworth LLP has served as defense national coordinating counsel and/or defense liaison counsel in, among other MDLs, *In re: Tepezza® Marketing, Sales Practices, and Products Liability Litigation*, *In re: Tasigna® (Nilotinib) Products Liability Litigation*, *In re: Aredia® and Zometa® Products Liability Litigation*, *In re: Welding Fume Products Liability Litigation*, and *In re: School Asbestos Litigation.* The firm has also represented MDL defendants in nationally important MDLs, such as *In re: Zantac® (Ranitidine) Products Liability Litigation* and *In re Fosamax® Products Liability Litigation*.

INTRODUCTION

MDLs exist to "promote the just and efficient conduct" of large-scale litigation in a centralized manner.[2] Historically, too many federal courts have conflated efficiency with global settlement and entirely disregarded justice. This "aggregated settlement" approach encourages plaintiffs to file claims that would never merit individual filing in the hopes that frivolous and questionable claims will be paid out when the defendant inevitably settles to bring an end to the otherwise perpetual litigation. Allowing spurious and otherwise meritless cases to remain on the docket delays resolution of potentially meritorious claims, imposes huge burdens on MDL defendants and courts, and prevents efficient resolution of the overall case inventory.

Fortunately, what we call the "merits-driven" approach has started to become the prevailing philosophy of MDL case management. Under this approach, transferee judges engage on the key legal and factual issues from the outset of the MDL, focusing on resolving cases on the merits of those issues as quickly and efficiently as possible.[3] Representative cases decided on their merits by motion or trial aid the parties in valuing the overall case inventory and therefore facilitate party-led settlement. Although the Preliminary Draft promotes this approach, it does not do enough to guide transferee courts.

The final Rule 16.1 should provide genuine direction to transferee courts—instructing them to engage with potentially dispositive factual and legal questions at the case management phase, guiding them in how to use the answers to most efficiently resolve cases, and encouraging them to continue this approach through the MDL's lifecycle. This Comment makes specific proposals to Rule 16.1(c) and (d) that would better implement the merits-driven approach to MDL management the Rule seeks to embody.

THE COMPETING PHILOSOPHIES OF MDL CASE MANAGEMENT

For at least a decade, judges have decried the once-ubiquitous judicial culture of transferee courts pushing parties toward global settlements and regarding remand of MDL cases for trial as failures.[4] Under this "aggregated settlement" approach, judges often view cases as largely interchangeable units to be settled instead of engaging with the factual distinctions in the case inventory. The failure to engage early with the key factual and legal issues also encourages the filing of spurious and meritless claims, compounding the problems of managing the litigation.[5]

Transferee courts applying the aggregated settlement approach encourage plaintiffs' attorneys to warehouse meritless claims in the hope that a bloated case inventory will increase settlement

[2] 28 U.S.C. § 1407(a).

[3] *See* Bolch Jud. Inst., Duke L. Sch., *Guidelines and Best Practices for Large and Mass-Tort MDLs* 1-2, 96 (2d ed. 2018) [hereinafter *MDL Guidelines*], https://perma.cc/EX84-6FHC.

[4] *E.g.*, Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 144 (2013).

[5] *Id.* at 186–87 ("If We Build It, They Will Come[.] Regardless of the amount of judicial effort and resources, unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process…").

pressure.[6] This Committee's own 2018 report estimated that 20-50% of all MDL cases are entirely spurious, with plaintiffs lacking even *prima facie* evidence of an injury caused by the defendant's alleged tortious conduct.[7] It is impossible to quantify how many of the remaining claims have other, harder to spot legal defects that make them legally unviable. Using spurious and otherwise meritless claims to inflate a case inventory will remain a winning proposition so long as courts largely refuse to cull meritless cases without case-specific discovery workup.[8]

The aggregated settlement approach to MDL management undercuts both just and efficient resolution of claims, the two primary goals of the MDL statute.[9] Justice is not served by MDL defendants settling spurious claims under threat of ruinous liability from the sheer volume of warehoused cases.[10] Efficiency is not served by fixating on global settlement instead of acquiring key information early in the MDL and using it to resolve cases quickly on their merits.

The merits-driven approach has been gaining momentum in recent years. Transferee judges report that the JPML now sends a clear "message that they are to move as quickly as possible," and many believe "the ability to resolve cases efficiently [is] an important factor in JMPL selection[. J]udges who warehouse cases do not get selected."[11] Independent legal commentators recognize the

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[6] *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (aggregated proceedings "can unfairly 'plac[e] pressure on the defendant to settle even un-meritorious claims'" (citation omitted)); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 358 (5th Cir. 2017) ("The undeniable pressure on defendants to settle is a reality in these alleged mass tort cases."); *In re Gen. Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374, 392 (S.D.N.Y. 2019) ("[S]ettlement pressure is particularly acute in multidistrict litigation . . . ."); *see also* Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. Kan. L. Rev. 219, 257 (2017) (referring to the "*in terrorem* effect"); Lawyers for Civil Justice, *Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee* at 3 (Dec. 22, 2022), https://www.uscourts.gov/sites/default/files/22-cv-t_suggestion_from_lcj_-_rule_16_0.pdf ("The reason mass-tort MDLs attract voluminous unexamined claims is obvious: the FRCP are failing to create the same expectations for pre-filing due diligence in MDLs that they typically provide in other cases.").

[7] *See* Advisory Committee on Civil Rules, *MDL Subcommittee Report* 142 (Nov. 1, 2018) [hereinafter *Advisory Committee on Civil Rules*], https://www.uscourts.gov/sites/default/files/2018-11_civi_rules_agenda_book_0.pdf ("[I]n many MDL centralizations – perhaps particularly . . . [in] pharmaceutical products or medical devices [MDLs] – a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit.").

[8] *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 55 (2021) ("A previous study showed that nearly one-third of the MDL judges who presided over products-liability MDLs that ended in private settlement *had not ruled on a single merit-related motion* before the settlement occurred.").

[9] 28 U.S.C. § 1407(a).

[10] MDL Guidelines, *supra* note 3, at 2; *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (aggregated proceedings "can unfairly 'plac[e] pressure on the defendant to settle even un-meritorious claims'" (citation omitted)); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 358 (5th Cir. 2017) ("The undeniable pressure on defendants to settle is a reality in these alleged mass tort cases."); *In re Gen. Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374, 392 (S.D.N.Y. 2019) ("[S]ettlement pressure is particularly acute in multidistrict litigation . . . .").

[11] *Id.* at 2; *see also In re Seroquel Prod. Liab. Litig.*, 447 F. Supp. 2d 1376, 1378 (J.P.M.L. 2006) (proper MDL management requires "assigning all related actions to one judge committed to disposing of spurious claims quickly").

superiority of the merits-based approach.[12] And, now, the draft Rule 16.1 incorporates its principles.[13]

Courts applying the merits-driven approach engage with the key factual and legal issues of the MDL inventory from the start, then grapple with the merits of the key issues early in the litigation to promote resolution of cases within the overall inventory. This approach better embodies the MDL statute's twin goals of justice and efficiency.[14] Forcing the parties to grapple with the merits of the case inventory early provides information critical to weeding out frivolous cases before they overwhelm those claims that have at least *prima facie* validity. It also helps the parties and the court identify cases that are representative of plaintiffs' overall case inventory or discrete subsets of that inventory. Litigating representative claims early minimizes the expense, time, and burden to provide both sides the data needed to value plaintiffs' case inventory and efficiently resolve plaintiffs' claims through litigation or settlement.

As discussed below, the final Rule 16.1 should provide far more guidance to parties and transferee courts on how best to implement the merits-driven approach endorsed by the Rule. Otherwise, many transferee courts will continue to apply the unjust and inefficient aggregated settlement approach that has plagued the MDL system for decades.

COMMENTS TO PROPOSED RULE 16.1

As proposed, Rule 16.1(c) directs transferee courts to require the parties to meet and confer to prepare a report before the initial management conference that addresses any matters the transferee court wishes to be informed about and any matters the parties want to raise. There is then a non-exhaustive list of topics the transferee court may want to consider. The proposed Committee Note in the Preliminary Draft provides limited clarification of what falls under these broad topics. The draft Rule 16.1(d) would then direct the transferee court to enter an initial MDL management order addressing the topics in the report and any additional matters the court wishes to address.

The Preliminary Draft does not do enough to promote the merits-driven approach to MDL case management. As proposed, Rule 16.1 rightly encourages transferee courts to engage with the key factual and legal issues at the initial case management conference stage, consistent with the merits-driven approach. However, the lack of definitive instruction in the Preliminary Draft leaves the proposed Rule largely toothless to address the persistent problems in the MDL system.

Rule 16.1 should make clear that a transferee court's obligation from the outset is to find ways to efficiently resolve the case inventory. Rule 16.1(c) should do more to identify the most efficient means. Rule 16.1(d) should then instruct transferee courts to actually use these means throughout the litigation to promote the just and efficient resolution of the cases. Specific proposals to this effect are below.

[12] MDL Guidelines, *supra* note 3, at 2, 96.

[13] *See, e.g.*, Preliminary Draft Rule 16.1(c)(3) & Committee Note.

[14] *See* 28 U.S.C. § 1407(a).

I. Proposed Rule 16.1(c) Should Provide More Guidance to Parties and Transferee Courts

Rule 16.1(c) in the Preliminary Draft instructs the transferee court to order the parties to prepare an initial case management report addressing "any matter designated by the court" and any other matter the parties want to bring to the court's attention, including topics listed in Rule 16.1(c) or in Rule 16. If the parties' initial case management reports provide the transferee court with relevant information early in the litigation, the reports can be an invaluable tool for promoting efficient MDL management. However, neither the Preliminary Draft's Rule 16.1(c) nor the accompanying commentary in the Draft Committee Note provide nearly enough guidance in what information is relevant to efficient MDL management.

A. Proposed Rule 16.1(c)(3)

Existing Draft Rule: As proposed, Rule 16.1(c)(3) suggests "identifying the principal factual and legal issues likely to be presented in the MDL proceedings" as a possible topic for the initial case management report. Per the accompanying Draft Committee Note, the transferee court determines whether these "factual issues should be pursued through early discovery" or the "legal issues should be addressed through early motion practice."

Comment: While this support for the merits-driven approach would provide some guidance to transferee courts, it does not provide enough concrete direction to parties and the courts about what constitutes a principal factual or legal issue that can lead to early resolution of claims.

The principal legal issues under the merits-driven approach will include any issues that are dispositive and can be decided before trial. In products liability litigation, for example, general causation is a key legal issue that underlies any tort claim. Without competent evidence of general causation—typically expert testimony that complies with Federal Rule of Evidence 702—there is no need to litigate the other issues in the pending cases.[15] Addressing general causation as early as possible therefore best promotes efficient, merits-driven resolution of plaintiffs' case inventory. Even if a transferee court's ruling on general causation does not dispose of the MDL, it provides the parties important information about the relative strength of the plaintiffs' overall inventory, which facilitates possible party-led settlement.[16] Another potentially dispositive ruling that MDL courts can address early to promote efficiency in failure-to-warn claims—a very common MDL claim, particularly in pharmaceutical and medical device products liability litigation—will be a determination about the adequacy of the warnings. Resolving issues that determine the viability of a significant number of cases—like establishing that purported representatives of deceased

[15] Of course, there is no benefit to addressing general causation testimony early if the transferee court wrongly admits unreliable expert testimony. The harm from judges abdicating their role as gatekeepers is magnified in the MDL context, where an evidentiary decision can affect anywhere from dozens to hundreds of thousands of cases. Hollingsworth LLP therefore applauds the recent amendment to Rule 702 clarifying the rigorous standard governing expert testimony. *See* Eric Lasker, *The New Federal Rule of Evidence 702 and the Fight Against Scientific Skepticism*, Att'y L. Mag. (Dec. 12, 2023), https://attorneyatlawmagazine.com/legal/opinion/the-new-federal-rule-of-evidence-702-and-the-fight-against-scientific-skepticism.

[16] *See* MDL Guidelines, *supra* note 3, at 96 ("In many MDLs, meaningful settlement discussions are not possible until completion of discovery and extensive testing of the parties' contentions through decisions on dispositive and *Daubert* motions.").

plaintiffs' estates have legal authority to proceed[17] or determining the cut-off date for claims under the statute of limitations[18]—can also promote more efficient valuation of plaintiffs' case inventory.[19]

The principal factual issues will be those that either (a) immediately cull meritless cases or (b) identify representative cases for individual case work-up and possible early trial. A non-exhaustive list should include the basic factual showings to maintain the common claims in the MDL, including evidence showing that plaintiff had an injury within the scope of the MDL and, when applicable, was exposed to the product or substance at issue. For claims brought by the estate of a deceased plaintiff, the individuals pursuing the claims on the estate's behalf should additionally have to show they are the estate's authorized representative. Identifying these issues early permits early discovery focused on culling spurious claims as early as possible. That is the only way the parties and court can focus on the individual cases that are not *prima facie* meritless.

Without identifying these kinds of potentially dispositive issues (ideally early, as the Preliminary Draft proposes), the transferee court cannot make informed decisions about how best to promote efficient resolution of the litigation.

B. Proposed Rule 16.1(c)(4)

Existing Draft Rule: As proposed, Rule 16.1(c)(4) suggests as a possible topic for the initial case management report "how and when the parties will exchange information about the factual bases for their claims and defenses." Per the accompanying Draft Committee Note, "[e]xperience has shown that in MDL proceedings an exchange of information about the factual bases for claims and defenses," such as fact sheets or other forms of plaintiff census discovery, "can facilitate efficient management." The corresponding portion of the draft Committee Note then goes on to caveat away the endorsement of any specifics.

Comment: Rule 16.1(c)(4) in the Preliminary Draft does not go far enough to promote efficient use of early census discovery, such as plaintiff fact sheets. "Census discovery" is directed to all MDL plaintiffs, regardless of whether their case is being worked up in individual discovery and is separate from discovery available in individual litigation under the Federal Rules of Civil Procedure.[20] The information gathered in census discovery helps the parties and the court identify

[17] *See* Product Liability Advisory Council, Inc. ("PLAC"), *Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee* (2023), https://www.uscourts.gov/sites/default/files/23-cv-c_suggestion_from_plac_-_rule_16_0.pdf.

[18] MDL Guidelines, *supra* note 3, at 96 ("In some MDLs, a defendant's uncertainty about the statute of limitations or other limits on future suits can be a substantial hurdle to settlement; offering guidance on such issues may therefore help facilitate a settlement.").

[19] *See id.*

[20] Hollingsworth LLP shares other commentators' concerns that loose language in Rule 16.1(c)(4) of the Preliminary Draft may confuse the distinctions between these two forms of discovery and lead to misallocated burdens. *See* Lawyers for Civil Justice, *A Rule, Not an Exception: How the Preliminary Draft of Rule 16.1 Should be Modified to Provide Rules Rather than Practice Advice and to Avoid the Confusion of Enshrining Practices into the FRCP that are Inconsistent with Existing Rules and Other Law* 4-11 (Sept. 18, 2023) [hereinafter *Lawyers for Civil Justice*].

"candidates for expedited resolution through voluntary withdrawal, dispositive motions, or through a settlement process."[21]

The MDL Guidelines therefore encourage MDL courts to require "streamlined, cost-effective paper [census] discovery to the maximum extent possible" to facilitate early identification of representative cases (potentially including formal bellwether designations) and limit unsubstantiated claims.[22] Rule 16.1(c)(4) should similarly encourage census requirements for plaintiffs to identify the basic facts underlying their claims and to make *prima facie* evidentiary showings on dispositive issues. In product liability MDLs, for example, census discovery would require preliminary proof of (1) the specific product used by the plaintiff; (2) how the plaintiff used or was exposed to the product; (3) the plaintiff's alleged injuries or other consequences of use or exposure; (4) the date of plaintiff's alleged injury; (5) the date of the plaintiff's purported notice of the defendant's allegedly wrongful conduct, and (6) plaintiff's releases authorizing the defendant to collect relevant records from third parties (medical providers, employers, etc.).[23] In addition to promoting fairness and efficiency, census discovery helps courts to ensure they do not overstep their jurisdiction by adjudicating claims where plaintiffs lack Article III standing.[24]

The Rule should also make clear to transferee courts that plaintiff fact sheets and other census discovery should be "deemed a form of discovery governed by the relevant Federal Rule of Civil Procedure, requiring the same level of completeness and verification."[25] Per the MDL Guidelines, "[c]ase management orders should include procedures for dismissing claims due to substantial noncompliance with fact sheet requirements and deadlines."[26] Failure to comply may warrant dismissal of MDL plaintiffs' claims, just like a plaintiff in an individual case may have their claims dismissed for failure to comply with discovery obligations.

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[21] MDL Guidelines, *supra* note 3, at 10.

[22] *Id.* at 9. While census discovery is necessary to identifying potential bellwethers, either formally designated or *de facto*, some degree of randomness may be helpful to prevent gamesmanship by the parties. *See* Loren H. Brown, et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 Akron L. Rev. 663, 690 (2014). Transferee courts should consider the option of random selection of bellwethers from a pool of cases that meet certain criteria for representativeness.

[23] MDL Guidelines, *supra* note 3, at 11 (discussing pharmaceutical and medical device products liability cases specifically); *see also id.* (discussing personal injury and employment cases).

[24] *See* Lawyers for Civil Justice, *supra* note 20, at 4-5 (Sept. 18, 2023); DRI Ctr. L & Pub. Pol'y, *Separating the Wheat from the Chaff: The Need for a Rules-Based Solution to Address Unsupportable Claims in Context of MDL Proceedings* 6-7 (Oct. 11, 2023), https://www.dri.org/docs/default-source/center-law-public-policy/dri-center-comment-on-proposed-frcp-16-1_final2.pdf?sfvrsn=2#:~:text=In%20addition%2C%20DRI%20believes%20that,not%20cast%20aspersions%20on%20parties.

[25] MDL Guidelines, *supra* note 3, at 10; *see also id.* at 13 ("[T]imely and substantial compliance with fact sheet requirements, including completion of 'core criteria,' should be the norm.").

[26] *Id.* at 13; *see also In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 2007–MD–1871, 2010 WL 4720335, *1 (E.D. Pa. Nov. 15, 2010) (*Lone Pine* order entered three years into litigation because the court "share[d] Defendant's concern" that plaintiffs had failed to provide documentation in support of statements in their Plaintiff Fact Sheets and required "additional support" to "objectively identify which of the many thousand plaintiffs have injuries which can credibly be attributed to" using the allegedly defective product).

C. Proposed 16.1(c)(7)

Existing Draft Rule: As proposed, Rule 16.1(c)(7) suggests as a possible topic for the initial case management report "any likely pretrial motions and a plan for addressing them." The accompanying portion of the Draft Committee Note explains that "[e]arly attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery."

Comment: Rule 16.1(c)(7) in the Preliminary Draft once again fails to provide genuine guidance to transferee courts to assist them in efficiently managing the MDL docket. In the absence of early resolution, each MDL case will ultimately be remanded for trial. The motion for the transferee court to suggest remand to the JPML is thus the prime example of a likely pretrial motion in an MDL. Transferee courts should not abuse their discretion over the remand decision by having cases sit, warehoused in the MDL, when efficient remand for trial is possible.[27] As reported in MDL Guidelines, judge and counsel are increasingly recognizing that remand "may be on the table from the first days of the MDL, with judges setting end-dates for resolution and working backwards to set the case management schedule."[28] Even when the initial case management report does not set a remand date,[29] the court and parties should be focused from the outset on setting a schedule that efficiently pushes cases toward resolution by motion or trial.[30] When proposing the schedule in the initial case management order, the parties should have to provide the transferee court their proposals for the most efficient method of reaching this ultimate scheduling goal.

D. Proposed Rule 16.1(c)(9)

Existing Draft Rule: As proposed, Rule 16.1(c)(9) suggests as a possible topic for the initial case management report "whether the court should consider measures to facilitate settlement of some or all actions before the court." The Committee Note in the Preliminary Draft affirms that settlement is "a decision to be made by the parties" while also noting that "a court may assist the parties in settlement efforts."

Comment: Hollingsworth LLP shares other commentors' concerns that the Preliminary Draft identifying settlement as an issue to be addressed at the initial case management conference phase

[27] *See Hamer v. LivaNova Deutschland GmbH*, 994 F.3d 173, 180–81 (3d Cir. 2021) (Transferee courts should suggest remand as soon as remand is more efficient and must remand when no pretrial issues remain.); *see also In re Managed Care Litig.*, 416 F. Supp. 2d 1347, 1348 (J.P.M.L. 2006) (The JPML has sole authority to remand cases, but has "consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate.").

[28] MDL Guidelines, *supra* note 3, at 1; *id.* at 3 ("Both judges and counsel strongly supported the emerging practice of setting an end-date for the MDL, then working back into a trial schedule."); *id.* at 94 ("As a mechanism to keep counsel keenly focused on moving the cases forward, some transferee judges now set end dates for their MDLs, at which point any cases not resolved are remanded.").

[29] *Id.* at 3 ("This end-date should of course be set after the transferee judge has become educated about the case and consulted with counsel about their understandings and expectations.").

[30] *Id.* at 2 (describing the modern assigning practices of the Joint Panel on Multidistrict Litigation).

could lead transferee courts to mistakenly apply an aggregated settlement approach.[31] Transferee courts can best facilitate party-led settlement "by advancing the litigation so that factual and expert development occurs and the cases become ripe for settlement discussions."[32] That cannot occur until the transfer courts have engaged with the merits of the case inventory.

II. Proposed Rule 16.1(d) Should Instruct Transferee Courts to Promote Justice and Efficiency By Using the Information Provided on the Rule 16.1(c) Issues and Remaining Engaged with the Issues as the Litigation Progresses.

Existing Draft Rule: As proposed, Rule 16.1(d) provides that the transferee court "should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion." The proposed Committee Note identifies the goal of the Rule as the "effective and efficient management of MDL proceedings" and encourages courts to be open to modifying the management order when appropriate throughout the case.

Comment: Rule 16.1(d) is the Rule's sole direction to the transferee court to use the information provided by the parties' initial case management report, but it provides *no direction whatsoever* about how to use that information to efficiently resolve MDL cases. Indeed, the portion of the Draft Committee Note on Rule 16.1(d) even contradicts the lone instruction in the Preliminary Draft's plain language—the direction to the transferee court to address the matters designated under Rule 16.1(c). No reasonable person would argue that there is a one-sized-fits-all approach to most efficiently resolving MDL cases. But the proposed Rule 16.1(d)'s refusal to even specify the goals of a case management order—goals which are unique in the MDL context—makes it hard to see how enacting the proposed Rule would achieve anything at all. The plain language of Rule 16.1(d) should contain at least the goals and guidance contained in the proposed Committee Note.

First, Hollingsworth LLP agrees with other commenters that there is little point in the Potemkin exercise of creating a rule without content.[33] The draft Rule 16.1(d) does not actually instruct courts to follow the approach contemplated by Rule 16.1. The final Rule 16.1(d) should instruct transferee courts to use the information in the parties' initial case management report to determine the most efficient process for continuing the litigation, to identify potentially representative cases to develop for individual case work up and possible early trial, and to cull spurious claims from the docket.

Second, Rule 16.1(d) should instruct that the transferee "court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings," instead of relegating this guidance to the Preliminary Draft's accompanying Committee Note. Transferee courts should routinely revisit the Rule 16.1(c) topics with the benefit of the information obtained at earlier phases of the litigation and with the goal of identifying additional ways to efficiently

[31] Lawyers for Civil Justice, *supra* note 20, at 17-19.

[32] MDL Guidelines, *supra* note 3, at 96.

[33] *See, e.g.*, Lawyers for Civil Justice, *supra* note 20.

resolve cases within the MDL inventory.[34] Encouraging the continued use of the merits-driven approach beyond the initial case management phase would be a significant step toward giving Rule 16.1 real impact.

As the census discovery and case-specific discovery required under the initial case management order begins to identify the key factual issues in the litigation, transferee courts should act on that information to facilitate merits-driven case resolution. When a potentially dispositive issue is identified, transferee courts should amend case management orders to require at least *prima facie* evidentiary support on that issue in the relevant cases, regardless of whether those cases are in active discovery. Such orders can help significantly in preventing a flood of spurious claims drowning out potentially meritorious cases that deserve to be heard.[35] "*Lone Pine* orders [that] require each plaintiff in a mass-tort MDL to submit a report setting forth evidence sufficient to document the basis for his or her personal-injury claims" are a prime example, but certainly not the only one.[36] Courts are increasingly using such orders to screen cases where plaintiffs cannot produce readily-obtainable evidence necessary to prove causation, injury, or use of the allegedly defective product.[37] Courts have also used case management orders requiring offers of proof to address widespread failure to comply with discovery obligations.[38] When appropriate, transferee courts should use multiple orders "to streamline the litigation as needed at different stages throughout the pendency of the MDL."[39]

This approach benefits all legitimate parties to the litigation. Plaintiffs with non-spurious claims secure earlier decisions on the merits—including whatever damages they may ultimately receive—and defendants obtain rulings or verdicts that allow them to accurately value the case inventory

[34] This proposal is fully in line with the draft Committee Note concerning Rule 16.1(c)(8), which notes that "courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote … communication between the parties and the court on a regular basis."

[35] *See* Robreno, *supra* note 4, at 186-87 ("unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process"); *see also Abbatiello v. Monsanto Co.*, 569 F. Supp. 2d 351, 353-54 (S.D.N.Y. 2008) (*Lone Pine* orders can help "protect defendants and the [c]ourt from the burdens associated with potentially non-meritorious mass tort claims").

[36] MDL Guidelines, *supra* note 3, at 104; *see id.* ("It has been recognized that the 'basic purpose of a *Lone Pine* Order is to identify and cull potentially meritless claims …. *Lone Pine* Orders can be issued at any time … to weed out truly meritless cases and cases that claimant and counsel are not prepared to pursue, and to ensure that the transferor courts receive only viable cases."); *id.* at 13 ("Especially as a proceeding matures, the transferee judge may consider the entry of *Lone Pine* orders requiring all plaintiffs to submit an affidavit from an independent physician. These orders are particularly important in an MDL proceeding involving disparate theories of causation—or when multiple alternative potential causes of the alleged injuries exist.").

[37] *Id.* at 95.

[38] *Id.* at 14 ("When fact sheets have been submitted with inaccurate information, the court should consider requiring that all individual parties submit some minimum quantum of evidence. If no such evidence is available, the court should provide individual an opportunity to explain the absence of the evidence."); *e.g.*, *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 2007–MD–1871, 2010 WL 4720335, *1 (E.D. Pa. Nov. 15, 2010) (*Lone Pine* order entered three years into litigation because the plaintiffs had failed to provide documentation to support their Plaintiff Fact Sheets, so additional support was needed to "objectively identify which of the many thousand plaintiffs have injuries which can credibly be attributed to" the product at issue).

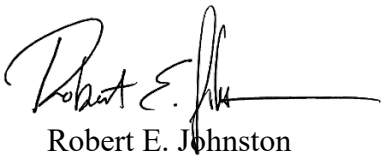
[39] MDL Guidelines, *supra* note 3, at 105.

without paying to defend the bogus claims that make up a staggeringly large proportion of the MDL inventory.[40]

CONCLUSION

The undersigned respectfully submit the foregoing comment in the hope it will aid the Committee in crafting the language of Rule 16.1 to promote the just and efficient resolution of MDL cases.

Sincerely,



Robert E. Johnston

Gary Feldon

[40] Advisory Committee on Civil Rules, *supra* note 7, at 3 (20-50% of all MDL claims lack even the basic elements of a viable claim).

DIAMOND~MASSONG
Where Law and Medicine Merge

Maria S. Diamond
Attorney at Law

February 1, 2024

Advisory Committee on Civil Rules
Administrative Office of the United States
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Rule 16.1 – Multidistrict Litigation

Dear Members of the Rules Committee:

I am a partner at Diamond Massong, PLLC in Seattle, Washington. My firm specializes in representing plaintiffs who have been injured by medical negligence or by medical devices and pharmaceutical products. Since my admission to practice in 1983, I have practiced in state and federal courts around the country, including mass tort MDL litigations.

I wish to begin by commending the Committee on its diligent and exhaustive efforts to address perceived problems with current MDL practice, and to improve it for trial courts and litigants alike. However, I do have some fundamental concerns about the changes to Rule 16.1 that I am compelled to share.

Fundamentally, I must question the purpose behind the proposed rule change, i.e., exactly what problem are we trying to solve? This may seem rather basic, yet any rule changes must necessarily be filtered through this lens. If the problem is a need to provide guidance to MDL judges about how to manage an MDL, then I am concerned because the proposed rule changes go much further than providing mere guidance to judges. Although I'm certain everyone can agree on the goal of improving MDL management, as drafted the proposed changes to Rule 16.1 add unnecessary complexity to an already complex process. Further, they may well reduce efficiency and fairness, which are core principles of the MDL statute, and one should not be achieved at the expense of the other.

I am concerned about defense representations to the Committee that MDLs are "overwhelming" and "clogging the courts." Such representations are not only contrary to my own experience, but contrary to every **credible** source I have ever read on the subject.

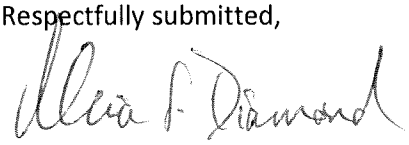
Additionally, I have some specific concerns with the proposed changes. First, is the notion of selecting "coordinating counsel" to ostensibly facilitate a coordination process. This is an issue that primarily impacts the plaintiffs' side as defendants come into an MDL with their chosen leadership counsel in place and ready to move forward. I strongly believe that the appointment of coordinating counsel will add a layer of complexity to a process that the Committee is striving to simplify. In contrast, individual plaintiffs are represented by many different attorneys. By the time of consolidation, there are dozens, if not hundreds, of law firms with filed cases at various stages that will be swept into the MDL.

The plaintiffs in every MDL deserve the best leadership counsel the court can appoint, taking into account the potentially myriad types of claims and issues in that MDL. From my perspective as an individual plaintiff's lawyer, there is no more important issue in an MDL than who is chosen to lead the litigation for all plaintiffs. Appointing a coordinating counsel that is later replaced by leadership counsel may well create an inefficient and potentially unfair lack of continuity in the process.

Finally, I am concerned about the proposed mandatory early verification and mandatory sanctions proposal. In many cases, defendants are the ones who possess proof of product use. Thus, it is no surprise that the corporate bar has proposed that plaintiffs be required to produce proof of use within 30 days of filing a complaint—an impossible feat in many cases. The fact that defendants are the gatekeepers of proof of use is one of the very reasons the Federal Rules of Civil Procedure do not require plaintiffs to prove their case upon filing a complaint. The discovery process is intended to find and develop proof. Complaints need only provide fair notice of a plausible claim based on information and belief. Moreover, if appropriate, Rule 11 already provides a remedy for sanctions.

Thank you for your consideration.

Respectfully submitted,



Maria S. Diamond
Attorney at Law

MSD:

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February 2, 2024

Submitted via regulations.gov

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, District of Columbia 20544

Re: Proposed Adoption of Rule of Civil Procedure 16.1

Judge Bates:

Washington Legal Foundation submits this comment on the proposed Federal Rule of Civil Procedure 16.1. WLF appreciates the opportunity to weigh in on whether the Committee on Rules of Practice and Procedure should submit the proposed rule to the Supreme Court for approval. As explained below, the Committee should submit the proposed rule, with some modifications.

Trying to conserve judicial resources, Congress created multi-district litigation over 55 years ago. But MDLs have not lived up to their initial promise. Transferee courts adopt procedures meant to avoid trials. The procedures exert tremendous pressure on defendants to reach a global settlement. MDLs thus encourage plaintiffs to file baseless claims. That is one reason that MDLs are now the most common way aggregate litigation is resolved in the federal courts. At the end of fiscal year 2022, 61.5% of all civil cases in federal court were in MDLs.[1] The sharp increase in the percentage of cases housed in MDLs has highlighted many MDL shortcomings. They no longer help "secure the just, speedy, and inexpensive determination of every action and proceeding."[2]

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[1] *Judicial Panel on Multidistrict Litigation — Judicial Business 2022*, U.S. Courts, https://perma.cc/A8DU-9GQC; *Judicial Caseload Indicators - Federal Judicial Caseload Statistics 2022*, U.S. Courts, https://perma.cc/AM8B-AQ3F.

[2] Fed. R. Civ. P. 1.

Adopting a rule that addresses MDL problems is long overdue. But the Proposed Rule has several defects. For example, it encourages the appointment of leadership counsel, which could create more problems than it would solve. The Proposed Rule's ideas for new pleadings and direct filing orders do not belong in the federal rules. Nor do suggestions for how to encourage settlement or use special masters. This comment, however, does not address these issues as they are adequately discussed by other comments submitted to the Committee. Rather, this comment focuses on what WLF sees as one of the biggest problems with MDLs—the inability to quickly dismiss meritless claims.

I. WLF Has An Interest In Ensuring That MDLs Operate In An Efficient Manner.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. It submitted a comment to the Advisory Committee on Civil Rules about the need for a new civil rule addressing MDL procedures.[3] WLF also appears before federal courts urging that defendants in MDLs get a fair shot.[4] WLF's Legal Studies Division, its publishing arm, often produces and distributes articles on legal issues related to MDL problems.[5]

II. Proposed Rule 16.1(c) Should Be Amended To Vet Claims Earlier.

MDLs often attract meritless claims. Because of the hydraulic pressure that defendants face to settle MDLs, plaintiffs are encouraged to file "cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action."[6] This is because plaintiffs' "lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of

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[3] *See* WLF Letter, *In re Multi-District Litigation Reform* (Sept. 23, 2019).

[4] *See, e.g.*, *E. I. du Pont de Nemours & Co. v. Abbott,* 144 S. Ct. 16 (2023) (per curiam).

[5] *See, e.g.*, Christopher P. Gramling et al., *Early Assessment of Claims Can Help Reduce the MDL Tax*, WLF WORKING PAPER (Mar. 2020); Mary Nold Larimore & Matthew J. Hamilton, *Cost-Shifting Can Stimulate More Focused, Efficient Discovery in MDL Proceedings*, WLF LEGAL BACKGROUNDER (June 1, 2018).

[6] *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2016 WL 4705807, *1 (M.D. Ga. Sept. 7, 2016).

their case being scrutinized as closely as it would if it proceeded as a separate individual action."[7] Plaintiffs' firms are incentivized to file many claims because it "may provide the firm some advantage in obtaining a leadership role."[8] So there is "little practical downside to building a sizeable claim portfolio, particularly for those with reasonable prospects of obtaining an appointment to the steering committee or some other lucrative role in the case."[9] This has led to a "sophisticated legal ecosystem" in which plaintiffs' attorneys drum up plaintiffs to bring claims in pending MDL actions.[10]

Data shows that between 30% and 50% of all claims in MDLs are unsupportable.[11] This means that a plaintiff "did not use the product involved," "had not suffered the adverse consequence in suit, or [] the pertinent statute of limitations had run before the claimant filed suit."[12] The number of baseless claims hurts public confidence in the fairness of the MDL process. Allowing so many meritless claims to go undetected is unfair to defendants. Many defendants, especially those in the healthcare sector, must pay an "MDL Tax." There is very little cost to plaintiffs filing claims. But defendants must pay for discovery and other costs. Besides these financial burdens, many healthcare defendants must report the existence of these claims to the Food and Drug Administration and their shareholders. The pressure to settle the claims is thus very high. The continued costs of allowing an MDL to drag on usually outweigh any benefit in defeating the meritless claims.

Baseless claims also saddle the judiciary with costs, which are ultimately borne by taxpayers. When unsubstantiated claims are allowed to linger, there are motions and other procedural issues that courts must handle. Some of the largest MDLs require a full-time law clerk to handle the flood of filings and have three magistrate judges assigned to handle different aspects of the case.[13]

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[7] *Id.*

[8] S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 Clev. St. L. Rev. 391, 412 (2013).

[9] *Id.*

[10] *See* Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, Wall St. J. (Nov. 25, 2019), https://perma.cc/7X9C-7QPN.

[11] MDL Subcommittee Report, Advisory Committee Rules of Civil Procedure, 142 (Nov. 1, 2018), https://perma.cc/36EV-CSKH.

[12] *Id.*

[13] *See, e.g.*, MDL 875 In Re: Asbestos Products Liability Litigation (No. VI), U.S. Dist. Ct. for the E.D. Pa., https://perma.cc/BL56-NTDU.

Plaintiffs' attorneys have developed tactics that help ensure that these meritless claims go undetected. They do not timely complete the fact sheets so defendants and judges lack even basic information about the plaintiffs and their claims.[14] This way, the plaintiffs' claims may survive long enough to be swept into a global settlement where they can get a piece of the pie.[15]

The best solution to this problem is a rule that allows for defendants and transferee courts to quickly identify these unsupported claims. But Proposed Rule 16.1(c)(4) fails to accomplish that goal. It mistakenly conflates the lack of a claim with a lack of adequate discovery. This problem is evidenced by Proposed Rule 16.1(c)(4) saying that the parties will exchange information. That suggests a two-way street in which both the defendant and the plaintiffs must provide each other with information about the plaintiffs' claims. That does nothing to help eliminate unsubstantiated claims and only increases the burden on defendants while further encouraging plaintiffs to file meritless claims.

The solution to the Proposed Rule's flaws is simple. Proposed Rule 16.1(c)(4) should be amended to mandate that plaintiffs alone must establish standing and the facts necessary to state a claim, including facts establishing the nature and timeframe of any use of the product in question. Plaintiffs should provide this proof soon after the case is filed or transferred to an MDL so that unsubstantiated claims can be quickly dismissed.[16] This requirement should also come with some teeth. The Proposed Rule should explicitly state that an attorney who provides false information required by Proposed Rule 16.1(c)(4) may be sanctioned under Rule 11. This would help discourage plaintiffs' counsel from filing the unsubstantiated claims and help to ensure that MDLs are more efficient for the judiciary and fairer for defendants.

The note to Proposed Rule 16.1(c)(4) should also be amended. Like the Proposed Rule, the note uses the word "exchange" five times. This too suggests that defendants have some role to play in providing information necessary to establish the viability of a claim. But worse is the note's discussion of both claims and defenses. The point of Proposed Rule 16.1(c)(4) is to weed out large

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[14] *In re Phenylpropoanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1227, 1234 (9th Cir. 2006).

[15] *See Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2016 WL 4705807 at *1.

[16] *Cf. In re Zoloft (Sertraline Hydrochloride Prods. Liab. Litig.)*, MDL No. 2342, Doc. No. 216, 59-62. (Judge Rufe telling plaintiffs' counsel at the first status conference that they must soon make the appropriate certification).

numbers of claims that are unsubstantiated. The goal is not to burden defendants with greater disclosure requirements. Doing so would even further encourage plaintiffs to file unsubstantiated claims because defendants may decide that reaching a global settlement is better than complying with discovery. These references to exchanging information and defenses should thus be removed from the note to Proposed Rule 16.1(c)(4).

The note is also flawed because it lacks any mention of the problems that undergird the Proposed Rule. As mentioned above, the point of the proposal is to help identify unsubstantiated claims much earlier. Yet the note appears to discourage MDL courts from meaningfully enforcing Proposed Rule 16.1(c)(4) by focusing on discovery, the exact timing of which depends on many factors. In other words, the note does not encourage courts to require disclosures as soon as claims are filed.

The Subcommittee's report includes the solution to this problem. As the report states, "[t]he unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. [In normal civil litigation, defendants can] challenge individual claims one by one."[17] Explaining in the note that this early challenging of claims is impractical in the MDL process and thus the required early disclosure by plaintiffs would help courts and litigants understand Proposed Rule 16.1(c)(4)'s purpose.

To encourage MDL courts to strictly require plaintiffs to provide the necessary information, the note should also describe how early examination of claims benefits the judiciary and ensures that defendants have due process of law. This explanation would ensure that MDL courts do not see Rule 16.1(c)(4) as another requirement without an end but rather view it as a tool to eliminate baseless claims and help resolve all claims more quickly. Combined with the amendments to the Proposed Rule itself, these fixes to the note will ensure that adopting Proposed Rule 16.1(c)(4) accomplishes its goal.

* * *

[17] MDL Subcommittee Report, *supra* n.11 at 143.

Adopting a specific rule addressing many issues present in MDLs is a good idea, and WLF applauds the Committee and the Subcommittee for their hard work on these issues. But Proposed Rule 16.1 is flawed in several respects. The Committee should fix those problems before submitting the proposal to the Supreme Court for its approval.

Respectfully submitted,

John M. Masslon II
SENIOR LITIGATION COUNSEL

Cory L. Andrews
GENERAL COUNSEL & VICE
PRESIDENT OF LITIGATION

United States District Court
Northern District of California
United States Courthouse
San Francisco, California 94102

Chambers of
Charles R. Breyer
United States District Judge

February 2, 2024

Advisory Committee on Civil Rules
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Rule 16.1 – Multidistrict Litigation

Dear Members of the Rules Committee,

I am writing in support of proposed Rule 16.1.

I am a recent convert to the rules process directed to Multidistrict Litigation. Over the past twenty-five years, I have conducted more than a dozen MDL proceedings. My case management decisions in those MDLs have always been guided by the Federal Rules of Civil Procedure 1 and 28 U.S.C. § 1407, which directs transferee courts to adopt procedures that will promote the just and efficient conduct of the action. While the goal of a "just and efficient" process is laudatory, it is also abstract. Proposed Rule 16.1 addresses this concern by providing the court and the parties with a checklist of options that, in any given case, may achieve efficiency and a just result.

My conversion to supporting such a rule can be explained by the precatory, as distinct from mandatory, nature of its recommendations. Rule 16.1 suggests to the court and to the parties various tools that can be applied in an appropriate case, recognizing that a "one size fits all" approach can be inefficient and unjust. For example, it may be appropriate in one case to address jurisdictional concerns at the outset, before additional resources are expended; in another case, a court may wish to address the legal sufficiency of the claims, or statute of limitations issues, in advance of costly merits litigation. In non-MDL cases, judges routinely balance these concerns. There is no reason to dictate to judges the order, or necessity, of adjudicating these concerns in MDL cases.

A recent article in Law 360, "Proposed Rule Misses the Mark on Improving MDLs" (available at https://www.law360.com/articles/1789085/proposed-rule-misses-the-mark-on-

improving-mdls), expressed concern that the proposed rule does not require the early vetting of claims. While I can appreciate requesting that such a procedure be considered in a case management order, it may make sense in some cases to await a determination of certain factual or legal issues before ascertaining the scope of the litigation.

Success in managing MDL litigation often stems from the judge's ability to utilize his or her experience and common sense. The proposed rule helpfully focuses the parties' and the court's attention on approaches that will result in substantial cost and time savings, while allowing the court flexibility to choose which of those approaches to employ in a particular case with a set of particular issues.

I urge adoption of proposed Rule 16.1.

Sincerely,

Charles R. Breyer
U.S. District Judge

The Superior Court
SPRING STREET COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

COMMENTS ON FEDERAL RULE OF CIVIL PROCEDURE 16.1

SUBMITTED BY JUDGES OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES ASSIGNED TO THE COMPLEX CIVIL LITIGATION PROGRAM

Feb. 2, 2024

Introduction

The commentators are judges assigned to the Complex Civil Litigation Program for the Superior Court of the State of California for the County of Los Angeles. Some commentators have served as the original organizers of the Complex Litigation Program, including a former Presiding Judge for the County of Los Angeles. Our commentators have managed mass torts in state court involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories, to identify a few categories of our complex judges' workload. We hope to bring to the discussion lessons learned and best practices that we believe will further develop the case management rules for multidistrict litigation (MDL) envisioned by the proposed F.R.C.P. 16.1. These comments reflect our own professional views and experience and are not the official position of the Los Angeles Superior Court or of the California courts generally. Further, none of these comments refers to a particular case or indicates what the signatories would do in a case in the future.

The commentators believe the Rule is a good idea and orients judges and counsel to the court case management principles that effective case management requires. We agree with the introduction to the Committee Notes stating that the Rule can generally guide courts handling complex litigation, especially non-MDL aggregations. Early vetting, two-way discovery, and coordination with overlapping litigation in state court will help move along meritorious claims while eliminating meritless ones.

The MDL statute is over 50 years old.[i] Its basic outline is straightforward. The Judicial Panel for Multidistrict Litigation (J.P.M.L.) consolidates cases for all pretrial proceedings in a single federal district court.[ii] Like the coordinated state trials in California, the pretrial proceedings include core discovery, early dispositive motions, and motions in limine. The MDL judges also bifurcate trials of specific claims of plaintiffs and oversee settlements that may resolve large numbers of cases comprising the MDL.

The statutory charge is to promote the just and efficient conduct of MDL actions.[iii] An MDL

judge may "exercise such inherent powers as are necessary to manage and complete those pretrial proceedings." Although section 1407 is a procedural statute, it creates a complex consolidated litigation process that makes exercising the court's inherent power uniquely necessary.[iv]

MDL actions are volume-based litigation. Plaintiff's lawyers in MDLs generate revenue through economies of scale because litigation costs per client decline the more clients a firm acquires. As of 2020, 95 percent of all claims pending in MDL actions involve mass torts, which frequently benefit from tools developed to manage complex litigation.[v]

Some commentators believe there should be incentives to identify or eliminate meritless claims. We agree that the transferee court should take action early in the life of an MDL to determine whether the aggregation includes claims that are meritless and should not have been filed. The plaintiff and the plaintiff's attorney typically possess critical information about any potential harm before the case commences, and the plaintiff's counsel should exercise appropriate prescreening before filing such actions.

Commentators recommend an initial gatekeeper approach and frontloading initial disclosures.[vi] The Rule might suggest that the transferee judge in mass tort personal injury cases require attorneys to go further than basic Rule 11(b)(3) representations to the court and to certify within a short period of time post-filing that counsel has undertaken a diligent review of the plaintiff's available medical records, exposure information, and information about the use of the item or drug. The goal of such order is to eliminate baseless claims derived from mass marketing. The Rule should prompt judges to consider adopting initial mandatory discovery disclosures before party-driven discovery.

This approach should benefit early assessment and may enhance early resolution of actions.[vii] Such early disclosures are particularly beneficial in product liability and pharmaceutical cases.[viii] Encouraging transferee judges to use more cooperative models of discovery in MDL actions can be part of the solution to many of the fundamental problems arising from the filing of unvetted cases in MDLs.

Comment on (a) and accompanying Committee Note:

Subsection (a) of the proposed Rule recommends that the transferee court schedule an initial management conference after the MDL Panel orders the transfer of actions. We suggest this subsection also state that the transferee court should stay all included actions pending further order of the court at the Initial MDL Management Conference (if the MDL Panel itself does not order a stay of the transferred actions).[ix]

As we understand the MDL Panel Rules, before a transfer order is issued by the MDL Panel, the court before which a potentially included case is pending maintains pretrial jurisdiction. Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Rule 2.1(d). Therefore, before the MDL Panel orders transfer of an action, the (potential) transferor court may continue to hear and rule on motions and supervise ongoing discovery (although the court also may exercise its

discretion to stay the case pending a decision by the MDL Panel). See Manual for Complex Litigation, Annotated, section 22.35 at p. 504 (4th ed. 2023).

It is much more difficult to manage a case that has undecided motions or discovery disputes pending. A transferee court that receives such a case must unravel what already has been done by the parties in order to mesh future litigation activity in that case with motion practice and discovery in other cases that are part of the MDL. It is best that all litigation activity be temporarily stayed while the parties in the cases brought together by the MDL discuss among themselves and with the court an expeditious and economical plan for the litigation as a whole (subject of course to the parties' ability to request an exception to the temporary stay).

Comment on (b) and (c)(1) and accompanying Committee Notes:

We recognize that many MDL transferee judges have taken an active role in marshalling the available plaintiff firms, both for the preliminary purpose of designating "coordinating counsel" in advance of the Initial MDL Management Conference and to establish Plaintiffs' Leadership Counsel for the duration of the MDL. In our experience, the court need not undertake this role. It is better initially to stand back and let the multiple plaintiff firms who have clients with claims in the MDL attempt to organize themselves.

The use of the term "may" in subsection (b) and the term "whether" in subsection (c)(1) supports our view that the MDL judge should use discretion before any particular plaintiff firms are selected to be first among equals by having a "coordinating" role or a court-selected Plaintiffs Leadership role. The draft Comments regarding subsection (c)(1) impliedly presume that affirmative efforts by the Court to select Plaintiffs' Leadership is desirable. We suggest this language be re-worded in a more balanced fashion to recognize the risks in both outward appearances and judicial ownership of the work of Plaintiffs' Leadership when the leadership is chosen primarily by the Court and not by voluntary private ordering by the advocates.

An aggressive effort by the Court to organize the representation for one side of a litigated dispute and then to manage the work of such lawyers may seem to imply that the Court is a kind of guarantor of the adequacy of the representation and a champion of the outcome to be obtained by the legal team created by the Court's efforts. This is contrary to the Court's role as a disinterested neutral managing a complex mass tort proceeding. The draft comment to subsection (c)(1) implies that the Court has a fiduciary duty to mass tort plaintiffs to ensure the adequacy of their representation. That is not supported by the law and is an undertaking by the Court that should not be accepted without clear justification. These are not class actions; each plaintiff has selected a lawyer, and the importance of this threshold action by the willing plaintiff should be recognized and honored.

We have found the plaintiff firms can arrange a reasonable division of labor and financial commitment among themselves in most cases, given a moderate amount of time to negotiate and draft work-sharing agreements and a method of dispute resolution. This private ordering can still provide the necessary efficiencies achieved by clear lines of communication between Plaintiffs' Leadership and defendant(s). When plaintiffs' counsel organize cost-sharing and dispute resolution among themselves, the MDL court is relieved of the need to closely supervise

time sheets, cost disbursements and associated matters which otherwise may consume a large amount of judicial effort (or, alternatively, require use of Special Masters at further eventual expense to the lawyers and thus, inevitably, to the parties themselves). As and when the appearing plaintiff firms present a workable leadership structure, we have no problem with judicial endorsement of the proposed arrangement. We discuss below how plaintiffs with lawyers outside the leadership structure should be allowed to control their own cases in due course.

We recommend that the comments suggest the Court should designate Plaintiffs' Leadership only after the lawyers demonstrate over a period of weeks of effort that they cannot organize themselves or if the leadership team chosen collectively by the plaintiffs demonstrates clearly that it is unable to effectively coordinate plaintiffs' collective efforts. In such instances, the Court should clarify why it has undertaken to select a leadership team – so that some such Plaintiffs' Leadership can be put in place – and that the Court is not thereby trying to be the guarantor of the adequacy of such leadership or endorsing the actions of the selected leadership group (consistent with the court's duty to remain neutral).

Comment on (c)(1)(E) and accompanying Committee Note:

Regarding preparing a joint report on behalf of plaintiffs, the Comment says that the report may reflect parties' divergent views. This is appropriate, but the Comment also says it may be necessary for the court to give priority to leadership counsel's pretrial plans. We suggest the court apply its own good judgment as to appropriate case management and the priority of case activity after considering everyone's views. We agree with the current draft comment that the MDL court must "take care not to interfere with the responsibilities non-leadership counsel owe their clients." They should be encouraged to take advantage of discovery and other resources created by the court in coordination with Plaintiffs' Leadership and defendant(s), but in due course they should be allowed to bring their cases to trial, failing settlement, with such additional preparation as they show they reasonably need, even if this involves additional discovery beyond that sought by Plaintiffs' Leadership. These efforts may be prudently stayed by the MDL court while it attempts to move the majority of the pending claims to early bellwether trials and/or settlement activity.

Comment on (c)(1)(F) and accompanying Committee Note:

The draft rule in subsection (c)(1)(F) presumes that an MDL court has the power "to establish a means for compensating leadership counsel." This is a reference to the frequent practice in MDLs of establishing a court-ordered "common benefit fund" by which each plaintiff's case is taxed some percentage of any recovery to pay for attorney fees and attorney costs incurred by Plaintiffs' Leadership. In common application, this tax is imposed on all plaintiffs in the federal MDL cases whether or not they want the help of Plaintiffs' Leadership and whether or not their chosen lawyer is part of Plaintiffs' Leadership. In some cases, the federal MDL judge also imposed this same tax on plaintiffs who file in state court and never were subject to federal court jurisdiction.

We invite the Committee to consider the academic literature as to whether these common benefit funds are lawfully imposed. While it is true that "common fund" taxes on actual recoveries obtained for the benefit of many have been imposed for decades where litigation success already has created an actual fund, it is questionable whether these authorities allow federal MDL courts to create an anticipated revenue source without regard to the actual benefits provided by Plaintiffs' Leadership in a given MDL. The practices developed in MDLs over the years create a revenue pool which, in turn, generates obvious competition for the opportunity to share in this money by selection to serve in a Plaintiffs' Leadership position created by the court. In simple terms, taxing a portion of any recoveries that might occur in a mass tort case (whether by verdict and judgment or by settlement), creates a strong incentive to participate in Plaintiffs' Leadership and to incur "billable hours." This then may force the Court to manage the work of such leadership by reviewing progress billing for hours and costs incurred (often via use of Special Masters) and reviewing litigation strategies employed.

These problems are discussed at length by Professor Charles Silver and Professor Robert Pushaw in two recent articles. Charles Silver, "The Suspect Restitutionary Basis for Common Benefit Fee Awards in Multi-District Litigations," 101 TEX. L. REV. 1653 (2023); Robert J. Pushaw, Jr. and Charles Silver, "The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations," 48 BYU L. REV. 1869 (2023). District Judge Vince Chhabria also carefully reviewed the sources of a federal district court's power to impose a common benefit tax in his decision in 2021 regarding a request by Plaintiffs' Leadership for approximately $800,000,000 in the Roundup MDL. *In re Roundup Prods. Liab. Litig.*, 544 F.Supp.3d 950, 958-62 (N.D.Cal. 2021). A detailed defense of the practices that have developed in MDLs was published by District Judge Eldon E. Fallon in 2014. Eldon Fallon, "Common Benefit Fees in Multidistrict Litigation," 74 LA. L. REV. 371.

We suggest the Comments should, at a minimum, acknowledge that the legal basis for the application of these assessments in mass tort litigation to unwilling plaintiffs remains open for debate. Conversely, we agree with the concept that cost-sharing agreements between willing plaintiffs and their chosen lawyers as a matter of private ordering of leadership/work-sharing agreements amongst such plaintiffs are acceptable and desirable. The distinction is that such arrangements are voluntary, not imposed by the asserted power of the Court, and that the Court, therefore, is relieved of the duty of ongoing supervision of such expenditures. The willing parties can consign the task of resolving disputes about agreed common-benefit expenses to other willing neutrals via arbitration, isolating the Court from any such supervisory duties.

Comment on (c)(3) and (c)(4) and accompanying Committee Note:

An early focus of complex litigation (indeed of all litigation) should be on the principal factual and legal issues. Reducing uncertainty about the most important facts and about key legal issues encourages consensual dispute resolution.

The first case management conference provides a fundamental opportunity for early assessment to determine if a more cooperative model of initial mandatory disclosure will work. The transferee judge may inquire whether the plaintiff's attorney has engaged in prefiling due diligence and whether both sides are amenable to initial disclosure of discovery. The transferee

judge may identify non-meritorious claims early in the litigation's lifecycle using plaintiff fact sheets and may require certification of prefiling due diligence. The Court may require plaintiffs to offer straightforward information (including limited documentation authorizations); to identify the injury, the exposure, and the identity of the plaintiff's lawyers; and to state whether plaintiffs have sought compensation for a similar injury, illness, or condition and the compensation sought and obtained. Finally, the Court may track compliance with the plaintiff's fact sheets and precertification review in addressing allocations impacting common benefit funds (if the Court determines it has authority to impose such allocations).

Comment on (c) (11) and accompanying Committee Note:

Subsection (c) (11) of the proposed Rule recommends the parties identify related actions that have been filed or are expected to be filed in other courts and consider possible methods for coordinating them. The draft committee notes recognize that many state court systems have mechanisms for consolidating separate actions in their courts, and there may be overlap with the MDLs.

Based on our experience, there are many reasons why parties may not include state court actions in an MDL. The absence of complete diversity, faster resolution in state court, the plaintiff's desire to avoid common assessments, and loss of control over the litigation commonly drive the selection of state court jurisdiction. Even if cases are not removable, there are several reasons that state courts may track the MDL and benefit from coordination.[x]

Some commentators have looked favorably on federal-state court coordination in such circumstances. The Manual for Complex Litigation recommends that MDL judges "communicate personally with state court judges, who have a significant number of cases in order to discuss mutual concerns, and suggestions," and share "pretrial orders, and proposed schedules."[xi] Chief justices from the state courts advise "to take all available and reasonable steps to promote communication between state and federal courts for the purpose of establishing best practices for the management of like kind litigation that spans multiple state jurisdictions, and federal districts."[xii]

While the drafters acknowledge the important consequences of parallel state court proceedings for managing the MDLs, they omit the method of identifying such actions and the challenges presented to coordinate federal-state actions. Identification of similar state court actions is the first step in assessing coordination. Thereafter, after consultation with counsel, the MDL judge may contact a state judge coordinating similar consolidated state actions or direct counsel to initiate such contact. We recommend that the transferee judge appoint liaison counsel early in the litigation to identify and report all cases pending in other state court jurisdictions that may be similar or related to the MDL actions. Defense counsel may be in a better position to perform this reporting function.

The benefits of state court litigation coordination efforts with federal MDL are numerous.[xiii] Coordination between the state and federal court will promote cooperation in scheduling hearings, conducting and completing discovery, and providing access to common discovery work product through shared databases, platforms, and web-based sites available across court systems.

Cases tried in state courts may provide a benefit similar to the trial of bellwether cases in federal court; that is, such trials may reduce uncertainty about case value. These benefits can be enhanced if transferee judges and state judges in coordinated proceedings confer regarding selection of cases for trial in the respective proceedings.

The Rule may note that coordination can avoid inconsistencies between federal and state rulings on discovery and privilege issues (insofar as the same or similar rules for privilege apply in both forums). Less advanced state court proceedings may adopt wholly or in part fully developed case management orders and standardized pleadings, as well as adopting protocols for ESI and the like. Some judges have even held joint hearings or conferences with federal and state judges presiding over the presentation of evidence and argument on various issues, including Science Day presentations.

However, we invite the Committee to address the limitations imposed on federal courts regarding the preclusive effects of the MDL judge's rulings on state court actions. In *Smith v. Bayer Corp.*, the MDL Judge "engaged in extensive efforts to coordinate its proceeding with state courts" handling the same drug in related litigation. Despite these cooperative efforts, the federal judge eventually issued an injunction relying on the preclusive effects of the MDL action that resulted in the dismissal of the attempted class claim in the state proceeding. However, the U.S. Supreme Court unanimously held that the Anti-Injunction Act prevented the federal judge from overseeing proceedings outside the MDL. [xiv] The ruling highlights the limitations on an MDL judge's power over state court cases and provides guidance on the limits of coordinated efforts.

Finally, we reference back to our concerns above as to proposed subsection (c)(1)(F) regarding any use of common benefit funds as a tool to manage relationships between MDLs and state proceedings. For reasons of both comity and respect for the lack of jurisdiction of the federal courts as to parties not before such courts, the federal judiciary should proceed with caution before attempting to spread a common-benefit fund "tax" to cases pending in state dockets.[xv] For the same reasons, the MDL judges should understand that discovery produced by a defendant in the MDL on general liability issues is not then "owned" by the MDL Plaintiffs' Leadership or the MDL court such that access to the same discoverable information by the state court plaintiffs and their advocates can be limited by the federal court restricting a defendant from providing discoverable information unless the state court plaintiffs agree to pay a common benefit fund assessment for the benefit of the MDL Plaintiffs' Leadership under the supervision of the MDL judge. The Ninth Circuit in *In re Bard IVC Filters Product Liability Litigation*, 81 F.4th 897 (9th Cir. 2023), enforced a common benefit fund assessment agreed to in the MDL on a lawyer settling a state court action, but the Ninth Circuit's reasoning was based on that lawyer's stipulation to those terms, which resulted in an order entered in the MDL based on that stipulation.

Conclusion

Based on our experience, a new F.R.C.P. 16.1 along the lines currently proposed will help the bench and bar manage these complicated mass tort cases, including cases pending in our state courts. We have focused our comments on a few parts of the draft rule that we believe will benefit from further consideration and revision. We urge careful consideration of the extent to which a neutral decision-maker should have substantial ownership of the choice of lead plaintiff

counsel and ownership, via imposition of a common benefit fund, of the process by which such lawyers receive compensation from plaintiffs who have not themselves hired these lawyers. We also remind the drafters of the rule of the importance of both comity and respect for the jurisdictional limits of an MDL district court's reach when it attempts to control the parties and judges' conduct in parallel proceedings in state court.

Thank you for considering our comments.

Respectfully submitted,

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David S. Cunningham III

Kenneth R. Freeman

William F. Highberger

Carolyn B. Kuhl

Yvette M. Palazuelos

Stuart M. Rice

Lawrence P. Riff

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[i] Public Law 90-296, 90th Congress, Second Session April 1968.

[ii] See 28 U.S.C. §1407(b).

[iii] See 28 U.S.C. §1407.)

[iv] See *In re Bard IVC Filters Product Liability Litigation*, 81 F.4th 897 (9th Cir. 2023).

[v] See Rosen Avraham, Lynn A. Baker, Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIGATION, 143, at 145-46 (2021).

[vi] *Ten Principles for Legitimizing MDLS*, 44 AM. J. TRIAL ADVOCACY 113.

[vii] See Carolyn B. Kuhl & William F Highberger, *A Unified Theory of Civil Case Management*, Vol. 107, #1 JUDICATURE, 35, at 37-42 (Duke University School of Law 2023).

[viii] *Id.*

[ix] Any such stay should allow service of process to continue.

[x] See Barios and Callsen, *Federal Multidistrict Litigation Coordination with State Courts*, 89 UMKC L. Rev. 855 (Summer 2021)

[xi] MANUAL FOR COMPLEX LITIGATION, ANNOTATED, section 20.312 at p. 263 (4th ed. 2023).

[xii] Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L. J. 1339, 1357.

[xiii] *Federal Multidistrict Litigation Coordination with State Courts*, 89 UMKC L. Rev. 855 (Summer 2021)

[xiv] See *Smith v. Bayer Corporation*, 564 U.S. 299 (2011).

[xv] *In re Roundup Prods. Liab. Litig., supra,* 544 F.Supp.3d at 964-969; *Genetically Modified Rice Litigation*, 764 F.3d 864, 874 (8th Cir. 2014).

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February 7, 2023

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed New Rule 16.1 on MDL Proceedings

Dear Committee on Rules of Practice and Procedure:

Over the last two decades, I have represented individuals harmed by pharmaceutical drugs and medical devices. In most instances, the cases have been consolidated within a multi-district litigation or similar state coordinated action. I have had the privilege to serve on several plaintiff steering committees of consolidated actions throughout my career, including Transvaginal Mesh MDL #s 2187, 2327, 2325, & 2326, Fosamax MDL # 1789, Essure California JCCP # 4887, and Risperdal/Invega California JCCP # 4775, and Stryker Rejuvenate & ABGII MDL # 2441, and understand firsthand the proficiencies and effectiveness of an MDL. It is a valuable tool providing access to the courts while creating efficiencies.

With any process there is always room for improvement and the committee's efforts to review and gauge the MDL process is appreciated. After reviewing proposed new Rule 16.1 it is evident that the committee has put a lot of time and effort into its development. There are aspects of the proposed rule with which I agree, however, there are other provisions that, while important, should not be covered at an initial conference.

The new proposed rule 16.1 (a) calls for the transferee court to schedule an initial management conference to begin to develop a case management plan. In my experience, the MDL transferee judges are already taking this proactive step to address preliminary matters, including, but not limited to if and how leadership will be appointed, how newly filed or related actions will be transferred in and/or coordinate with the MDL proceedings, and identifying other previously entered orders. The proposed new rule covers these preliminary matters accordingly.

However, the entirety of the proposed new rule broadens the scope of what is typically covered in an initial case management conference and includes items that would be untimely. Specifically, to

require the parties, before leadership is appointed to meet and confer on the following provisions, would be premature and may be prejudicial to the parties:

(4) how and when the parties will exchange information about the factual bases for their claims and defenses;

(5) whether the consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(6) a proposed plan for discovery, including methods to handle it efficiently;

(7) any likely pretrial motions and a plan for addressing them.

(9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I); and

(12) whether matters should be referred to a magistrate judge or a master.

Each of the above requires substantive knowledge of the case itself, considerable time to negotiate between the parties, and fundamental decision making that will impact the entire litigation. Thus, the above would be better addressed once an MDL judge appoints leadership. As an example, the proposed new rule indicates that a plan and methodology for discovery should be mapped out. That would include meeting and conferring on important orders before either side fully understands the breath of discovery, like a protective order, ESI order, and/or case specific discovery order. Further, in my experience, these orders typically take several meet and confers to negotiate, often time taking months and multiple hearings with the judge to iron out disputes. In some cases, depositions are needed before an ESI order or search terms are agreed upon. To require a proposed plan for discovery that includes methodology at an initial conference would likely cause delay. The six provisions set forth above are better managed once leadership is appointed or after the initial conference.

As such, my recommendation is that the committee promulgate a rule limited to the preliminary matters that can and should be covered in an initial conference. Thank you for considering my comments on proposed new Rule 16.1.

Respectfully submitted,

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February 8, 2024

Via Email
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Dear Committee Members,

On December 7, 2023, the Minnesota State Bar Association's (MSBA) Assembly, its policy-making body,voted to support the proposed amendments to the following Federal rules and forms, as well as one new rule:

• Appellate Rules 6 and 39;

• Bankruptcy Rules 3002.1 and 8006; • Bankruptcy Official Forms 410, 410C13-M1, 410C13-M1R, 410C13-N, 410C13- NR, 410C13-M2, and 410C13-M2R; and

• Civil Rules 16, 26, and new Rule 16.1.

The MSBA believes the proposed changes will foster increased transparency and possibly efficiency between parties and the court.

Sincerely,

Cheryl Dalby

Cheryl Dalby
Chief Executive Officer

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February 9, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Building, Room 7-240
One Columbus Circle, NE
Washington, DC 20544

Re: Public Comment of John Rosenthal and Jeff Wilkerson, Partners at Winston & Strawn LLP, Regarding Proposed New Rule 16.1

The undersigned attorneys, partners at the law firm of Winston & Strawn LLP, respectfully submit this Comment to the Advisory Committee on Civil Rules (the "Committee"), which responds to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on the published draft of proposed new Rule 16.1 (the "Proposed Rule").[1]

I. Introduction

At the outset, we would like to thank the Committee for its hard work and attention to the matters addressed by the Proposed Rule. We have been engaged in this process throughout, including recent attendance at key events such as Duke Law School's McGovern Symposium in Durham and Baylor Law School's MDL Judicial Summit in Aspen. The Committee's engagement with these issues, not just through the rulemaking process, but also via discussion with the bench and bar, is commendable.

In our collective view, the importance of a fair and orderly approach to MDL case management cannot be overstated. Cases consolidated in MDLs dominate the federal civil docket, with recent data

[1] The authors of this letter have considerable experience in a wide variety of MDL litigation, including antitrust, mass tort, toxic tort, and consumer fraud/false advertising cases. We believed our collective experience permits us not only to understand some of the issues with conducting MDL litigation, but comment upon how and whether the proposed Rule 16.1 is likely to impact the conduct of MDL litigation going forward. With this said, this comment represents the views of the authors and not necessarily the views of Winston & Strawn LLP.

suggesting they comprise over 70% of the civil caseload.[2] And while the MDL process certainly has its virtues, the consolidation of thousands (sometimes tens of thousands) of cases into collective proceedings is upsetting fundamental precepts of how civil cases are supposed to move forward, including that cases should be filed only when there is a good-faith basis to allege an injury caused by the defendants' conduct. This problem is compounded by the onset of private litigation funding, which drives claim generation and aggregation and can skew incentives away from a focus on the validity of such claims—what some have called the "find a name, file a claim" problem. To that end, we have all been confronted with the endless barrage of advertising for personal-injury claims on television, radio, and social media. It should be no surprise that the person answering the phone calls those ads generate often is not an attorney, and prospective plaintiffs can be signed up to file a claim before even meeting an attorney, much less an attorney who conducts a reasonable investigation before a complaint is filed.

In the absence of rules, district judges assigned to MDLs have developed ad hoc procedures to address the significant management problems MDLs pose. Intended or not, however, those procedures are too often serve only two broad purposes: (i) coordinate discovery; and (ii) move the matters towards settlement. Short-form and consolidated pleadings, for example, though intended to ease the administration of the case, can also serve to eviscerate the typical Rule 12 motion process—already rendered extremely difficult by the sheer volume of cases. Appointment of plaintiffs' leadership—again, intended to address administrative difficulties—too often results in installing and funding a small set of repeat players as plaintiffs' leadership whose interests may be inconsistent with those of individual claimants. And increasing use of a relatively small group of go-to special masters to oversee large aspects of MDL litigation raises significant questions about whether their use steps into the territory appropriately reserved for Article III judges. In short, practices intended to address some of the problem posed by MDLs can, and often do, compound those problems.

With that said, we believe that the Proposed Rule, which functions largely as a checklist of things that courts *may* ask the parties to address and *may* address in an early case management conference, does not serve the typical function of a "Rule." The Proposed Rule provides suggestions as opposed to instructions. Equally important, the Proposed Rule does not acknowledge the central problem that animated the rulemaking effort in the first place—the substantial number of unvetted and, in many cases, factually baseless claims that are filed, and can persist for significant time periods, in many MDLs. As drafted, therefore, we believe the Proposed Rule does not move the ball forward with regarding to improving the management of MDLs. We do believe, however, that a Proposed Rule along the lines of Rule 16.1 can be beneficial, assuming the Committee adopts certain changes suggested herein to both the Rule and the associated Committee Notes.

II. Early Vetting

There is consensus—among judges, defense practitioners, and even many plaintiffs' lawyers—that mass filing of unexamined claims is occurring in large MDLs. The MDL Subcommittee has acknowledged this consensus in prior reports, citing estimates that as many as 40–50% of claims in some MDLs may

[2] Rules 4 MDLs, *70% of Federal Civil Cases are in MDLs as of Year End, FY21* (online at https://www.rules4mdls.com/copy-of-mdl-cases-surge-to-majorty-of#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%93%20April%2013%2C,cases)%20resides%20in%20Multidistrict%20Litigations%20) (last visited February 9, 2024).

involve "unsupportable claims."[3] This consensus comports with our own experience and observations in practice. In the Roundup® cases, for example, where we both have experience, Judge Chhabria established a much-needed "wave" process to move cases through the MDL. Yet we have seen many, many cases repeatedly moved back into later and later waves, and eventually voluntarily dismissed, often because the plaintiffs' counsel simply do not have any ability to show that the plaintiffs had either the relevant medical diagnosis or any meaningful exposure to the product. These cases were often pending in the MDL for *years* before dismissal. In another recent example, in the Zostavax Litigation, an order "designed merely to require each plaintiff to come forward with prima facie evidence" supporting their claims resulted in more than 1,100 claims being dismissed, but only after *four years* of litigation, during which the defendant had produced over 6,000,000 pages of documents and made nearly 40 witnesses available for deposition.[4]

Mass filing of meritless claims causes significant harms—imposing a tremendous burden upon the court and the parties. The existence of such unvetted claims increases the cost, and slows the pace, of discovery. It hampers defendants' (and for that matter, plaintiffs') ability to confidently assess the potential exposure, and thus renders settlement more difficult.[5] It interferes with the bellwether trial process, introducing cases into the pool that provide little to no information about the value of good-faith claims, and which may be worked up at significant cost before being dismissed.[6] Defendants forced to contend with thousands of meritless claims may feel pressure to settle in light of the extraordinary costs imposed, even knowing that a not-insignificant portion of the pool is not likely to make it to trial. And on the other side of the same coin, claimants who have more meritorious claims will find the value of those claims unfairly diluted. Finally, the filing and maintenance of such plainly meritless cases poses serious ethical

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[3] *See, e.g.*, Draft Minutes of the Civil Rule Advisory Committee, MDL Subcommittee Report, Oct. 16, 2020, at 17 (online at https://www.uscourts.gov/file/31448/download) (noting the "perception that MDL consolidations tend to attract a worrisome fraction of cases that would not be brought as stand-alone actions because there is no reasonable prospect of success.") (last visited February 9, 2024); MDL Subcommittee Report in Advisory Committee on Civil Rules Agenda Book at 142–43 (Nov. 1, 2018) (online at https://www.uscourts.gov/file/24803/download) (noting the "fairly widespread agreement among experienced counsel and judges that in many MDL centralizations … a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit.") (last visited February 9, 2024).

[4] *In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.*, MDL No. 2848, 2022 WL 17477553, at *1, *4–5 (E.D. Pa. Dec. 6, 2022).

[5] *See* Duke Law School Center for Judicial Studies, *MDL Standards & Best Practices* 11 (2014) (online at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf) (last visited February 9, 2024) ("[S]ettlements talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weakness of the global litigation and examine the potential value of individual claims.").

[6] *See* Mark R. Ter Molen, et al., *Bellwether Trials: A Defense Perspective*, Law360 (2016) (online at https://www.mayerbrown.com/-/media/files/news/2016/04/bellwether-trials-a-defense-perspective/files/bellwethertrialsadefenseperspective/fileattachment/bellwethertrialsadefenseperspective.pdf) (last visited February 9, 2024) ("With unrepresentative bellwethers, the defendants and remaining plaintiffs might dismiss the outcome of a bellwether trial as an aberration.").

concerns—which can create doubts in the minds of the public, defendants, and individual claimants about the integrity and fairness of the process.[7]

The reasons for this problem are clear enough. In part, it arises from forces outside the scope of the Proposed Rule—third-party litigation funding and claim-aggregation are driving incentives to "find a name, file a claim."[8] Funders have increased risk appetite, and they are financing mass advertising campaigns designed to create a significant pile of claims, many of which receive little serious vetting prior to the filing of the claim.[9] Indeed, recent estimates are that plaintiffs' lawyers, lead generators, and third-party funders spend about $1 billion *per year* on advertising for prospective plaintiffs.[10] This estimate included, for example, $94 million in advertising for the Pradaxa® litigation, $103 million for the Roundup® litigation, and $122 million for the Xarelto® litigation.[11]

But the problem is also one of rules and procedure. While Rule 12 motion practice is still a critically important procedural tool in many MDLs (e.g., economic-loss class actions), the mass filing of claims in the largest MDLs can make the traditional Rule 12 process impractical and prohibitively expensive as a tool for challenging individual claims. Even where such motions are an option, processes designed to ease the administrative burden in an MDL—consolidated or short-form complaints with scant details on individual claimants—can make any meaningful challenge to such claims extraordinarily difficult. And the use of discovery techniques, such as plaintiff fact sheets ("PFS") or initial censuses, are often too little and nearly always too late—for example, PFS orders often are not adopted for months or years, after thousands of meritless claims may already have been filed. Nor does a discovery mechanism such as the PFS, as practice has shown, serve as a sufficient mechanism for removing meritless claims from MDLs. Discovery mechanisms cannot solve a problem that is fundamentally procedural—rules must be in place *ex ante*.

While the MDL Subcommittee repeatedly recognized the concern with unsupportable claims during the process of studying these issues and drafting the Proposed Rule,[12] the Proposed Rule does not set forth any requirements or procedures for addressing the problem of such meritless claims; indeed, it does not even provide relevant *guidance* on the nature of the issue. Thus, while the Subcommittee has stated on

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[7] Elizabeth Burch and Margaret Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835, 1843 (2022) (online at https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2023/01/Burch-Williams-final-1.pdf) (last visited February 9, 2024) ("Instead of acting as dependable gatekeepers, mouthpieces, translators, and counselors, some attorneys functioned as vacuums by indiscriminately pulling in claims and then bullying their clients into settling.").

[8] *See* John Beisner, et al., *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding a Decade Later* 12-17 (U.S. Chamber of Commerce Inst. For Legal Reform 2020) (online at https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf) (last visited February 9, 2024) (collecting instances in which third-party litigation funding drove filing of meritless claims).

[9] *See id.*

[10] Cary Silverman, *Gaming the System: How Lawsuit Advertising Drives the Litigation Cycle* 1 (U.S. Chamber of Commerce Inst. For Legal Reform 2020) (online at https://instituteforlegalreform.com/wp-content/uploads/2020/04/Lawsuit-Advertising-Paper_web.pdf) (last visited February 9, 2024).

[11] *Id.* at 2–4.

[12] *See, e.g.*, *supra* n.2.

more than one occasion that Subsection 16.1(c)(4) is aimed at addressing unvetted claims, a plain reading of that Subsection and the draft Advisory Committee Note do not bear that out. In the absence of any clarification in the Rule as well as the Advisory Committee Note, the Subsection will be read by at least some, if not a significant number, of judges and litigants as suggesting nothing more than bilateral discovery that would be called for even in the absence of the Proposed Rule—calling for consideration only of "how and when the parties will *exchange information* about the factual bases for their claims *and defenses*" (emphasis added).

The draft Committee Note not only suggests the problem is one simply of discovery, it does not even *mention* the concern or problem that is driving the Rule. Despite the MDL Subcommittee's repeated recognition in the past that the filing of unexamined and meritless claims is both prevalent and problematic, the draft Committee Note is silent on this issue.

We respectfully ask the Committee to clarify in both the language of the Rule as well as the Advisory Committee Note that the issue to be addressed is early vetting of claims, not simply discovery mechanisms. Without such edits, the Proposed Rule threatens to make the situation worse rather than better—solidifying the same practices that have allowed meritless claims to flourish thus far. We second the thoughtful recommendations set forth by LCJ on pages 6 and 10–11 of their September 18, 2023 comment as to specific language in this regard. And we emphasize that, absent such changes, it would be better not to move forward with a rule at all—at the very least, the rule should do no harm.[13]

III. Other Concerns

Outlined below are some additional concerns regarding the proposed Rule 16.1 and its draft Committee Note.

A. Appointment of Leadership Counsel

Section 16.1(c)(1) of the Proposed Rule calls for consideration of "whether leadership counsel should be appointed." We note that there is some debate about the role, responsibilities, or duties of leadership counsel.[14] As our colleagues from both sides of the "v" have aptly explained at recent conferences, there are important and unanswered questions about the authority of leadership counsel to represent plaintiffs who have not retained them, MDL courts' authority to shift representation to such

[13] During the October 16, 2023 Public Hearing, the Committee asked several witnesses whether the issue of concern is that plaintiffs fail to understand that an MDL does not excuse a party's obligations under Rules 8, 9 and 11, and whether the Committee should consider emphasizing that point in the Committee Note. While we agree that the MDL statute does not excuse a party's pleading obligations under Rules 8, 9 and 11 and there would be a benefit to the Committee Note emphasizing this fact, a revision to the Committee Note to that effect is not, in our view, sufficient by itself to address the underlying problem of unvetted claims. We do not believe simply reemphasizing attorneys' obligations will resolve the issue, especially given the financial incentives to stockpile claims. Only a mechanism to ensure the vetting of these claims early in the litigation will act as an appropriate gatekeeping function to deter the filing of meritless claims and/or remove such claims early from the MDL process.

[14] *See* David L. Noll, What Do MDL Leaders Do? Evidence from Leadership Appointment Orders, 24 Lewis & Clark L. Rev. 433, 465–66 (2020) (online at https://scholarship.libraries.rutgers.edu/esploro/outputs/journalArticle/What-do-MDL-leaders-do-evidence/991031567548504646) (last visited February 9, 2024).

counsel without claimants' consent, leadership counsel's ethical obligations to clients who have not retained them, and where responsibilities lie to keep nonleadership counsel apprised of developments in the litigation. Moreover, disputes between leadership and nonleadership counsel may require mediation by the MDL judge, but the possibility of *ex parte* discussions between the judge and plaintiffs' counsel on such issues would both be unfair to defendants and risk the appearance of impropriety. The Proposed Rule does not recognize or provide guidance on these thorny issues. We believe that if the concept of leadership counsel is to be enshrined in the federal rules, the Committee Note should, at the very least, recognize that such unsettled issues exist.

B. Consolidated Pleadings

Section 16.1(c)(5) of the Proposed Rule, which suggests consideration of "whether consolidated pleadings should be prepared to account for multiple actions filed in MDL proceedings," could create considerable confusion. It is unclear how such "consolidated pleadings" align with Rule 7(a), which sets forth the "only" pleadings allowed in federal court. It is also unclear whether or to what extent other rules' repeated references to "pleadings" would apply to such consolidated complaints. We especially fear that, without guidance on the legal effect and requirements for such pleadings, they will only further exacerbate the difficulties of challenging meritless claims in MDL cases. In our view, this section should be stricken from the Proposed Rule. At the very least, the Proposed Rule should make clear that such "consolidated pleadings" are subject to the same requirements as any other pleading.

C. Settlement Facilitation Measures

Section 16.1(c)(9) of the Proposed Rule suggests consideration of "measures to facilitate settlement," with the accompanying note suggesting "judicial assistance" to "facilitate the settlement of some or all of the actions." Several other sections of the Proposed Rule and the Advisory Committee's Note also refer to the court's role in facilitating settlement.[15] While reasonable actions and accommodations to facilitate a settlement the parties desire are appropriate and helpful, we believe that the Proposed Rule places undue emphasis on settlement and could suggest a presumption that settlement is an appropriate or expected outcome in all MDLs. To state the obvious, just because enough cases have been filed to warrant the creation of an MDL does not mean those claims have merit. Liability in MDLs can be hotly contested and, as discussed above, meritless and unsupported claims are well-recognized as an unfortunate feature of many MDLs. Moreover, an especial focus on settlement in the MDL context is unnecessary, because Rule 16(c)(2)(I) already calls for consideration of actions that could assist in settling the case when appropriate. We believe that a focus on settlement in the Proposed Rule thus only serves to further an incorrect belief that all MDLs should proceed to settlement as promptly as possible.

D. Special Masters

Section 16.1(c)(12) of the Proposed Rule suggests that MDL courts obtain the parties' views on "whether matters should be referred to a magistrate judge or master." We are concerned about the inclusion of this subsection in the Proposed Rule for several reasons.

[15] *E.g.*, Proposed Rule 16.1(c)(1)(C), Advisory Committee's Note to Proposed Rule 16.1(c)(1)(C).

First, we do not believe the subsection is necessary, as there are already rules regarding the appointment and use of special masters. Specifically, Rule 53 requires that "the court must give the parties notice and an opportunity to be heard" before appointing a master, and Rule 72 provides guidance and procedures for referrals to magistrate judges.

Second, over the last decade, we have seen a broad expansion in the use of special masters in the MDL context. Of most concern, we have seen the scope of special masters' responsibilities expand dramatically—from specialists appointed to address highly technical (e.g., e-discovery) or collateral (e.g., settlement) issues, to now including cases where special masters are used as generalists, assuming broad responsibility for the pretrial conduct of the case. We believe the inclusion of this subsection could be read as an endorsement for appointing masters, which is contrary to the current Federal Rules stating that "appointment of a master must be the exception and not the rule" and "[a] master should be appointed only in limited circumstances" because "[d]istrict judges bear primary responsibility for the work of their courts." Rule 53, Advisory Committee's Note to 2003 amendment.

Third, as the Committee has previously stated, "[o]rdinarily a judge who delegates these functions should refer them to a magistrate judge acting as a magistrate judge." *Id.* We strongly agree with this proposition, and we are concerned that inclusion of Section 16.1(c)(12) of the Proposed Rule will erode the presumption in favor of the use of magistrate judges.

Finally, we are concerned about transparency regarding the appointment, referral, procedural processes followed, and costs of special masters. All too often, parties have a special master foisted upon them with little chance to suggest candidates, vet candidates, and/or object to their appointment. We have been involved in numerous cases, including those in the MDL context, where the description of special masters' duties is unclear and, in some cases, where their duties appear so broad as to essentially replicate the role of the district judge. Also, clear procedural mechanisms and rules for bringing issues before the special master are often lacking, including: (i) the requirements for written submissions; (ii) whether and to what extent the parties and special master can engage in *ex parte* contacts with not just the parties, but also the district court; (iii) whether special master proceedings should be transcribed; and (iv) the format and content of any special master findings or recommendations. The costs associated with a special master are also often enormous. Yet in many cases, there is little transparency regarding these costs, including the costs of staff the special master may retain to assist her or him in the matter.

With the above noted and to the extent that the Committee intends to retain Section 16.1(c)(12) as part of the Proposed Rule, we would respectfully suggest the draft Committee Note should be revised in a manner that strongly indicates:

- Appointment of special masters should be the exception, not the rule.
- A special master's referral should be clearly defined, limited in nature, and confined to specific technical and/or procedural tasks.
- More importantly, broad delegation of pretrial proceedings is not the appropriate use of a special master.

- The district court should enter a referral order upon which the parties have a full and fair opportunity to provide their input that addresses, among other items: (i) the process for suggesting, vetting and approving special masters (including a process to object to their appointment); (ii) a statement of a scope of referral that is consistent with the notion that special masters are to be the exception and not the rule; (iii) the procedural process for the submission, adjudication and recommendation of matters brought before the special master (including a prohibition on *ex parte* contacts with the parties and/or the district court); and (iv) details regarding the obligations of the special master to report his or her fees and expenses.

* * * * *

At the October 16, 2023, hearing on the Proposed Rule, the Committee asked Alex Dahl from LCJ whether that organization would prefer no Proposed Rule at all or the current draft. His answer was clear—it is preferable to have no rule at all rather than the current draft. He went on to explain, though, that with the modifications suggested by LCJ and others, particularly as it relates to early vetting, the Committee could pass a rule that would have meaningful positive impact on the efficient and fair conduct of MDLs. We whole heartedly agree and ask the Committee to consider the changes suggested herein.

Respectfully submitted,

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John J. Rosenthal
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M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

February 13, 2024

Advisory Committee on Civil Rules
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Rule 16.1 – Multidistrict Litigation

Dear Members of the Rules Committee:

Judge Charles Breyer recently submitted a comment in support of proposed Rule 16.1. I write to echo his sentiments and also to offer my own perspective on the chief criticism of the proposed rule—that it should be mandatory, particularly on the issue of early claims vetting—with which I strongly disagree. While it is true that mass filings of unvetted claims plague many MDLs, in my view, mandatory rules governing how and when to address the issue would not be an effective solution. Beyond that, a mandatory rule in general is unnecessary and would have negative, albeit unintended, consequences. I say this based on my experiences grappling with the issue in my two MDLs, one of which, 3M Combat Arms Earplug v2 (MDL 2885), is the largest MDL in history.

In 3M, a mandatory early vetting rule would have been impossible to comply with or enforce—despite good intentions and a serious need to weed out frivolous claims. This is because nearly 99% of the 3M claimants were current or former military service members, which meant that virtually all service and medical records needed to "vet" their claims were in the possession and control of the Department of Defense and/or the Veterans Administration. As a result, production of those records was governed by the respective agencies' *Touhy* regulations, which the Department of Justice interpreted as requiring a "filed action." At that time, most of the 3M claims were on tolling agreements, so they were not filed. Before asking the government to produce records for nearly 300,000 claimants in a timely and centralized fashion, it was necessary to create an administrative docket where all claims had to be filed. This took over two years, but once the administrative filing process was in place and the *Touhy* requests were submitted, along with Privacy Act Orders, we obtained the necessary records and the vetting process began, ultimately leading to the dismissal of more than 90,000 claims. This could not have happened "early" in the litigation. And, importantly, the 3M experience demonstrates that proper and effective vetting can—and does—occur in the absence of a mandatory rule, even with unprecedented numbers.

Although the information-gathering challenges in 3M may be fairly characterized as unique, the lessons from that experience are broadly applicable. Every MDL unfolds differently, and no one can foresee the substantive or procedural nuances that may impact the timing and feasibility of a formal vetting process. In some MDLs, an early census or vetting of cases will be the prudent course from a case-management perspective; while in others, the time and expense of a census should await resolution of some generally applicable threshold and/or dispositive issues, such as federal preemption or general causation. It also may be that the unique practical circumstances of a particular MDL—like 3M—forestall any "early" vetting of claims. A rule *mandating* early vetting cannot account for such variables. And more broadly, *any* mandatory case management rule for MDLs would only serve to frustrate and stifle creative case management in the very litigation needing it most. MDL judges must be allowed the discretion and flexibility to figure out how to best manage their dockets and determine on a case-by-case basis how to structure a tailored case-management strategy, including when and how to most appropriately "vet" claims.

A final, related observation. Without question, the problem of unvetted claims in MDLs is a valid concern, but at the same time it should be noted that this problem is significantly compounded by tolling agreements, freely granted by defendants to plaintiffs' counsel, with no mandatory vetting criteria required in exchange for the statute of limitations tolling. This practice allows tens of thousands of cases to sit on the sidelines, unfiled and outside the reach of court jurisdiction, and thus unvetted, for years. A mandatory vetting rule would be ineffective as to these claims, which in many MDLs far exceed the number of filed claims.

Thank you for the opportunity to share my views on proposed Rule 16.1. I strongly support its adoption. It provides a thoughtful and robust framework to guide MDL judges and counsel in navigating the complex needs and nuances of a new MDL.

Respectfully,

M. Casey Rodgers

M. Casey Rodgers
United States District Judge

COMMITTEE ON FEDERAL COURTS

RICHARD HONG
CHAIR
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February 14, 2024

COMMENT ON PROPOSED RULE 16.1(c)(4)
TO THE ADVISORY COMMITTEE ON CIVIL RULES

The New York City Bar Association ("City Bar") greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Civil Procedure proposed by the Advisory Committee on Civil Rules (the "Advisory Committee").

The City Bar, founded in 1870, has approximately 23,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. It includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The City Bar's Committee on Federal Courts (the "Federal Courts Committee") addresses substantive and procedural issues relating to the practice of law in the federal courts. The Federal Courts Committee respectfully submits the following comments on the proposed Rule 16.1(c)(4) of the Federal Rules of Civil Procedure.

I. Background

The Advisory Committee has proposed a new Rule 16.1 governing management of Multidistrict Litigation ("MDL"). The proposed rule is designed to guide the MDL court in addressing the various and complex issues unique to an MDL proceeding. However, in explaining proposed Rule 16.1(c)(4), the committee note does not fully describe the purpose of the provision or its potential function. The City Bar recommends revisions to the proposed committee note to Rule 16.1(c)(4) to provide additional detail and clarity on the issues that the provision is designed to address and its place in the discovery process.

II. Considerations

Proposed Rule 16.1(c)(4) directs the parties, as part of the initial management conference report required by Proposed Rule 16.1(c), to address "how and when the parties will exchange information about the factual bases for their claims and defenses." This provision targets the distinctive MDL problem that some claims are insufficient at the time of filing but may not be disposed of quickly because of the number of claims and the preference to address common issues first. Proposed Rule 16.1(c)(4) provides a valuable mechanism to ensure early exchange of information to prevent insufficient claims and defenses from clogging the MDL. The proposed rule reflects the current practice in many MDLs and is designed to protect all parties and the court from the burden of insufficient claims and defenses.

However, we would go further in the committee note accompanying Rule 16.1(c)(4) to make clear that the provision is not itself designed to weed out insufficient claims and defenses early in the litigation. Similarly, we would make clear in the note that the provision functions as a form of early discovery, like an initial disclosure, rather than functioning as a pleading rule. To ensure appropriate implementation of the rule, the City Bar recommends adopting changes to the committee note that identify the issue targeted and explain that the provision is a discovery mechanism.

The Advisory Committee should not adopt any changes to proposed Rule 16.1(c)(4)—or any other provision of proposed Rule 16.1—that would implicitly or explicitly alter the pleading or dismissal standards. To the extent that the Advisory Committee seeks to address the problem of insufficient claims through a pleading or dismissal rule—whether a change in pleading standard or a new mechanism for ensuring that claims meet that standard in an MDL—such a substantive change should not be buried in a case management rule and should not be unique to MDLs. Rather, any changes to pleading requirements or changes to dismissal mechanisms must be made through amendments to the rules governing pleadings and dismissals. As currently proposed, Rule 16.1(c)(4) does not appear to alter either pleading or dismissal standards, and the City Bar supports that aspect of the provision.

The City Bar also supports that Rule 16.1(c)(4) imposes reciprocal disclosure obligations on both plaintiffs and defendants for their initial claims and defenses, informed by the respects in which parties are differently situated. While MDLs have not been reported to create the same incentives for insufficient defenses as insufficient claims, courts have flexibility under this rule to adopt an exchange mechanism and timing that do not burden the parties and promote efficient and fair management of the matter.

III. Proposed Revisions

Based on the foregoing considerations, we support the adoption of Rule 16.1(c)(4) as drafted but propose the following revisions to the committee note to proposed Rule 16.1(c)(4): Rule 16.1(c)(4). Experience has shown that in certain MDL proceedings early exchange of information about the factual bases for claims and defenses can facilitate the efficient management of the MDL proceedings. Such exchange of information may be useful to determine the sufficiency of claims and defenses and prevent insufficient claims or defenses that would not have been brought outside the MDL context from burdening all parties and the court. Some courts have

utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. The exchange of information under this provision is akin to initial disclosures and other early discovery mechanisms; this provision does not change the parties' pleading obligations or the standards for dismissal.

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens, including by considering different parties' individual circumstances. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court. For example, it is widely agreed that discovery from individual class members is often inappropriate in class actions, but with regard to individual claims in MDL proceedings exchange of individual particulars may be warranted. And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

Respectfully submitted,

Richard Hong, Chair
Federal Courts Committee

Drafting Subcommittee
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February 14, 2024

Committee on Rules of Practice and Procedure
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Re: Proposed Amendments to Rules 16(b)(3) and 26(f)(3) on Privilege Logs

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this comment regarding the consideration of rulemaking related to amendments to Rules 16(b)(3) and 26(f)(3) on privilege logs by the Advisory Committee on Civil Rules ("Advisory Committee"). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly rely on the producing party to provide a reliable privilege log as part of document productions. AAJ supports the proposed rule as early discussion about how to address claims of privilege or protection may assist in case management and prevent problems regarding over-designation.

I. The Rule Must Work for All Parties, Regardless of the Number of Documents Subject to Production in Any Given Case.

Some defense-side commenters have focused on a minority of cases involving huge document productions. Of course, there is an objection to document-by-document logs in these cases, but it would be a mistake to draft a rule based on mega-document productions. As discussed during the 2021 Invitation for Comment on Privilege Log Practice, there are AAJ members litigating state-based tort claims in federal court exclusively due to diversity jurisdiction, such as trucking crash or bad-faith insurance cases. These cases may involve only a handful of privileged documents where an individual log is not burdensome for the producing party and a categorical log could result in denying the plaintiff access to key documents that are neither privileged nor attorney work product. Production needs to reflect the number of documents involved in any given

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case, and the rules governing privilege logs should not assume that document-by-document logging is too expensive, burdensome, or inefficient. As written, the proposed amendments strike the right balance.

Further, AAJ urges the Advisory Committee to retain key language in the Committee Note that reinforces the importance of flexibility within document productions. These essential statements include:

- "No one-size-fits-all approach would actually be suitable in all cases." *[End of fourth paragraph of Rule 26 Committee Note.]*
- "In some cases, it may be suitable to have the producing party deliver a document-by-document listing with explanations of the grounds for withholding the listed materials." *[Beginning of fifth paragraph of Rule 26 Committee Note.]*
- "Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front." *[Beginning of third paragraph of Rule 16 Committee Note.]*

II. Over-Designation Should Be Recalibrated in the Committee Note.

Regardless of practice area, AAJ members consistently grapple with issues of over-designation. Members report that corporate counsel are frequently copied on production and design emails (and business-related emails more generally) that do not relate to legal issues in a misguided attempt to protect them from discovery.[1] Communications involving counsel in anticipation of litigation do not protect from discovery the underlying facts that led to the litigation being brought in the first place. Moreover, contract lawyers frequently over-designate documents in a rush not to give away any privileged documents accidentally.[2] Often, this work is not supervised until very

[1] *In re: Marriott Int'l Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2021 WL 2910541, at *5 (D. Md. July 12, 2021) (holding that pre-incident vendor's "primary function was for business purposes—namely cybersecurity incidence response, identifying compromises, and remediating them" which "work would occur regardless of the presence of' attorneys and was primarily business activity); s*ee* Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, [hereinafter February 6th Testimony] at 171 (Feb. 6, 2024) (written submission of Brian D. Clark, Lockridge Grindal Nauen PLLP) (citing *Kleen Products v. International Paper et al.*, No. 10-C-5711, 2014 WL 6475558 (N.D. Ill Nov. 12, 2014)); *see also* informal comments filed by Kate Baxter-Kauf, Lockridge Grindal Nuen (PRIV-0005) and Jasper Abbott, Warshauer Group, P.C. (PRIV-0016), available at https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf.

[2] Defense- and plaintiff-side practitioners alike have expressed their frustration with the unreliability of contract attorneys' review of documents for privilege objections. *See, e.g.*, Transcript of Proceedings, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, at 193 (Jan. 16, 2024) [hereinafter January 16th Transcript] (statement of David Cohen, Reed Smith), https://www.uscourts.gov/sites/default/files/jan_16_hearing_transcript.pdf ("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.

late in the litigation, after key witnesses have been deposed.[3] When documents are not properly logged, this over-designation can lead to additional expense and delay for *all* parties.

While there is a near-constant struggle with over-designation, there is only one reference to it in the Rule 26 Committee Note, somewhat buried in the second sentence of the seventh paragraph: "Production of a privilege log near the close of the discovery period can create serious problems." The placement of over-designation near the bottom of the Rule 26 Committee Note, coupled with the prefatory emphasis on the burdens of costs of document-by-document logs in the first paragraph, creates asymmetry by prioritizing costs and relegating the very real problem of over-designation to an afterthought.

A. Revisions to the First Paragraph of the Committee Note in Rule 26(f)(3)(D).

The original draft Committee Note presented to the Standing Committee in January 2023 provided a summary of the costs, essential information, and over-designation concern associated with privilege logs succinctly in the first paragraph.

> Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on ground of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document 'privilege log.' These logs sometimes may not provide the information needed to enable other parties or the court to assess the justification for withholding the materials, or be more detailed and voluminous than necessary to allow the receiving party to evaluate the justification. And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery.[4]

However, the proposed Committee Note retains only the first two sentences and drops the last two sentences that served to balance the concerns raised by the plaintiff and defense bars. Mindful of the direction provided by the Standing Committee to shorten the Committee Note to

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They're not the most highly trained attorneys."); February 6th Testimony, *supra* note 1, at 148–49 (written submission of Aaron J. Marks, Cohen Milstein Sellers & Toll PLLC) ("In practice, document review decisions are often delegated to teams of junior attorneys or contract attorneys. Where these attorneys may be unsure of whether to withhold a document, they are likely to err on the side of withholding documents—even where the claim of privilege may be questionable at best.").

[3] There are potential delays and costs resulting from these decisions, such as whether to re-depose a witness. *See* informal comments of Brandon L. Peak, Butler Wooten & Peak LLP (PRIV-0014) and Samantha Heuring, Douglas, Leonard & Garvey (PRIV-0012), available at https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf.

[4] Hon. Robin L. Rosenberg, *Advisory Committee on Civil Rules Report to the Standing Committee*, *in Comm. on Rules of Practice and Procedure Agenda Book* 208 (Jan. 4, 2023), https://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-january-2023.

keep it proportional to the length of the proposed textual change in Rule 26(f)(3)(D), AAJ proposes that the last two sentences could be restored and combined as follows to make the same point:

> These logs sometimes may not provide sufficient or detailed information to allow parties or the court to assess the justification for withholding the materials. And on occasion, producing parties may over-designate and withhold materials not entitled to protection from discovery.

Should the Committee decide that it does not want to add additional text to the first paragraph of the Committee Note, then AAJ alternatively recommends the Committee delete the following sentence from that paragraph: "Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log."[5]

B. Revisions to the Last Paragraph of the Committee Note in Rule 26(F)(3)(D).

AAJ recommends the removal of the following sentence found in the last paragraph of Committee Note: "Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case."[6] The purpose of the rule is to encourage early communication. Blaming both parties for over-designation is not helpful, as it does not further the goal of the amendment and assumes that both parties are equally responsible for over-designation, which in the experience of AAJ members simply is not the case.

III. Consider Adding a Definition of Privilege Log.

Douglas McNamara, who testified at the October 16 hearing on privilege logs, provided a thoughtful definition to the Committee Note in his testimony[7] based on templates for former

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[5] *See, e.g.*, Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, at 22 (Jan. 16, 2024) [hereinafter January 16th Testimony] (written submission of Lori Andrus, Andrus Anderson LLP), https://www.uscourts.gov/sites/default/files/testimony_outlines_for_jan_16_final.pdf (supporting the removal of this sentence, as it "isn't necessarily accurate today and likely won't be accurate in the future" because "[t]echnological advances have made privilege logs much cheaper to generate"); February 6th Testimony, *supra* note 1, at 95 (written submission of Kate Baxter-Kauf, Lockridge Grindal Nauen PLLP), https://www.uscourts.gov/sites/default/files/2024-02-06_hearing_testimony_packet_final.pdf (suggesting removal of the phrase "can involve very large costs" from this sentence). AAJ suggests adding language rather than subtracting it as a possibly less controversial solution although both adequately address the imbalance found in the first paragraph.

[6] This suggestion was made by AAJ's President-Elect Lori Andrus during the public hearing on January 16, 2024. January 16th Transcript, *supra* note 5, at 21 (statement of Lori Andrus, Andrus Anderson LLP).

[7] In his written testimony submitted for the October hearing, Douglas McNamara suggested the following edit to the Committee Note:

> In some cases, it may be suitable to have the producing party deliver a document-by-document ~~listing with explanations of the grounds for withholding the listed materials.~~ privilege log. Courts have found as adequate privilege logs that provide a brief description or summary of the contents of

federal Judge Paul W. Grimm and Judge David J. Waxse. AAJ suggests a slightly refined definition here:

> In some cases, it may be suitable to have the producing party deliver a document-by-document privilege log that includes a brief description or summary of the document, the number of pages and type of document, who prepared and who received the document, the purpose in preparing the document, and the specific basis for withholding the document.[8]

This proposed definition is concise, consistent with the overall direction of the Committee Note, and does not raise new issues not previously considered by the Advisory Committee.

IV. Suggestions by the Defense Bar Tilt the Balanced Rule Crafted by the Discovery Subcommittee and Should Be Rejected.

Overall, the suggestions made by the defense bar fit into the category of a wish list sought by those engaging in complex litigation with thousands of documents. This is not representative of many cases handled by AAJ members, which involve an average amount of documents and where categorical logging can sweep away a swath of documents without providing either an adequate explanation of what the documents are or why a particular document is privileged.

A. Proposed Amendments to Rule 26(b)(5)(A) Are Unnecessary and Should Be Rejected.

A submission by Judge Facciola and Jonathan Redgrave and echoed by Lawyers for Civil Justice ("LCJ") recommends an amendment to Rule 26(b)(5)(A) itself.[9] Proponents argue that such a reference is required because Rule 26(b)(5)(A) is the source of the problem that the proposed amendments aim to solve. While AAJ itself has on occasion proposed cross-referencing in other rulemaking, it believes that cross-referencing is most suitable when there is a *choice* between two rules to apply, in which case the reference provides guidance regarding which rule is most

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> the document; the number of pages and type of document; the date the document was prepared; who prepared and received the documents; the purpose in preparing the document; and the specific basis for withholding the document. *See, e.g.*, Paul W. Grimm, Charles S. Fax, & Paul Mark Sandler, *Discovery Problems and Their Solutions*, 62–64 (2005); *Hill v. McHenry*, No. CIV.A. 99-2026-CM, 2002 WL 598331, at *2–3 (D. Kan. Apr. 10, 2002).

Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Comm. on Civ. Rules, at 26 (Oct. 16, 2023) (written submission of Douglas McNamara, Cohen Milstein Sellers & Toll) (emphasis in original), https://www.uscourts.gov/sites/default/files/testimony_packet_for_october_16_2023_final_10-11.pdf.

[8] Paul W. Grimm et al., *Discovery Problems and Their Solutions*, 62–64 (2005); *Hill v. McHenry*, No. CIV.A.99-2026-CM, 2002 WL 598331, at *2–3 (D. Kan. Apr. 10, 2002).

[9] Judge Facciola and Mr. Redgrave propose adding the following at the end of Rule 26(b)(5)(A)(ii): "The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D)." Letter from Hon. John M. Facciola and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Comm. On Rules of Practice and Procedure (Nov. 24, 2021).

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applicable.[10] This is not the case here. In this instance, the proposed text is unnecessary, and the Committee Note proposed by LCJ would be strongly opposed by AAJ and its members.

In particular, the rule text proposed by Judge Facciola and Mr. Redgrave and the Committee Note proposed by LCJ would create unnecessary controversy, and Rule 26(b)(5)(A) cannot be changed to remove the burden of reviewing documents for privilege.[11] Since the suggestion was not part of the published rule, AAJ members and the plaintiff-side practitioners generally are not focused on commenting on it, believing that it is not part of the amendments under consideration. However, AAJ urges the Advisory Committee to avoid unnecessary controversy and refrain from inserting into the rule unnecessary provisions previously rejected by the Committee.

Another proposed submission from members of the Council and Federal Practice Task Force of the ABA Section on Litigation[12] takes the proposed amendment to Rule 26(b)(5)(A) a step further by advocating for the inclusion of one-sided language providing for the court to determine the method of compliance.[13] The proposed text, which actively encourages court involvement, is the antithesis of the Committee Note proposed by LCJ, which reads: "The privilege log form and process should not require judicial attention or intervention in the ordinary course."[14] Although AAJ opposes the Committee Note from LCJ, we do agree with the sentiment that it would be better to let parties work out a plan for discovery, including a plan to manage privileged documents, before going to the judge. Not only will it help the parties develop a working relationship, but the court should also not waste time on matters that do not require judicial involvement.

AAJ strongly urges the Advisory Committee to avoid language that would add "undue burden," "proportional to the needs of the case," or similar language into the Committee Note. In many types of wrongful death and personal injury litigation, there are issues with asymmetrical information, such that the defense has more information about the facts and issues in the case than

[10] For example, AAJ's comment on the proposed illustrative aids rule, subsequently adopted by the Advisory Committee on Evidence, encouraged adding a reference to FRE 1006 on voluminous aids to distinguish illustrative aids from those qualifying as evidence under the voluminous aids rule. This provided symmetry to the rules since the amendments to FRE 1006 on voluminous summaries already provided a prompt to the new illustrative aids rule.

[11] As Lea Bays said in her comment, "The fact that a producing party has withheld a large amount of documents on the basis of privilege, or the fact that the litigation is 'asymmetrical,' should not eradicate the receiving party's ability to have sufficient information to understand what is being withheld, on what basis, and to assess the claim of privilege for withheld documents." Lea Bays, Comment Letter on Proposed Amendments to Civil Rules 16(b)(3) and 26(f)(3), at 3 (Dec. 12, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0016.

[12] This submission written by Anne Marie Seibel, a partner at Bradley, should not be confused with an official submission from the ABA.

[13] The proposed language would add the following sentence after Rule 26(b)(5)(A)(ii): "Where necessary to prevent undue burden, the method of compliance with (A)(i) and (A)(ii) shall be determined by the court after consultation with the parties."

[14] Lawyers for Civil Justice, Comment Letter on Proposed Amendments to Civil Rules 16(b)(3) and 26(f)(3), at 7 (Oct. 4, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0007.

the plaintiff. The references suggested by the LCJ are an unhelpful addition to the proportionality analysis already required by Rule 26(b)(1), while failing to provide guidance to the assessment of privilege. Similarly, AAJ opposes any version of the Committee Note that would diminish the role of the court in assisting the parties with discovery management or presume that certain documents or communications are always privileged. Such Committee Notes are overly broad, undermine judicial authority, and can lead to mischief where in-house counsel are routinely copied on documents in order to assert privilege regardless of whether it is related to ongoing litigation.[15] For example, while communications involving counsel may be protected, underlying facts uncovered during an investigation are discoverable,[16] as are post-incident reports used for business purposes.[17]

B. A Suggestion for Addressing Ongoing Production in the Committee Note.

AAJ notes that many defense interests are pushing for the Advisory Committee to remove the reference to the "rolling" logs in the Committee Note and replace it with "tiered" or "staged" logging. While this may cause some disagreement between the plaintiff and defense bars, it is likely an issue that the rule is designed to address through early discussion. It makes no sense from a time or cost perspective for plaintiffs to wait until the end of discovery to begin viewing documents,[18] especially if documents are needed for depositions. If the requested production is capturing irrelevant or unimportant documents, then knowing this early can save the defendant costs as well. Contrary to defense-side commenters, AAJ members like and understand the term "rolling" and have concerns that a rule emphasizing "tiered" logging will result in a more general

[15] For example, documents between in-house and outside counsel created after the initiation of litigation could be about that litigation or another legal matter so a blanket presumption of privilege based on a temporal description only is too limited.

[16] *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney[.]").

[17] *Adams v. Gateway, Inc.*, No. 2:02-CV-106, 2003 WL 23787856, at *5–6 (D. Utah Dec. 30, 2003) (finding that, while Gateway may have become aware of product performance issues as a result of a litigation, "the investigation had at its core the diagnosis and resolution of potential problems" and was motivated by "Gateway's self-interest as a retailer of computer products.").

[18] The February 6, 2024, testimony from the Committee to Support Antitrust Laws ("COSAL") provides numerous examples of how categorical logging failed to save time or costs for the parties or the court:

> But the consequences of that categorical approach, rather than the traditional document-by-document log proposal initially offered by the plaintiffs, led to expensive consequences: multiple motions and in camera reviews for the Court to undertake, dozens if not hundreds of hours of attorney time, improperly withheld documents (which, even if inadvertent, are still a problem), and the case being delayed for months while the defendants conducted a wholesale privilege re-review. The great majority of that additional expense and time could have been saved by sticking to a traditional, document-by-document log.

February 6th Testimony, *supra* note 1, at 142–43 (written submission of Aaron J. Marks, Cohen Milstein Sellers & Toll PLLC).

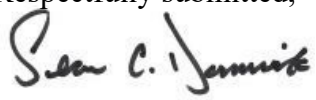
log that fails to provide the details to determine whether the document is privileged.[19] Given the discussion elicited at the hearings, it seems useful to define what a rolling log is, rather than leaving the term in quotes, by providing a description that enhances optionality and flexibility in the rule. The sentence could look like this:

> Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment. Production of a privilege log near the close of the discovery period can create serious problems. ~~Often it will be valuable to provide for "rolling"~~ An ongoing or scheduled production of materials, sometimes referred to as a rolling log or a staged production, along with ~~and~~ an appropriate description of the nature of the withheld material can identify areas of potential dispute early,~~.~~ ~~In that way, areas of potential dispute may be identified~~ and, if the parties cannot resolve them, be presented to the court for resolution.

V. Conclusion.

AAJ supports the proposed rule amendments as drafted with minor edits to the Committee Note in Rule 26(f)(3)(D). Suggestions to expand the proposed text and include a cross-reference within Rule 26(b)(5)(A) do not improve the proposed rules, and indeed will only create controversy where none currently exists. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,



Sean Domnick
President
American Association for Justice

[19] Jeannine Kenney, Hausfeld LLP, summarizes this additional layer of bureaucracy in her January 16, 2024, testimony, "a 'tiered' approach would add yet another layer of subjectivity to that review: reviewers would not only have to make judgments about whether a document is privileged and why but also whether each document is material and why." January 16th Testimony, *supra* note 5, at 11. As Kate Baxter-Kauf wrote in her submitted testimony, "In addition, 'tiered' logging seems to contemplate that almost all documents will be reviewed by the producing party before either documents or a privilege log is produced, which is likely to exacerbate delay and push disputes later in the litigation, rather than achieving the goals outlined by the Committee." February 6th Testimony, *supra* note 1, at 94.

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February 14, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Building, Room 7-240
One Columbus Circle, NE
Washington, DC 20544

Re: Comment to Proposed Amendments to the Federal Rules of Civil Procedure on Privilege Logging

Dear Advisory Committee on Civil Rules:

I respectfully submit a response to the request for comments regarding certain proposed amendments to Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure.[1] I thank you for the opportunity to comment, and I commend the Committee's tireless efforts and dedication in order to improve our judicial system through the refinement of the Federal Rules.

I. Introduction

While the 2015 Amendments to the Federal Rules were a dramatic step forward in attempting to reduce the burden associated with the discovery of electronically stored information ("ESI"), the reality is that the sheer volume and diversity of ESI potentially subject to discovery in a civil action has grown exponentially in the last several years, increasing the costs and burdens associated with the discovery of ESI. The single largest cost component in any civil litigation is discovery, often comprising more than 50% of the overall costs. Of that number, the review of ESI for production is the largest cost component of discovery, often comprising more than 30% to 60% of the cost. In turn, the review and logging of documents withheld on the basis of privilege presents the largest cost component of document review. These costs are only compounded by the reality that many courts and parties continue to construe Rule 26(b)(5) as having a document-by-document privilege log requirement, despite the flexibility provided by the Federal Rules and the admonition in the 1993 Advisory Committee Notes to Rule 26(b)(5) that such logs may be unduly burdensome in some cases.

While well intentioned, the proposal to amend Rule 26(f) and Rule 16(b) does not directly address the fundamental problem associated with the commonplace practice by many district courts to require privilege logs on a document-by-document basis, regardless of the circumstances,

[1] This comment represents my views alone and does not necessarily represent the views of Winston & Strawn.

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pursuant to the misapplication of Fed. R. Civ. P. 26(b)(5)(A)(ii).[2] As currently drafted, the proposed amendments are not likely to address inordinate costs and burdens associated with this practice and, in particular, will not encourage approaches designed to reduce this burden and cost through other approaches than document-by-document logging. Without some refinement, the proposed rule changes and their associated comments may actually raise the costs and burdens of litigation, antithetical to the goals of Rule 1.

While I appreciate that additional substantive changes to the rules might further prolong any amendment, I respectfully suggest that additional changes are necessary to Rule 26(b)(5)(A) and the associated Advisory Committee Note to clarify that: (i) document-by-document logging is not a requirement under the Federal Rules in order to preserve a claim of privilege; (ii) district courts and the parties should consider alternative means and methods to identify documents withheld on the basis of privilege to include the use of categorical logs and/or metadata logs; (iii) there should be rebuttable presumptions that certain categories of documents and electronically stored information need not be logged—such as communications with litigation counsel or documents generated after the filing of the complaint; (iv) the information necessary to establish a claim of privilege; and (v) Rule 502(d) orders can include provisions that ensure that information contained in a log cannot form the basis of a claim of waiver.

II. Relevant Background

I am antitrust and complex commercial litigator. I was with Howrey LLP for approximately 20 years, where I created one of the first e-discovery advisories within a law firm in the United States. Since 2008, I have been a litigation partner with Winston & Strawn LLP, where I am actively engaged as a trial lawyer in a variety of complex litigation, with particular emphasis on class action and multi-district litigation. Since 2008, I have also acted as the Chair of Winston & Strawn's e-Discovery & Information Governance Practice Group. Our practice group includes e-discovery lawyers, technologists, and review attorneys providing every service across the Electronic Discovery Reference Model. Our practice typically handles e-discovery in over 800 civil litigation matters a year. A significant portion of our annual work (well north of 40,000 hours) relates to privilege review and preparation of privilege logs.

During my career, I have conducted or supervised dozens privilege reviews, including logs generated during the course of those reviews. I have extensive experience in various logging practices to include document-by-document logs, categorial logs, and metadata logs. In addition, I have participated in scores of meet and confers relating to privilege document disputes. I have

[2] *See* Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure ("Facciola-Redgrave Letter"), Jan. 31, 2023, at 2, https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf (explaining that "the omission of any proposed amendments to Fed. R. Civ. P. 26(b)(5)(A)(ii) itself in the rules package unfortunately fails to address directly the progeny of cases that misapply this rule and axiomatically insist that the rule requires that a party must log each privileged document individually, including courts holding that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances.").

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also briefed and argued a significant number of motions relating to disputes over the claim of privilege.

Beyond my litigation experience, I have been involved in various thought leadership activities in the field of litigation and, specifically, electronic discovery. I am a former member of the Sedona Conference Steering Committee of Working Group 1 – Electronic Document Retention and Production. In that capacity, I was the Editor in Chief of The Sedona Conference Commentary on Protection of Privileged ESI ("Sedona Commentary"), 17 Sedona Conf. J. 95, at 155 (2016), a paper that provides extensive guidance on the conduct of privilege review, including best practices around privilege logging.

III. General Comments Regarding the Proposed Rules Changes

A. Changes Are Necessary to Address the Rising Cost of Privilege Review and Logging Consistent with the Goals of Rule 1

In 2016, the Sedona Conference wrote in its Commentary on the Protection of Privileged ESI, "Privilege logging is arguably the most burdensome and time consuming task a litigant faces during the document production process," and the challenges necessitated by large volume document review and logging result "in the modern privilege log being as expensive to produce as it is useless."[3] To sum it up as plainly as the Sedona Conference did, "the procedure and process for protecting privileged ESI from production is broken."[4] That conclusion is as true today as it was in 2016.

The reality is that document-by-document privilege logging has become the de facto standard within many districts. The burdens and costs necessitated by privilege reviews and preparing document-by-document logs are substantial. The requirement to log documents withheld on the basis of privilege on a document-by-document basis is significant and, in fact, the single largest cost component in civil litigation. The logging process is inherently time consuming, especially given the difficult issues of assessing privilege.

Today, the process typically involves using some source of artificial intelligence or advanced search methodology to first identify the potentially privileged document. Once identified, the document is then reviewed at the first level, typically by a review attorney (although in some cases a paraprofessional or an associate). Complicated privilege calls are typically escalated to a more senior team member as well as a certain percentage of the privilege documents (although in many cases it could be all of the privileged documents) are reviewed at a second level. The documents identified as privileged are then logged, where certain objective information about the document is extracted from the litigation support system, but the overall description and basis for the claim of privilege are typically generated by the review attorney. Finally, the overall log is typically quality controlled by a more senior team member to ensure the accuracy of the log.

[3] *See* Sedona Commentary, 17 Sedona Conf. J. 95, at 155 (2016).

[4] Sedona Commentary at 103.

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As you can imagine, the process described above is a very time-consuming process, especially in larger complex, class, and MDL litigation, where the documents logged typically range in the hundreds and, in many cases, thousands. In those cases, it is not uncommon for our team to expend several *thousand* hours to engage in the document-by-document logging process for a larger matter. The process is further compounded, in terms of time and expense, considering the recent trend in asymmetrical litigation where opposing counsel refuses to negotiate top-level logging for email threads and chat communications.[5]

The de facto requirement on individual document logging without regard to record volume, type, and importance is not consistent with the intent of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding."[6] The cost of preparing privilege logs is not proportional to the yielded return. It is not uncommon in most litigation for the opposing party to never review or seek any clarification of the individual log entries. On the other extreme, there appears to be a trend in asymmetrical litigation of opposing counsel challenging the contents of a log without regard to its contents, operating on the assumption that there is no downside to challenging the contents of the log from their perspective in terms of burden or cost. My experience in litigating privilege issues is that the document-by-document log approach adds very little to the process and, to the contrary, there are other approaches to privilege logging that can result in significant reduction of cost and burden.

B. Additional Meet-and-Confers Without More Changes Will Not Address the Fundamental Costs and Burdens of Privilege Logging

I share the concern of various interested parties, such as the Lawyers for Civil Justice, that the current proposed amendments to Rules 16(b) and 26(f)—without any substantive link to Rule 26(b)(5)(A)—ultimately do little to address the fundamental costs and burdens of privilege logging. As noted above, these burdens are drastically exacerbated by insistence on document-by-document privilege logging regardless of circumstances, and the proposal to endorse further meet-and-confer requirements will likely heighten the burdensome nature of the privilege process without any meaningful guidance on methods of compliance determined by the scale and needs of the case.

The Advisory Committee Note to the 1993 amendments, which got it right, expressly recognizes that the appropriateness of the method of compliance may differ where the privilege claims are on documents of an extensive volume: "Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if

[5] While there is a lot of discussion about whether the latest generative AI will alleviate this burden, the reality is that large language models have been around for some time. Certainly, the addition of natural language search will assist the identification and evaluation of privilege, but: (i) these newer engines are relatively immature and will take time to refine; and (ii) may increase efficiency and speed of document review and logging but are unlikely to eliminate the need for lawyers to ultimately make the difficult judgment calls around privilege.

[6] Fed. R. Civ. P. 1.

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the items can be described by categories."[7] The proposed amendments, as written, seek to specify that discovery plans and scheduling address "the timing and method of complying with Rule 26(b)(5)(A)." As Judge Facciola and Jonathan Redgrave rightly observed, however, what courts and parties have put into practice based on Rule 26(b)(5)(A) "does not fully harmonize with the intended purpose of those provisions to promote flexibility," as the default to traditional individual document logging "hinders the parties and the courts from careful and full consideration of alternative methods of compliance."[8] Despite the Note's endorsement of flexibility to the circumstances in choosing a method of compliance, courts continue to insist that the rules designate document-by-document logging.

In this regard, I have attempted on numerous occasions over the last two decades to negotiate novel approaches to logging other than a document-by-document logging approach. In 2009, for example, I worked with then-Magistrate Judge John Facciola (D.C.D.C.) and the late William Butterfield (Hausefled LLP) to put forward a novel approach to privilege logging in the form of objective privilege logging. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869, Misc. No. 07-489 (October 8, 2009) (D.D.C.). Despite the initial use of this practice over a decade ago, I have run into a wall in attempting to meet and confer with opposing counsel in the effort to propose, negotiate, and/or litigate some alternative approach to a document-by-document logging, with the standard response from opposing counsel being that the Federal Rules require such. Because of the pervasive but unsupported view of what the "rules" provide, and despite the Note's recognition that document-by-document logging is not necessarily required, the proposed rule changes unfortunately do not go far enough.

1. Clarification in Rule 26(b)(5) that Document-By-Documents Logs Are Not Required and, in Many Cases, Alternative Methods of Identifying Privilege Materials Withheld from Production Are More Appropriate

I respectfully suggest that the Committee changes to Rules 26(f) and 16(d) alone are not sufficient to address what has become a de facto practice by district courts in many jurisdictions to mandate document-by-document logging in order to maintain a claim of privilege. A change is required to Rule 26(b)(5)(A) and the Advisory Note to reiterate that document-by-document logging is not required by the Federal Rules. As suggested by Facciola and Redgrave and supported by LCJ,[9] adding this single sentence would put the focus where it belongs—the rule that is the source of the misunderstanding:

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

[7] Fed. R. Civ. P. 26(b)(5), advisory committee's note to 1993 amendments.

[8] Facciola-Redgrave Letter at 2.

[9] *Id.*

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In addition, the Committee Note accompanying this amendment should also clarify that Rule 26(b)(5)(A) does not require a document-by-document approach to logging to preserve a claim of privilege, rejecting the de facto approach in district courts. The Committee might use the Advisory Committee Note to reiterate that the Rule never imposed a traditional privilege log requirement, and that the manner of compliance is context-dependent based on the needs of the case, to be determined by the parties and the court.

Relatedly, the Committee Note to Rule 26(b)(5)(A)(ii) should expressly endorse or identify other means to satisfy the obligation to log documents withheld on the basis of privilege. By way of example, categorical logs have emerged as an alternative to document-by-document logging. Categorical logs are a means to save tremendous burden and costs and, in fact, have been adopted and/or endorsed in the Southern District of New York, Commercial Division of the Supreme Court of New York, and the Delaware Chancery Court. *See* Commercial Division of the Supreme Court of New York Rule 11-b(b)(1) of Section 202.70(g) ("The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs."); *see also* Court of Chancery Guidelines for Discovery (c)(iv)(B), available at https://courts.delaware.gov/forms/download.aspx?id=99468. ("It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis."); S.D.N.Y. Civ. R. 26.2(c); W.D.N.Y. Civ R. 26(d)(4).[10] Other district course have successfully used the practice of categorical logs.[11]

The common refrain by some receiving parties is that categorical logs are fundamentally unfair and do not provide sufficient information from which they can adequately challenge the assertion of privilege (i.e., categorical logs can be used as a method to conceal documents that are not otherwise appropriately withheld on the grounds of privilege). In response to that claim (one which I personally have found unfounded), my suggestion is that the Committee Note should also reference a practice, that I have used with success, that I refer to as "Categorical Log Plus."[12] This

[10] Another practice that should be noted in the Committee Note is the use of "metadata logs" or, simply, a log of objective information often extracted from the litigation support system (e.g., date, author, recipients, file type). *See* Sedona Commentary (public comment version), at 29 (2014).

[11] *See, e.g.*, *Asghari-Kamrani v. U.S. Auto. Ass'n*, No. 2:15-cv-478, 2016 WL 8243171, at *1–4 (E.D. Va. Oct. 21, 2016) (finding party's categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be "unduly burdensome for no meritorious purpose"*)*; *ManufacturersCollection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 558888, at *4–5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a "document-by-document listing . . . would be unduly burdensome" and provide "no material benefit to Precision in assessing whether a privilege [] claim is well grounded."); *First Horizon Nat'l Corp. v. Certain Underwriters at Lloyd's*, 2013 WL 11090763, at *7 (W.D. Tenn. Feb. 27, 2013) (permitting categorical privilege log and noting that "several courts have employed such a categorical approach to balance competing concerns of, on the one hand, the burden on the withholding party to perform a detailed indexing of a large amount of documents and, on the other hand, the need for the requesting party, and even more importantly, the court, to be able to adequately assess the applicability of the privilege being asserted.")

[12] I first advocated the use of this approach in *In re Rail Freight Fuel Surcharge Antitrust Litig*, MDL No. 1869, Misc. No. 07-489 (October 8, 2009) (D.D.C.), where Judge Facciola endorsed the use of an objective log approach. Under this approach, the producing party agrees to run a set of privilege-screener search terms. For any ESI that is identified by the screening process, the producing party provides in the first instance a list of documents that are claimed to be privileged in the form of the objective metadata (author, recipient, date created, document title, etc.) that is generated

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method allows for the presumption of categorical logging in the first instance, allowing identification of certain log categories that are reasonably organized and elucidate the nature of the withheld materials. Under this approach, however, a receiving party would have the right upon good faith basis to request that certain categories or a subset of categories are logged on a document-by-document basis. This practice allows for the significant reduction of burden by eliminating a document-by-document approach for most documents claimed as privilege, but also ensures that the receiving party will be able to obtain, upon good faith basis, a document-by-document log for documents where they feel such information is necessary to evaluate a claim of privilege.

2. Rebuttable Presumption that Certain Categories of Documents and ESI[13] Need Not Be Logged

A revised Committee Note should go further and provide that a presumption should exist for the exclusion of certain categories of privilege claims from logging based on the nature of the communication and the persons who are parties to the communication. This would include privileged communications between outside trial counsel and in-house counsel about a case after the complaint is filed; attorney-work product regarding the litigation; and post-commencement internal communications with in-house counsel.[14] Of course, there may be certain matters such as an antitrust action where the alleged anticompetitive behavior may be alleged to be ongoing. In the context of such cases, the presumption could be easily rebutted to require the logging, for example, of post-complaint documents and communications.

3. Endorse Top-Level Email and Chat Logging to Reduce Burden of Email and Chat Strings

Discovery is shifting: the focus is turning more heavily on emails, and increasingly so on chats. These types of ESI present additional challenges to the privilege logging process, making communications technology even more burdensome to log. More specifically, emails or chains

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from the litigation support system. The receiving party can then designate documents or categories of documents on the objective privilege log that it would like the producing party to review in greater detail and provide a traditional Rule 26(b)(5)(A)(ii) log for those entries/categories. The producing party then has the burden of logging those entries and supporting any claim of privilege. I have used this procedure successfully in complex litigation, resulting in substantial cost savings to the parties.

[13] I have used a similar approach referred to as "Metadata Log Plus," where a metadata log is produced in the first instance, but the receiving party can request, upon good-faith basis, a document-by-document log for some subset of the documents withheld on the basis of privilege.

[14] *See Am. Broad. Cos., Inc. v. Aereo, Inc.*, 2013 WL 139560, at *2 (S.D.N.Y.,2013) (requiring moving party "to further limit its request to mitigate the substantial and undue burden the request presently imposes" by, *inter alia*, "exclusion from the privilege logs of documents created after the commencement of litigation relating to the technology at issue" and "excluding from the privilege log purely internal communications among counsel and their agents"); *see also United States v. Bouchard Transp.*, 2010 U.S. Dist. LEXIS 37438, at *4 (E.D.N.Y. Apr. 14, 2010); *Ryan Inv. Corp. v. Pedregal De Cabo San Lucas*, 2009 U.S. Dist. LEXIS 118337, at *9, 2009 WL 5114077 (N .D. Cal. Dec. 18, 2009).

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typically contain a series of related emails or chats often referred to as a chain, which would include the "last-in-time" or "top-level" email as well as "lesser" or "thread members" that are fully contained within the chain or thread.[15]

Top-level or last-in-time logging requires the party claiming privilege to log the top level or last-in-time email within an email chain for a chain that might, for example, include 10 lessers as part of the email chain. On the other hand, a document-by-document requirement for all emails in the chain would require 11 log entries—the top-level email and the 10 lessers. Top-level logging has emerged as a widely accepted practice in federal and state court litigation as a means to reduce the burden associated with logging privileged emails and chats. *See, e.g.*, *Deora v. Nanthealth, Inc.*, CV 17-1825-TJH (MRWx), Dkt.74 ¶ A.3.a. (C.D. Cal. Oct. 31, 2018) ("A most inclusive email thread is one that contains all of the prior or lesser-included emails, including attachments, for that branch of the email thread. The Parties agree that removal of wholly-included, prior-in-time, or lesser-included versions from potential production will reduce all Parties' costs of document review, production, and litigation support hosting. Accordingly, each Party may produce or list on any required privilege log only the most inclusive email threads."); *see also Mayall v. USA Water Polo, Inc.*, No. 8:15-cv-00171-AG-RNB, Dkt. 52 ¶ IV. (C.D. Cal. Aug. 25, 2015) (When there is a chain of privileged e-mails, the producing party need only include one entry on the privilege/redaction log for the entire email chain and need not log each e-mail contained in the chain separately."); *Johns v. Bayer Corp.*, No. 09-CV 1935 DMS JMA, (S.D. Cal. Dec. 01, 2010) ("When there is a chain of privileged e-mails, the Producing Party need only include one entry on the privilege log for the entire email chain, and need not log each e-mail contained in the chain separately. However, the privilege log must identify all recipients (cc's and bcc's) and the sender of the most recent email in an email chain; all recipients (cc's and bcc's) and senders of all other emails within the entire chain must also be identified, but may be identified collectively (i.e., do not need to be separated per each email in the chain.").[16]

With this said, it has been my experience over the last few years that many receiving parties and some courts have rejected the common practice of top-level logging, instead insisting on an email-by-email logging requirement for every email in the chain. The primary argument for insisting on this email-by-email approach is that there could be information reflected in the metadata of the lesser that would reveal the information was communicated to a person who would

[15] An exemplar may help. Assume there is an email that has a back-and-forth among a group of people. The last email in the chain would reflect the "last in time" email, and the prior or lesser parts of that chain would be reflected below the last in time.

[16] *See also Rabin v. Pricewaterhousecoopers*, 2016 WL 5897732, at *2 (N.D. Cal. Oct. 11, 2016) ("An email thread for which a Party claims a privilege may be logged in a single entry provided that such entry identifies all senders and recipients appearing at any point in the thread."); *Martinelli v. Johnson & Johnson*, 2016 WL 1458109, at *5 (E.D. Cal. Apr. 13, 2016) ("Accordingly, each party may produce or list on any required privilege log only the most inclusive email threads."); *ABS Global, Inc. v. Inguran, LLC*, 2015 WL 12805631, at *7 (W.D. Wis. Apr. 14, 2015) ("Where an individual privilege log entry is necessary for an email thread, the Party's privilege log should reflect only the most inclusive message and need not include earlier, less inclusive messages that are fully contained, including attachments, within the most inclusive message."); *see also Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 642 (D. Nev. 2013) (declining "to require separate itemization in the privilege log").

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break the claim of privilege, or that they require the lesser to evaluate the claim of privilege. But there could be no claim of privilege in the first instance as to the lesser if it was sent to or received by someone who is not a privileged actor. In addition, the logging information in the lesser is highly unlikely to provide additional information that would change or alter the privilege analysis.[17]

4. Clear Guidance Regarding Contents Required of a Log and Timing and Procedures for Challenging Claims of Privilege

The Committee should also clarify, in the Advisory Committee Note, what constitutes the contents of an adequate log. A review of decisions from the various courts across the circuits demonstrates there is near universal agreement that the following categories of information comply with Rule 26(b)(5)(A): (i) date; (ii) author(s); (ii) addressee(s); (iii) person(s) copied or blind copied; (iv) a general description of the information claimed as privileged; and (v) a description of the claimed privilege (e.g., attorney-client privilege, work product, joint defense material, common interest material). *See, e.g.*, *Miller v. Pancucci*, 141 F.R.D. 292 (C.D. Cal. 1992).[18] Despite a few decades of caselaw regarding the requisite contents of a privilege log, receiving parties (especially in complex litigation) are now regularly attempt to request additional information regarding the logged documents that are not necessary to evaluate the claim of privilege and, in many cases, might contain privileged information, requiring additional costs and burdens in the preparation of a log. For example, I have been involved in numerous disputes where a receiving party demands that the title, file name, or subject line of the document be logged. *See Pub. Citizen, Inc. v. U.S. Dep't of Educ.*, 388 F. Supp. 3d 29, 42 (D.D.C. 2019) ("[T]he Court finds that the subject line of the email chain was properly withheld under the attorney–client privilege as its disclosure would reveal the client's motivation in seeking legal advice."); *In re Chevron Corp.*, 2013 WL 11241413, at *7 (D.D.C. Apr. 22, 2013) (noting that an email subject line "itself may be fairly read as reflective of counsel's legal theories"). Litigants should not be required to either negotiate or litigate on a case-by-case and court-by-court basis what constitutes the sufficient contents of a log in order to maintain a claim of privilege and, instead, this requirement should be set forth in at least the Note.

[17] To address concerns about non-privileged actors, I often agree to list all of to, from, ccs and bccs in the email chain. In addition, I have also used a "Top-Level Plus" logging approach in many instances, where I will agree to engage in top-level logging for emails and chat threads, but the receiving party can request, upon a good-faith basis, a subset of the emails and chat threads to be logged separately as to the top-level and lesser emails and chats.

[18] *See also Dollar Tree Stores, Inc. v. Toyama Partners LLC*, No. CV 10-0325 SI (NJV), (N.D. Cal. July 26, 2011) ("A party meets its burden of demonstrating the applicability of the attorney-client privilege by submitting a privilege log that identifies '(a) the attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated.'"); *Cleancut, LLC v. Rug Doctor*, 2010 WL 1417859, at *1 (D. Utah Apr. 6, 2010) (rejecting argument that log was "inadequate" because it did not identify the title of the document); *SecurityPoint Holdings, Inc. v. United States*, 2019 WL 1751194, at *2 (Fed. Cl. Apr. 16, 2019) (rejecting argument that privilege log was insufficient based on "the lack of document titles and email subject lines disclosed"); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Donaldson Co.*, 2014 WL 2865900, at *10 (D. Minn. June 24, 2014) (approving a privilege log that did not contain document titles/email subject lines).

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5. **Use of Rule 502(d) Orders in a Manner that Precludes the Use of Contents of a Log as Basis for a Claim of Waiver**

Counsel preparing a log has to be concerned that the disclosure of too much information on a privilege log (especially as it relates to the description of the information claimed as privileged) can form the basis of a claim of waiver. On the other hand, the receiving party often argues that the information disclosed on the log is not sufficient for making a decision whether to challenge the privilege claim, necessitating an *in camera* review of the documents in question. A potential solution to these competing concerns is for the Committee Note to endorse the use of Rule 502(d) orders to clarify that the contents of a privilege log cannot form the basis of a claim of waiver of privilege. By doing so, the Federal Rules would facilitate the use of 502(d) orders in a manner that would improve the quality and contents of the log without fear of the argument of waiver, in addition to saving judicial resources by potentially avoiding *in camera* review.

III. Conclusion

I thank the Committee for its continued work on these important issues. I am grateful to have the opportunity to comment on the proposed Rules. It is important that civil litigation be fair to all parties and allow for cases to be decided on their merits. The cost and burden of privilege review and logging has outgrown the limited benefit of such logs. There are other practices and approaches to the treatment of privileged documents that should be endorsed in the Federal Rules. The current proposed changes in Rules 16 and 26 simply do not go far enough in addressing these issues. I would, therefore, advocate that the Committee consider further revisions to the proposed rules consistent with the comments herein.

Respectfully submitted,

John Rosenthal

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February 15, 2024

Thank you for the opportunity to comment on proposed Rule amendments regarding privilege log practice under Rules 26(b) and 16(b). I have practiced for 25 years representing clients in federal district courts and before the 9th Circuit Court of Appeals. My law firm primarily represents plaintiffs in cases involving environmental torts, personal injury, insurance claims and defective products. My partners and I regularly serve as class counsel in class actions involving large corporate defendants. In the course of years of discovery practice, I have made some observations regarding the importance and function of the rules regarding privilege logs.

Today, most serious cases involving corporate misconduct are won or lost in discovery. When a regular person files a case against a powerful, well-healed corporation, whether the case makes it to a fair resolution on the merits almost always depends on whether the Plaintiff is allowed to make a rigorous inquiry into information held by the defendant. The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties that are essential to proper litigation. *Id.* The privilege log requirement in Rule26(b)(5(A) is a linchpin component of ensuring a fair, meaningful discovery process.

The critical requirement of Rule26(b)(5(A) is that a litigant withholding information from discovery production on the basis of privilege provide the opposing party sufficient information to evaluate the applicability of the privilege claimed. Without such a requirement, it is simply inescapable that zealous litigants will withhold critical evidence behind questionable privilege analyses. I have seen this time and again in serious cases, and as litigators, we have all felt the pull to keep harmful documents out of discovery, if there is a colorable argument for privilege and a likelihood that the opposing side will not have a meaningful opportunity to challenge the privilege claim. I would like to share one striking example from a set of medical device cases my firm handled in recent years.

My firm filed four cases in Montana State district court on behalf individuals injured by a defective hip replacement product produced by a major international medical device manufacturer. The cases were not removable to the established multidistrict litigation for the hip product because plaintiffs sued a Montana distributor, but the cases proceeded parallel to the process in the federal MDL. The cases were defended by one of the Nation's most reputable defense firms. For the first three years of litigation, the Defendant refused to answer basic discovery requests regarding why it recalled the same hip product in countries other than the United States. This refusal included a fully-briefed writ petition by the Defendant to the Montana Supreme Court and approximately 6 successful discovery motions by Plaintiffs. When

the Defendant finally produced the requested documents, it withheld 3,778 responsive documents behind an attorney-client privilege log. Defendant's counsel swore to the district court and the Montana Supreme Court in formal, signed pleadings that the documents withheld under the privilege log were "thousands of privileged communications exchanged between [defendant] and its attorneys in the United States and elsewhere for the purpose of securing legal advice ... " However, this case was the rare case where the Defendant was ultimately forced to turn over the purportedly privileged documents for scrutiny by plaintiffs and the court. The district court went so far as to hire an esteemed civil procedure professor to evaluate the privilege assertions in the defendant's privilege log.

After comprehensive review, the Plaintiffs and Court learned that ninety-nine percent of the 3,778 documents withheld behind the defendant's privilege assertions were never actually privileged. Thousands of the documents were never generated for the purpose of obtaining legal advice. Many of the withheld the documents involved no communications with lawyers whatsoever. Many more documents had been shared with outside third parties such as governmental regulators, so privilege was waived. Based largely on the independent discovery master's findings, the district court sanctioned the defendant for withholding thousands of documents behind fraudulent assertions of privilege for years. Without rigorous privilege log requirements, the Defendant's misconduct in that case would never have been unearthed and both my clients and the MDL would have been deprived of the most critical documents in the cases.

Based on these and other experiences in discovery-intensive cases, I support the proposed changes to privilege log practice under Rules 26(b) and 16(b). However, I believe there are a few opportunities to make the amendments work better for courts and litigants.

First, I would strike the sentence found in the first paragraph of the Committee Note that, "Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by document "privilege log." The Rules and Committee Notes should encourage privilege logs that are thorough and honest for each document withheld from discovery. Stressing the cost associated with preparing a privilege log runs counter to this imperative. It is critical that information be provided for each individual document withheld because the analysis of whether privilege applies must often be conducted on a document-by-document basis.[1] For instance, it is important that litigants disclose who authored and received the documents withheld for privilege. Without such information, the opposing party cannot evaluate whether the documents were for the purpose of obtaining legal advice or whether the documents were sent to third parties, waiving the privilege. Allowing parties to designate entire categories of documents that they contend are privileged, without identifying the specific documents in an adequate privilege log, would only facilitate parties' ability to conceal the most critical documents in a case by sandwiching them in with tens or hundreds of other documents in a purportedly privileged category of documents.

[1] *Please see,* October 16, 2023 testimony by Doug McNamara before the Rules Committee, requesting specific language be added to the Committee Note regarding what information must be included a privilege log, and citing to Judge Grimm's article *Discovery Problems and Their Solutions*, and citing *Hill v. McHenry,* No. CIV. A. 99-2026-CM, 2002 WL 598331, at *2-3 (D. Kan. Apr. 10, 2002).

Second, I also suggest removing the sentence from the last paragraph of the Committee Note regarding "failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case." An adequate privilege log *is* the communication between the parties regarding the privileges involved in the case. Counsel who believes documents to be privileged will not be at liberty to disclose more about the documents and privileges than is required in the privilege log.

In summary, any changes to the Rules or Committee Notes, should bolster the requirement that parties withholding evidence from discovery provide all the information necessary to evaluate the applicability of the claimed privileges for each individual document. Any changes tending to weaken this requirement will undermine the ability of the courts to serve as a forum where both sides are allowed mutual knowledge of relevant facts and where cases are resolved on the merits.

Thank you for considering these comments.

Sincerely,

Jory C. Ruggiero

PUBLIC SUBMISSION

Comment from thompson, fred

Posted by the **United States Courts** on Feb 15, 2024

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Comment

My name is Fred Thompson. I am a member of Motley Rice, LLC, and have served on numerous multi-district litigation plaintiffs' leadership positions over my career. I am writing to comment on the proposed draft Rule 16.1. I believe the creation of a position "coordinating Counsel" is not a wise move. The appointment of the counsel without reference to "skin in the game"---with no requirement that the counsel be representative of the pending cases or frankly to have any particular knowledge of the underlying issues and facts of the litigation will not have any streamlining effect on the formation. It smells of creating a special guild of professional coordinating counsel who doubtless will see themselves as somehow expert in mdl formation. (in this regard, no fees or expenses should ever be allowed for the person who presides over the preliminaries--i can see special masters seeing this slot as a desirable appointment if it is lucrative) While I don't doubt that our academic friends will have the confidence of ignorance that they would be well suited to lobby for such positions, they are the worst group to evaluate and organize the mdl. With no experience and their institutional biases for rules and hurdles and thresholds, they invariably gravitate to bureaucratic defendants' positions. Having appointed this figure, to then charge that position with creating a detailed brief of issues to be presented prior to the initial organizational meeting simply adds an unneeded bureaucratic step to the organization. Such an attempt to draft answers to such questions in the blind with the court either will result in boilerplate filings at best, or at worst will result in distorted positions that will be repudiated and modified by the leadership when they assume their positions of responsibility. Several of the required filings are frankly comic---SETTLEMENT for example. What does a coordinating counsel with no authority, with no case representational requirement, with no background, and no interaction with defendant possibly advise the organizing court about SETTLEMENT?-- Why not simply write in the Rule: after all the parties are identified and brought before the Court, and after the number of alleged parties, the injuries, the number and scope of the injuries, and the theories of liabilities are ascertained, and after adequate discovery is made to allow a complete understanding, if the case can be resolved by settlement, it should be...that is, unless the defendants choose to defend the case, which is their right. ... The Rule is better written to require an immediate first hearing of all interested parties at which first meeting the methods and means of appointment of Leadership, Liaison and Steering Committee shall be set out. Authoritative responses to the enumerated list of issues contemplated by the proposed rule should be required of the

appointed leadership (except for settlement) within a very brief window. If the court wishes to appoint a designated counsel to be spokesman for the assembled plaintiffs at that first meeting, then I guess it could do that, but the counsel should be selected from persons who have actual cases pending, and it should be recognized that until the appointment of leadership, no authoritative positions should be contemplated. This process assures that the proceeding will have the legal responsibility and moral authority to lead the litigation. If the Court in its discretion invites input as to issues and procedure for the first meeting, it could do so, but the key phrase here is "in its discretion." The key to early efficiency is in settling the leadership positions quickly and then having these persons, cloaked with the authority of their appointment, set out the basic CMOs that will propel the mdl forward.

Thank you for receiving my comment
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February 15, 2024

RE: Comments to Proposed Rule 16.1 – Multidistrict Litigation

Rule 16.1(c) adds an extra burden and expense to Plaintiffs. The purpose of 28 USC § 1407 is to promote efficient and just adjudication of claims when they involve more than on common question of fact. While Rule 16.1(c) attempts to make the process of MDLs more efficient, the effect is an extra burden and expense on Plaintiffs. Often faced with filing deadlines, Plaintiffs would be faced with the added expense of expediting orders for medical records to meet the early discovery rule. This extra expense and burden are contrary to the purpose of 28 USC § 1407 to have just adjudication for all parties involved.

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February 15, 2024

Committee on Rules of Practice and Procedure
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Re: Proposed Amendments to Rule 16.1 (Multidistrict Litigation)

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this comment regarding the rulemaking related to proposed Rule 16.1 on Multidistrict Litigation by the Advisory Committee on Civil Rules ("Advisory Committee"). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly represent clients in multidistrict litigation proceedings, both in leadership and non-leadership positions. AAJ supports the proposed rule with amendments as described in this comment.

I. A Framework for Evaluating the Proposed Rule.

AAJ is keenly aware of the time and effort the Advisory Committee dedicated to considering and reviewing proposals and appreciates that one-sided and unfair proposals have been rejected in favor of a more modest and balanced rule. Proposed Rule 16.1 provides the flexibility that judges and parties require. MDLs come in many sizes and too much rigidity is unnecessary for small MDLs, hampering and delaying the resolution of claims. Additionally, any MDL rule must work for antitrust and securities MDLs and other claims based in federal law. Although the defense bar has largely focused on product liability claims, AAJ appreciates the consideration the Advisory Committee has given to class action MDLs, mass action MDLs, and MDLs based on non-product liability related claims, which still make up a significant part of the MDL landscape.

One of the stated purposes of the rule is to provide direction to judges and attorneys handling their first MDL. While there are options for achieving this objective other than a federal rule, AAJ is mindful that should a rule be approved, it must provide clarity and not create

unintended ambiguity or add uncertainty into already complex litigation.[1] With the goal of providing clear direction in mind, AAJ provides two sets of recommendations for making the rule more workable for parties and courts. Each set is its own alternative, but the recommendations stem from similar concerns regarding the proposed rule discussed in Part II *infra*.

II. Concerns Regarding Implementation.

AAJ has three major concerns regarding the implementation of the proposed rule.

First, the qualifications of the "coordinating counsel" are undefined in both the rule text and the Committee Note. While the Advisory Committee may be assuming that the coordinating counsel is an attorney who is familiar with the legal issues in the case,[2] no such requirement can be found in the proposed rule. Indeed, no part of the rule or Committee Note provides specific guidance to the transferee court regarding whom should be appointed to this role. Without explicit direction, a judge who is unfamiliar with MDLs could just as easily appoint a third-party neutral, a mediator with no relation to the case, or a lawyer she or he knows to this position. Furthermore, in MDLs in which leadership is contested (or in which different slates of leaders are competing for appointments), it may be unhelpful or inadvisable for the court to appoint a coordinating counsel prior to making a leadership determination. In these instances, picking a coordinating counsel from one side over the other may lead to significant management issues that an inexperienced transferee judge would want to avoid.[3]

Second, many of the proposed topics are too premature to be useful at the initial conference stage and cannot be addressed until leadership has been appointed. The Advisory Committee previously considered two alternatives known as Alternative 1 (longer list) and Alternative 2 (shorter list), the latter of which had more traction during the informal comment period with the AAJ members involved in the discussion regarding alternatives. AAJ recommends that the

[1] The January 16, 2024, public hearing heightened awareness of unintended ambiguity as it was clear from the testimony provided that members of the plaintiffs' bar interpreted the role of "coordinating counsel" differently. The Advisory Committee members also offered differing interpretations of the role, with some offering that it was more administrative in nature while others speculating that it was no different from liaison counsel, a position frequently part of leadership structure. If the drafters of the rule are sending out mixed signals, it is reasonable to assume that district court judges, especially those with little to no experience with MDLs, might read the text of the rule differently too. This lack of predictability is unhelpful, as well as potentially time-consuming and expensive for parties and the court.

[2] AAJ makes this observation based on the Committee Note, which states in 16.1(c)(1) that, "If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position. . . ." It would be inherently problematic to appoint an attorney who is serving the court in a special master or ministerial capacity to leadership.

[3] These management issues could include the promotion of an outlier legal theory of the case, interfering with the self-organization that routinely takes place amongst plaintiff-side practitioners, or recommendations for the appointment of leadership that are not in the best interests of case management. *See* Judges of the Superior Court of the State of California for the County of Los Angeles Assigned to the Complex Civil Litigation Program, Comment Letter on Proposed Rule 16.1 on Multidistrict Litigation (Feb. 2, 2024), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0032 ("This private ordering can still provide the necessary efficiencies achieved by clear lines of communication between Plaintiffs' Leadership and defendant(s). When plaintiffs' counsel organize . . . among themselves, the MDL court is relieved of the need to closely supervise . . . matters which otherwise may consume a large amount of judicial effort.").

Advisory Committee consider shortening the list of topics in the proposed rule to focus the transferee court's attention on only the most practical issues for consideration prior to appointment of leadership. In the alternative, if the Advisory Committee determines that it prefers a more detailed list of topics, then AAJ recommends that the transferee judge consider: (1) whether leadership needs to be appointed, and (2) if that appointment needs to be made before the meet and confer and preparation of the report.

Finally, the Committee Note should reflect the substance of the proposed rule. AAJ provides several recommendations to ensure that the Committee Note accurately reflects the scope of the rule text, including suggestions that follow its two proposed alternatives. *See infra* Part II.C.

A. The Position of "Coordinating Counsel" Is Not Defined and Seems Unnecessary.

AAJ has deep reservations about the appointment of a coordinating counsel generally.[4] While AAJ has concerns regarding the absence of qualifications of coordinating counsel and criteria for the selection process in the text, more broadly, the proposed rule also fails to consider the unintended consequences of selecting the wrong person as coordinating counsel.[5] In some cases, the appointment of coordinating counsel could prove helpful by providing a roadmap for early management of the MDL to the transferee judge. However, in small MDLs, the appointment may be unnecessary or obsolete.[6] In some MDLs, the appointment may create unintended issues, such as additional jockeying for leadership selection and disagreements over the direction of the

[4] AAJ's redlines of Alternatives 1 and 2 during the informal comment period in the summer of 2022 removed "coordinating" from before "counsel" in the draft rule.

[5] No requirement exists in either the text of the rule of the Committee Note that coordinating counsel represent plaintiff side-interests or even have a stake in the litigation. This may work if the position was purely ministerial. However, with the inclusion of topics in (C)(1)-(12), at an absolute minimum, the coordinating counsel would have to work with lawyers familiar with the litigation to complete the report. Furthermore, there is no prohibition against multiple appointments of the same coordinating counsel for multiple MDLs, which would result in the rule creating a magistrate or special master provision, undermining the selection process of the JPML, which has carefully determined which judge should receive the litigation. As Jennifer Hoekstra explained in her testimony for the second public hearing:

> The coordinating counsel appointment appears duplicative of the purpose of the magistrate or special master in supporting the court. It also appears to step into the process of the JPML in appointing a judge to oversee the MDL. The JPML has already gone through the arduous process of determining where to consolidate and which judge to consolidate in front of. Why is it needed to add another layer of court appointed counsel to coordinate for the judge who has just been appointed and selected?

Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, at 106 (Jan. 16, 2024) [hereinafter January 16th Testimony] (written submission of Jennifer Hoekstra, Aylstock, Witkin, Kreis, and Overholtz PLLC), https://www.uscourts.gov/sites/default/files/testimony_outlines_for_jan_16_final.pdf. There is also an assumption that one coordinating counsel may be sufficient when that may or may not be in the best interests of the claimants or the court (the proposed Committee Note says "Rule 16.1(b) recognizes the court may designate coordinating counsel -- perhaps more often on the plaintiff than the defendant side").

[6] *See, e.g.*, Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, at 192 (Feb. 6, 2024) [hereinafter February 6th Testimony] (written submission of Jessica Glitz, Johnson Law Group), https://www.uscourts.gov/sites/default/files/2024-02-06_hearing_testimony_packet_final.pdf.

litigation before enough information about the nature and type of claims is available for evaluation by the parties. There is also a lack of clarity about how the proposed rule interacts with leadership appointments in class action under Rule 23(g), which may comprise all (or a significant part) of the claims within the MDL.[7] While the purpose of the rule is to provide direction to transferee judges with little or no MDL experience, these unintended consequences make it worth considering whether alternatives may provide the same result without the unnecessary risk or uncertainty.

In some MDLs, it may be clear early on whom should be appointed to leadership and the transferee judge could go ahead with that appointment, skipping the appointment of a coordinating counsel as an unnecessary step.[8] In other MDLs, there may be contested leadership, with competing slates of attorneys or many attorneys from different firms competing for leadership appointments. If leadership is contested, does the appointment of coordinating counsel help with litigation management? If the attorneys representing the injured plaintiffs have different approaches and divergent legal theories, then appointing one of them may not be helpful, even if the transferee judge specifies the initial report should include dissenting views.[9] In these instances, it may be better to forego the coordinating counsel appointment altogether and allow plaintiff-side counsel to self-organize or consider whether the appointment of interim leadership may be necessary before holding an initial management conference.

Further, while the appointment of coordinating counsel is optional,[10] a rule providing the option may make it more likely than not that a coordinating counsel is designated by the transferee judge in the first place. And if a coordinating counsel is appointed, there are considerations regarding this position that have not been discussed, such as whether only experienced attorneys can be appointed to the position and if so, how is the experience obtained or evaluated, and what is the impact of any experience requirements or thresholds on diversity and ensuring that attorneys

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[7] *See* January 16th Testimony, *supra* note 5, at 180–82 (written submission of Norm Siegel, Stueve, Siegel, Hanson LLP) (detailing issues with appointment requirement of interim class counsel under Rule 23(g)). There are also concerns about how the anti-trust class actions would function within the context of the rule. *See, e.g.*, February 6th Testimony, *supra* note 6, at 134 (written submission of Kellie Lerner, Robins Kaplan).

[8] January 16th Testimony, *supra* note 5, at 156 (written submission of Lisa Ann Gorshe, Johnson Becker PLLC) ("Leadership, in the mass tort arena, is best served when there exists a continuity related to who is tasked with overall representation of plaintiffs.").

[9] *See, e.g.*, February 6th Testimony, *supra* note 6, at 25 (written submission of W. Mark Lanier) ("The lack of one clear plaintiffs' voice caused unnecessary frustration, loss of time, and expense for the parties."); January 16th Testimony, *supra* note 5, at (written submission of James Bilsborrow, Weitz & Luxenberg) (suggesting that separate reports may be required as illustrated by the dicamba herbicides MDL in which a separate report was filed by a smaller group of plaintiffs' counsel urging the court to create a separate track for antitrust claims, which ultimately was done). Bill Cash offered another perspective on reports in his February 6, 2024, testimony and further questioned how a transferee judge would be able to use a report that is fractured in this manner to make any decisions. February 6th Testimony, *supra* note 6, at 175 (written submission of William F. Cash III, Levin Papantonio Rafferty Proctor Buchanan O'Brien Barr Mougey P.A.) ("[I]n MDLs where plaintiffs are not yet organized, no one person or team is best positioned to speak for all. This may actually put defendants in the role of choosing their opponents—choosing which plaintiffs' lawyers they'd most like to deal with in preparing the report. That is not workable.").

[10] AAJ supports the flexibility provided by the proposed rule.

are a fair representation of the clients in the litigation.[11] Finally, how is coordinating counsel to be compensated?[12] The draft seems to assume that parties are responsible for their own costs, yet only one report is to be produced.[13]

Finally, during the February 6th hearing several members of AAJ were asked about using the term "liaison" instead as a possible substitute for "coordinating" counsel. That alternative did not receive a more positive reception. As Ashleigh Raso stated in her testimony (paraphrasing), "Liaison counsel is often a thankless job. It's the janitor of the MDL and appointing someone to do this may result in ignoring janitorial duties."[14] In response to questions, Ellen Relkin pushed back on the notion that a coordinating or liaison counsel would bring more lawyers' voices to the table than plaintiffs' self-organizing, noting that the coordinating counsel could miss someone too.[15]

In evaluating whether the appointment of coordinating counsel will benefit the management of the litigation or create additional speedbumps, the outcome is not clear, and AAJ questions whether a coordinating counsel position is truly required for an initial management conference[16] or whether other options already familiar to judges and plaintiff-side practitioners would be more beneficial to initiating the litigation. In balancing these factors, AAJ recommends removal of "coordinating counsel" because many MDLs will benefit from another structure that encourages plaintiffs to self-organize or prioritizes the appointment of leadership (or interim leadership) prior to the coordination of an initial management conference. When combined with the overall drafting issues AAJ has identified related to the rule's lack of qualifications and criteria for who should be appointed as "coordinating counsel," these fundamental concerns over the role's effectiveness clearly tip the scale in favor of removing the provision entirely.

B. A Shortened List of Topics for Meet and Confer.

The proposed rule encourages transferee judges to hold an initial management conference to "develop a management plan for orderly pretrial activity," but it also recognizes that this

[11] Several plaintiff practitioners mentioned concerns with "repeat player" issues and difficulties breaking into leadership. It is imperative that the Advisory Committee not compound this issue.

[12] *See* January 16th Testimony, *supra* note 5, at 106 (written submission of Jennifer Hoekstra) (noting that costs of coordinating counsel would decrease the ultimate recovery of clients); *id.* at 36 (written submission of Alyson Oliver, Oliver Law Group PC) (noting added expense of "coordinating counsel" especially if combined with a counsel 'green' in the litigation).

[13] The Committee Note to 16.1(c) states, "This should be a single report, but it may reflect the parties' divergent views on these matters."

[14] During her testimony on February 6, 2024, Ashleigh Raso of Nigh Goldenberg Raso & Vaughn also stated that liaison counsel need not be physically located in the same state as the transferee judge to effectively serve in this capacity.

[15] If the "coordinating counsel" is someone that the court knows but who is not familiar with either the litigation or the plaintiff's bar, then it would be easy to miss someone. If the coordinating counsel is selected from a group of lawyers known to the plaintiffs, it is difficult to discern why the outcome would be different.

[16] At the hearing on January 16, 2024, there was discussion regarding whether the word "early" should replace the word "initial" in 16.1(a). AAJ is not recommending this change; its advocating for a shorter list of topics. However, should the Advisory Committee revise the proposed rule to include more than one management conference, then AAJ would recommend changing "initial" for "early" or another more accurate textual choice.

"ordinarily would not be the only management conference held during the MDL proceedings." *See* Committee Note to Rule 16.1(a). While AAJ agrees with the Committee that early attention to some of the matters identified in proposed 16.1(c) "may be of great value," consideration of several of these topics during an initial conference is untimely and imprudent.

The rule cannot be a substitute for training new judges or for the Manual on Complex Litigation, so what exactly is the purpose of listing all potential topics for discussion? If a rule lists multiple topics, then discussion of those listed topics will become the default even if the parties need to focus on the basic structure of the MDL early in the litigation.[17] A judge's insistence that parties submit a report that addresses every topic listed in 16.1(c) will result in a waste of time and resources for parties and the court. In MDLs where leadership or interim leadership has been appointed, it might be possible to discuss topics relating to discovery and pretrial orders at an initial conference. However, if leadership has not been appointed and an appointment is likely to be made later or is recommended in the report itself, then many topics should be deferred until after leadership is in place.[18]

As an AAJ member stated in her testimony at the second public hearing, "[T]he Draft Rule appears to try to do too much, too soon, suggesting a combined report addressing both how to decide leadership within the MDL and what leadership would then propose to do to advance the MDL."[19] Thus, AAJ proposes two drafting options to better clarify the meet and confer. For both options, AAJ recommends moving leadership's role in settlement activities from proposed 16.1(c)(1)(C) to 16.1(c)(1)(E) to better reflect the order of these leadership activities. AAJ also recommends adding the word "Management" to the title of the rule.[20] Attachment A is a redline of the text drafting options along with a revised Committee Note.

- **<u>Option 1</u>: Remove "Coordinating Counsel" and Shorten List of Topics.** AAJ's first recommended option for amending the proposed rule would remove the "coordinating counsel" from the rule and provide a shortened list of topics[21] that could be more easily agreed to and reported on by the parties early in the litigation. This option would provide a roadmap for the MDL to get established

[17] The AAJ seldom agrees with John Rabiej, but he notes the default point in his January 16th testimony, "…the Rule's listed matters will become the default." January 16 Testimony, *supra* note 5, at 62. Likewise, Rachel Hampton, a defense-side witness, noted at the same hearing that clerks would likely read the text literally, noting to the judge any deficiencies in a report that failed to cover all 12 topics. Transcript of Proceedings, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, at 175 (Jan. 16, 2024) [hereinafter January 16th Transcript] (statement of Rachel Hampton, Sidley Austin LLP), https://www.uscourts.gov/sites/default/files/jan_16_hearing_transcript.pdf.

[18] For example, at this initial stage, discussions related to facilitating settlement (Rule 16.1(c)(9)) or referring matters to special masters (Rule 16.1(c)(12)) are very premature and may be inappropriate prior to appointing leadership.

[19] January 16th Testimony, *supra* note 5, at 176 (written submission of Jennifer Scullion, Seeger Weiss LLP).

[20] The Standing Committee removed "Managing" from the beginning of the rule title in June 2023. This muddied, rather than clarified, what the rule is about. AAJ recommends adding "Management" to the end of the title.

[21] Topics that are removed from the Rule could instead be included in the Committee Note as possible matters for consideration that may be designated by the court under 16.1(c) (revised to 16.1(b)).

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without wading into issues that need to be resolved by leadership or that need additional time to thoughtfully consider.[22]

- **Option 2: Remove "Coordinating Counsel" and Add Leadership Appointment.** Option 2 takes the proposed change in Option 1 to remove "coordinating counsel" and replaces it with an option to appoint leadership, signaling that the appointment of leadership can be made first. With this change, some topics listed under 16.1(c)(1) regarding the appointment of leadership would be moved to 16.1(b) and would no longer be listed as separate topics. The topics under (c) could still be shortened as proposed in Option 1, but there is less urgency to shorten the list if leadership is already appointed. There would be no changes to paragraph (d).[23]

AAJ believes that the strongest and most workable version of the rule would omit the coordinating counsel role (Option 1). However, should the Advisory Committee decide to retain the coordinating counsel, AAJ urges amendment of the Committee Note to provide guidance to the transferee judge to ensure that an appropriate attorney is selected for the position. In that case—and in the spirit of flexibility—AAJ suggests that the Committee edit the note to 16.1(b) with the following language:

> **Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel – perhaps more often on the plaintiff than the defendant side – to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.
>
> While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. ~~The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~
>
> Careful consideration should be given to the appointment of coordinating counsel on the plaintiff's side, particularly when cases from multiple state and federal jurisdictions are involved. The court should choose a plaintiff-side attorney who is already representing plaintiffs in the litigation and has a stake

[22] AAJ rarely agrees with Lawyers for Civil Justice ("LCJ"), but in this instance, AAJ wholly endorses their recommendation that topics 16.1(c)(9) (whether the court should consider measures to facilitate settlement) and 16.1(c)(12) (whether matters should be referred to a magistrate judge or master) should be removed from the list.

[23] AAJ has reviewed drafting suggestions submitted to the Advisory Committee by AAJ members. While AAJ agrees with many of these proposals in principle, we opted to offer this version for the Advisory Committee's consideration because it is consistent with the framework devised by the drafters and does not unduly expand the length or scope of the proposed rule.

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in the outcome. The appointment of a coordinating counsel on the defense side is not usually required and should appointment be advisable, there are only one or two lead defense attorneys involved automatically winnowing the selection for defendants. While the coordinating counsel on the plaintiff side may be later considered for a leadership role, the designation of coordinating counsel does not necessarily result in leadership designation. If there are multiple attorneys competing for leadership appointment, the court should carefully consider who can best represent the plaintiffs' interests and manage the litigation. One option is for the court to revisit leadership appointment after a specific time-period to ensure that appointed leadership is serving their assigned function.

While multiple paragraphs could be written regarding the qualifications of coordinating counsel, drafting such a Committee Note easily would result in an overly long Committee Note and may cause confusion about whether there are substantive differences between the qualifications for coordinating counsel and leadership. Thus, AAJ urges the Committee to choose a drafting revision that removes the coordinating counsel from the rule. The testimony from the plaintiff's attorneys from the public hearings indicates that the position is not necessary and in most MDLs, the plaintiffs self-organize.[24] The transferee judge should either have the plaintiffs self-organize (or appoint interim leadership) for the initial conference and prepare a report that includes topics (1), (2), (3), (6), (8), (10), and (11). Alternatively, leadership could be appointed, and all topics could be included in the report, except settlement, which is premature for an initial conference.

C. Revisions to the Committee Note.

With a new rule, there is an expectation that the Committee Note will be substantial to provide guidance and clarity. AAJ proposes the following global recommendations to improve the Committee Note, including:

- Removing references to "coordinating counsel" from the Committee Note;
- Moving the reference to 16.1(c)(1)(C) on leadership role in settlement activities to 16.1(c)(1)(E) to align with proposed renumbered text and renumbering other paragraphs accordingly;
- Removing portions of the Committee Note related to 16.1(c)(4), (5), (7), (9), and (12), as they are too premature to be included in a one-size-fits-all list of recommended topics for discussion at this early stage of litigation.

[24] *See, e.g.*, January 16th Transcript, *supra* note 17, at 29 (statement of Mark Chalos); February 6th Testimony, *supra* note 6, at 74 (written submission of Jennie Lee Anderson, Andrus Anderson LLP); *id.* at 16 (written submission of Lexi Hazam, Lieff Cabraser Heimann & Bernstein); *id.* at 89 (written submission of Ashleigh Raso, Nigh Goldenberg Raso & Vaughn); *id.* at 197 (written submission of Jessica Glitz, Johnson Law Group); *id.* at 202 (written submissions of Amber L. Schubert, Schubert Jonckheer & Kolbe, LLP).

- Including Committee Note language that would support Option 2, *supra*, in which leadership counsel or interim counsel is appointed before the initial management conference and report;

- Moving the reference to 16.1(c)(1)(C) on leadership role in settlement activities to 16.1(c)(1)(E) to align with proposed renumbered text and renumbering other paragraphs accordingly; and

- Removing a few sentences that are either too tangential to the rule text or too specific in application to provide guidance for implementing the rule's text.

AAJ has included a redline of the Committee Note as Attachment A to this comment for ease of reference.

III. Extreme Proposals from the Defense Bar Must Be Rejected.

In an effort to expand the proposed Rule 16.1 beyond the scope of an initial management conference accompanied by a report to the transferee judge, the defense bar is pushing to include a provision to address "claim insufficiency" and standing issues.[25] DRI's comment even quotes from a memorandum that AAJ submitted to the Advisory Committee back in 2018, which DRI characterizes as AAJ's acknowledgment that cases are sometimes filed prematurely.[26] This is an inaccurate oversimplification of AAJ's statement then, and a mischaracterization of AAJ's position now.

A. The Committee Must Avoid Going Backwards.

The Advisory Committee has already considered and rejected the requirement of plaintiff fact sheets at the outset of the MDL. While they may be helpful with certain MDLs, they are not universally helpful, and the Advisory Committee has strenuously avoided the creation of a one-size-fits-all-rule. AAJ urges the continuation of this approach.

LCJ's proposed amendment to 16.1(c)(4) regarding "claim sufficiency" is a step backwards. First, it is limited in its perspective and written to address product liability claims, which are only one part of the MDL docket. Second, the language added by LCJ's current proposal is similar to language sought by that organization earlier regarding mandatory initial disclosures and which has already been rejected by the Advisory Committee.[27] Moreover, the proposed LCJ language is not about distinguishing discovery from an exchange of information regarding claims

[25] *See, e.g.*, Laws. for Civ. Just., Comment Letter on Proposed Rule 16.1 on Multidistrict Litigation (Sept. 18, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0004; DRI Ctr. for L. & Pub. Pol'y, Comment Letter on Proposed Rule 16.1 on Multidistrict Litigation (Oct. 11, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0010.

[26] DRI, *supra* note 25, at 6 (quoting Memorandum from the AAJ MDL Working Group to the Advisory Committee on Civil Rules (May 25, 2018) [hereinafter "2018 Memorandum"], *reprinted in Advisory Committee on Civil Rules Agenda Book* 181 (Nov. 1, 2018), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2018)).

[27] *See* Laws. for Civ. Just., Comment Letter on Proposed Rule 16.1 on Multidistrict Litigation (Sept. 9, 2020), https://www.uscourts.gov/sites/default/files/20-cv-aa_suggestion_from_lawyers_for_civil_justice_-_mdls_0.pdf.

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because the rule text provides that a proposed discovery plan is a topic for consideration under 16.1(c)(6). Finally, and most importantly, the issue of "claim sufficiency" is highly contentious, appearing frequently in so-called tort reform proposals pushed by the defense bar.[28] AAJ urges the Advisory Committee to reject "claim sufficiency" as language that is too controversial to lead to positive and productive engagement amongst defense- and plaintiff-side MDL practitioners at an initial management conference. The rule should set the framework for managing the entire MDL, for gathering cases for consolidation, and determining the types of claims that have been consolidated. Because consolidation can occur rapidly while proof of product use takes time, it is impractical—if not impossible—to require proof of product use up front.

B. Not All Problems Can Be Solved by a Rule.

In our 2018 memorandum, AAJ suggested the creation of an inactive docket to address claims that require additional time to be verified, including cases that may have been filed to preserve a client's claim before the applicable state statute of limitations expired.[29] With an established inactive docket in place, the entire litigation would not be hamstringed by claims that require additional time to verify specific product use, exposure, or implantation; to obtain official medical records, or locate other documentation to confirm medical diagnosis and treatment; or sometimes even to find a client who may have moved or changed phone numbers.[30] The active docket could continue with traditional pre-trial discovery, while cases on the inactive docket would remain there until more information becomes available, at which point decisions can be made about what to do with each case (i.e., transfer to the active docket, transfer or remand to another court because the case is outside the scope of the MDL transfer order, or voluntary dismissal).

As AAJ stated in its 2018 memorandum:

> "These early-filed claims not only slow down the litigation and result in delays for case resolution, but create a false impression that all claims in the MDL have certain weaknesses or are underdeveloped. They distract the transferee court from its primary focus and attention on the common discovery issues, generally relating to the defendant's conduct, which advance the litigation as a whole."[31]

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[28] In March 2017, former Judiciary Committee Chairman Bob Goodlatte introduced the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (1st Sess. 2017). which The Act contained substantial provisions on MDLs, including a claim-sufficiency requirement. H.R. 985 § 105 ("[C]ounsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceedings shall make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.").

[29] 2018 Memorandum, *supra* note 26, at 181.

[30] Low-income clients tend to have less stable housing, resulting in more frequent moves. *See* Seungbeom Kang, *Severe and Persistent Housing Instability: Examining Low-Income Households' Residential Mobility Trajectories in the United States*, 38(9) HOUS. STUD. 1615, 1616 (2023), https://www.tandfonline.com/doi/epdf/10.1080/02673037.2021.1982871?needAccess=true ("[L]ow-income households' residential moves tend to occur frequently and involuntarily."). These clients may also more frequently rely on pre-paid or "burner" phones rather than signing a longer-term contract or agreeing to the credit check required by major cell phone carriers.

[31] 2018 Memorandum, *supra* note 26.

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Many issues have been before the Advisory Committee since that early discussion of topics, and AAJ urges the Advisory Committee not to be distracted by the defense bar's focus on the premature claims issue.[32] Which claims belong in the MDL and which belong elsewhere will get sorted out, but it would be inappropriate for "coordinating counsel" to do so. Moreover, the sorting and prioritization of claims will almost always occur after the appointment of leadership, who decide which fact patterns and theories of liability belong in the MDL. The defense bar wants to have it both ways: they want to strenuously object to the inclusion of claims in the MDL unless they perfectly fit the claims criteria, yet they also strenuously object to the remand of claims inappropriately removed from federal court that are outside the scope of the MDL.[33]

Finally, it is important to make rules-based decisions based on data, and not on one extraordinarily large MDL that is causing a mischaracterization of the MDL litigation landscape. As Jennifer Hoekstra explained in both her oral and written testimony before the Advisory Committee on January 16, 2024, the 300,000 claims in the 3M Products Liability MDL (No. 2885)—which reportedly comprises more than 40% of the federal docket[34]—are in the process of being settled and over 270,000 of those have qualified for settlement[35] by identifying use of the product and injury (and these veterans who were injured during service to their country should be compensated for their injuries). The remaining claims are still being investigated, but Hoekstra noted that some veterans were filed twice because they had reached out to more than one lawyer, but the system is in place to prevent double recovery. These findings are consistent with the Bloomberg data submitted by Mark Lanier, which concluded that 2022 was the eighth straight year with a decline in MDL cases yet "[p]ercentage-wise, with so many types of MDLs in decline over the years, products liability cases have assumed a larger and larger share of the MDL docket and, due primarily to 3M's combat arms earplugs case, of the federal docket overall."[36]

IV. Conclusion.

AAJ thanks the Advisory Committee for its extremely thorough and diligent consideration of MDLs and proposed Rule 16.1. An initial management conference should help the parties and court plan for the litigation. Because this is a new rule, AAJ makes several recommendations based on efficiency in process and clarity in drafting to ensure that transferee judges can successfully implement the proposed rule should it be approved. First, remove the position of "coordinating

[32] This issue can continue to be debated at bench-bar conferences, but since there is not even agreement on the scope or cause of the issue, it cannot be addressed with a rules-based solution.

[33] AAJ commented during informal rulemaking on this rule about the inclusion of remand as a topic for discussion. *See Multidistrict Litigation Subcommittee Report*, *in Advisory Committee on Civil Rules Agenda Book* 183 (Oct 12, 2022), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-civil-rules-october-2022.

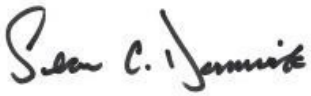
[34] February 6th Testimony, *supra* note 6, at 28 (written submission of W. Mark Lanier).

[35] January 16th Testimony, *supra* note 5, at 103–04 (written submission of Jennifer Hoekstra). If no additional claims qualify, this is a hefty 90% recovery rate. As Mark Lanier commented in this testimony for the February 6, 2024, hearing, "the solution to reduce the federal MDL caseload is not for plaintiffs' counsel to help fewer injured people; it is for corporations to injure fewer people, and to stop the procedural gamesmanship of the MDL system that keeps MDLs running longer." February 6th Testimony, *supra* note 6, at 28 (written submission of W. Mark Lanier).

[36] Eleanor Tyler & Robert Combs, Bloomberg Law, *2023 Litigation Statistics Series: Multidistrict Litigation* 16 (Sept. 2023), *in* February 6th Testimony, *supra* note 6, at 49 (Exhibit A to testimony of W. Mark Lanier).

counsel" from the proposed rule. Creating a new position without any definition or parameters when combined with substantial responsibility best suited to leadership is more likely to lead to avoidable issues. Second, consider limiting the topics for discussion to those directly related to the initial management of the MDL. Finally, ensure that the Committee Note follows the text of the rule. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,



Sean Domnick
President
American Association for Justice

ATTACHMENT

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AAJ's Redline of Proposed Rule 16.1 and Committee Note

Rule 16.1. Multidistrict Litigation Management [Conference][1]

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designation Of Coordinating Counsel For The Conference.** The transferee court may designate coordinating counsel to:~~

~~(1) assist the court with the conference; and~~

~~(2) work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

Option 1: Remove "coordinating counsel" from the rule and redesignate 16.1(c) as 16.1(b) *infra*.

(b) Designation of Leadership Counsel. The transferee court may consider whether leadership counsel or interim leadership counsel should be appointed, and if so, the procedure for appointment and whether such appointment should occur before or after the initial management conference.

Option 2: Replace the "coordinating counsel" in 16.1(b) with leadership or interim leadership counsel in 16.1(b).

(Unlike Option 1, Option 2 would maintain the original numbering.)

(b)~~(c)~~ Preparing A Report For Initial MDL Management Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address any matter designated by the court, which may include any matter addressed in the list below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

(1) whether leadership counsel should be appointed, and if so:

(A) the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;

[1] At its June 2023 meeting, the Standing Committee removed "Managing" from the title of the Rule, which mistakenly gives the impression that the Rule is about more than an MDL Management Conference. It would be clearer to call it "Multidistrict Litigation Management" or "Multidistrict Litigation Management Conference."

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

~~**(C) their role in settlement activities;**~~

(C)~~**(D)**~~ proposed methods for them to communicate with and report regularly to the court and nonleadership counsel;

(D)~~**(E)**~~ any limits on activity by nonleadership counsel~~; and~~

(E) their role in settlement activities; and

(F) whether, and if so when, to establish a means for compensating leadership counsel;

(2) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

(3) identifying the principal factual and legal issues likely to be presented in the MDL proceedings;

~~**(4) how and when the parties will exchange information about the factual bases for their claims and defenses;**~~[2]

~~**(5) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;**~~

(4)~~**(6)**~~ a proposed plan for discovery, including methods to handle it efficiently;[3]

~~**(7) any likely pretrial motions and a plan for addressing them;**~~

(5)~~**(8)**~~ a schedule for additional management conferences with the court;

Consideration of topics 16.1(c)(4), (5), (7), (9), and (12) during the initial management conference is untimely and imprudent unless leadership has been appointed.

[2] Should the Advisory Committee opt to keep (c)(4), AAJ recommends the following edit: "identifying how and when the parties will exchange early information about the factual bases for their claims and defenses" providing symmetry with topics (3) and (4), which both start with "identifying" and also providing additional information on what information is to be exchanged.

[3] Some plaintiff-side witnesses have recommended deleting (4) and keeping (6). The recommendation stems from not understanding what (4)'s "exchange of information" means while a proposed plan for discovery in (6) is clear and can include references to fact sheets or other methods for exchanging information in the Committee Note. As Lexi Hazam stated (paraphrasing) in response to questions during the February 6th hearing, "plaintiff facts sheets are part of the discovery process."

~~**(9)** whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);~~

(6)~~(10)~~ how to manage the filing of new actions in the MDL proceedings;

(7)~~(11)~~ whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

~~**(12)** whether matters should be referred to a magistrate judge or a master.~~

(c)~~(d)~~ **Initial MDL Management Order.** After the conference, the court should enter an initial MDL management order addressing the matters designated under Rule 16.1~~(c)~~(b)---and any other matters in the court's discretion. This order controls the course of the MDL proceedings until the court modifies it.

As with 16.1(b), Option 1 would redesignate 16.1(d) as 16.1(c).

COMMITTEE NOTE

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. ~~In recent years, these actions have accounted for a substantial portion of the federal civil docket.~~ There previously was no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

AAJ recommends removing this sentence, as it unnecessarily contributes to controversy over an accurate depiction of the federal docket.

Not all MDL proceedings present the type of management challenges this rule addresses. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

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AAJ's Redline of Proposed Rule 16.1 and Committee Note

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs to develop a management plan for the MDL proceedings. That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1~~(c)~~(b) may be of great value to the transferee judge and the parties.

~~**Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel – perhaps more often on the plaintiff than the defendant side – to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.~~

~~While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~

AAJ's Option 1 would remove "coordinating counsel" from the text of the rule, and thus remove this portion from the Committee Note.

Under Option 1, the substance of the draft note to proposed 16.1(b) would be moved into the list of topics to consider. *See infra*.

[**Rule 16.1(b).** Rule 16.1(b) recognizes that it may be helpful to appoint leadership counsel or interim leadership to represent the plaintiff side during the initial management conference. While appointment of leadership counsel is not universally needed in MDL proceedings, it may be especially helpful in larger MDLs. Special consideration to leadership appointments must be made to MDLs that include exclusively or partially class actions moved into the MDL in which interim leadership for the class has been appointed under Rule 23(g) prior to transfer to ensure that class members retain adequate representation.[4]

In selecting leadership counsel, courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent plaintiffs, keeping in mind

If the "coordinating counsel" position in 16.1(b) is replaced with the permissive appointment of leadership or interim leadership counsel per Option 2, then AAJ proposes adopting Committee Note language along these lines.

[4] While there may be other ways to draft a reference to Rule 23(g), the testimony of Norman Siegel at the January 16, 2024, hearing detailed the concerns of the intersection of the proposed Rule 16.1 with the appointment of interim class counsel under Rule 23(g).

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the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

Early appointment of leadership or interim leadership is one option to consider. The transferee judge can also wait to review recommendations made by the parties in their report before deciding whether to appoint leadership. In these instances, the transferee judge would allow parties to self-select their own leadership to represent each side's interests during an initial management conference. While leadership may be more necessary to appoint on the plaintiff side than the defense side given the number of counsel involved, self-selection is a frequently used plaintiff-side tool for initial communication.]

Rule 16.1~~(c)~~(b). The court ordinarily should order the parties to meet and provide a single report to the court about the matters designated in the court's Rule 16.1~~(c)~~(b) order prior to the initial MDL management conference. The court may select which matters listed in Rule 16.1 or Rule 16 should be included in the report submitted to the court, and may also include any other matter, whether or not listed in those rules. The report may reflect the parties' divergent views on these matters. ~~The court may select which matters listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may also include any other matter, whether or not listed in those rules.~~

The text in this paragraph is largely reordered. These first paragraphs assume that the "coordinating counsel" position has been removed from the rule.

If Option 2 is selected, the numbering of these paragraphs would remain the same.

Rules 16.1~~(c)~~(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow. Experience has shown, however, that the matters identified in Rule 16.1~~(c)~~(b)(1)-(7~~12~~) are often important to the management of MDL proceedings. In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

Option 1 redesignates 16.1(c) as 16.1(b) in the rule text and relevant portions of the Committee Note.

Rule 16.1~~(c)~~(b)(1). Appointment of leadership counsel is not universally needed in MDL proceedings. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. This provision calls attention to a number of topics the court might consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method for the selection of leadership counsel that is best for all MDL proceedings. If the judge has not already done so and leadership counsel is recommended by the plaintiff-side, that recommendation should be included in the report. [The transferee judge has a responsibility in the

selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.]

Under Option 2, the bracketed language can be found in the note to 16.1(b) *supra*.

~~MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries, and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.~~

This paragraph does not accurately reflect the MDL docket or plaintiff-side practitioners' experiences. Indeed, some MDLs are exclusively made up of class actions.

[Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.] ~~If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).~~

Under Option 1, this bracketed sentence stays here.

Under Option 2, it is moved to the note to 16.1(b) *supra*.

The rule also calls for a report to the court on whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

~~Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that – a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement~~

This paragraph is moved and labeled "Subparagraph (E)" *infra* in accordance with recommended changes to the text of Rule 16.1(b)(1).

~~and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.~~

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (C)~~(D)~~ directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit non-leadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(d). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (D)~~(E)~~ recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that non-leadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Subparagraph (E) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that – a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.

Previously labeled "Subparagraph (C)." *See supra*.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order

until well into the proceedings, when the court is more familiar with the proceedings.

Rule 16.1~~(c)~~(b)(2). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

Rule 16.1~~(c)~~(b)(3). Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

~~**Rule 16.1(c)(4).** Experience has shown that in certain MDL proceedings an exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings.~~

These paragraphs are moved to (c)(6) *infra*.

~~The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court.~~ [~~And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.~~]

~~**Rule 16.1(c)(5).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use~~

~~master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp*., 574 U.S. 405, 413 n.3 (2015).~~

Rule 16.1~~(c)(6)~~(b)(4). A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication~~.~~

Experience has shown that in certain MDL proceedings an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. The timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

This paragraph contains text moved from (c)(4) *supra*.

~~**Rule 16.1(c)(7).** Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.~~

Rule 16.1~~(c)(8)~~(b)(5). The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

~~**Rule 16.1(c)(9).** Whether or not the court has not appointed leadership counsel, it may be that judicial assistance could facilitate the settlement of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate settlement.~~

Rule 16.1~~(c)(10)~~(b)(6). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.

Rule 16.1~~(c)(11)~~(b)(7). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

~~**Rule 16.1(c)(12).** MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.~~

The appointment of a magistrate judge or master when still trying to determine the scope of the MDL is premature.

Rule 16.1(c)~~(d).~~ Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management

of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel were appointed after the initial management conference under Rule 16.1(a).

PUBLIC SUBMISSION

Comment from Spagnoli, Christine

Posted by the **United States Courts** on Feb 15, 2024

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Comment

Dear Members of the Committee:
I am a consumer attorney and partner in the law firm of Greene, Broillet & Wheeler located in Los Angeles, California. Our firm represents individual plaintiffs in personal injury and wrongful death suits, primarily in California state court, and also regularly in federal court, usually as a result of diversity jurisdiction. I personally have specialized in product liability cases against major auto manufacturers and tire companies for the past 35 years, and have experienced many of the issues with privilege logs consistent with the following excerpt from the original comment to the proposed rule change:

"These logs sometimes may not provide the information needed to enable other parties or the court to assess the justification for withholding the materials, or be more detailed and voluminous than necessary to allow the receiving party to evaluate the justification. And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery."

I have experienced these types of problems with over-designation and the time-consuming difficulty it presents in identifying underlying factual materials that are shielded by assertion of a privilege. On a number of occasions, when provided with sufficient details as to the underlying information that may have been included in an email, and more detail as to the function of the people who sent/received communications, I have successfully obtained court orders compelling production of documents that have been listed on a privilege log. While I generally agree that the proposed changes are helpful, I hope the committee will take into account that not all cases involve large productions such as those in mass tort cases, and that the rule should be flexible to address individual cases. I also believe it would be helpful for the Committee to include additional notes such as the one that was removed from the earlier comments regarding over-designation.

Comment ID

USC-RULES-CV-2023-0003-0044

Tracking Number

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Comment Details | **Submitter Info**

Received Date

Feb 15, 2024

Hon. John M. Facciola (ret.)
Jonathan M. Redgrave

February 15, 2024

***VIA* EMAIL**

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Facciola – Redgrave Second Supplemental Personal Submission to Advisory Committee on Civil Rules Regarding Potential Rulemaking Pertaining to Privilege Logs

Dear Mr. Byron:

On January 31, 2023, we made a supplemental personal submission regarding the then current proposed amendments to Fed. R. Civ. P. 16(b) and 26(f) and pertinent draft Committee Notes regarding privilege logs.[1] In that letter, we proposed the addition of a single, neutral sentence to Fed. R. Civ. P. 26(b)(5)(A)(ii). We also provided comments and suggestions regarding the proposed Committee Notes addressing the potential amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D). The proposal and our comments were based on many years of experience adjudicating privilege log disputes as well as supervising the preparation of privilege logs in complex litigation. Our suggestions were (and are) intended to enhance the goals of the proposed amendments to achieve the fairness and efficiency sought by Rule 1.

In the intervening period since our Supplemental Submission, *inter alia*, the Advisory Committee has held three public hearings, and received multiple additional comments regarding the proposed amendments and draft Committee Notes that were published for public comment by the Advisory Committee in August of 2023. Having testified at one hearing (one of us) and otherwise observed or received reports of the hearings and having reviewed various submissions and available transcripts of proceedings, we believe that the need for the neutral additional language in Rule 26(b)(5)(A) that we have previously proposed has been significantly reinforced. We also urge that the proposed Committee Notes not be changed in a manner that could weaken the support for flexible, case-specific, and fair privilege log protocols that is presently set forth in the Advisory Committee's proposed language in the amendments and proposed Committee Notes.

[1] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (January 31, 2023), https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

At the outset, we again appreciate and applaud the Advisory Committee's and the Discovery Subcommittee's efforts to address the vexing, persistent problems of privilege logs. No doubt, producing and receiving parties have differing, often contentious, views of what should be done and not done. But there is little doubt that continued, misplaced adherence in cases to document-by-document logs, requiring a painstaking explanation of the basis of each claim, imposes unnecessary and disproportionate burdens on all parties, and the court when disputes arise, often without actually providing the information that receiving parties assert is needed to assess the claims for documents that actually matter in any given action.[2]

In short, we generally agree with the Advisory Committee's proposals requiring that the parties, and recommending that the court, address privilege issues, logs, and compliance with Rule 26(b)(5)(A) early in the case.[3] We also agree that flexibility and the needs of each case should be key guiding principles, with court guidance often being beneficial.[4] However, in our judgment, and consistent with multiple other comments, the proposed amendments do not go far enough, and the rules need to be enhanced to realize the Advisory Committee's objectives. Importantly, in our view, we respectfully submit that an amendment to the language of Rule 26(b)(5)(A) itself is required to fulfil the stated objective of the amendments package.

---

[2] Based on our experience, despite painstaking efforts, more often than not the explanations (or descriptions) provided in traditional document-by-document privilege logs adds little to no valuable information because they (a) are boilerplate repetitions of "magic language" that review attorneys must select from a limited menu of options, (b) restate objective information otherwise provided in the log entry, and (c) are necessarily conclusory and unsupported assertions.

[3] We concur with comments stating that the parties in many cases will not have sufficient information to meaningfully address privilege issues, privilege log protocols, and timing at the initial Rule 26(f) conference. The Committee Notes should provide that parties may defer addressing those issues, and the court has the discretion to provide a schedule for the parties to address those issues. The Committee Notes should also recommend that the parties and the court monitor privilege log preparation and related issues throughout discovery to make any needed modifications. In other cases, privilege logs may not be an issue, and the Committee Notes should reflect that the parties may simply report that to the court.

[4] Some practitioners find that parties' conferences seldom yield meaningful results and are a waste of time, raising the possibility that the Rule 26(f) requirement may be treated as a checkbox by some attorneys and parties. Our experience is that fruitful agreements can be, and are, reached, particularly when the court provides support and guidance. Indeed, comments submitted by both receiving and producing parties' attorneys reflect that in complex cases privilege log protocols are frequently negotiated, and agreements are reached.

A neutral amendment to 26(b)(5)(A) supports and enhances the proposed amendments.

We previously suggested that the Advisory Committee should add this sentence at the conclusion of 26(b)(5)(A) (preceding subdivision (B)):

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

The additional language is neutral in that it neither favors nor disfavors any particular manner of compliance[5], including a determination that the needs of the case do not require articulating a manner of compliance.[6] The addition does not amend the substance of subdivisions (A)(i) or (ii). And the statement does not reference any time when the manner of compliance must be determined and leaves open deferring until the requisite information is known and modifying if the circumstances and needs of the case change. Indeed, a Committee Note addressing the added language could simply state the sentence was added to conform the Rule to the amendments to Rules 16(b)(B)(iv) and 26(f)(3)(D).[7]

The additional language also supports the intent of the proposed amendments and Committee Notes by emphasizing that the operative procedural rule does **not** dictate the manner of compliance in any given case or even suggest a default standard that would favor requesting or producing parties. Thus, it supports the intended flexibility and consideration of the needs of each case as opposed to requiring any party to show the need to deviate from a presumptive required manner of compliance. As a matter of practice, the current default manner of compliance is a document-by-document privilege log with an explanation or description of the basis of each claim. Indeed, several submissions by attorneys for predominantly requesting parties even recommend that an express presumption *favoring* such document-by-document logs be made in the rule or Committee Notes, emphasizing the adherence to purported current practice and presumed requirements. These very suggestions highlight the need for a change in Rule 26(b)(5)(A) itself to address the issue. Critically, Rule 26(b)(5)(A) is where the debate as to what will be required in any given case is joined because it is the operative rule as to what is

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[5] Some comments have recommended amending the Rule 26(b)(5)(A) Committee Notes to include a presumption that communications exclusively between in-house and outside counsel after the service of a complaint. We agree that presumptive exclusions can be helpful and note that such exclusions often are negotiated and adopted by parties and does not conflict with the neutrality of the proposed addition to Rule 26(b)(5)(A).

[6] A substantial portion of federal actions do not require substantial document productions or privilege logs, and the proposed language does not mandate that a privilege log (or a form of notice of withholding) be created in each action.

[7] Without any further commentary, we also respectfully submit that any changes that improve the privilege logging requirements and practices as to parties should also be extended to non-parties who face the same burden and proportionality predicaments but who are supposed to receive the added benefit under the rules that explicitly protect Rule 45 subpoena recipients from "undue burden or expense." Fed. R. Civ. P. 45 (d)(1).

required. And to be clear, we vigorously disagree with any amendment to Rule 26(b)(5)(A) that would favor traditional document-by-document logs, and we respectfully submit that such a presumption would undermine the flexibility intended by the proposed Amendments and Committee Notes, as well as the existing rule and the 1993 Advisory Committee Notes.

Why is the addition of the suggested language in Rule 26(b)(5)(A) needed?

First, in practice Rule 26(b)(5)(A) is interpreted to require a document-by-document log as the default manner of compliance in many cases.[8] The Rule, however, sets forth a general procedure and a standard. The Rule does not specify the manner of compliance, the precise information required, the form of a log, or notice of withholding, The Advisory Committee got it right both in the 1993 rule and the Committee's current proposed amendments and Notes – one size does not fit all cases.

The sentence we propose should be added explicitly clarifies that there is no required or default manner of compliance. The parties and the court should address the needs of each case and make a discrete, case-specific decision regarding the manner of compliance that fairly balances the interests of the parties and the principles of Rule 1. Otherwise, the current (and historic) default to document-by-document logging in many, if not most, jurisdictions will remain a default, and the intent of the proposed amendments likely will not be realized.

Moreover, we also respectfully suggest that the explicit recognition in Rule 26(b)(5)(A) of this necessary flexibility echoes Judge Jordan's inquiry at the October 2023 public hearing regarding whether privilege logging under the rules should reflect a level of proportionality – *i.e.*, the amount and type of logging in a matter should be commensurate with the value it adds to the

[8] Multiple comments have addressed the reality that the rule frequently is interpreted by courts and by parties to require a document-by-document privilege log as the default manner of compliance. By way of illustration, consider this dialogue in a decision from late 2023 reflecting how courts may default to a document-by-document logging paradigm, following rote advocacy from parties (here in the context of a non-party subpoena response where the requesting party cited a case from 1987 that the court introduces as its first supporting reference): "Although Ms. Bennett complains of the burden of requiring her to prepare a privilege log, Ms. DeRosa is correct that Ms. Bennett bears the burden to demonstrate that the Privileges apply on a document-by-document basis and cannot satisfy that burden based on blanket or conclusory assertions. (ECF No. 129 at 2) (*quoting*, *inter alia*, *von Bulow v. von Bulow*, 811 F.2d 136, 146 (2d Cir. 1987), *Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg, N.Y.*, 171 F. Supp. 3d 136, 147 (S.D.N.Y. 2016))." *Bennett v. Cuomo*, 2023 WL 7624669, at *1 (S.D.N.Y. Nov. 14, 2023); *see also Allstate Insurance Co. v, Electrolux Home Products, Inc.*, 2023 WL 4865877 at *3 (D. Conn. July 31, 2023) (requiring defendant to provide a document-by-document log in accordance with local rule: "A party invoking the work product doctrine 'bears the burden of establishing its applicability to the case at hand,' [citation omitted], and in this district carrying that burden requires logging each claim on a document-by-document basis in a privilege log meeting the requirement D. Conn. L. Civ. R. 26(e). Electrolux has not done this."). These are simply more examples of what nearly everyone recognizes – the pervasive concept of document-by-document privilege logging as a default standard has become entrenched in practice over the last three decades, even though the rule did not carry such an intent.

just, speedy, and inexpensive determination of every action and proceeding. In short, we believe it should, and further believe that the language we have submitted accomplishes this task.[9]

Furthermore, a number of questions and answers at the public hearings ventured into consideration as to whether new technologies, such as generative artificial intelligence, would be available in the future to eliminate burden concerns and somehow moot any need to further address privilege logging issues in the rules. Whether or not such technologies will ameliorate burdens, the reality of impending technology advancements is actually another reason to amend Rule 26(b)(5)(A) itself because the reliable and trustworthy outputs of these new technologies could undoubtedly take many forms and shapes (and not just a document-by-document log), and the rule (inaccurately applied today to presume document-by-document logs) should not be an impediment to the application of future technologies to better enable the just, speedy, and inexpensive determination of every action as it pertains to privilege logging.[10]

Second, the current proposed amendments do not connect Rule 26(b)(5)(A), the operative procedural rule for withholding documents from productions on grounds of privilege or work product protections, to the amended provisions of Rules 16(b) and 26(f). Because many courts and parties presume, erroneously in our assessment, that Rule 26(b)(5)(A) requires a document-by-document log, the absence of a reference in Rule 26(b)(5)(A) will in practice undermine the intent of the proposed amendments to Rule 16(b) and Rule 26(f) to promote flexibility, address the needs of the case, and reach a fair balance of the interests of all parties.

Third, as a practical matter, the proposed addition is needed to ensure that parties and their attorneys are fully aware of the requirement to address privilege logs early and, in our view, throughout discovery. Attorneys do consult the rules but less frequently the Committee Notes, and because the Committee Notes are published to provide the history of the adoption of a rule and subsequent amendments, locating the relevant notes is cumbersome. Furthermore, not all courts require a Rule 26(f) conference in all cases, and the parties may not have a Rule 26(f) conference or may not consult Rule 26(f) if they do. The proposed neutral amendment to Rule 26(b)(5)(A) triggers attorneys to consult the amendments to Rule 16(b) and Rule 26(f) and, if they have not addressed privilege logs, they will be prompted by the proposed language to do so.

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[9] In our view, an amendment to Rule 26(b)(5)(A) does not need to insert a test or cross-reference to other sections of the rules with respect to proportionality, and we respectfully submit that our simple proposed sentence captures the importance of proportionality for privilege logs in practice. Of course, a Committee Note accompanying the amendment could expand on the concept if the Advisory Committee believes that additional discussion of proportionality in this context would be beneficial.

[10] By way of example, it is entirely foreseeable that technologies of the future could provide a manner and means of requesting or producing (or both) sides of the discovery equation using prompt engineering or other means to query data and obtain results that could be by category or some other grouping, including exemplars or samples, that would provide the requisite notice and reliability under Rule 26(b)(5), without being a traditional document-by-document log.

Objections to the proposed addition to Rule 26(b)(5)(A) are not compelling.

The principal objection to our proposed language appears to be a sentiment that amending Rule 26(b)(5)(A) is not needed. We believe that objection is based on the notion that references to "the timing and method of complying with Rule 26(b)(5)(A)" in the proposed amendments to Rule 16(b)(3)(B)(iv) and Rule 26(f)(3)(D) will be sufficient to link those amendments to Rule 26(b)(5)(A), and that the parties will also somehow glean that their discussions are not burdened with a default presumption of document-by-document privilege logging that currently surrounds Rule 26(b)(5)(A) in practice today. We respectfully disagree as a matter of principle and practice with this notion and urge the Advisory Committee to consider the preceding enumerated support for the additional proposed amendment to Rule 26(b)(5)(A) that we have suggested.

We are also aware that at least one comment objected to the proposed amendment on the grounds that it would require a case-by-case determination of the compliance that would burden courts and parties and prohibit courts from adopting standing rules.[11] We respectfully disagree as the proposed amendments to Rules 16(b) and 26(f) put forth by the Advisory Committee already specifically require the parties to address the timing and method of compliance, and allow the court to incorporate those issues in a scheduling and management order. Any additional burden imposed by those mandatory considerations is designed to prevent more significant burdens being imposed on the parties and the court later by virtue of neglecting to address and resolve as early as practicable the timing and method of compliance in the matter.[12]

Finally, we are aware of some views that the language we are suggesting somehow creates "unnecessary controversy" and then implies that the draft text somehow removes the "burden of reviewing documents for privilege."[13] These arguments do not withstand scrutiny. First, there is no controversy created by virtue of the language we suggest unless "controversy" is defined as

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[11] *See* Re: Proposed Amendments to Civil Rules 16 and 26 and Proposed New Rule 16.1, submitted by Jeannine Kenney (January 2, 2024), at 10, https://www.uscourts.gov/sites/default/files/testimony_outlines_for_jan_6_final_0.pdf.):

> Other proposals urge the Committee to *require*, by amendment to Rule 26(b)(5)(A), that a case-by- case determination on the manner of compliance be made. Doing so would impose greater, not lesser, burdens on courts and parties to identify a logging methodology, prohibit courts from adopting standing rules on compliance which they are free to do now, and prevent judges from establishing their own standing policies and procedures on privilege logs as they do for many other discovery procedures (such as default ESI orders) where the parties have not agreed to alternative approaches.

[12] We also note that if the phrase "shall be determined" is deemed too strong or creates an unintentional mandate on the court to include in a Scheduling and Management Order, then "shall be considered" would suffice to realize the value of the proposed amendment while retaining the court's flexibility in entering an agreed upon order or its own order consistent with the proposed amendment and Committee Notes to Rule 16(b).

[13] American Association for Justice submission to Advisory Committee addressing Proposed Amendments to Rules 16(b)(3) and 26(f)(3) on Privilege Logs (February 14, 2024), at 5-6, available at https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0038.

all parties having a clear understanding of what the rule does and does not dictate, or the term is alternatively defined as the need for the parties and the court to discuss the manner of privilege logging to ensure that it meets the needs of the action (i.e., what the other amendments to Rule 16 and Rule 26 also provide). Second, there is nothing in the language providing *de jure* or *de facto* relief from any burdens associated with the review and identification of privileged documents in discovery in any action. That said, we would be remiss if we did not note that all the rules should be interpreted and applied to meet the needs of each action, consistent with Fed. R. Civ. P. 1, and that there is no obligation on any party to undertake burdens simply for the sake of undertaking burdens.

The Advisory Committee should not need to republish for public comment if it adopts the proposed amendment to Rule 26(b)(5).

In short, the proposed amendment to Rule 26(b)(5) that we are urging does not raise new issues not previously considered by the Advisory Committee. The proposed modest and neutral amendment to Rule 26(b)(5) that we have suggested has been available to members of the Committee and to the bench and bar for assessment and comment for a full year. Indeed, comments regarding the proposal have been received by the Committee. In addition, several witnesses at the January 16, 2024, hearing, were specifically asked for their views about the proposal. The bench and bar thus have had, and have taken, the opportunity to comment.

We strongly urge the Advisory Committee to retain the flexibility and needs of case considerations set forth in the proposed Committee Notes to Rules 16(b) and 26(f), and to provide additional clarity regarding certain aspects of the Notes.

Adopting a document-by-document log as the default method of compliance would defeat the purpose of the proposed amendments.

The Committee has received comments that suggest that the default method of compliance should be a document-by-document log with an explanation of the basis of each, and further assert that receiving parties have a greater need for document-by-document logs in large production cases with large numbers of documents withheld on the grounds that over designation for withholding is a greater risk and more prevalent in such cases.[14] If the proposed Committee Notes are amended as suggested, the flexibility and consideration of the needs of each case promoted by the Committee Notes would be undermined, if not effectively cancelled. Although

[14] Kenney Comment at 9:

> The statement that (document-by-document] logs are appropriate in only 'some' cases, together with the 1993 Note that suggested it may be unduly burdensome where voluminous documents are withheld, may suggest that that such logs are appropriate when only a small number of documents are withheld. But it is large withholding cases—where thousands or hundreds of thousands of documents are withheld—in which document-by-document information is most needed. Such cases pose the greatest risk that large swaths of documents will be withheld, making detailed disclosures critical.

we do not dismiss receiving parties' concerns about "over-designations," the suggested "remedy" will extend and likely exacerbate the current problems.[15]

Multiple factors impact both over and under designations,[16] one of which is the time pressure imposed by the preparation of document-by-document logs in large production cases, or cases with accelerated timelines, or both. Notwithstanding that technology—extraction of metadata and use of document databases in production—can and do expedite the identification of potentially privileged and protected material and the population of the log with objective information included in the privilege log, human review and quality checking are required, and humans confirm the description or explanation of claims. Reviewers are generally junior or less experienced attorneys who must review quickly to meet production and log deadlines, and, despite careful training and supervision, whose work must be quality checked by more seasoned attorneys. The review also is dynamic as novel issues and facts are discovered that require re-visiting claims previously asserted or missed.

In short, modifying the Committee Notes in any manner that would suggest that there must be a showing of burden to deviate from document-by-document logs is simply contrary to intent of the proposed amendments and Committee Notes. The parties must deliberate to strike a balance between competing interests and be creative in doing so particularly as potentially useful technologies evolve. The Advisory Committee got it right 1993 – document-by-document logs are sometimes appropriate, sometimes not.

Removing references to categorical logs as an example of an alternative method of compliance would be an error.

Categorical logs may not be useful in all cases but can be in many, and failing to allow for the consideration of the option would be a misstep. *First*, excising categorical logs would be inconsistent with guidance in the Committee Notes to the 1993 adoption of Rule 26(b)(5), and there has been no justification put forward to justify such a departure. *Second*, categories, where carefully designed, are useful to reduce burdens on all parties and offer the court an opportunity to provide guidance on disputed classes of claims. *Third*, categories, as has been suggested, are not a means to hide over-designations. Indeed, our experience is that courts have ordered and requesting parties have sought to use (and often use) categories for purposes of challenging

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[15] To be clear on this point, the problem of "over-designations" cited in multiple submissions can have many causes, but regardless of the cause(s) in any given action it is certain that the issue exists in the current world of document-by-document logs as a *de facto* default. There is no reason to believe that "doubling down" on document-by-document logs going forward in all cases (large or small) will somehow address the problem of over-designations, whereas other ideas, such as tiering (*see infra)*, provide a mechanism for a focus on key issues that matter that will also facilitate court guidance that, in turn, can reduce the risk of over-designations.

[16] Missing legitimate claims also is a greater risk in large productions cases. Fed. R. Evid. 502(d) orders, which as well documented are often not entered or are entered without clearly excluding the provisions of 502(b), reduce the risk of waiver but do not address the risk of disclosure of privileged and protected materials. Producing parties are appropriately sensitive to disclosures of otherwise protected materials and the inherent inconsistency with the policy purposes of the privilege and work product protection. And clawbacks—the remedy for erroneously produced privileged and protected materials--impose yet additional delay and burdens on the parties and often the court.

claims as well as for exclusions from logs. Moreover, categories can be designed with care and procedures for sampling individual documents can be negotiated and employed to confirm proper implementation.

The issue of timing, the adoption of the method of compliance should be more thoroughly addressed in the Committee Notes to Rule 16(b) and Rule 26(f).

Although addressing the method of compliance and related privilege issues may be appropriate in the initial Rule 26(f) conference, the parties should have the option to defer until such time as adequate information is available. The court in turn has the discretion to set a schedule for the parties to address compliance if the parties find that meaningful discussions are not possible at an early date in the matter. In addition, the Notes should recognize that the method of compliance may require the parties and the court to modify the method as the case evolves.

We concur with the recommendation to change references in the proposed Notes to Rule 26(f) from "rolling logs" to "tiered logs."

Tiering discovery to expedite production of more likely sources of relevant, important, and material information first and less likely material information later is a frequent practice that benefits all parties. Contrary to objections raised that tiering somehow increases over designations and permits producing parties to unilaterally decide what is material, in our experience tiering in most cases occurs in consultation with opposing parties and often involves the court.

As for claims of privilege, tiering has the additional benefits of focusing efforts on withheld documents that are *more likely* to be material to the merits of the case and, when combined with privilege logs for produced tiers, providing an earlier opportunity to address substantively difficult claims about which reasonable minds can differ. As we noted in our Supplemental Submission, the vast majority of privilege disputes do not pertain to material documents. Using logging that is sequenced by agreed-upon tiers thereby increases the probability that difficult and disputable claims which pertain to material withheld documents are addressed and, if necessary, the court's guidance is sought, in a timely manner.[17]

Tiered productions and privilege logs have the additional potential benefit of truncating document productions and consequently reducing the documents subject to logging. For example, requesting parties may conclude that they have obtained the information needed to prosecute their claims and choose to demand no further productions. Producing parties could

[17] We respectfully submit that such an approach to staging and focus during the discovery period in cases will be far more effective in avoiding, detecting, and/or ameliorating "over-designations" in cases as opposed to thinking that requiring yet more traditional document-by-document logs on a "rolling" basis during the discovery period will solve the problem. In contrast, just requiring more document-by-document logs earlier in cases on a wholesale basis will likely force producing parties to be more conservative with privilege calls as the review process is ongoing (*e.g.*, review teams are still moving up the learning curve, additional facts are being discovered and evaluated, etc.), resulting in subsequent downgrades later in the discovery period (that will inevitably be seen as initial over-designations that in turn will foster mistrust and ultimately lead to disputes being presented to the court that could have been avoided).

even conclude, where an appropriate Fed. R. Evid. 502(d) order is in place and with informed client consent, to not withhold and log documents on privilege and protection grounds for certain tiered productions (i.e., employ a "quick peek" production for that tier).

In sum, tiered productions and logs make sense. And while tiered logs do not cure problems that have been identified by others with respect to "rolling" logs, they present benefits that offset the challenges and redounds to the benefit of requesting and producing parties, as well as the court.

Proposals submitted to remove the concept of "burden" from the proposed Committee Notes to Rule 26(f) should not be adopted.

Burden is a significant factor to consider in discovery, and burdens in the privilege logging process can impact all parties and the court. We do not contest that over-designations also impose burdens, but over and under designations, as noted herein, are in significant part a function of the sheer volume of electronically stored information subject to production today, and the pressures and burdens attendant to document-by-document logs requiring an explanation of the basis for each claim contributing to the problem. Assuredly, attributing over-designation to nefarious purposes resolves nothing. The costs and burdens faced by producing parties are real, and over-designations that do occur contribute to the burdens on the receiving parties. Striking a fair balance in the method of compliance with 26(b)(5)(A) must be the common enterprise.

Technology holds great promise to mitigate the burdens of privilege log preparation and improve precision of log entries, but has substantial costs and has not, and is unlikely to, in the foreseeable future replace human judgment in asserting, challenging, and adjudicating claims of privilege and protection, and in any event, technology should not be artificially restricted to "document by document" outputs.

None of us can predict the course of technological advances. Who knows if generative artificial intelligence based on large language models might replace human reviewers in making initial privilege assertions and drafting privilege log descriptions or explanations. But we should not be confident that technology will resolve the costs and burdens of privilege reviews and axiomatic document-by-document logs. *First*, technology is not free. Ask any corporate information officer about the costs of licensing and implementation of a new application. *Second*, applications are often "black boxes," and algorithms can be trade secrets. Trusting the outputs requires the development of applicable metrics to measure, and then applying those metrics to ensure sufficient accuracy. *Third*, the complexity and often jurisdictionally variant substantive law of privilege plus the various means of communicating privileged and protected information will inevitably still require some level of human legal judgment to quality check, confirm, and modify asserted claims as well as pose challenges about how and what information to log. *Fourth*, as noted above, to the extent that technologies can improve the process for identifying documents withheld as privileged, there is no reason why the outputs of that technology must be smashed into a "document by document" log box. Indeed, it may well be that various aspects of identification and validation will come forth from new technologies that provide requisite trustworthiness for the parties and the court, yet the outputs will simply not be "document by document" in character or type.

The privilege log problem may appear intractable but will worsen by inaction.

In our judgment, both the volume of electronically stored information and new forms of communication technology will continue apace and impose more burdens on all parties and the courts. In the end, parties must find means to recognize and address their divergent interests and, when necessary, seek the assistance of the court in doing so. There are no silver bullets. But the proposed amendments and Committee Notes, with slight modifications, are positive and worthy of adoption. If adopted, we recommend that bench and bar should monitor the impact of the amendments and be prepared to address further actions regarding the rules as necessary. We also believe that the adoption of an amended Rule 26(b)(5)(A) as we have suggested will not only directly support the Committee's intent for the amendments package, but it would also spur the development of further academic and bar commentary and guidance that will assist practitioners and jurists in addressing privilege logs and privilege disputes in the future.

Again, we sincerely thank the Advisory Committee for its consideration of our submission, and for the many efforts made by the Committee and its members to address and resolve the ongoing dilemma of privilege logs.

/s/ John M. Facciola

John M. Facciola

/s/ Jonathan M. Redgrave

Jonathan M. Redgrave

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February 15, 2024

Mr. H. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
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Re: Proposed Rule 16.1 on MDL Proceedings

Dear Members of the Advisory Committee,

Thank you for allowing me to offer my perspective on the new proposed Rule 16.1 concerning MDLs.

My name is A. Layne Stackhouse, and I have been practicing law, and specifically representing injured victims in the context of mass torts, for over a decade. Throughout the course of my career, I have represented thousands of plaintiffs in a variety of mass torts in both state and federal coordinated litigations. My career has led me to represent all manner of plaintiffs injured by all manner of products, whether pharmaceutical drugs, medical devices, herbicides or over the counter products. Based upon my experience, I provide the following commentary:

Regarding consolidation and the MDL process in general, consolidation is a valuable tool to promote efficiency, judicial economy, and fairness to all parties and our justice system. Nevertheless, I think everyone who operates in this context understands the process can always be improved. For this reason, I echo the many sentiments of my esteemed colleagues that certain portions of proposed Rule 16.1 make plain sense. For instance, I agree that proposed 16.1(c) subsections 1, 3, 10, and 11 are all topics that can be fairly addressed at an initial case management conference. Generally speaking, these matters are all typically addressed early in any MDL or coordinated action. So while I am not convinced they are *necessary* at the initial case management conference, I do see the value in including them as appropriate early topics in the new rule.

However, based upon my experience, the topics proposed in proposed 16.1(c) subsections 4, 5, 6, 7, 9, and 12 are likely premature matters to determine at the first case management conference. These topics often require institutional knowledge of the case and familiarity with the respective parties' positions. Furthermore, how these topics land is often the result of lengthy negotiation between the parties, something that isn't likely feasible that quickly after the formation of an MDL. These provisions, in my opinion and experience, are more appropriate for consideration after leadership has been appointed and the parties have had time to meet and confer.

Regarding proposed Rule 16.1(b), like many of my colleagues have already commented, I believe this provision would cause more confusion than it would aid in the efficient and fair litigation of an MDL. "Coordinating counsel" is quite vague, and would seem redundant in light of the fact that the rule contemplates early designation of lead counsel for both sides (which is par for the course already). What exact role do they play over the course of the litigation and what is the scope of their role after preparation of a Rule 16.1(c) report? I personally believe early appointment of leadership is a better approach.

Finally, the suggestion that the new rule needs to address so-called "unsupportable claims" is unfounded. First, oftentimes as advocates we have to act quickly in preserving our clients' rights. This means, occasionally, needing to file cases before a full investigation has been undertaken. While not *ideal*, in practice this issue with inevitably arise. Nevertheless, if such a situation occurs and it is proven later that the case should not be pursued, we already have a myriad of tools to address this.

And importantly, based upon the MDL subcommittee's definitions, an "unsupportable claim" is invariably hard to define pre-discovery. Specifically: a claim where the plaintiff did not suffer the adverse consequence at issue, or where the claim is time-barred under applicable law. Both of these scenarios may involve complex determinations of fact and law. For instance, pre-discovery, how are we determining choice of law to decide what the applicable law is? Pre-discovery, how are we determining which exceptions to state statute of limitations and/or state statutes of repose may or may not apply? Pre-discovery, how are we determining the oftentimes complex and nuanced discovery rules that exist in the majority of the states? Pre-expert reports and *Daubert* rulings, how are we determining which injuries are viable versus not viable?

As anyone with experience in mass torts understands, these are often complex and complicated litigations that evolve throughout the course of the litigation. Full fact discovery may reveal plausible bases to allege new injuries, novel theories of causation, and exceptions like fraudulent concealment or disease exceptions to toll state statute of limitations and/or repose. Even the science frequently develops over the course of the litigation. Oftentimes, these questions may arise in any individual case that require a deep dive into the underlying state law and a thorough review of the applicable case law. None of these issues are completely straight forward with a clear "right" legal *and* factual answer at the outset of a litigation that may take years to resolve.

Lastly, we already have effective tools that are utilized in the case that any particular claim should be dismissed because it is truly frivolous. Plaintiffs' counsel can voluntarily dismiss these claims, defense counsel can move to have them dismissed, and Rule 11 already provides the court with the requisite power to deal with bad actors and to deter inappropriate behavior.

In conclusion, I share the sentiments and suggestions of others, who suggest in more detail, the Committee should remove the suggestion of a Coordinating Counsel and limit the scope of rule 16.1(c). I appreciate the opportunity to provide this commentary.

Sincerely,

A. Layne Stackhouse

COMMENT
TO THE
ADVISORY COMMITTEE ON CIVIL RULES

The Product Liability Advisory Council ("PLAC") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments regarding the proposed Rule 16.1.

I. INTRODUCTION

PLAC is a nonprofit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] Dedicated to enhancing and reforming the law, especially concerning the liability of product manufacturers and related companies in the supply chain, PLAC draws from the varied experiences of its corporate membership spanning diverse manufacturing sectors. Additionally, PLAC includes several hundred leading product liability defense attorneys across the country as sustaining (non-voting) members. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae, including in the United States Supreme Court, and has offered comments on proposed legislation and rulemaking that could potentially impact the legal liability of the manufacturing sector.

Many of PLAC's corporate members are currently the targeted defendants in mass tort MDLs, including some of the largest MDLs pending on the federal docket. Other PLAC corporate members have been involved in large MDL proceedings that have since resolved. Accordingly, PLAC's corporate members will be directly impacted by and have a substantial interest in the Committee's proposed Rule 16.1 governing MDL proceedings.

II. FORMAL REQUIREMENTS FOR EARLY EXCHANGE OF INFORMATION

PLAC respectfully refers the Committee to its October 5, 2022 and February 16, 2023 Comments submitted to MDL Subcomittee—attached hereto as Exhibits B and C—regarding the pressing need for procedural mechanisms requiring early disclosure of information substantiating individual claims in the MDL setting. PLAC also respectfully refers the Committee to the Statement of David Cooner on behalf of PLAC submitted in conjunction with the Committee's February 6, 2024 hearing, attached hereto as Exhibit D. As set forth in these materials, meritless and unvetted claims represent a significant problem for the management of MDLs and place an enormous burden on both courts and the parties. A formalized process for early disclosure would (a) alleviate the tremendous burden placed on MDL courts resulting from dockets clogged with

[1] A list of PLAC's corporate members is attached as Exhibit A.

meritless claims, (b) allow plaintiffs with claims that are supported with evidence of actual use of the product or the alleged injury at issue to advance their claims in a more timely manner, and (c) permit defendants to evaluate and address—including for settlement purposes—the true magnitude and risk presented by such claims. PLAC respectfully submits that the current proposed Rule 16.1, which does not formally require any early disclosure of information substantiating individual claims, will not address the growing problem of meritless claims plaguing many MDLs.

At the recent February 6th hearing of the Advisory Committee, Professor Marcus asked PLAC's representative (David Cooner, Chief Counsel – Litigation of Becton Dickinson and Company) for any "data" demonstrating the existence of meritless claims. Comprehensive data is difficult to compile. Many frivolous claims are never exposed because they get swept up in mass settlements that protect the plaintiffs from ever having to produce any proof. Other claims are dismissed without any explanation, often disguising the fact that they lacked merit in the first instance. Despite the unfortunate lack of concrete data, however, there are numerous MDLs where the procedural developments help to illuminate the problem.

For example, in the Avandia MDL, the court required that all plaintiffs provide basic medical records substantiating usage of Avandia and claimed injuries.[2] The court later instituted a requirement for each plaintiff to produce a physician certification setting forth a determination that the plaintiff used Avandia, suffered a relevant injury, and the relation in time of the injury to the Avandia usage, and providing the medical records the physician reviewed to make their determination.[3] Ultimately, these requirements of presenting basic facts that should have been investigated before a complaint's filing, along with related settlement eligibility requirements, resulted in roughly 53% of all claims in the Avandia MDL being either dismissed or rejected.

Another example is the Taxotere MDL. In that proceeding, the court established a "show cause" process to facilitate the dismissal of cases where the plaintiffs either failed to produce evidence of product identification or had other discovery deficiencies. Out of the roughly 16,000 cases originally filed, approximately 2,300 cases have been dismissed through that process. In addition, out of the 63 cases initially selected as candidates for bellwether trials, only 2 cases were ultimately available to proceed to trial (both resulting in defense verdicts). Summary judgment was entered in 24 of the original 63 cases, and 7 more were voluntarily dismissed. The remaining 29 cases had to be removed from the bellwether pool for a variety of other reasons, including some for insufficient evidence of product use or injury.

Recent decisions also illustrate the problem of unvetted claims causing MDLs to languish years beyond when they should have been resolved. In the Granuflo/Naturalyte MDL, over a decade after the MDL's formation in 2013, the court dismissed the claims of eleven plaintiffs for failing to adduce factual evidence or expert testimony supporting causation, including several plaintiffs lacking any evidence that they suffered from the very conditions at issue in the MDL.[4]

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[2] *In re: Avandia Marketing, Sales, Prac. and Prod. Liab. Litig.*, MDL No. 1871, Case No. 07-md-01871-CMR, Pretrial Order No. 86 (E.D. Pa. 2009).
[3] *In re: Avandia Marketing, Sales, Prac. and Prod. Liab. Litig.*, Pretrial Order No. 121 (E.D. Pa. 2010).
[4] *See In re Fresenius GranuFlo/NaturaLyte Dialysate Prod. Liab. Litig.*, MDL No. 13-2428, Case No. 13-11714, 2023 WL 5807340, at *13 (D. Mass. Sept. 7, 2023).

That development echoes what occurred in the Zostavax and Proton-Pump MDLs discussed in greater detail in PLAC's February 16, 2023 comment (Exhibit C).

This all-too-common problem of claims that that clearly were not vetted results in clogged MDL dockets, prevents defendants from accurately assessing the magnitude of risk, and precludes timely resolution of large litigations. PLAC thus respectfully submits that mandatory early disclosure of information substantiating basic elements of claims, such as injury and product usage, is critical to ensuring that the issue of meritless and unvetted claims does not continue to unfairly burden both the courts and the parties.

Exhibit “A”

MANAGING PRODUCT RISK FROM DESIGN THROUGH LITIGATION

Corporate Member List

February 2024

3M

Altec, Inc.

Altria Client Services LLC

American Honda Motor Company, Inc.

APYX Medical

Bayer Corporation

Becton Dickinson

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Bridgestone Americas, Inc.

Caterpillar Inc.

CC Industries, Inc.

CNH America LLC

Copeland LP

Daimler Trucks North America LLC

Deere & Company

DISH Network L.L.C.

Emerson Electric Co.

Ford Motor Company

General Motors LLC

Gilead Sciences, Inc.

GlaxoSmithKline

GLOCK, Inc.

Goodman Global Group, Inc.

Google LLC

Great Dane LLC

Hankook Tire America Corp.

Hyundai Motor America

Illinois Tool Works Inc.

Isuzu North America Corporation

Johnson & Johnson

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kubota Tractor Corporation

Magna International Inc.

Mazak Corporation

Mazda Motor of America, Inc.

Medtronic, Inc.

Merck & Co., Inc.

Meta Platforms Technologies, LLC

Microsoft Corporation

Newell Brands Inc.

Novartis Pharmaceuticals Corporation

PACCAR Inc.

Pfizer Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

PLAC
MANAGING PRODUCT RISK FROM DESIGN THROUGH LITIGATION

Corporate Member List

February 2024

Rheem Manufacturing Company

RJ Reynolds Tobacco Company

Robert Bosch LLC

Subaru of America, Inc.

Suzuki Motor USA, LLC

Textron Inc.

The Boeing Company

The Goodyear Tire & Rubber Company

The Home Depot

The Sherwin-Williams Company

Toyota Motor Sales, USA, Inc.

Tristar Products, Inc.

U-Haul International, Inc.

Vermeer Corporation

Volkswagen Group of America, Inc.

Volvo Cars USA, LLC

Waymo LLC

Whirlpool Corporation

XCMG American Research Corporation

Yokohama Tire Corporation

ZF TRW

Zoox, Inc.

Exhibit “B”

COMMENT
TO THE
ADVISORY COMMITTEE ON CIVIL RULES
AND ITS MDL SUBCOMMITTEE

The Product Liability Advisory Council ("PLAC") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL Subcommittee ("Subcommittee").

I. INTRODUCTION

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and the reform of the law in the United States and elsewhere, with an emphasis on the law governing the liability of product manufacturers and related companies in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts, including the United States Supreme Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management. Similarly, over the years, PLAC has offered comments on proposed legislation and rulemaking that could potentially impact the legal liability of the manufacturing sector.

PLAC and its membership have a keen interest in the present work of the MDL Subcommittee and its evaluation of possible rule amendments to improve the MDL process. A number of PLAC's corporate members are currently the targeted defendants in mass tort MDL's, including some of the largest MDL's pending on the federal docket. Taken together, the MDL cases filed against those manufacturers number in the thousands, and in all likelihood, comprise more than half of the MDL cases currently active. Further, a number of other PLAC corporate members have been involved in past MDL proceedings that have now resolved.

In short, many of PLAC's corporate members will be directly impacted by the Subcommittee's recommendations.

[1] A list of PLAC's corporate members is attached as Exhibit "A".

II. THE SUBCOMMITTEE'S PRESENT SCOPE

PLAC has reviewed the Subcommittee's recent discussion of proposed rule changes related to the MDL process, contained in its May 13, 2022 report to the Standing Committee.[2] That report indicated that the Subcommittee was considering at that time changes to Rules 16 and 26 of the Federal Rules of Civil Procedure. As formulated, those revisions would have (1) encouraged the early exchange of information about individual cases providing a sort of "census" of the MDL's inventory of actions; and (2) encouraged the early appointment of plaintiffs' leadership counsel.

PLAC has also reviewed the Subcommittee's June 2022 Supplemental Report to the Standing Committee.[3] That supplemental report outlined a different approach, proposing a new "freestanding" Rule 16.1 for MDL proceedings. The Subcommittee articulated two different versions of the proposed rule, with Alternative 1 providing a more detailed list of pre-trial topics for a newly designated MDL judge to consider addressing early in the proceedings. The more abbreviated Version 2 more closely mirrors the previously considered revisions to Rules 16 and 26, focusing on a possible early exchange of information among the parties, and the appointment of plaintiffs' leadership counsel. Both the May and June reports emphasized the Subcommittee's intent to further evaluate those possible additions to the rule.

III. EARLY EXCHANGE OF INFORMATION

PLAC and its corporate members believe that a procedural mechanism is sorely needed to screen claims at an early stage in an MDL. In the experience of many of our members, the influx of dubious claims in the MDL setting is a very real and significant problem. As this Subcommittee itself has recognized, there seems to be "fairly widespread agreement" among experienced practitioners and judges that the problem exists in many MDL's.[4] The Subcommittee noted reports that 20-30% of claims in some centralized proceedings (and maybe as high as 40-50% of cases) involve "unsupportable claims."[5] Those meritless claims involve plaintiffs who did not use the product at issue; plaintiffs who have not suffered a legally cognizable injury; and/or claims barred by the statute of limitations.[6]

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[2] *See* Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure at 10 (May 13, 2022) in Committee on Rules of Practice and Procedure Agenda Book at 731 (June 7, 2022) [hereinafter "June 2022 Standing Committee Agenda Book"], *available at* https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf (last visited Sept. 12, 2022).

[3] *See* Supplemental Report of the MDL Subcommittee of the Advisory Committee on Civil Rules (June 2022) [hereinafter "MDL Subcommittee Supplemental Report"] in June 2022 Standing Committee Agenda Book, *supra* note 2, at 1067.

[4] MDL Subcommittee Report in Advisory Committee on Civil Rules Agenda Book at 142-43 (Nov. 1, 2018) [hereinafter "Nov. 2018 Advisory Committee Agenda Book"], *available at* https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf (last visited Sept. 12, 2022).

[5] *Id.* at 142.

[6] *Id.*

An experienced judge who presided over a large MDL has identified the proliferation of "non-meritorious cases" as one of the "unintended consequences" of MDL centralization.[7] Some commentators, as well as this Subcommittee, have referred to the multiplication of dubious claims in an MDL proceeding as the "Field of Dreams' problem – 'if you build it, they will come.'"[8]

One of the principal drivers explaining the significant number of meritless claims is the widespread escalation of attorney advertising in recent years. A respected arm of the United States Chamber of Commerce (the Institute for Legal Reform) calculates that plaintiffs' interests (attorneys, lead generations, and third-party funders) spend roughly $1 billion annually on television advertising soliciting mass tort clients.[9] In its case study, the Institute found that plaintiffs' interests spent $94 million in advertising in the Pradaxa litigation; $122 million in the Xarelto litigation; $63 million in talcum powder litigation; and $103 million in the Roundup litigation.[10] At least one MDL judge has directly associated an "onslaught of lawyer television solicitations" as contributing to an explosion of new filings in the MDL he was overseeing.[11]

The addition of so many meritless claims to an MDL's inventory has immediate and prejudicial consequences for companies targeted in an MDL and places great burdens on MDL courts. Unless and until defendants receive concrete information about individual actions, they have no means to accurately assess the magnitude of the risk and effectively prepare to manage that risk. The uncertainty created by the absence of an early screening mechanism presents many challenges for a corporate defendant, including developing adequate staffing and properly meeting financial reporting obligations. And despite the economies arguably created by centralized proceedings, there are nonetheless incremental costs associated with processing, tracking, and defending each individual case. Early screening mechanisms should also ease the burden on the MDL court's docket, either through earlier dismissals of cases or through plaintiffs' counsel choosing not to file unsupported cases.

In addition, the absence of a meaningful early disclosure requirement for plaintiffs creates an uneven playing field between the parties. Defendants are invariably required to produce information bearing on the liability issues early in the proceedings. By contrast, it is often years before plaintiffs are required to produce anything more than the cursory information included in fact sheets, and in many instances, they are never required to do so at all. The present imbalance in the parties' respective disclosure obligations would be remedied by the adoption of an early screening procedure.

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[7] *See In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08:MD-2004 (CDL), 2016 WL4705827, at *1 (M.D. Ga. Sept. 7, 2016).

[8] Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 413-14 (2014); MDL Subcommittee Report in Nov. 2018 Advisory Committee Agenda Book, *supra* note 4, at 142-43.

[9] *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle* at 1 (2020), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/04/Lawsuit-Advertising-Paper_web.pdf (last visited Sept. 12, 2022).

[10] *Id.*

[11] *See, In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705827, at *1 n.2 (noting that "onslaught of lawyer television solicitations" contributed to an explosion of cases in that MDL).

For those reasons, PLAC strongly believes that rulemaking – whether embodied in a freestanding Rule 16.1 or with revisions to Rules 16 and 26 – needs to be more "muscular" than the present proposal. As currently worded, the proposals reference an "exchange" of information, without specifying the specific information or documents that should be disclosed. Moreover, the language in the proposed rule is permissive, leaving the adoption of such a procedure completely to the discretion of the presiding judge.

In a March 8, 2022 comment to the Advisory Committee, Lawyers for Civil Justice "(LCJ") proposed a more detailed rule requiring plaintiffs (in personal injury actions) to provide documentation of product use or exposure and of an alleged injury at an early point in the MDL proceeding.[12] PLAC agrees with the approach advocated by LCJ, and fully endorses that organization's proposal. Only with the routine required disclosure of such information can the courts and the parties meaningfully screen MDL inventories for marginal claims.

IV. SELECTION OF PLAINTIFF'S LEADERSHIP COUNSEL

PLAC endorses the Subcommittee's proposal to encourage MDL judges to appoint leadership counsel for plaintiffs and define their responsibilities at an early stage of the proceedings. As a practical matter, in the experience of PLAC's members, the early appointment of leadership is already occurring in many MDL's. Particularly in large MDL's, the prompt identification of leaders to speak on behalf of plaintiffs benefits not only the plaintiffs themselves, but also the MDL courts and the defendants.

V. OTHER PROPOSED REVISIONS

The more detailed "sketch" (Version 1) of a new Rule 16.1, set forth in the Subcommittee's June 2022 supplemental report, includes several additional topics for MDL judges to address early in the proceeding. As a practical matter, most of those topics are routine and recurring issues invariably addressed in the early days of most MDL's. PLAC does note, however, that the appointment of a special master is not an issue that arises in the majority of MDL's. Many judges assigned an MDL choose to handle all aspects of the proceedings themselves. Others choose to employ the assistance of magistrates in their district. While some judges do appoint special masters for specific tasks, the practice is by no means standard. PLAC therefore believes the reference to special masters should be eliminated, as the issue is not one generally applicable to most MDL's.

VI. FUTURE COMMENTS

The Subcommittee has expressly stated on several occasions that its work is evolving, and that it "may significantly modify or abandon this new approach" based on further input.[13]

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[12] *See* Comment of Lawyers for Civil Justice to the Advisory Committee on Civil Rules and MDL Subcommittee (Mar. 8, 2022), *available at* https://www.uscourts.gov/sites/default/files/22-cv-d_suggestion_from_lcj_-_mdls_0.pdf (last visited Sept. 12, 2022).

[13] MDL Subcommittee Supplemental Report in June 2022 Standing Committee Agenda Book, *supra* note 2, at 1067.

Given the importance of the topics to its membership, PLAC will continue to monitor the Subcommittee's deliberations and proposals. PLAC respectfully requests the opportunity to submit additional comments in the future, as the process continues.

Exhibit “A”

PLAC
MANAGING PRODUCT RISK FROM DESIGN TO LITIGATION

Corporate Member List

September 2022

3M
Altec, Inc.
Altria Client Services LLC
APYX Medical
Bayer Corporation
Becton Dickinson
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Bradford White Corporation
Bridgestone Americas, Inc.
CC Industries, Inc.
Daimler Trucks North America LLC
Deere & Company
DISH Network L.L.C.
Emerson Electric Co.
Ford Motor Company
General Motors LLC
Gilead Sciences, Inc.
GlaxoSmithKline
GLOCK, Inc.
Goodman Global Group, Inc.
Google LLC
Great Dane LLC
Hankook Tire America Corp.
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
James Hardie Building Products Inc.
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kubota Tractor Corporation
LG Electronics USA, Inc.
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Merck & Co., Inc.
Meta Platforms, Inc.
Microsoft Corporation
Mueller Water Products
Newell Brands Inc.
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
PACCAR Inc.
Pfizer Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Rheem Manufacturing Company

PLAC
MANAGING PRODUCT RISK FROM DESIGN TO LITIGATION

Corporate Member List

September 2022

RJ Reynolds Tobacco Company

Robert Bosch LLC

Stihl Incorporated

Subaru of America, Inc.

Suzuki Motor USA, LLC

Textron Inc.

The Boeing Company

The Goodyear Tire & Rubber Company

The Home Depot

The Sherwin-Williams Company

The Viking Corporation

Toyota Motor Sales, USA, Inc.

Tristar Products, Inc.

U-Haul International, Inc.

Vermeer Corporation

Volkswagen Group of America, Inc.

Volvo Cars USA, LLC

Waymo LLC

Whirlpool Corporation

Yokohama Tire Corporation

ZF TRW

Zoox, Inc.

Total Members: 72

Exhibit “C”

COMMENT
TO THE
ADVISORY COMMITTEE ON CIVIL RULES
AND ITS
MDL SUBCOMMITTEE

The Product Liability Advisory Council ("PLAC") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL Subcommittee ("Subcommittee").

I. INTRODUCTION

As detailed in PLAC's previous Comment, submitted on October 5, 2022, PLAC and its membership have a keen interest in the present work of the MDL Subcommittee and its evaluation of possible rule amendments to improve the MDL process. Many of PLAC's corporate members are currently the targeted defendants in mass tort MDLs, including some of the largest MDLs pending on the federal docket. Taken together, the MDL cases filed against these companies number in the thousands, and likely comprise more than half of all MDL cases currently active. Several other PLAC corporate members have also been involved in past MDL proceedings that have now resolved. In short, the Subcommittee's recommendations will directly impact many of PLAC's corporate members.

PLAC has reviewed the Subcommittee's recent summary of discussions with and proposed rule revisions by Lawyers for Civil Justice ("LCJ") and American Association for Justice ("AAJ") as detailed in the Subcommittee's report to the Advisory Committee.[1] While we recognize there is some resistance to formalizing an early disclosure process in Rule 16.1, PLAC respectfully submits this Comment on the Subcommittee's proposed rulemaking with the goal of improving the entire MDL process for the courts and the parties. PLAC and its members reiterate their strong belief that there is a critical need for procedural mechanisms requiring early disclosure of information and evidence substantiating individual claims in the MDL setting, and the absence of such mechanisms has far-reaching implications for the entire MDL process. A formalized process for early disclosure would (a) alleviate the tremendous burden placed on MDL courts resulting from dockets clogged with meritless claims, (b) allow plaintiffs with claims that are supported with evidence of actual use of the product or the alleged injury at issue to advance their claims in a more timely manner, and (c) permit defendants to evaluate and address—including for settlement purposes—the true magnitude and risk presented by such claims.

[1] *See* Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure in Committee on Rules of Practice and Procedure Agenda Book at 172 (October 12, 2022), *available at* https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-civil-rules-october-2022 (last visited Feb. 6, 2023).

II. EARLY EXCHANGE OF INFORMATION

This Subcommittee has recognized that there seems to be "fairly widespread agreement" that meritless claims are a problem in many MDLs and that 20–30% (and as high as 40–50%) of claims in some centralized proceedings involve "unsupportable claims."[2] PLAC's members also have extensive experience with claims involving plaintiffs who did not use the product at issue, plaintiffs who have not suffered a legally cognizable injury, and claims barred by the statute of limitations. And as MDLs have only grown in size (along with the significant, related increase in attorney advertising), so too has the influx of unvetted and meritless claims in those MDLs. Many of these claims linger in MDLs for years and are dismissed only after defendants invariably engage in costly discovery and motion practice, and MDL courts have expended substantial time and judicial resources in determining that the challenged claims are unsupported. Those plaintiffs with claims that are supported with evidence of the actual use of the product or the alleged injury at issue often then wait years to advance their claims, given the incredible backlogs caused by meritless claims.

These meritless and unvetted claims result in significant prejudice for companies targeted in MDLs. Unless and until defendants receive concrete information about individual actions, they have no means to accurately assess the magnitude of the risk and effectively prepare to manage that risk. The uncertainty created by the lack of an early screening mechanism presents many challenges for a corporate defendant, including developing adequate staffing and properly meeting financial reporting obligations. That uncertainty makes it far more difficult for the corporate defendant to also evaluate the actual risk of the claims in the MDL, making it also more difficult to determine early strategies, including settlement. Early screening mechanisms would also ease the tremendous burden on MDL dockets, either through earlier dismissals of cases or through plaintiffs' counsel choosing not to file unsupported cases.

In a December 22, 2022 comment to the Advisory Committee and Subcommittee, LCJ proposed a rule requiring plaintiffs in mass tort MDL proceedings to engage in basic due diligence and make "a showing that the plaintiffs belong in the litigation" at an early point in MDL proceedings.[3] This would include documentation of a plaintiff's product use or exposure and alleged injury.[4] As with LCJ's comment previously submitted on March 8, 2022, PLAC agrees with the approach advocated by LCJ, and fully endorses that organization's proposal. Only with the routine, required disclosure of such information can the courts and the parties meaningfully screen MDL inventories for meritless claims. Unfortunately, allowing for discretion in an early-disclosure requirement will result in uneven application of that requirement and will likely lead to the same position that parties and the MDL courts now find themselves in: dockets filled with unsupported and meritless claims and the far-reaching effects of those backlogs.

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[2] Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure in Committee on Rules of Practice and Procedure Agenda Book at 142-43 (Nov. 1, 2018), *available at* https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf (last visited Feb. 6, 2023).

[3] *See* Comment of Lawyers for Civil Justice to the Advisory Committee on Civil Rules and MDL Subcommittee (Dec. 22, 2022), *available at* https://www.uscourts.gov/sites/default/files/22-cv-t_suggestion_from_lcj_-_rule_16_0.pdf (last visited Feb. 6, 2023).

[4] *Id.*

Two recent decisions highlight the large problem of meritless and unvetted claims plaguing many MDL dockets and the importance of instituting early disclosure requirements. In one MDL proceeding—more than four years after the creation of the MDL—the court issued an order "designed merely to require each plaintiff to come forward with prima facie evidence" supporting their claims that the defendant's product was the cause of their alleged injuries.[5] As the MDL court observed, it had "presided over the MDL for over four years," "extensive discovery" had taken place, and if "plaintiffs had prima facie proof of specific causation, common sense dictates that it would have surfaced by now."[6] Yet more than 1,100 plaintiffs failed to produce any such threshold evidence, thereby necessitating dismissal of their claims.[7] This occurred only after the defendant engaged in the costly production of "over 6,000,000 pages of documents" and "made nearly 40 persons available for depositions."[8] The MDL court rightfully observed that "[c]ontinuing to carry these cases on the docket" was "severely prejudicial to [the defendant] under the circumstances to say nothing of the added administrative burden to this court as it seeks to move this MDL forward."[9]

In another MDL proceeding—more than five years into the litigation—it was undisputed that 100 cases alleging "personal injury" were "filed in the names of plaintiffs who were in fact deceased at the time the complaints were filed."[10] The Plaintiff Steering Committee contended that Fed. R. Civ. P. 17 precluded dismissal "by permitting the relevant plaintiffs reasonable time to substitute the representatives of estates of the deceased plaintiffs as new plaintiffs, with appropriate amendments."[11] But the MDL court noted that Rule 17 only applied when "determination of the proper party to sue is difficult or when an understandable mistake has been made," not when, as here, "counsel could have verified whether the plaintiff was alive or deceased before filing suit."[12] Given counsel's failure to engage in such basic pre-filing vetting, the cases were summarily dismissed.[13]

Both decisions underscore the lack of basic due diligence undertaken in MDL proceedings, along with the prejudice and burden from having such non-meritorious claims remain on MDL dockets for years. PLAC respectfully submits that a mandatory early screening requirement, like the one in LCJ's proposal, is essential to ensure that this all-too-frequent phenomenon does not continue to unfairly burden both the courts and defendants.

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[5] *In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.*, MDL No. 2848, 2022 WL 17477553, at *4 (E.D. Pa. Dec. 6, 2022).
[6] *Id.* at *5.
[7] *See id.*
[8] *Id.* at *1.
[9] *Id.* at *5.
[10] *In re Proton-Pump Inhibitor Prod. Liab. Litig.*, MDL No. 2789, 2022 WL 17850260, at *1 (D.N.J. Dec. 22, 2022).
[11] *Id.*
[12] *Id.* at *4.
[13] *See id.*

III. FUTURE COMMENTS

The Subcommittee has expressly stated several times that its work is evolving, and that it "may significantly modify or abandon this new approach" based on further input.[14] While PLAC understands there is some resistance to a formalized requirement of mandatory early disclosure, it respectfully suggests this approach is critical to reducing the burden currently placed on the MDL process as a result of the absence of such a requirement. Given the importance of the topics to its membership, PLAC will continue to monitor the Subcommittee's deliberations and proposals. PLAC respectfully requests the opportunity to submit additional comments in the future, as the process continues.

[14] Supplemental Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure in Committee on Rules of Practice and Procedure Agenda Book at 1067 (June 7, 2022), *available at* https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf (last visited Feb. 6, 2023).

Exhibit “A”

PLAC
MANAGING PRODUCT RISK FROM DESIGN TO LITIGATION

Corporate Member List

February 2023

3M

Altec, Inc.

Altria Client Services LLC

APYX Medical

Bayer Corporation

Becton Dickinson

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Bridgestone Americas, Inc.

CC Industries, Inc.

Daimler Trucks North America LLC

Deere & Company

DISH Network L.L.C.

Emerson Electric Co.

Ford Motor Company

General Motors LLC

Gilead Sciences, Inc.

GlaxoSmithKline

GLOCK, Inc.

Goodman Global Group, Inc.

Google LLC

Great Dane LLC

Hankook Tire America Corp.

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works Inc.

Isuzu North America Corporation

James Hardie Building Products Inc.

Johnson & Johnson

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kubota Tractor Corporation

LG Electronics USA, Inc.

Magna International Inc.

Mazak Corporation

Mazda Motor of America, Inc.

Merck & Co., Inc.

Meta Platforms, Inc.

Microsoft Corporation

Mueller Water Products

Newell Brands Inc.

Novartis Pharmaceuticals Corporation

Novo Nordisk, Inc.

PACCAR Inc.

Pfizer Inc.

Polaris Industries, Inc.

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PLAC
MANAGING PRODUCT RISK FROM DESIGN TO LITIGATION

Corporate Member List

February 2023

Robert Bosch LLC

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Waymo LLC

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Yokohama Tire Corporation

ZF TRW

Zoox, Inc.

Exhibit “D”

STATEMENT OF DAVID COONER

(S.V.P., Chief Counsel – Litigation of Becton Dickinson and Company)

ON BEHALF OF THE PRODUCT LIABILITY ADVISORY COUNCIL

Good Morning.

I am David Cooner, and I am Senior Vice President and Chief Litigation Counsel for Becton Dickinson and Company. Becton Dickinson, or BD as it is called, is one of the largest global medical technology companies in the world. BD and its 75,000 employees are committed to enhancing the safety, and efficiency of clinicians' care delivery process, to enabling laboratory scientists to accurately detect disease and to advancing researchers' capabilities to develop the next generation of diagnostics and therapeutics.

BD is a member of the Product Liability Advisory Council, known as PLAC. PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and the reform of the law in the United States and elsewhere, with an emphasis on the law covering the liability of product manufacturers and related companies. PLAC and its members have a keen interest in the present work of the committee in evaluating a rule amendment to improve the MDL process. A number of PLAC's corporate members -- including my company BD -- are currently the targeted defendants in mass tort MDLs, including some of the largest MDLs pending on the federal docket. Taken together, the MDL cases filed against those manufacturers

number in the thousands, and in all likelihood, comprise more than half of the MDL cases currently active.

PLAC and its members believe that the MDL process -- albeit well-intended -- is "broken" in a number of respects. Today, however, I am here to address what is probably the most serious problem plaguing MDL practice. That is the proliferation of non-meritorious claims in MDL centralized procedures. As the MDL subcommittee has previously acknowledged, there appears to be "fairly widespread agreement" among experienced practitioners and judges that this problem exists in many MDLs. Those meritless claims involve plaintiffs who did not use the product at issue; plaintiffs who have not sustained a legally cognizable injury; and/or claims barred by the statute of limitations.

In my practice, I see lawyers boast of claim inventories, larding the MDL with cases that have little to no vetting. I have seen countless cases that would never have been filed were it not for the ease of aggregation and, worse, protection within the MDL system. Frankly, many of the rules of civil procedure intended to establish a case's bona fides are either shelved or given lip service in an MDL, leading lawyers to invest in finding new cases, as opposed to establishing the merits of their cases, knowing that volume is the coin of the realm. And volume escalates one's profile in an inevitable settlement program and burnishes one's reputation, positioning one for assume a leadership role in the next MDL.

PLAC and its corporate members believe that a procedural mechanism is sorely needed to screen claims at an early stage in an MDL. As presently drafted, however, the proposed Rule 16.1 does not adequately address the problem. Subsection (c) (4) of the draft rule is more aspirational than compulsory. It merely invites MDL courts and parties to consider "how and when the parties will exchange information about the factual bases for their claims and defenses." The provision does not prescribe what information should be disclosed. Nor does it prescribe at what point in the proceedings the bases of the claims should be disclosed. For that matter, the draft provision does not actually require anything; it merely suggests an MDL court can consider mandating an exchange of information. Respectfully, it has no teeth and because of that, it will not change the flaws that lard our courts with meritless cases, siphon costs, and delay justice for meritorious claimants.

Many PLAC members and my own company BD have seen firsthand the prejudice that can result in an MDL when a more robust early screening process is not required. Without such information early in the proceedings, defendants have no means to accurately assess the magnitude of the risk, making it difficult to effectively manage that risk and conduct business operations. Absent an early and robust screening mechanism, corporations lack the information necessary to accurately meet their financial reporting obligations. Moreover, the sheer

administrative burden of processing multiple meritless claims greatly increases the cost and burden to both the courts and the parties. And, the proliferation of dubious claims stands as an impediment to settlement in a myriad of ways.

In past comments submitted to the Advisory Committee (including comments dated March 8, 2022 and September 18, 2023), Lawyers for Civil Justice ("LCJ") proposed a more detailed rule requiring plaintiffs (in personal injury actions) to provide documentation of product use or exposure and an alleged injury at an early point in the MDL proceeding. As set forth in its comments to the Advisory Committee, PLAC agrees with the approach advocated by LCJ, and fully endorses that organization's proposal. Only with the routine required disclosure of such information can the courts and the parties meaningfully screen MDL inventories for marginal claims.

Under our judicial system, a plaintiff filing an individual action is required to demonstrate a factual basis for the claim early in the life of the case. This is a cornerstone of the Federal Rules of Civil Procedure. No less should be expected from each plaintiff filing a claim in an MDL. PLAC encourages the Committee to revise Rule 16.1 to include a compulsory provision ensuring that occurs in future MDLs.

burns charest llp

February 16, 2024

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Federal Rule of Civil Procedure 16.1

Dear Members of the Committee:

We write regarding the Committee's proposed amendment to the Federal Rules of Civil Procedure to add a new Rule 16.1 addressing multidistrict litigation under 28 U.S.C. § 1407.

We are the founding partners at Burns Charest LLP, a litigation firm specializing in representing plaintiffs in class actions and mass torts. In that capacity, partners at our firm have been named lead counsel or appointed to plaintiffs' leadership committees in varied and numerous mass-tort and class-action MDLs, including *In re EpiPen Marketing, Sales & Antitrust Litigation* (D. Kan.), *In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala.), *In re Domestic Airline Travel Antitrust Litigation* (D.D.C.), *In re Automotive Parts Antitrust Litigation* (E.D. Mich.), *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs* (Fed. Cl.), *In re Urethane Antitrust Litigation* (D. Kan.), *In re Plaid Inc. Privacy Litigation* (N.D. Cal.), *In re Andarko Basin Oil & Gas Lease Antitrust Litigation* (W.D. Okla.), *In re Dental Supplies Antitrust Litigation* (E.D.N.Y.), *In re TikTok, Inc. Consumer Privacy Litigation* (N.D. Ill.), and *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Liability Litigation* (D.N.J.).

This comment raises certain concerns about the proposed Rule's application to mass torts and to class actions. This comment first highlights two specific issues regarding mass torts. First, the status report recommended by the draft rule should be expanded to include the method and timing of adjudicating pending motions to remand matters to state court for lack of subject matter jurisdiction. Second, the Committee should reject the suggestions made by other commentators that proposed Rule 16.1(c)(4) be revised to address an alleged epidemic of insufficient claims in MDLs. This comment then discusses why the proposed Rule should not be applied to class actions within MDLs.

I. Proposed Rule 16.1(c) should include a provision related to a plan for addressing motions to remand matters to state court.

While the current text of proposed Rule 16.1(c)(7) suggests that an MDL court may wish to establish a plan for handling pretrial motions, it fails to address an important category of motions that are not ordinarily considered "pretrial motions", namely, motions to remand a matter to state court.

Cases transferred into an MDL may originate in either federal or state court. For some cases filed in state court, there is no basis for federal jurisdiction. In such cases, after removal, the plaintiffs will seek to return to state court by filing a motion to remand. At the same time, the case may be noticed to the JPML as an action that should be transferred; defendants then typically seek to stay consideration of the remand motion. When confronted with both a motion to remand and a motion

to stay, most transferor courts will grant the stay, leaving the remand to be decided by the MDL court. While there is an implicit expectation that such motions will be decided promptly, that does not always occur, which warrants inclusion of this matter among the list of items to be addressed in an initial case management conference. Left unaddressed, the improperly remanded state cases risk getting stuck in no man's land.

"Our federalism . . . . represent[s] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments."[1] Because removal implicitly demonstrates a litigant's distrust of the adjudicatory process in state court,[2] the Supreme Court has long recognized that the impact of removal on state sovereignty raises significant concerns regarding the state-federal balance of power.[3] Prompt ruling on pending remand motions, regardless of the decision an MDL court reaches on their merits, demonstrates the respect and comity due the state courts.

The nation's "system of 'dual sovereignty'" protects the States from encroachment by the federal government.[4] "'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"[5] While removal is constitutionally permissible when authorized by statute, policing the boundary between state and federal jurisdiction remains the task of every federal judge.[6] In the MDL context, doing so requires that MDL courts review pending motions to remand for lack of subject matter jurisdiction "with sensitivity to 'federal-state relations.'"[7] This structural imperative warrants inclusion of this issue among the matters suggested for consideration at the initial case management conference.

Although procedural flexibility is part of the rationale for an MDL, "[t]he requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception."[8] As a consequence of our federal system, "[a] State's dignitary interest bears consideration when a district court exercises discretion" in its handling of a motion to remand.[9] Because "[s]ubject-matter limitations on federal jurisdiction serve institutional interests,"[10] the very act of removing a case from state court challenges federalism regardless of whether the move to federal court is beneficial for one or even both parties. As institutional interests are "too important to leave to the whims of the parties

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[1] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999) (quoting *Younger v. Harris*, 401 U.S. at 37, 44 (1971)).
[2] *See, e.g.*, *Rothner v. City of Chicago*, 879 F.2d 1402, 1408 (7th Cir. 1989).
[3] *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941).
[4] *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).
[5] *Shamrock*, 313 U.S. at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).
[6] *See Ford Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (citing *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)) (reiterating that courts must consider objections to subject matter jurisdiction *sua sponte*).
[7] *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 423 (2010) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).
[8] *Ruhrgas*, 526 U.S. at 577 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998)) (internal quotation marks omitted)). Although *Ruhrgas* permits district courts in limited circumstances to determine personal jurisdiction before addressing subject matter jurisdiction, *id.*t 588, nothing in that case suggests that threshold matters can be postponed indefinitely.
[9] *Id.* at 586.
[10] *Id.* at 583.

or to the efficiencies of a particular case,"[11] whether particular litigants will be prejudiced by delayed consideration of motions to remand is irrelevant. Instead, it is "the interest of comity and federalism" that must drive prompt action by MDL courts.[12] And, if prejudice is to be considered, the Supreme Court has made it clear that that prejudice is the *de facto* abrogation of the "protection of individuals" afforded by "'the diffusion of sovereign power.'"[13] Preserving separate state power, including through remands when federal jurisdiction is lacking, "reduce[s] the risk of tyranny and abuse from either front."[14]

While efficiency validly guides the exercise of judicial discretion, particularly in the MDL context, principles of federalism outweigh convenience and efficiency.[15] And, "[i]t goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'"[16] Similarly, as the Sixth Circuit recently held, while an MDL court has "broad discretion to create efficiencies and to avoid unnecessary duplication," such a court must "find efficiencies within the Civil Rules, rather than in violation of them."[17] That prompt rulings on remand motions are invariably the best practice is reinforced by the JPML's "confident" expectation that the transferee judges "will give the pending remand motions [their] prompt attention."[18] This view is shared by the many transferor judges who defer ruling on pending motions to remand once a conditional transfer order is entered.[19] Therefore, when considering how to structure an MDL, an MDL court should also consider when and how to promptly rule on pending motions to remand. Proposed Rule 16.1 should be revised to reflect this.

The importance of ruling on matters of subject matter jurisdiction is implicit in many of the comments received by this Committee on proposed Rule 16.1. If the Committee were to adopt a proposal related to the early production of discovery materials as part of a revision to proposed Rule

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[11] Scott Dodson & Elizabeth McCusky, *Structuring Jurisdictional Rules and Standards*, 65 Vand. L. Rev. En Banc 31, 38 (2012).
[12] *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999).
[13] *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).
[14] *Id.* (quoting *Gregory*, 501 U.S. at 458).
[15] *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002); *cf. United States v. Stevens*, 559 U.S. 460, 470 (2010) (observing that the Constitution "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs").
[16] *Stern v. Marshall*, 564 U.S. 462, 501 (2011) (quoting *INS v. Chadha,* 462 U.S. 919, 944 (1983)).
[17] *In re Nat'l Prescription Opiate Litig.*, 2020 WL 1875174, at *1, 4; *see also id.* at *3 (noting that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance").
[18] *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 899 F. Supp. 2d 1374, 1376 (J.P.M.L. 2012); *see also In re Air Crash Into the Java Sea on January 9, 2021*, MDL No. 3072 (J.P.M.L. Apr. 7, 2023), https://www.jpml.uscourts.gov/sites/jpml/files/MDL-3072-Transfer_Order-3-23.pdf ("Plaintiffs will not suffer any undue prejudice from centralization while remand motions are pending as they can present their remand motions to the transferee court.").
[19] *See, e.g.*, *City of Santa Fe v. Purdue Pharma L.P.*, CV 19-1105 KG/JHR, 2020 WL 671008, at *2 (D.N.M. Feb. 11, 2020) (citing *Bd. of Cnty. Comm'rs of Seminole Cnty. v. Purdue Pharma L.P.*, No. CIV-18-372, 2019 WL 1474397, at *2 (E.D. Okla. Apr. 3, 2019); *Bustamante v. Volkswagen Grp. of Am., Inc.*, No. 16-2259. 2016 WL 3145029, at *1 (D. Kan. June 6, 2016); *Levy v. Volkswagen Akti Engesellschaft*, No. 1:15-cv-01179, 2016 WL 8261798, at *2 (D.N.M. Feb. 22, 2016); *Pace v. Merck & Co., Inc.*, No. CIV 04-1356, 2005 WL 6125457, at *1 (D.N.M. Jan. 10, 2005)).

16.1(c)(4),[20] it would be particularly important that cases over which the MDL court lacks jurisdiction not be made subject to any such requirement. While all states have some sort of pleading standard, these standards vary and do not require Article III standing or compliance with *Twombly* and *Iqbal*.[21] Because commentators' proposed revisions to Rule 16.1(c)(4) are couched in terms of standing and pleading sufficiency, it is inappropriate to require early discovery if the MDL court lacks subject matter jurisdiction. This is especially true if the MDL court, as some have, enforces compliance with such discovery-type orders on pain of a dismissal with prejudice.

Similarly, concerns over the authority of leadership counsel and the preservation of nonleadership counsel's obligations to their own clients are reduced at least in part by prompt remand of cases over which subject matter jurisdiction is lacking. Counsel for plaintiffs are typically aware that formation of an MDL is possible or likely before filing a complaint. Because a plaintiff is the "master of his complaint," a complaint drafted so as to avoid federal jurisdiction by, for instance, declining to sue a diverse defendant or to raise a federal cause of action effectively expresses the plaintiff's desire not to be subject to the authority of an MDL court and of leadership counsel. Because our system of federalism protects that choice, it is incumbent upon an MDL court to promptly release these litigants over whom jurisdiction is lacking.

Therefore, the proposed Rule 16.1(c) should include additional language:

> (13) how and when the court will rule on any pending motions to remand matters to state court.

And, the Notes should be revised to include a discussion of the rationale for this provision:

> **Rule 16.1(c)(13).** Many MDLs feature cases that have been transferred into the MDL after having been removed from state court. Because determining subject matter jurisdiction is a threshold matter and an obligation upon all federal courts, an MDL court must promptly rule on any pending motions to remand such cases to state court for lack of subject matter jurisdiction. Until the MDL court determines that it has subject matter jurisdiction, parties to pending motions to remand may not be required to participate in information exchanges or production of discovery. Therefore, the parties and the MDL judge should plan for a process for prompt decisions on these motions. Many MDL judges have found it convenient to identify (or ask the parties to identify) remand motions that share common factual or legal issues and then to rule on exemplars. The court can then order the parties to show cause why the exemplar ruling should not be applied to similar motions.

II. The Committee should reject proposed revisions to Rule 16.1(c)(4) that seek early production of discovery material.

[20] Examples include the comments from Lawyers for Civil Justice and the DRI Center for Law and Public Policy.

[21] *See Bell Atl. Co. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Some commentators have suggested that the Committee revise the language of proposed Rule 16.1(c)(4) to create what amounts to two rounds of fact discovery.[22] It is unclear what problem these commentators are looking to solve and even more unclear why their proposal solves any problem that might exist. When considered in the light of a typical mass-tort MDL, these commentators' proposals will not promote efficiency but will only create additional paperwork burdens for the parties and the courts. Most mass-tort MDLs proceed by means of a bellwether process in which certain cases are selected for detailed development. Either in advance of that selection or parallel to the development of those cases, the remaining cases undergo case-specific discovery as to the factual basis of the plaintiff's claim (e.g., use of the product, duration of use, type of and evidence for injury, etc.). Through this process, MDL defendants receive the information sought by their proposed revision. While MDL defendants might not receive the information at the precise point in time they desire it, that loss of control over timing is congruent with the many other restrictions on individual control over the pace of litigation that are a consequence of MDL aggregation.

Providing the same information twice discourages efficiency. The burden of proving the factual basis for their claims falls upon plaintiffs. Plaintiffs who cannot provide that basis as part of discovery will either dismiss their claims or have them dismissed. If a case settles before discovery reaches that point, plaintiffs will have to provide that information as part of the claims process. Particularly in a pharmaceutical-defect or toxic-exposure MDL, awards are determined by a grid or matrix that considers various factors such as age, comorbidities, and the type and severity of injury. A precondition to receiving an award under such a system is demonstration of injury.

Accordingly, it is unclear how defendants' burden is meaningfully increased by waiting until an appropriate time to receive information about an individual plaintiff's claims. A plaintiff who refuses to provide early discovery versus a plaintiff who refuses to provide a fact sheet will require the same effort from a defendant to compel production or seek dismissal. Indeed, with two separate rounds of fact discovery, defendants may even have to compel the same information twice. This is hardly efficient.

Moreover, the Committee should disregard certain commentators' implication that an ultimate determination that some plaintiffs do not qualify for an award necessarily implies deficient prefiling investigation. Especially in pharmaceutical and toxic-tort MDLs, medical records are typically necessary to establish with certainty the use of the product or exposure to the toxin as well as the precise injury. Ordinary laypersons are frequently unable to recall these details with the precision necessary to determine eligibility for an award. Due to patient privacy requirements and the overburdened and disaggregated nature of the American healthcare system, obtaining medical records is not a simple or quick process. For that reason, it has never been suggested that a prefiling investigation by plaintiff's counsel requires obtaining and reviewing medical records rather than relying upon a client's reasonable self-report.

Ultimately, the concern in these comments appears to be about settlement. Global settlements in MDLs are often negotiated as a total amount (say $250 million) that is then divided amongst claimants in accordance with the type and severity of their injuries. Obviously, the amount agreed to may be higher if the anticipated number of claimants is 10,000 as opposed to 6,000. Thus, the source

[22] For examples, see note 20, *supra*.

of these commentators' criticism appears to be a concern that defendants' settlement offers may be too high due to the presence of plaintiffs who are later determined not to qualify for an award. But a defendant's settlement calculations are not a reason to impose additional burdens on the parties in a situation where no plaintiff is ultimately going to receive compensation without establishing an injury.

In short, the Committee should reject as inefficient and unnecessary any proposal to revise proposed Rule 16.1(c)(4) in order to impose an additional production burden on MDL plaintiffs.

III. Proposed Rule 16.1 should not apply to class-action MDLs.

Finally, proposed Rule 16.1 should not—and, really, cannot—apply to class actions. A review of the Committee's own commentary regarding this proposed Rule as well as a preview of the adverse effects that would come from force-fitting its provisions into class actions make this conclusion unavoidable.

The Committee itself demonstrates its intent for the proposed Rule to apply to mass torts only by using "MDLs" as a shorthand for mass torts and pointedly contrasting "MDLs" with "class actions". The draft Note for proposed Rule 16.1(c)(1), for example, observes that, unlike specific requirements for appointing class counsel under Rule 23, "[t]here is no single method that is best for all MDL proceedings" "for selecting such leadership counsel." The Committee's phrasing is no accident. As a prior Committee report on the proposed Rule noted, the earliest calls advocating for the proposed Rule were "mainly focused on 'mass tort' proceedings" and driven by some perceived "difficulties with relying on Rule 26(f)" to manage mass-tort MDLs. This report also highlighted the fact that various provisions of Rule 23, such as those prescribing class counsel's duties (Rule 23(g)(4)) and outlining the procedure for awarding fees to class counsel (Rule 23(h)), have no counterpart in the mass-tort arena.

Applying proposed Rule 16.1's provisions to class actions would produce unintended and undesirable consequences that will only increase the inefficiencies and delays associated with managing and litigating these cases. While each provision is problematic in the class-action context, we discuss below two such provisions as exemplars.

Proposed Rule 16.1(b), which authorizes a transferee court to select "coordinating counsel" to assist with the initial management MDL conference" (discussed in proposed Rule 16.1(a)) and suggests that counsel's performance in that role may influence the court's later leadership appointment, is unnecessary in class actions. Class-action MDLs do not entail many of the management issues that arise in mass torts and effectively utilize existing Rule provisions governing initial scheduling conferences and reports following consolidation and transfer. If adopted, the proposal would also suggest that courts consider additional (and sometimes conflicting) factors beyond those already contained in Rule 23(g)(1).

In addition, proposed Rule 16.1(c)(1), which requires the parties to submit a report prior to the initial MDL management conference that may address, among other things, "whether leadership counsel should be appointed," the procedure for selecting leadership counsel, and the structure, responsibilities, and compensation of such counsel would conflict with widely accepted practice in MDL class actions. In these cases, the transferee court's early appointment of interim lead class

counsel and the significant rights and responsibilities that come with this appointment under Rule 23 are essential to ensuring the efficient and effective prosecution of the class's claims and the orderly management of the litigation. To suggest that such appointments may be unnecessary, as the proposed provision does, would cause serious problems that would adversely affect the parties, counsel, and the courts. Ultimately, applying this and the other provisions of the proposed Rule to MDL class actions would violate Rule 1's dictate that the Rules should be interpreted and administered "to secure the just, speedy, and inexpensive determination of every action and proceeding."

IV. Conclusion

The Committee should include a provision requesting parties to propose a plan for addressing motions to remand among the topics that may be included in the initial report describe in proposed Rule 16.1(c). Conversely, the Committee should reject calls to incorporate an additional layer of discovery into MDLs beyond what is already authorized by the Rules of Civil Procedure. Finally, the Committee should make it clear that the provisions of proposed Rule 16.1 cannot be applied where they would conflict with the requirements of Rule 23 pertaining to class actions.

Best regards,

BURNS CHAREST LLP

Warren T. Burns, Partner

Daniel H. Charest, Partner

Korey Nelson, Partner

MORGAN & MORGAN
AMERICA'S LARGEST INJURY LAW FIRM

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February 15, 2024

VIA EMAIL TO:
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Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rule 16.1 Regarding Multidistrict Litigation

Dear Committee Members,

Thank you for the opportunity to provide comment on Proposed Rule 16.1 regarding multidistrict litigation.

My name is John A. Yanchunis, and my 42 years of practicing law following a two clerkship with United States District Judge Carl O. Bue, Jr. (now deceased) informs my perspective about the proposed Proposed Rule 16.1 regarding multidistrict litigation.

I began my work in class litigation in 1995, and since that time I have been appointed to leadership positions in multidistrict litigations ("MDLs") as well as some of the largest consumer class cases litigated in the United States. *See, e.g.*, *In re DoubleClick, Inc. Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001); *Fresco v. Automotive Directions, Inc.*, No. 03-61063-JEM (S.D. Fla.) and *Fresco v. R.L. Polk*, No. 07-60695-JEM (S.D. Fla.); *Davis v. Bank of America*, No. 05-80806 (S.D. Fla.); *Kehoe v. Fidelity Federal Bank and Trust*, No. 03-80593 (S.D. Fla.).

Among other cases, more recently I have been appointed to leadership positions in some of the most significant privacy non-MDL class actions: *Rodriguez v. Google LLC*, No. 3:20-cv-04688-RS (N.D. Cal.); *Brown v. Google LLC*, No. 4:20-cv-03664-YGR (N.D. Cal.); *Adkins v. Facebook, Inc.*, No. 3:18-cv-05982 (N.D. Cal.). Recent appointments to leadership positions in significant privacy MDLs include:

- *In re: Capital One Consumer Data Security Breach Litigation*, No. 1:19-md-02915-AJT (E.D. Va.)
- *In re: Equifax, Inc. Customer Data Security Breach Litigation*, No. 1:17-md-02800-TWT (N.D. Ga.)
- *In re: Yahoo! Inc. Customer Data Security Breach Litigation*, No. 5:16-md-02752-LHK (N.D. Cal.)
- *In re: U.S. Office of Personnel Management Data Security Breach Litigation*, No. 1:15-mc-01394-ABJ (D.D.C.)

- *In re: Target Corp. Customer Data Security Breach Litigation*, MDL No. 2522 (D. Minn.)
- *In re: The Home Depot, Inc. Customer Data Security Breach Litigation*, No. 1:14-md-02583-TWT (N.D. Ga.).

Along with other members of my Firm, we have extensive experience with class actions and MDLs, and my commentary on Proposed Rule 16.1 is informed by that collective experience.

As drafted, the focus of Proposed Rule 16.1 appears to address product liability MDLs. While my firm has handled and continues to handle product liability MDLs, my practice primarily focuses on class actions across myriad areas of law. While not all MDLs involve or are considered class actions, there are MDLs that are *solely centralized class actions*. Take for example *In re: Capital One Consumer Data Breach Litigation*. Cases were filed across the country after Capital One notified customers of an extensive data breach. Those cases were brought before the Judicial Panel on Multidistrict Litigation (the "JPML") for consolidation and centralization. After the JPML sent all of those cases (and any tagalong cases) to the Eastern District of Virginia to be consolidated and centralized, my co-lead counsel and I only pursued the case through the class action device. The same is true for most other MDLs in which I have served in leadership roles.

As my colleague (and co-lead counsel in *In re: Capital One Consumer Data Breach Security Breach Litigation* and other matters) Norman E. Siegel articulates in his public comment, Proposed Rule 16.1(c)(1) provides that "MDL proceedings do not have the same commonality requirements as class action." This can only be accurate if "MDL proceedings" is not read to include class actions, and instead "product liability and common disaster MDLs centralizing individual claims." However, Proposed Rule 16.1 does not draw such distinctions, and appears to focus on all MDLs regardless of the representative devices employed in them.

I also join Mr. Siegel's concerns about the designation of coordinating counsel under Proposed Rule 16.1(b). Rather than designating a coordinating counsel, it is routine and exceedingly more efficient to begin with the consideration and appointment of interim class counsel that will undertake the fiduciary role of representing absent class members throughout the pendency of the class-action-based MDL. This is achieved when the transferee court sets a schedule for any proposed interim appointments under Rule 23(g), considers those applications, and carefully and thoughtfully selects and appoints interim class counsel.

Once the transferee court reviews, considers, and ultimately appoints interim class counsel under Rule 23(g), that appointed class counsel acts as a fiduciary and is vested with the power to speak for the absent class members, enter into agreements with opposing parties, and litigate any disputes that might arise, including any issues that would typically arise during an initial case management conference like protective orders, ESI, 502(d) agreements, preservation requirements, discovery plans, and pretrial motions schedules. These are crucial negotiations and can impact how (and even whether) causes of action are pursued, and are best left to an interim appointment under Rule 23(g), rather than the designation of a coordinating counsel under Proposed Rule 16.1(b).

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This leads me to the next issue with Proposed Rule 16.1(c)(1)—that Rule 23(g) already enumerates factors that a District Court must consider before any interim appointment. Proposed Rule 16.1(c)(1) falls woefully short on this matter, and contravenes the Advisory Comments to the 2003 Amendments to Rule 23: "It responds to the reality that the selection and activity of class counsel ***are often critically important to the successful handling of a class action***." Furthermore, the Manual for Complex Litigation (Fourth § 21.11) counsels that interim appointments should be done before (or at) the initial case management conference, particularly where—like in most class actions that are centralized via the MDL process—a number of attorneys and groups of attorneys vie for myriad leadership positions: "In such cases, designation of interim counsel clarifies responsibility for protecting the interest of the class during precertification activities, such as ***making and responding to motions, conducting any necessary discovery, moving for class certification***, and negotiating settlement. This routine and well-established process would now be at odds with the Proposed Rule concerning "coordinating counsel" and "leadership counsel."

I join Mr. Siegel's proposals to address the issues with the Proposed Rule.

First, where an MDL only has centralized class actions, and no other collective device, those MDLs should be explicitly excluded from the proposed rule.

Second, for hybrid MDLs (where there are both individual claims and representative claims brought under Rule 23), it should be made clear that nothing in Proposed Rule 16.1 should supersede or otherwise contravene Rule 23(g).

Finally, to the extent "coordinating counsel" is deemed necessary in any centralized class action MDLs or hybrid MDLs, that "coordinating counsel" role should be limited to purely ministerial duties pending the appointment of interim class counsel under Rule 23(g).

Again, thank you for taking the time to review and consider my testimony.

Sincerely,

John A. Yanchunis, Esq.

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NIGH GOLDENBERG RASO & VAUGHN

Mr. T. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United State Courts
One Columbus Circle, NE
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01/22/2024

Thank you for allowing me to testify on this very important issue. My name is Ashleigh Raso and I am a founding partner at Nigh Goldenberg Raso & Vaughn, a six-attorney law firm with locations across the country. I am located in Minneapolis, Minnesota.

My colleagues' comments on the hard work this committee has done and the genuine interest in making MDLs more organized and efficient bears repeating. Thank you for taking the time to make complex litigation more organized, while educating new MDL judges on the best way to proceed.

I currently serve on five leadership positions, including the Plaintiffs' Executive Committee and the Plaintiffs' Steering Committee of coordinated actions[1]. I also have the privilege to serve as acting[2] liaison counsel in three of those litigations. The liaison counsel position gives me a unique perspective into coordinating and organizing MDLs. Based on my experience as liaison counsel I will speak primarily on the issue of designating "coordinating counsel".

I. Coordinating Counsel

I agree that early organization is paramount to coordinating an MDL and supports the intent of 28 U.S.C. § 1407. I believe the best and most efficient way to organize an MDL is to appoint *qualified* liaison counsel.

[1] *In re Stryker LFIT V40 Femoral Head Prods. Liab. Lit.* (17-MD-2768); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Lit.* (19-MD-2875); *In re Zimmer M/L taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Tech. & Versys Femoral Head Prod. Liab. Lit.* (18-MD-2859); *In re Profemur Hip Implant Prods. Liab. Lit.* (21-MD-2949); Florida Exactech Coordinated Action (2022-CA-00270).

[2] "Acting" liaison counsel because in Stryker LFIT V40 the position was called "Administrative Counsel". In the Zimmer M/L Taper Litigation I served as both PEC and Liaison Counsel. I also serve as state liaison counsel in the Florida Exactech Coordinated Litigation.

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Some of the tasks I have done as liaison counsel that go beyond basic communication with lawyers include: working with experts to put together digestible case criteria to ensure meritorious cases are filed, working with defense counsel on best practices of serving complaints and discovery, working with the court's clerk to create a "Case Filing Master Manual" to ensure that cases are filed to the judge's specifications, publishing a plaintiffs'-only website where all court orders can be found and discovery may be served, helping *pro se* counsel file and communicate with the court, advising the court and the parties about certain data points of the plaintiffs in the litigation (age, jurisdictions involved, etc…), and assisting with many other issues that arise.

It is crucial to appoint a liaison counsel who is most qualified[3] and actually wants a position that involves high levels of organization and communication. If the transferee judge can appoint a position before the litigation even begins, three adverse impacts will be felt: (1) a premature fight to be appointed coordinating counsel, which may not result in the most qualified candidate being appointed; (2) a rush to coordinate leadership excluding potentially good candidates; (3) confusion regarding authority to make decisions on behalf of the litigation; and (4) a lack of diverse candidates being appointed.

1. Premature Fight to be Appointed Coordinating Counsel

Should the judge choose a designated counsel, it is possible that the coordinated counsel will be an attorney in close proximity to the courthouse[4], not the most qualified person. If the goal is to increase the organization of an MDL and aid first-time MDL judges, appointing a qualified, experienced liaison counsel *after* the first hearing is more important than appointing a coordinating counsel *before* the first hearing. While I am located in Minnesota, my appointments for acting liaison counsel have been in Massachusetts, New

[3] Qualified counsel should be highly organized and able to communicate efficiently at all levels. Many tasks assigned to liaison counsel are not glamorous and are often overlooked, but the liaison counsel position is a vital position to keep the MDL organized. Organization becomes even more important when there are a large number of defendants and claimants.

[4] Historically the liaison counsel practiced in the jurisdiction of the courthouse, however, even before COVID-19, liaison counsels were increasingly being appointed from around the country based on their skill, not their location. Online tools and virtual hearings have increased the ability to organize from different locations and to involve qualified attorneys from all areas of the country.

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York, and Florida. I'd like to believe I was appointed, and in some cases chosen by my colleagues, for my qualifications as liaison counsel, not for my address.

There are times when coordinating counsel should be selected very carefully. I have been contacted numerous times by *pro se* clients. There may be litigations, like the recent Uber Passenger Sexual Assault Litigation, or a coordinated clergy sexual abuse litigation, where *pro se* litigants may reach out to the coordinating counsel in the early days of litigation. There are circumstances where special consideration should be given to trauma-informed counsel. Likewise, many products impact women or women of color, like in the recent hair relaxer litigation or the previous transvaginal mesh litigation. Special consideration may be given to appointing the right person to interact with *pro se* litigants in those cases.

2. Rushing to Coordinate May Exclude Good Leadership Candidates

In line 127 of the advisory committee notes it state, "In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that designation of coordinating counsel may not be necessary." (Advisory Committee notes Lines 127-131). While informal organization often occurs, the potential leadership will have no indication of *when* the court may appoint coordinating counsel. The result will be a rush to organize and coordinate amongst themselves before the transferee judge *sua sponte* appoints coordinating counsel. The rush to coordinate quickly may exclude excellent attorneys who may otherwise be unknown to the potential leadership and unknown to the court before the first hearing.

3. Confusion on Who Has Authority to Make Decisions

Section 16.1(c) includes a variety of topics to cover in the first hearing. In order to speak on these issues, there will need to be a discussion across the "V". The coordinating counsel may not be ultimately chosen to lead the litigation or may not be on leadership at all. Agreeing on issues such as "how and when the parties will exchange information about the factual bases for their claims and defenses," or a "proposed plan for discovery," or "pretrial motions" or any number of the other items listed in 16.1.(c) will not carry any weight, resulting in wasted time and confusion.

This is particularly true if coordinating counsel is at odds with the attorneys seeking ultimate leadership in the litigation. In fact, if the coordinating counsel is not in agreement

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with a group seeking leadership, defendants may refuse to have these discussions at all until a leadership group is appointed.

This lack of actual authority is equally true for defendants. For example, in a case like *In Re: Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Lit*. where there are over thirty defendants, coordinating counsel may be chosen for defendants as well, resulting in chaos between the many different law firms representing defendants who may have conflicting views on discovery for their clients. This will result in further confusion on who has the authority to speak on the issues listed in Rule 16.1(c), wasting the time of the court and the parties.

4. Lack of Diverse Leadership

In order for the judicial system to be trusted, it is important that the counsel leading the litigation look like the plaintiffs and represent a broad array of experiences. Under this current proposed rule there is only one appointment that is made before the very first hearing. Whether it is intended or not, there will be a fight for that one position. As a result of that fight, highly involved and well-known law firms may seek that position, potentially resulting in diverse and highly qualified candidates being passed over.

This is further amplified if the coordinating counsel has any authority or persuasion over who is ultimately appointed to leadership. If the coordinating counsel has any say over who is appointed to leadership, this will be the most highly sought-after position, resulting in premature fights, disorganization, and confusion.

As those who testified before me have pointed out, although there is nothing in this rule that suggests that coordinating counsel will serve as leadership going forward, that will be the impact felt. There will be a *de facto* presumption that coordinating counsel will be in leadership.

II. Rule 16.1(c)

Rule 16.1(c) contains many important topics to cover early in the litigation, however, the first status conference is too soon for many of these topics. Additionally, there is a logistical obstacle as there will be questions regarding who has the authority to speak and negotiate on these issues, as discussed above. Any attempt at organizing these items and

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speaking on them with authority could result in conflicting agreements and ultimately achieve the exact opposite of what this rule intends to do.

Instead, if this rule is necessary, I believe it should be centered around the judge's authority and preferences. For example,

"Before the initial case management conference the transferee judge may enter an agenda on the subjects to be covered at the first status conference. The agenda may include the following topics:

(1) Whether leadership structure is necessary, how it should be structured, and the duties of leadership, including whether leadership has been agreed upon or whether there will be conflicting leadership positions, and if so the judge's preference for appointing potential leadership (applications, motions, and/or interviews);
(2) Whether the court will stay the pending deadlines in individual actions;
(3) The handling of the direct filing and *pro hac vice* status;
(4) Filing procedures in the MDL, including filing on the master dockets versus individual case filings;
(5) Whether certain matters will require a Magistrate judge's involvement;
(6) Practice pointers the Judge would like to discuss;
(7) Scheduling of future case management conferences; and
(8) Procedures for scheduling or contacting the court."

This list is preliminary and may not be necessary, but will help guide the parties and the Court on the most pressing issues for the first case management conference. Thank you for taking the time to consider my thoughts and I look forward to speaking with you.

Thank you,
Ashleigh Raso

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February 16, 2024

VIA EMAIL
RulesCommittee_Secretary@ao.uscourts.gov
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Colombus Circle, NE
Washington, DC 20544

Re: Draft Federal Rule of Procedure 16.1

Dear Members of the Committee on Rules of Practice and Procedure:

Thank you for the opportunity to comment on the Committee's proposed new Rule 16.1 regarding multidistrict litigation. I am submitting this comment on behalf of the Committee to Support the Antitrust Laws (COSAL), an organization of plaintiffs' antitrust law firms across the country that prosecute antitrust class actions.

COSAL requests an amendment to the Committee Note to address the issues relating to the treatment of class actions in proposed Rule 16.1 that were raised in the submissions and testimony of Jeannine Kenney (dated January 2, 2024) and Kellie Lerner (submitted January 23, 2024), among others. Our proposed amendment recognizes that class actions do not implicate the same management and coordination issues as other types of MDLs.

In submitting this proposed amendment, COSAL is not taking a position on the new Rule as it relates to MDLs that are not class actions.

Proposed amendment to Rule 16.1's Committee Note:

Many different types of civil actions are coordinated or consolidated for pretrial proceedings pursuant to Section 1407 – Multidistrict Litigation. Among them are class actions, which are governed by Federal Rule of Civil Procedure 23 (Class Actions), caselaw and various statutes, such as the Class Action Fairness Act and the Private Securities Litigation Reform Act. Rule 16.1 is not intended to supplant or alter FRCP 23, the body of statutes and caselaw governing class actions, or

long-standing best practices used by courts in organizing and managing class action MDLs, including the appointment of interim class counsel and consolidating and coordinating actions, both of which should occur at the outset of the litigation.

Thank you for considering our views. If you have any questions about this submission, please contact Pamela Gilbert, pamelag@cuneolaw.com, (202) 253-3561.

Sincerely,

Pamela Gilbert
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PUBLIC SUBMISSION

Comment from Billan, Nardeen

Posted by the **United States Courts** on Feb 16, 2024

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I am a third-year law student currently studying multidistrict litigation ("MDL") in a Civil Litigation Capstone course. While my Rule 16.1 input will not be as high-level as other comments on the proposed amendments, my perspective aims to offer a disinterested view rather than favoring either side in an MDL.

Incorporating the governance of MDLs is a commendable step forward. I attended the final hearing on the proposed amendments to the civil rules and listened to the witnesses testifying. Although I cannot comment on many of the apprehensions expressed by witnesses, I find a place for me to add value in the word "should." The word "should" is prickly. It is a modal verb, used as a recommendation or suggestion. Initial management of MDL cases allows for appreciation on both sides of the "v.". Overall, its malleability allows for more of a reach than having a limiting effect.

Law school taught me that no two cases are the same. Facts differ, lawyer strategies vary, witnesses can be unpredictable, and judges face challenges. The ability to pivot is the silver lining. While one case may involve highly complex privilege issues, others may not. I appreciate the Federal Courts' commitment to the level of uniformity in the Federal Rules of Civil Procedure. However, not everything is black and white.

I can't help but draw parallels between the proposed amendments and the development of federal sentencing. The Sentencing Reform Act of 1984 aimed to reduce sentencing variances, obligating federal judges to strictly follow the U.S. Federal Sentencing Guidelines (the "Guidelines"). The rationale was to encouraging uniformity and predictability. Post-Booker (where the Supreme Court addressed Sixth Amendment) the remedy was to render the sentencing guidelines advisory, not mandatory. One could wonder if Federal Prosecutors and Federal Defenders would be somewhat more content with the Guidelines Post-Booker.

Permitting the Court and parties to use their discretion would tip the scale towards a more balanced and equitable approach as opposed to adhering to inflexible rules. Each MDL is complex, and with the growth of

Artificial Intelligence, e-discovery, and other rapidly growing technologies, we “should” be in the mindset of flexibility.

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Comment Details | **Submitter Info**

Received Date

Feb 16, 2024

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February 16, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
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Re: ***Comment Regarding Proposed "MDL Rule," Federal Rule of Civil Procedure 16.1***

Dear Mr. Byron,

Thank you for the opportunity to provide comments to the Committee on proposed Rule 16.1, which would govern multidistrict litigations. My colleague Diandra "Fu" Debrosse provided comments and testimony related to her work as our firm's Chair of Mass Tort Litigation. Our firm also handles a number of other cases, including single-event personal injury cases, class actions involving product liability claims and privacy violations, as well as securities and antitrust litigation.

DiCello Levitt has offices in Birmingham, Chicago, Cleveland, New York, San Diego, Santa Fe, and Washington, D.C. Our attorneys have been appointed to lead dozens of significant cases since its founding in 2017, including *In re Manufactured Home Lot Rents Antitrust Litig.*, No. 23-cv-06715 (N.D. Ill.); *In re Blackbaud, Inc. Customer Data Sec. Breach Litig.*, No. 20-mn-02927 (D.S.C.); *In re Fairlife Milk Prods. Mktg. and Sales Pracs. Litig.*, No. 19-cv-03244 (N.D. Ill.); *In re Marriott Int'l Inc. Customer Data Sec. Breach Litig.*, No. 19-md-02879 (D. Md.); *In re Equifax, Inc. Customer Data Security Breach Litig.*, No. 17-md-02800 (N.D. Ga.). Several of our attorneys are individually recognized by Chambers & Partners and are elected members of the American Law Institute. Members of our technology practice group have won *Law360*'s "Practice Group of the Year" in 2020, 2021, and 2022, and the firm was honored with American Legal Media's "Plaintiffs Firm of the Year" award in 2023.

We have been entrusted by courts across the country to lead some of the largest MDLs, and we have provided testimony and taught about our experiences. For example, I was invited by the Federal Judicial Center to provide comments on potential updates to the *Manual for Complex Litigation*, and I am invited by Professor Robert Klonoff to teach his Complex Litigation course twice yearly at Lewis & Clark University.

I have enjoyed discussing the efficient litigation of MDLs in interviews and oral presentations with many judges, including Judge J. Michelle Childs (before her elevation to the U.S. Court of Appeals for the D.C. Circuit), Judge Robert M. Dow, Jr. (prior to his appointment by Chief Justice John G. Roberts, Jr. as Counselor), and Judge Allison D. Burroughs (related to the pending *MOVE-it MDL*).

In my experience litigating *class action* MDLs, and having the benefit of many colleagues at my firm also litigating mass tort MDLs, what strikes me is the distinct difference between the two types of cases. While mass tort MDLs often benefit from "short form complaints" for individual plaintiffs with personal injuries, class action MDLs best benefit from representative "superseding" complaints, which set forth proposed class representatives who, after a vetting process, would fulfill the "adequacy" requirement of Federal Rule of Civil Procedure 23. Mass torts also sometimes need to address "common benefit" orders, given the number of attorneys involved in representing individual plaintiffs, while class action MDLs typically only address attorneys' fees if the case is successful, and co-lead counsel establish a litigation fund after their appointment.

It is important when considering a rule that would apply to *all* MDLs that the Committee not treat the rule as a "one-size-fits-all" *requirement* (which may be the case, even if language like "may consider" is used). Applying certain rules may make sense for mass tort cases, but not for class action cases. This is particularly an issue with proposed Rule 16.1(b), which states that a transferee court "may designate coordinating counsel" to perform certain tasks contemplated by Rule 16.1(a) and (c). While this rule may be helpful for certain types of cases, in the class action context, it is actually more helpful to designate lead counsel *first*, who would be best-suited to addressed issues which may impact the merits of a case. Designating coordinating counsel in a class action MDL, where literally hundreds of attorneys have filed overlapping class actions and are vying for "lead counsel" with their own idea of how the case should run, may actually lead to greater *inefficiencies* than if the transferee court asked for brief submissions as to how the case should be organized along with applications for lead counsel appointment. Judge Allison Burroughs recently employed this approach in the sprawling *MOVE-it MDL*, which involves hundreds of defendants. The result? Streamlined communication coming from only one group of lawyers who are designated to "speak" for the putative class.

Proposed Rule 16.1(b) is also concerning because it does not contain any criteria for the new "coordinating counsel" position. While Rule 23(g) provides courts with guideposts as to the necessary qualifications for lead counsel, proposed Rule 16.1(b) has no such

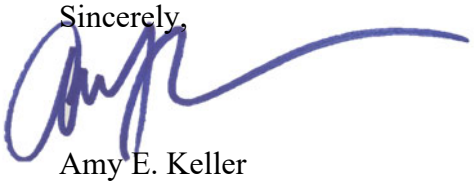
guidance. If the wrong coordinating counsel is appointed, that person may not have the requisite experience to make decisions or meet and confer with defendants as contemplated in proposed Rule 16.1(c).

Rule 16.1(c) could also lead to significant confusion among transferee courts, as Rule 16.1(c)(1) requires the parties to address "whether leadership counsel should be appointed," but does not address whether "leadership counsel" would be subject to the same analysis already set out by Rule 23(g). Rule 23(g) already provides the specific criteria that a court "must consider" when appointing interim class counsel, and provides that the court must appoint "the applicant best able to represent the interest of the class." Fed. R. Civ. P. 23(g)(1)(A), (g)(2). Countless MDL decisions have been published examining Rule 23(g), the timing of when appointment should occur (consistent with the Comments to the 2003 Amendments), and what additional considerations transferee judges may consider.

I appreciate that the Committee has been hard at work in developing proposed Rule 16.1, and believe that the proposed rule could be further revised to address the concerns I raise above. The Committee should consider revising the rule to provide that it is only meant to provide guidance, and that transferee judges should still consider the well-articulated principles from existing case law as well as sources like the *Manual for Complex Litigation*. Further, if transferee courts consider the appointment of "coordinating counsel," the proposed rule should make clear that the rule is meant for ministerial, case management-related purposes, only, and the coordinating counsel are not empowered to make decisions in the MDL which are binding, or could impact the merits of the litigation. Additionally, the Committee should specifically note that Rule 16.1 should not be read as supplanting or replacing Rule 23(g) in MDL class action cases, as a rule already exists relating to the appointment of lead counsel.

On behalf of my firm DiCello Levitt, I think the Committee for allowing me to share this information, and for considering my comments.

Sincerely,



Amy E. Keller

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

CLARITY ON THE TWO "RULES PROBLEMS": EMPIRICAL EVIDENCE OF THE INSUFFICIENT CLAIMS PROBLEM IN MDLS AND KEY TESTIMONY ON MUCH-NEEDED REVISIONS TO THE PROPOSED RULE 16.1 AND PRIVILEGE LOG AMENDMENTS

February 16, 2024

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") addressing issues raised during the public comment process about the Committee's proposed amendments to the Federal Rules of Civil Procedure (FRCP) concerning initial management of multidistrict litigation proceedings (MDLs) and privilege log practices (the "Preliminary Draft").[2]

INTRODUCTION

During the Committee's October 2023 public hearing on the Preliminary Draft, Judge Dow's three-part test for rulemaking was discussed: (1) Is there a rules problem? (2) Is there a rules solution? and (3) Does the rules solution risk negative consequences that would outweigh its value?[3] The public comment period has delivered a variety of perspectives that all point to the same conclusion: There are two, and only two, "rules problems" in the Preliminary Draft for which a "rules solution" would help courts and parties without producing harm. Those problems

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 36 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

[3] Transcript of Proceedings, *In the Matter of: Proposed Amendments to the Federal Rules of Civil Procedure,* October 16, 2023, https://www.uscourts.gov/sites/default/files/2023-10_transcript_of_civil_rules_hearing_0.pdf ("October hearing"), 249 (Judge Proctor).

are (1) insufficient claims in MDL proceedings and (2) the misunderstanding of what is required when parties withhold documents on the basis of privilege. The "rules solutions" to both problems are based on existing FRCP principles and are therefore easily fashioned to avoid negative unintended consequences. In contrast, the public comments have not identified any "rules problems" supporting the proposed Rule 16.1 provisions focused on designating leadership counsel, facilitating settlement, managing direct filing, appointing special masters, or preparing pleadings that are not allowed by Rule 7—and rulemaking on these topics risks serious negative consequences.

I. Proposed Rule 16.1(c)(4) and Insufficient Claims in Multidistrict Litigation

Empirical data demonstrate that insufficient claims are prevalent in mass-tort MDLs. This is a "rules problem" because the FRCP provisions that largely prevent insufficient claims from posing problems in single-party cases[4] are failing to have that effect in mass-tort MDLs. This "rules problem" is also an initial management problem – and therefore in the bullseye of the Committee's rulemaking effort – because judges have only one opportunity to prevent the problem, and that occurs at the earliest stage of the proceedings. An effective "rules solution" would not only solve the management problems, but also would affirmatively enhance judicial management by improving understanding of the case, expediting the information needed for resolution, and providing fairness to plaintiffs and defendants alike.[5] Unfortunately, as drafted, Section 16.1(c)(4) is not a rules solution – in fact, it is not an improvement over the status quo[6] and perhaps is even a step backward. Revisions to the proposed Section (c)(4) are needed, and a few modest changes would help solve both the rules and management problems by creating compliance with well-accepted FRCP pleading standards. In keeping with the Committee's apparent decision to eschew mandatory requirements, LCJ's proposed solution is entirely discretionary and would therefore not cause unintended negative consequences. Rather, it would help MDL judges and parties to prevent a common problem that inevitably requires judicial attention and litigation resources later on.

A. Empirical Data Show that Insufficient Claims Are Very Common in Mass-Tort MDLs

During the Committee's October 2023 hearing, questions were asked concerning the existence of empirical data showing "the extent of the unsupported claims problem" in MDL proceedings.[7] Committee members clarified that "I don't think anybody would dispute that there are meritless cases filed in MDLs"[8] and "[n]o one is suggesting this isn't a problem."[9] At least one plaintiffs

[4] This comment uses "single-party cases" to mean typical federal civil litigation matters that have not been consolidated into multidistrict litigation proceedings.
[5] *See* Lawyers for Civil Justice, *A Rule, Not an Exception: How the Preliminary Draft of Rule 16.1 Should Be Modified to Provide Rules rather than Practice Advice and to Avoid the Confusion of Enshrining Practices into the FRCP that are Inconsistent with Existing Rules and Other Law* (Sept. 18, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0004 ("LCJ Public Comment on Rule 16.1").
[6] October hearing, 285 (Dahl testimony).
[7] October hearing, 48 (Professor Bradt).
[8] October hearing, 249 (Professor Bradt).
[9] October hearing, 131 (Judge Proctor).

lawyer agreed that meritless claims are filed in MDLs.[10] This problem has been noted by MDL judges as well.[11]

Despite the general consensus of the problem, data regarding insufficient claims are hard to find. Of course, in many MDL proceedings, there are no adjudications or findings on the sufficiency of claims.[12] Thus, "[t]he data is in the dismissals,"[13] and LCJ has endeavored to provide the Committee with reliable data from public dockets and public sources demonstrating that the MDL Subcommittee's conclusion about this issue is indeed correct.[14] Here are the facts:

- In the *Ethicon, Inc., Pelvic Repair System Products Liability Litigation*,[15] **53 percent** of the total 46,511 cases filed—24,695 claims—were ultimately dismissed for factual shortcomings or inability to establish a recognizable injury.[16]

- In the *Zofran* MDL, which began in 2015 and was closed by 2021 (after the court granted summary judgment), the 751-case[17] MDL saw approximately **40 percent** of its cases dismissed. During a status conference on September 19, 2019, counsel noted that the "common denominator" in that 40 percent was "cases that … *should never been filed in the first place*."[18]

- In the *Vioxx* MDL, which began in 2005 and reached a settlement in November 2007, sources cite around a **30 percent** failure rate. Out of 30,499 heart attack claims that went through the claims process, 9,888, or 32.4 percent, of the heart attack claimants were unable to satisfy the rudimentary requirements.[19] For strokes, there were 17,863 claims that went through the gates process, and 5,399, or 30.2 percent, of the ischemic stroke claimants failed to provide documentation of these requirements.[20] And out of 48,362 claims that went

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[10] October hearing, 265 (O'Dell testimony).
[11] *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*, Case No. 4:08-MD-2004, 2016 WL 4705827, at *2 (M.D. Ga. 2016) ("MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.").
[12] October hearing, 237 (Kole testimony).
[13] October hearing, 108 (Shepard testimony).
[14] The MDL Subcommittee reported to the Committee:

> The unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. Were there no MDL centralization, arguably, this would not be a problem. Defendants would have an opportunity to challenge individual claims one by one. Indeed, but for the MDL centralization order, many of those claims might not have reached court at all.

MDL Subcommittee Report, Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, pp. 142, 143 https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.
[15] MDL No. 2327.
[16] October hearing, 238 (Kole testimony).
[17] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2021*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report.pdf.
[18] MDL No. 2657, Dkt. 1656 at 4-5 (emphasis added).
[19] *See* Rules4MDLs, *Case Study: Vioxx MDL and Settlement*, https://www.rules4mdls.com/case-study-vioxx-mdl.
[20] *See* Rules4MDLs, *Case Study: Vioxx MDL and Settlement*, https://www.rules4mdls.com/case-study-vioxx-mdl.

through the process, 15,287 – nearly one-third – failed because they could not or did not demonstrate the basic facts necessary to recover.[21]

- In the *Abilify* MDL, over **19 percent** of cases were dismissed. In this six-year MDL (which began in 2016 and was closed in 2022 after being resolved through settlement), there were approximately 2,812 cases total,[22] with 534 cases dismissed for failure to prosecute or failure to comply with court orders[23] and 14 voluntary dismissals.[24]

- In the *Juul Labs* MDL, approximately **17.5 percent** of the cases were dismissed. This MDL began in 2019 and is currently in the process of settling. There are 5,108 actions pending now; but 7,068 historical actions.[25] The docket reflects approximately 1,207 dismissals with prejudice and 484 dismissals without prejudice based on failure to comply with Plaintiff Fact Sheet ("PFS") requirements or for non-communication (Dkts. 4074 & 4147)[26] and

[21] *See* Rules4MDLs, *Case Study: Vioxx MDL and Settlement*, https://www.rules4mdls.com/case-study-vioxx-mdl.
[22] United States Panel on Multidistrict Litigation, *JPML Multidistrict Litigation Terminated Through September 30, 2022*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-Cumulative%20Terminated%20MDLs_0.pdf.
[23] MDL No. 2734, Dkt. 1159 (119 cases dismissed); Dkt. 1170 (149 cases dismissed); Dkt. 1177 (120 cases dismissed); Dkt. 1185 (19 cases dismissed); Dkt. 1186 (32 cases dismissed); Dkt. 1189 (95 cases dismissed).
[24] MDL No. 2734, Dkt. 374; Dkt. 714; Dkt. 1143; Dkt. 1144; Dkt. 1172; Dkt. 1173; Dkt. 1187.
[25] United States Panel on Multidistrict Litigation, *JPML MDL Statistics Report – Distribution of Pending MDL Dockets by district (2/1/2024)*, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-February-1-2024.pdf.
[26] MDL No. 2913, Dkt. 1073 (dismissing 45 cases without prejudice for failure to submit PFSs); Dkt. 1119 (dismissing 53 cases without prejudice; Dkt. 1173 (dismissing 13 cases without prejudice); Dkts. 1373 & 1447 (dismissing 9 cases without prejudice); Dkt. 1474 (dismissing 83 cases with prejudice); Dkt. 1594 (dismissing 12 cases with prejudice); Dkt. 1596 (dismissing 11 cases without prejudice); Dkt. 1697 (dismissing 7 cases without prejudice); Dkt. 1960 (dismissing 53 cases without prejudice); Dkt. 1798 (dismissing 6 cases without prejudice); Dkt. 1960 (dismissing 53 cases without prejudice); Dkt. 1961 (dismissing 5 cases without prejudice); Dkt. 2094 (dismissing 39 cases without prejudice); Dkt. 2097 (dismissing 3 cases with prejudice); Dkt. 2260 (dismissing 10 cases with prejudice); Dkt. 2346 (dismissing 17 cases without prejudice); Dkt. 2347 (dismissing 48 cases without prejudice); Dkt. 2367 (dismissing 27 cases with prejudice; dismissing 5, 3, 10, and 3 cases without prejudice); Dkt. 2451 (dismissing 40 cases with prejudice); Dkt. 2508 (dismissing 8 cases without prejudice); Dkt. 2513 (dismissing 3 cases with prejudice); Dkt. 2583 (dismissing 3 cases without prejudice); Dkt. 2584 (dismissing 18 cases with prejudice); Dkt. 2855 (dismissing 3 cases without prejudice); Dkt. 2938 (dismissing 1 case without prejudice); Dkt. 2939 (dismissing 6 cases with prejudice); Dkt. 3053 (dismissing 2 cases without prejudice); Dkts. 3249 (dismissing 8, 10, 10, and 4 cases without prejudice); Dkt. 3293 (dismissing 3 cases with prejudice); Dkt. 3299 (dismissing 6 cases without prejudice); Dkt. 3306 (dismissing 14 cases without prejudice); Dkt. 3341 (dismissing 1 case with prejudice); Dkt. 3342 (dismissing 14 cases without prejudice); Dkt. 3377 (dismissing 3 cases without prejudice); Dkt. 3378 (dismissing 2 cases with prejudice); Dkt. 3471 (dismissing 5 cases without prejudice); Dkt. 3684 (dismissing 10 cases with prejudice); Dkt. 3685 (dismissing 15 cases without prejudice); Dkts. 3713 & 3738 (dismissing 9 cases without prejudice; and dismissing 13 cases with prejudice); Dkt. 3771 (vacating dismissal with prejudice as to 5 cases); Dkts. 3859 & 3862 & 3863 & 3864 (dismissing 765 cases with prejudice); Dkt. 3962 (dismissing 21 cases with prejudice); Dkt. 4041 (vacating dismissal without prejudice as to 11 cases); Dkt. 4074 (dismissing 192 cases with prejudice); Dkt. 4147 (dismissing 3 cases with prejudice). (Note there is overlap between the figures for "with" and "without" prejudice.)

approximately 34 voluntary and stipulations of dismissals,[27] not including the dismissals (stipulated or voluntary) as to certain defendants only.[28]

- In the *3M Combat Arms Earplug* MDL, approximately **15 percent** of cases have been dismissed. This MDL began in 2019, and a global settlement in principle was reached in 2023. As of 2022, 316,275 total cases were filed in the MDL, which was formed in 2019 and is still pending (255,151 cases still pending).[29] The 15 percent dismissal figure comes from 47,837 cases dismissed for failure to comply with court orders, failure to resolve overlapping representation issues or to transition from the administrative docket to the active docket, or failure to answer Initial Census Questions,[30] and 23 voluntary dismissals noted on MDL docket.[31] Late last year, the MDL judge observed that "[i]ssues of overlapping attorney representation and duplicate cases have plagued the MDL."[32] [33]

[27] MDL No. 2913, Dkt. 248; Dkt. 305; Dkt. 635; Dkt. 699; Dkt. 783; Dkt. 831; Dkts. 834-844; Dkt 861; Dkt. 874; Dkt. 928; Dkt. 1006; Dkt. 1015; Dkts. 1053-1054; Dkt. 1790 (voluntary dismissal of proposed class reps; and 7 underlying cases); Dkt. 2728; Dkt. 3292; Dkt. 3433. After the entries at Dkts. 834-844, the clerk issued a note saying to "Re-file these documents in the underlying cases only." *See* July 29, 2020 Staff Text Entry. Similar notations are made at Dkts. 1053-1054.

[28] MDL No. 2913, Dkt. 1021; Dkt. 3256; Dkt. 3262; Dkt. 3719; Dkt. 3720; Dkt. 3850; Dkt. 4161; Dkt. 4162; Dkt. 4183; Dkt. 4184; Dkt. 4185; Dkt. 4186; Dkt. 4187; Dkt. 4188.

[29] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-12-9-22_0.pdf.

[30] MDL No. 2885, Dkt. 3076 (19,934 cases dismissed without prejudice); Dkt. 3077 (314 and 1,125 cases dismissed without prejudice), Dkt. 3340 (174 cases dismissed); Dkt. 3345 (1,222 cases dismissed without prejudice); Dkt. 3346 (1,569 cases dismissed without prejudice); Dkt. 3348 (11,004 cases dismissed without prejudice); Dkt. 3349 (267 and 254 cases dismissed without prejudice); Dkt. 3621 (1,592 and 10 cases dismissed without prejudice); Dkt. 3706 (7; 4,427; and 31 cases dismissed without prejudice); Dkt. 3727 (1,549 and 77 cases dismissed without prejudice); Dkt. 3752 (923 cases dismissed); Dkt. 3761 (32 cases dismissed without prejudice); Dkt. 3770 (18 cases dismissed); Dkt 3788 (123 cases dismissed); Dkt. 3796 (15 cases dismissed); Dkt. 3801 (27 cases dismissed); Dkt. 3802 (71 cases dismissed); Dkt. 3803 (11 cases dismissed); Dkt. 3835 (235 cases dismissed); Dkt. 3836 (48 cases dismissed); Dkt. 3916 (2,028 cases dismissed); Dkt. 3932 (1,672 cases dismissed); Dkt. 3943 (54 and 174 cases dismissed); Dkt 3962 (262 cases dismissed); Dkt. 3971 (303 cases dismissed); Dkt. 3972 (8 cases dismissed); Dkt. 3987 (3 cases dismissed); Dkt. 3990 & 3991 (169 cases dismissed); *but see* Dkt. 3120-1 (court reinstating 1,895 cases that were mistakenly placed on the delinquent plaintiff list).

[31] MDL 2885, Dkts. 723-736; Dkt. 756; Dkt. 762; Dkt. 792; Dkt. 794; Dkt. 2342; Dkt. 3280; Dkt. 3658; Dkt. 3664; Dkt. 3790. At Dkts. 737, 757, 764 (and more), the court noted that voluntary dismissals should be filed in the individual cases. Thus, the voluntary dismissal figure from the MDL docket does not capture all voluntary dismissals.

[32] MDL 2885, Dkts. 3925 & 3925-1. As of November 2023, news outlets noted the court order and exhibit showing that there were 3,548 "unresolved overlaps" where plaintiffs with the same name are shown to have different plaintiff ID numbers and law firms. *See* Collin Krabbe, *3M Earplug Judge Drops Over 3,5000 Claims in MDL* (November 6, 2023), Law360.

[33] In addition, in related bankruptcy proceedings, debtors cast doubt on the claims in the 3M Combat Arms litigation: "[N]early a quarter of plaintiffs in the Department of Defense data served in the military in the 1980s or 1990s (well before the Combat Arms earplugs were sold to the military) and nearly 40 percent of plaintiffs served in the military for 10 or more years. A significant number of plaintiffs also had elevated hearing thresholds in their baseline audiograms—i.e., any impairment indicated by their records was already evident before any possible use of the Combat Arms earplugs." *See In re: Aero Technologies, LLC, et al.*, S.D. Ind., Bankruptcy Court, Case No. 22-02890, Dkt. 1221, *Debtors' Motion For Entry Of An Order (I) Authorizing Estimation Of The Aggregate Value Of Combat Arms-Related Claims For The Purposes Of Establishing A Settlement Trust And Confirming A Plan Under Chapter 11; (II) Scheduling Claims Estimation Proceedings; And (III) Granting Related Relief, at p. 4.*

- In the *Mentor Corp. Transobturator Sling Products* MDL,[34] **75 percent** of the 850 cases filed were either dismissed by stipulation of parties (458 cases), dismissed voluntarily (74 cases), or decided against plaintiffs on summary judgment (100 cases).[35]

- In the California state court (JCCP) case involving *Cymbalta*, approximately **31 percent** of the cases were dismissed. The action began in 2015 and was resolved by settlement in May 2016. Out of the 1,325 plaintiffs total, 372 had their cases dismissed on August 16, 2019, for not responding at all or otherwise failing to comply with the CMO governing initial discovery of non-settling plaintiffs, and an additional 41 voluntarily dismissed their claims without payment.[36]

- The judge in the *Imerys Talc* bankruptcy threw out 16,000 votes cast by talc injury claimants on Imerys Talc America's Chapter 11 plan due to "zero diligence."[37] The judge said she "cannot – and will not – ignore" that the law firm that had submitted the claims never specifically asked any clients if they had been exposed to Imerys products or tried to distinguish between clients that were more likely or less likely to be exposed.[38]

The Committee should keep in mind that these numbers very likely understate the problem for several reasons, including that judges are not ordering information about claims, poor record keeping, multiple-plaintiff complaints, unfiled claims, and settlements of insufficient claims. Also, there is non-public data showing large numbers of insufficient claims in recent, large MDLs that has not been included here.

B. Insufficient Claims are Caused by a "Rules Problem"

Insufficient claims such as those described in Point A (above) result from a "rules problem" because the FRCP provisions that define the basic elements of a legal claim[39] in unconsolidated cases have proven impractical in MDLs with hundreds or thousands of claimants. As Judge M. Casey Rodgers explains, the usual procedural safeguards of claims sufficiency are "difficult to employ at scale in the MDL context, where the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands."[40] Many MDL courts regard the FRCP provisions as impractical.[41] MDL judges have said that if they used the same FRCP-based motions practice in mass-tort MDLs that they use in single-party cases, their time would be consumed with this one task. The principles behind Rules 3, 7, 8, 9, 10, 11, and 12 remain important and uncontroversial in all cases, including MDLs. They protect courts and

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[34] *In re Mentor Corp. Transobturator Sling Prods*., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, (M.D. Ga. Sept. 7, 2016).
[35] *Id*. at *1 n.2. *See also* Hon. Clay D. Land, *Multi-District Litigation after 50 Years: A Minority Perspective from the Trenches*, 53 Ga. L. Rev. 1237, 1242 (2019).
[36] *See In re: Cymbalta Drug Cases*, JCCP No. 4825, Defendant Eli Lilly and Company's Status Report and Request to Terminate JCCP 4825, dated January 30, 2020.
[37] *See* Rick Archer, *Judge Tosses 16K Talc Claimant Votes In Imerys Ch. 11* (October 13, 2021), Law360.
[38] *Id.*; *see also In re: Imerys Talc Amercia, Inc. et al.*, Case No. 19-10289 (D. Del., Bankruptcy), Dkt. 4239, at 25.
[39] Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."
[40] Judge M. Casey Rodgers, *Vetting the Wether: One Shepherds View*, 89 UMKC L. REV. 873, 873 (2021).
[41] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. Rev. 1669, 1674 (2017).

parties from insufficient claims by ensuring that every plaintiff has Article III standing and an actual case or controversy, which are constitutional requirements. The fact that these rules are not functioning in MDLs is a very important "rules problem."

C. The Insufficient Claims "Rules Problem" is Also an MDL Management Problem

The data in Point A (above) show not only that many insufficient claims are filed, but also that (1) absent a rule, getting rid of insufficient claims requires the judge's time and attention, and (2) when courts do order information about the basis of claims, claims get dismissed.

For example, in *In re: Zofran*, the court issued an early product identification order and an order requiring plaintiff fact sheets.[42] Specifically, as to the product identification order, the court concluded:

> that production of such information at a relatively early stage in the litigation may assist in the preservation and collection of additional evidence; is not likely to be unduly burdensome; is not likely to result in unfairness to any party; and may help resolve certain issues in this litigation in a timely manner.[43]

Following those orders, approximately 40 percent of the Zofran cases were dismissed.[44] Many of the dismissals were due to plaintiffs' failure to comply with the Court's procedural orders,[45] and many others were voluntary dismissals likely prompted by those orders.[46]

Similarly, in *In re: Abilify*, the over 19 percent dismissal rate occurred due to failure to comply with early court orders, failure to prosecute, [47] or voluntarily dismissals.[48] In *Juul Labs,* it was after PFS requirements were imposed that approximately 17.5 percent of cases were dismissed based on failure to comply with orders or otherwise communicate with the court.[49] In *In re: 3M Combat Arms Earplug*, many of the 47,837 dismissals were for failure to comply with early court orders, failure to resolve overlapping representation issues or to transition from the administrative docket to the active docket, or failure to answer Initial Census Questions.[50]

In other words, insufficient claims pose an MDL management problem—a problem that is worth avoiding—and case experience shows that solving that problem requires courts to issue an order early in the case requiring some basis that the claim belongs in the litigation. The earlier, the better; delay only invites more claims. Note that the *Zofran* case remained manageable (751

[42] MDL No. 2657, Dkts. 251 & 252 (Orders No. 10 & 11).
[43] MDL No. 2657, Dkt. 251.
[44] MDL No. 2657, Dkt. 1656 at 4-5.
[45] *See, e.g.*, MDL No. 2657, Dkt. 387; Dkt. 550; Dkt. 551; Dkt. 552; Dkt. 655.
[46] *E.g.,* MDL No. 2657, Dkt. 261; Dkt. 266; Dkt. 292; Dkt. 298; Dkt. 330; Dkt. 444; Dkt. 459; Dkt. 467; Dkt. 509; Dkt. 523; Dkt. 528; Dkt. 529; Dkt. 728; Dkt. 974; Dkt. 1031; Dkt. 1050; Dkt. 1051; Dkt. 1054; Dkt. 1055; Dkt. 1087; Dkt. 1088; Dkt. 1089; Dkt. 1094; Dkt. 1137; Dkt. 1138; Dkt. 1624; Dkt. 1637; Dkt. 1639; Dkt. 1640; Dkt. 1652; Dkt. 1678; Dkt. 1809.
[47] *See* n.23, *supra*.
[48] *See* n.24, *supra*.
[49] *See* n.26, *supra*.
[50] *See* n.30, *supra*.

cases) because the court's order requiring information about claims came relatively early in the proceedings, no doubt dissuading others from filing insufficient claims.

Many other problems occur when courts ignore insufficient claims. Professor Bradt asked during the October hearing:

> What is the real practical problem of those cases being parked on the docket during the MDL process, where it seems to me that much of the discovery and litigation is over the common issues, and if those claims are truly meritless, you don't have to settle them? It's not a class action. You don't have to settle them all. You just don't pay them out on the back end. What's the real problem?"[51]

The answers include:

1. Failing to make basic inquiries as to the sufficiency of claims deprives the court and parties of information that could inform initial management decisions related to discovery, motion practice, and bellwether selection,[52] and causes problems on remand and after settlement;

2. Uncertainty about the number of insufficient claims on and MDL docket hampers the parties' ability to consider settlement and therefore delays resolution;[53]

3. Failing to uphold FRCP pleading standards violates courts' constitutional responsibility to examine standing and an actual case or controversy;[54]

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[51] October hearing, 116 (Prof. Bradt).

[52] *See* Judge M. Casey Rodgers, *Vetting the Wether: One Shepherds View*, 89 UMKC L. Rev. 873, 873 (2021) (explaining that "high volumes of unsupportable claims … interfere with a court's ability to establish a fair and informative bellwether process.").

[53] Scott Partridge testified:

> 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.

Transcript of Proceedings, *In the Matter of: Proposed Amendments to the Federal Rules of Civil Procedure*, January 16, 2024, https://www.uscourts.gov/sites/default/files/jan_16_hearing_transcript.pdf ("January hearing"), 150-51 (Partridge testimony).

[54] October hearing, 145-46 (Leventhal testimony) and 197-204, (Halperin testimony).

4. Ignoring FRCP standards and constitutional requirements deprives defendants of notice of the claims against them; and

5. Allowing unexamined claims harms plaintiffs whose lawyers fail to look into the factual basis of claims.[55]

D. Fixing the "Rules Problem" Would Not Impair MDL Management

The Preliminary Draft is written as a flexible menu[56] rather than a mandatory rule, so Section (c)(4), even if revised, will be a prompt for MDL judges to ask counsel for their views. MDL courts will retain complete discretion over whether to order disclosures for the purpose of preventing and managing insufficient claims early in the proceedings, and may well forego this in an MDL comprised only of two class actions, for example.

LCJ's suggestion for revising Section (c)(4) (see Section H., below) would prompt an order for early disclosures; it would neither force judges to spend time on unnecessary work nor slow the MDL proceedings. On the contrary, as Tripp Haston testified, "I don't think that there is a choice, a dichotomy, between having to … address a cross-cutting issue and also asking the plaintiff for the basic citizenship type of information they need to participate."[57] Ordering disclosure of basic information is not a decision to halt consideration of substantive motions or anything else. In practical effect, it could function like "a Rule 26 disclosure"[58] for the purpose of honoring the Rule 8(a)(2) standard.[59] In fact, the primary purpose of such an order is the prophylaxis that will reduce the burdens on judicial resources caused by insufficient claims. As Chris Guth explained, "we're not trying to figure out how to better litigate claims that don't belong here in the first place. We're trying to keep them from coming in."[60] The order would ask for a basic showing "of the nature of the claim, the product involved, and a compensable injury."[61] In Toyja Kelley's experience, such an order works because 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."[62] If there is non-compliance with a disclosure order prompted by Section (c)(4), there will be a "one-line motion" to dismiss, and the effect of the order will be that "people won't file

[55] *See* Burch, Elizabeth Chamblee and Williams, Margaret S., *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd* (Nov. 1, 2022) at 11 ("Shepherding thousands of cases through pretrial has also prompted judges to streamline pleadings, discovery, and motion practice in ways that further depersonalize plaintiffs' court experience and remove the Federal Rules of Civil Procedure's built-in protections."), https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2023/01/Burch-Williams-final-1.pdf.
[56] Draft Minutes, Civil Rules Advisory Committee, March 28, 2023, Agenda Book, Committee on Rules of Practice and Procedure, June 6, 2023, at 855 ("In a sense, the rule offers the judge a 'cafeteria plan' to direct counsel to provide needed input up front without constricting the judges flexibility…."); January 2023 Standing Committee Meeting Minutes, Agenda Book, Committee on Rules of Practice and Procedure, June 6, 2023, at 37 ("The draft rule is designed to maintain flexibility.").
[57] October hearing, 141 (Haston testimony).
[58] October hearing, 114 (Shepherd testimony).
[59] Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."
[60] October hearing, 135 (Guth testimony).
[61] January hearing, 153 (Partridge testimony) and 182 (Rothman testimony).
[62] January hearing, 230 (Kelley testimony).

these cases."[63] This is why LCJ's suggested language is the "rule-based solution that doesn't create some unintended consequence"[64] for which the Committee is searching.

LCJ's suggested language also holds an answer to Judge Jordan's important question: "[I]s there[] a way to frame this so it doesn't jam the system up in the same way that a 12(b)(6) motion could stop everything?"[65] Judge Proctor also raised this issue by observing that it is common practice in single-party cases to stay discovery while a motion to dismiss is pending.[66] Why should product liability MDLs not be handled in the same manner? This question reveals the discrepancy, not the harmony, between current practices. In a single-party case, a judge might suspend aspects of the litigation (typically discovery) while a motion to dismiss (typically based on Rule 12(b)) is resolved. MDL practice is the opposite: judges suspend motions to dismiss while the litigation (including discovery, other motion practice, and bellwether trials) proceeds. So if the goal were to treat MDL cases just like single-party cases, then MDL courts would suspend the litigation and focus on motions to dismiss—*but this is NOT the LCJ proposal*. Rather, the LCJ proposal seeks to *prevent* the insufficient claims problem from overwhelming the proceedings. It does so by prompting courts to order early disclosures in keeping with existing FRCP and constitutional standards—orders affecting the parties, not the court.[67] This prompt will offer judges and parties a means of deterring insufficient claims while not interfering with any judge's discretion to focus on whatever topics or issues are appropriate for the proceedings.

E. Plaintiff Fact Sheets are Not the Solution to the "Rules Problem"

Plaintiff fact sheets are not used to vet claims[68] because, as the MDL Subcommittee knows, they are "not really a screening method so much as a useful way to 'jump start' discovery…."[69] If fact sheets were an effective means of addressing insufficient claims, MDLs would not be suffering from an insufficient claims problem because fact sheets are widely used.[70] Plaintiff fact sheets have proven to be ineffective in dealing with insufficient claims because of the complexity, time, and expense involved.[71] In Harley Ratliff's experience, despite the use of fact sheets, one MDL is "seven years in and more than 80 percent of the inventory of, at one time,

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[63] October hearing, 114-15 (Shepard testimony).
[64] October hearing, 249-50 (Judge Proctor).
[65] October hearing, 115 (Judge Jordan).
[66] October hearing, 133-34 (Judge Proctor).
[67] October hearing, 195 (Guttman testimony).
[68] October hearing, 127-30 (Guth testimony).
[69] Agenda Book, Committee on Rules of Practice and Procedure, June 25, 2019 at 236, https://www.uscourts.gov/sites/default/files/2019-06_standing_agenda_book_0.pdf.
[70] Research by the Federal Judicial Center ("FJC") shows that plaintiff fact sheets ("PFS") are "already used very frequently in larger MDL proceedings, and used in virtually all of the 'mega' MDL proceedings with more than 1,000 cases." Agenda Book, Advisory Committee on Civil Rules, Oct. 29, 2019, at 192, https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf; Meeting Minutes, Civil Rules Advisory Committee, Oct. 29, 2019, Agenda Book, Advisory Committee on Civil Rules, April 1, 2020, at 74, https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf ("Plaintiff fact sheets … have come to be used in almost all of the largest MDL proceedings."). *See also* Paul D. Rheingold, *Plaintiff's fact sheets; use of a census*, *in* LITIGATING MASS TORT CASES § 8:9 (August 2023 Update) ("In recent years, the use of routine interrogatories for the plaintiff to answer has become replaced by a plaintiff's fact statement (PFS).").
[71] October hearing, 205-06 (Ratliff testimony).

16,000 cases have no proof that they have ever been injured."[72] This is typical of other MDLs, where the basic pleading and factual requirements may not be dealt with "for 18 months, two years, [o]r even longer down the road."[73]

During the Committee's hearings, questions were asked about why disclosures of basic information showing claim sufficiency should be required in MDL cases when they are not in single-party cases. The answers are (1) single-party cases do not suffer from an uncontrolled insufficient claim problem because the FRCP are working;[74] (2) the large numbers of plaintiffs in mass-tort MDLs make existing FRCP procedures impractical and overwhelming, according to MDL judges;[75] and (3) MDL practices already diverge from those of single-party cases because fact sheets are used in lieu of motions to dismiss and FRCP-defined discovery devices. All of which gets to the question that the LCJ proposal answers: What procedure would allow MDL courts to prevent and address the insufficient claims problem using well-accepted FRCP pleading standards without overwhelming courts with motion practice focused on individual claims? The LCJ proposal relies on early basic disclosures as the procedure that works "at scale" for preventing and managing claims that are insufficient under existing FRCP standards.

F. A Prompt to Avoid the "Whenever We Get to It" Approach to Claim Insufficiency Would Help Judges Adhere to Constitutional Requirements

The Supreme Court has established that federal courts are under an independent obligation to assess their jurisdiction, the most important element of which is standing.[76] The "first and foremost of standing's three elements" is an "injury in fact,"[77] and the second requirement is a "causal connection" showing the injury is "fairly traceable to the challenged [conduct] of the defendant, and not the result of the independent action of some third party … not before the court."[78] These standards undoubtedly apply to MDL cases.[79] The Sixth Circuit has explained:

> [T]he Supreme Court—again unanimously—has said that, subject to one exception not relevant here, the cases within an MDL "retain their separate identities." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413, 135 S.Ct. 897, 190 L.Ed.2d 789 (2015). That means a district court's decision whether to grant a motion to amend in an individual case depends on the record in that case and not others. Nor can a party's rights in one case be impinged to create efficiencies in the MDL generally. "Section 1407 refers to individual 'actions' which may be transferred to a single district court, not to any monolithic multidistrict 'action' created by transfer." *Id*.

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[72] *Id*.
[73] October hearing, 190 (Guttman testimony).
[74] In single-party cases, the existing FRCP largely prevent and, if necessary, provide a procedure for handling claims that do not comply. Also, unconsolidated cases are not driven by the strong forces that create insufficient MDL claims, including mass advertising, competition for lead counsel positions, and intense regulatory and public relations pressure on the defendants.
[75] October hearing, 53, 213 (Judge Proctor).
[76] October hearing, 145-46 (Leventhal testimony) (*quoting U.S. v. Hayes*).
[77] *Spokeo*, 578 U.S. at 338.
[78] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up, brackets removed).
[79] October hearing, 87-88 (Beisner testimony).

In re Nat'l Prescription Opiate Litigation, 2020 WL 1875174, at *3 (6th Cir. Apr. 15, 2020). At the outset of individual actions, it is likely known whether the plaintiff was exposed to the alleged cause of harm and suffered a subsequent injury.[80]

Delaying the inquiry into basic standing requirements until an uncertain point—perhaps years into the litigation—is not consistent with the Supreme Court's established standard. Moreover, it is "counterproductive … when people don't know before a case is filed what is going to happen and they don't know what the expectations are going to be of them and their clients."[81] Rules are particularly important for new lawyers, law clerks, and litigants.[82] The idea that a court cannot deal with the essential elements of standing at a reasonably predictable early point in the proceedings is at least a serious procedural problem if not a fundamental failure. The FRCP should provide MDL judges a practical procedural tool for timely action to ensure the jurisdictional requirements of standing.

G. No MDL Proceedings Benefit from Insufficient Claims

Even if there is some debate as to *when* insufficient claims should be dealt with in a particular MDL proceeding, there is no question about *whether*. As Judge Rosenberg said, "[n]obody's in support of unsupportable claims."[83] Indeed, no MDL proceeding has ever benefitted from insufficient claims. Rule 16.1 and the Note should reflect that it is good management to address the problem, and bad management to ignore it. Newly appointed MDL judges should know that an analog to Benjamin Franklin's famous adage that "[g]uests, like fish, begin to smell after three days," could be said about insufficient claims: "the longer they're in, the more complicated it makes administration of the MDL."[84] Insufficient claims cause a "chain reaction" of problems for the court and parties.[85] Defendants always want to know, and should be able to know, whether the claims against them are insufficient, even if there's a reasonable chance that a motion will eventually terminate the proceeding.[86]

H. Section (c)(4), as Drafted, is Not a "Rules Solution" and Needs Revising

Draft Section (c)(4) prompts a discussion of "how and when *the parties* will *exchange* information about the factual bases for their claims *and defenses*" (emphasis added). The word *exchange* connotes discovery, and including the word *defenses* guarantees that this language will be misread as prompting a discussion about mutual discovery rather than a procedure for ensuring that plaintiffs' claims meet their essential requirements.[87] The Draft Note conveys the sense that requiring claims to meet the most basic requirements of standing and stating a claim could be an "undue burden[]" and "unwarranted." This language undermines the purpose of Section (c)(4) by conveying that courts should often prefer to ignore the mass filing of

[80] January hearing, 183 (Rothman testimony).
[81] October hearing, 64 (Kaspar Stoffelmayr testimony).
[82] January hearing, 173-75 (Hampton testimony).
[83] October hearing, 208 (Judge Rosenberg).
[84] October hearing, 140-41 (Haston testimony).
[85] January hearing, 187-88 (Rothman testimony).
[86] October hearing, 132 (Guth testimony); January hearing, 237 (Kelley testimony).
[87] October hearing, 148 (Leventhal testimony) ("this doesn't have anything to do with an exchange of information, and it also doesn't have anything to do with defenses.").

insufficient claims—the Field of Dreams problem—because discovery will take care of it. Plaintiffs lawyers agree this is confusing.[88] The purpose of Section (c)(4) is to prompt judges to order disclosures. Such orders will curtail insufficient claims. Fewer insufficient claims will relieve courts and parties from dealing with this problem and allow more focus on important issues.

1. Eliminate "exchange" and "defenses" from Section (c)(4)

The words *exchange* and *defenses* should be deleted from Section (c)(4). Just as Rules 8(a) and 9(b), and the 12(b) standard, are focused on the sufficiency of plaintiffs' claims, so should Section (c)(4) concern a procedure for ensuring that plaintiffs disclose the basic information to show that their claim belongs in the litigation. In contrast, discovery obligations are the topic of Section (c)(6).

2. Use the language of claim sufficiency in Section (c)(4)

Because the purpose of Section (c)(4) is to provide a prompt for handling—and more importantly, averting—the problem of insufficient claims, the text of Section (c)(4) should be the language of claim sufficiency. A modest edit would serve that purpose and avoid confusion with Section (c)(6) by prompting transferee judges to require an early check into the most basic elements of the claims. A revised Section (c)(4) should look something like this:

> (4) how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's alleged injury ~~about the factual bases for their claims and defenses~~;

3. The Note to Section (c)(4) should state that FRCP standards apply

The Note to Section (c)(4) should be revised to correct its misidentification of the insufficient claim problem as a discovery matter, and should explain why judges should issue orders that deter insufficient claims.[89] The Note to Section (c)(4) should state that the FRCP rules defining pleading standards, specifically rules 8(a) and 9(b), apply in MDL proceedings, as does Rule 11. Although this is nothing more than black-letter law,[90] the statement is necessary because Section (c)(4) should be a prompt for a procedure that drives compliance with those standards—and not a wink and a nod to an "MDL exception." This no-frills approach "would provide enough corroborating information to allow a party to determine whether the claim has the merit required by Federal Rule of Civil Procedure 8(a), 9(b) and 11."[91] It would make dismissal "almost a

[88] February hearing (transcript not available), *** (Hazam testimony).
[89] *See* Lawyers for Civil Justice, supra n. 9.
[90] *See, e.g.*, *In re National Prescription Opiate Litigation*, No. 20-3075, 956 F.3d 838, 844 (6th Cir. 2020) ("[N] neither §1407 nor Rule 1 remotely suggests that, whereas the Rules are law in individual cases, they are merely hortatory in MDL ones.").
[91] Posted Comment by Bayer, Oct. 15, 2023, pps 4-5. *See also* Alan E. Rothman & Mallika Balachandran, *Early Vetting: A Simple Plan to Shed MDL Docket Bloat,* 89 UMKC L. Rev. 881, 885 (2021)(describing successful use of

ministerial task rather than the far more re-source-intensive motion practice" currently required.[92] "Two pieces of paper is what we're asking for."[93] LCJ offers a potential Note text in its public comment consistent with these suggestions.[94]

I. Neither the Designation of Coordinating Counsel Nor the Appointment of Leadership Counsel Presents a "Rules Problem" for which a "Rules Solution" Exists—and the Risk of Negative Consequences is Extremely High

The public comment period did not produce any argument or evidence that a "rules problem" exists in relation to the designation of coordinating or the appointment of leadership counsel. To the contrary, the record is replete with warnings from practitioners on both sides of the "v" that including these topics in Rule 16.1 would cause more problems than it would solve. The testimony reflects that, by and large, plaintiffs' lawyers are organizing themselves. Moreover, as John Beisner discussed[95] and LCJ wrote,[96] rulemaking on this topic would inevitably engage the FRCP in the complicated ethical mire that arises when courts purport to define lawyers' responsibilities in a way that overrides plaintiffs' choice of counsel. The Committee should jettison this topic and delete Rule 16.1(c).

J. Settlement Does Not Pose a "Rules Problem" for which a "Rules Solution" Exists

No one identified the facilitation of settlement discussions as a "rules problem" during the public comment period. In fact, the proposed note to Section (c)(9) and members of the Committee pointed out that Rule 16 already addresses this topic,[97] and both plaintiffs' counsel and defense counsel testified that there is no need to focus on settlement at an initial management conference.[98] No one offered empirical data or even anecdotal evidence that there is a need for more judicial attention to settlement. To the contrary, there is considerable concern that MDL courts overstep when they emphasize settlement, which may even be counterproductive.[99] Many federal judges would disagree with the Preliminary Draft's commentary that a court should be "regularly apprised of developments regarding potential settlement" of matters before them and should "make every effort" to supervise lawyers (on one side of the case) as to their settlement efforts. The Committee should delete any mention of facilitating settlement from Rule 16.1.

"shorter questionnaires at the outset of an MDL proceeding, well before the PFS process, to specifically target the bona fides" of allegations of "exposure to the product and/or a relevant injury" as a gateway function, citing *In re Zofran (Ondansetron) Prod. Liabl. Lit*., No. 1:15-cv-2657-FDS, 2016 WL 3058475 (D. Mass. May 26, 2016).

[92] DRI Center for Law and Public Policy Comment, *Summaries*, at 142-143 of 177.

[93] *Id*.

[94] LCJ Public Comment on Rule 16.1, 10-11.

[95] October hearing, 78-82 (Beisner testimony).

[96] LCJ Public Comment on Rule 16.1, 11-17.

[97] *See* Preliminary Draft Rule 16.1(c)(9) and accompanying advisory committee's note; January hearing, 142-43 (Professor Bradt).

[98] January hearing, 121, 123-24 (Acosta testimony) and 137 (Mickus testimony).

[99] LCJ Public Comment on Rule 16.1, 17-19 ("the over-emphasis on settlement at the initial conference is inappropriate because it fosters a presumption of liability, conveys that the judge has an agenda, is inconsistent with the MDL statute's boundaries as a pre-trial mechanism, and is counterproductive because it puts the "cart" of settlement well before "horse" of litigating claims, defenses, and liability."); January hearing, 138-39 (Mickus testimony).

K. Direct Filing Does Not Pose a "Rules Problem" for which a "Rules Solution" Exists

There was also no discussion—let alone empirical data—during the public comment period that a "rules problem" exists related to direct filing. On the contrary, all of the information provided by witnesses on this topic emphasized the negative unintended consequences that any FRCP provision concerning direct filing would cause.[100] Inserting the concept of direct filing into the FRCP would be a radical decision because direct filing may be inconsistent with the statutory framework, which mandates that MDL transfers "shall be made by the [JPML]."[101] Moreover, because several courts have held that MDL courts lack *subject-matter jurisdiction* over direct-filed claims,[102] subsection (c)(10) urges the filing of claims that MDL courts lack power to address. Section 16.1 (c)(10) and the accompanying Note should be removed.

L. The Appointment of Special Masters Does Not Pose a "Rules Problem" and Adding More Rules Would Only Create Confusion

No public comment or hearing witness said a "rules problem" exists relating to the appointment of special masters, and there is no empirical data or anecdotal evidence that MDL courts need new guidance on this topic. Rule 53 already requires that "the court must give the parties notice and an opportunity to be heard" before appointing a master,[103] and Rule 72 provides guidance and procedures for referrals to magistrate judges.[104] Adding subsection 16.1(c)(12) to the FRCP would cause confusion by communicating an explicit endorsement of appointing masters, contrary to the Committee Note statements that "appointment of a master must be the exception and not the rule" and "[a] master should be appointed only in limited circumstances" because "[d]istrict judges bear primary responsibility for the work of their courts." [105] When a court appoints a master to address pre-trial matters, "[a]ppointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge."[106] Section (c)(12) should be deleted.

M. Inviting Pleadings and Discovery Devices that are Not Allowed or Described in the FRCP would Engender Significant Adverse Consequences

The Committee also did not receive any comments or testimony that there is a "rules problem" whose solution is to refer to pleadings not allowed under Rule 7 or to discovery devices that are not defined by the rules. There has been no empirical or anecdotal evidence of a problem. In contrast, there are significant negative consequences that will occur if the Committee were to

[100] LCJ Public Comment on Rule 16.1, 20-21.
[101] *See* 28 U.S.C. § 1407(a); *see also, In re Kaba Simplex Locks Marketing and Sales Practice Litig*., No. 1:11-MD-2220 (N.D. Ohio Aug. 1, 2012) ("no basis upon which [the court] has the legal authority to issue the requested direct filing order in the instant case.").
[102] *See, e.g.*, *In re Jan. 2021 Short Squeeze Trading Litig.*, 580 F. Supp. 3d 1243, 1253 (Jan. 10, 2022) ("The weight of authority further supports the conclusion that an MDL transferee court lacks subject matter jurisdiction over claims by new plaintiffs asserted for the first time directly in an MDL proceeding.").
[103] FED. R. CIV. P. 53(b)(1).
[104] *See* FED. R. CIV. P. 72. *See also* 28 U.S.C. §636(b).
[105] FED. R. CIV. P. 53 advisory committee's note to 2003 amendment.
[106] *Id.*

move forward with amendments that refer to documents that are not recognized by the FRCP.[107] The Committee should remove any mention of pleadings or discovery devices that are not allowed under Rule 7 or otherwise defined by the FRCP.

II. PRIVILEGE LOG PRACTICES PRESENT A "RULES PROBLEM" FOR WHICH THERE IS A STRAIGHTFORWARD AND MUCH-NEEDED "RULES SOLUTION"

Privilege logs present a "rules problem" because many courts and parties misconstrue Rule 26(b)(5)(A) to require document-by-document privilege logs in all cases—including cases involving massive amounts of data, and even for categories of documents that are highly unlikely to contain discoverable information, such as communications with outside counsel after the filing of a complaint.[108] Although the 1993 Committee Note correctly observed that detailed privilege logs "may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories,"[109] Rule 26(b)(5)(A) now effectively imposes these very burdens on litigants.[110]

A. The Burden of Privilege Logging Is Large and Disproportionate, and It Affects Both Big and Small Cases

Privilege review and logging is the single largest expense in civil litigation.[111] Robert Keeling, whose practice predominately focuses on handling privilege logs[112] testified that in one of his matters, "the contract attorney team spent a total of 21,378 hours on the single log," which is "the equivalent of an associate spending 11 years of their life to compose one log for one party on one matter."[113] Such disproportionate burdens are not affecting "just a big case or two," but rather, as Jonathan Redgrave explained, are "impacting the availability of the courts to smaller cases" as well.[114]

As technology progresses and the types of communication tools evolve, the volume of communications subject to discovery increases exponentially. Consequently, the number of documents subject to valid claims of privilege is also increasing. Although technology advances have aided the discovery review process, including through AI and TAR, it cannot replace the need to have attorneys review records withheld as privilege in the effort to prepare a log of every document when required. These logs, which can cost in excess of $1,000,000, rarely if ever

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[107] LCJ Public Comment on Rule 16.1, 19-20.
[108] *In re Imperial Corp. of America*, 174 F.R.D. 475, 478 (S.D. Cal 1997).
[109] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment ("The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.")
[110] Lawyers for Civil Justice, *The Direct Approach: Why Fixing the Rule 26(b)(5)(A) Problem Requires an Amendment To Rule 26(b)(5)(A)*, Oct. 4, 2023, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0007.
[111] October hearing, 220 (Rosenthal testimony); January hearing, 190 (Cohen testimony).
[112] October hearing, 16 (Keeling testimony).
[113] *Id*. at 6.
[114] October hearing, 91 (Redgrave testimony).

result in a meaningful change in information that impacts the merits issues in the case. Even if documents are inappropriately withheld, there are much better mechanisms available to identify these records in categorical logs that are designed to focus on key issues versus a log with over 100,000 documents that makes it much harder to find.

B. The "Rules Problem" Is that Courts and Parties Imbue Rule 26(b)(5)(A) with a Default to Document-By-Document Logging

The cause of the disproportionate logging problem is that courts and parties read Rule 26(b)(5)(A) to require document-by-document logging rather than—as the Committee intended in 1993—allowing more efficient and equally (or more) effective alternatives.[115] Judges, magistrate judges, and special masters "believe that's the de facto standard."[116] Although document-by-document logging may be appropriate for some withheld records, it is also important for courts and parties to consider that categorical logs may be more helpful.[117] Categorical logs with metadata are recognized on both sides of the "v" as a reasonable, efficient, and effective means of winnowing down the withheld documents that might be impactful to the case and should be specifically reviewed.[118]

C. The "Rules Solution" is to Amend Rule 26(b)(5)(A)

The "rules solution" is clear: The FRCP should clarify that document-by-document logging is not the default standard.[119] Putting this clarification in Rule 26(b)(5)(A) is the key[120] because that rule is the source the requirement to describe the nature of the documents withheld from production. The "rules package is incomplete if we don't address the actual 26(b)(5)"[121] because the current proposal to prompt early conversations on the topic cannot solve every problem, especially because "parties typically do not have the information they need to meaningfully discuss and negotiate privilege log issues at the outset of a case."[122] At very least, the proposed language offered by Judge Facciola and Jonathan Redgrave[123] is a necessary complement to the Committee's proposed amendments to Rules 16(b) and 26(f)(3)(D). [124] It is also important to include the concept of proportionality in a Rule 26(b)(5)(A) amendment because it is often inappropriately overlooked.

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[115] October hearing, 181 (Larson testimony); January hearing, 190 (Cohen testimony).
[116] October hearing, 224 (Rosenthal testimony).
[117] October hearing, 184 (Larson testimony); January hearing, 192 (Cohen testimony).
[118] *See* October hearing 24 (McNamara testimony) and 17 (Keeling testimony); January hearing, 247-48 (Myers testimony); February hearing, *** (Mosquera testimony).
[119] October hearing, 221 (Rosenthal testimony); January hearing, 197-98 (Cohen testimony).
[120] October hearing, 185 (Larson testimony) and 221 (Rosenthal testimony); January hearing, 198-99 (Cohen testimony).
[121] October hearing, 92, 97.
[122] October hearing, 7 (Keeling testimony).
[123] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023), https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.
[124] October hearing, 7 (Keeling testimony) ("if there is a change to Rule 26(b)(5) consistent with, for example, the proposed Jonathan Redgrave submission, then the proposed meet-and-confer requirements would, in my view, be beneficial.").

D. Suggesting "Rolling" Logging in the Note Will Cause Negative Unintended Consequences

The proposed Rule 16(b) Note language referring to producing privilege logs on a "rolling" schedule is not an appropriate "rules solution" because the unintended negative consequences will overwhelm any value. Robert Keeling testified:

> I can confidently say that rolling privilege logs are inefficient and ineffective. More specifically, they will lead to delay, increased costs, and lower-quality logs in large document cases. In turn, lower-quality logs will lead to more disputes between parties and increased judicial resources to resolve those disputes.[125]

Instead, if the Committee concludes that guidance about process would help achieve early dispute resolution, it should refer to "phased" or "tiered" logging, which are methods that focus the parties and the court on the "privileged communications that actually matter to the case."[126]

E. The Logging Burden is Asymmetric, and the Note Should Reflect This

Several commentators criticized the draft Note language for focusing more explanation on the burdens of producing privilege logs than on the burden of requesting documents and logs from the producing party. Although there are, no doubt, instances of frustration on the part of requesting parties, it would be inaccurate to equate the burdens. As one witness from the plaintiffs' perspective noted, it "would be bad faith" to say the burden is "symmetrical."[127]

F. Non-Parties Also Need a "Rules Solution"

The proposal to amend Rules 16 and 26 is not a "rules solution" to the problems that non-parties face in producing privilege logs because non-parties do not typically participate in early conferences or scheduling hearings. The Committee should amend Rule 45 to clarify that, just as with parties, there is not a default requirement for document-by-document privilege logs, and non-parties should tailor their logging processes appropriately and proportionately for the needs of the case.

CONCLUSION

The public comments and testimony about the Preliminary Draft have clarified that there are only two rules problems for which rules solutions exist without creating unwanted and unintended consequences. Those rules problems are (1) insufficient claims in MDL proceedings and (2) the highly burdensome default to document-by-document privilege logs. The rules solutions to both problems are grounded in well-established FRCP principles and therefore avoid unintended consequences. LCJ's proposal to improve Rule 16.1 seeks to *prevent* the insufficient claims problem from overwhelming MDL proceedings. It does so by prompting courts to order early disclosures in keeping with existing FRCP and constitutional standards—orders affecting

[125] October hearing, 7-8 (Keeling testimony).
[126] October hearing, 8-9 (Keeling testimony).
[127] October hearing, 176 (Keller testimony).

the parties, not the court. There are no "rules problems" supporting the proposed Rule 16.1 provisions focused on designating leadership counsel, facilitating settlement, managing direct filing, appointing special masters, or preparing pleadings that are not allowed by Rule 7—and rulemaking on these topics risks serious negative consequences. LCJ's suggestions for improving privilege log practices would help courts and parties find more efficient and equally (if not more) effective logging practices. Both of LCJ's proposals would lessen the burdens on judicial resources while protecting courts' discretion to manage each case.

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February 16, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: ***Comment Regarding Proposed Changes to Rules Regarding Privilege Logs—Fed. R. Civ. P. 16(b) and Fed. R. Civ. P. 26(f)***

Dear Mr. Byron,

I previously provided written comment and testimony regarding the Committee's proposed amendments to Federal Rules of Civil Procedure 16(b) and 26(f). I am grateful for the opportunity to address the Committee, and wish to provide additional information as the Committee finalizes the notes accompanying the proposed amendments.

In my earlier comments, I emphasized that, while some of my colleagues representing defendants have often commented on the burden of preparing privilege logs, that burden must be weighed against a common issue that many plaintiffs' counsel have seen time and time again in complex litigation: overdesignation of documents as "privileged."

The process for creating a privilege log often involves first-level reviewers who often "overdesignate" documents as privileged, worrying that they may inadvertently approve a document for production to the other side. This "overzealous" designation is why quality control review is necessary. But absent a requirement to create privilege logs—*i.e.*, if "categorical logs" became the norm because of a potential risk of burden in creating such logs—such a secondary review might not happen, and many documents which relate to the ultimate issue of the case may never be produced, and their designation never able to be challenged.

I previously discussed with the Committee my experience in the long-running MDL concerning the data breach of large, hotel chain's guest reservation system. *In re Marriott International Customer Data Security Breach Litigation*, MDL No., 19-md-2870 (D. Md.). In that case, after Special Master John Facciola ordered that the parties should *not* create "categorical" logs, Marriott produced an additional *thirteen thousand* documents that it had previously designated as "privileged"—documents which were critical to the theories of our case. Defendant's counsel discovered the mistaken designation specifically *because* they had to perform another review to create the privilege log. Had a categorical log been produced, we likely would have never seen those critical documents.

I asked my colleagues if they have experienced situations like the one above, and a surprising number of them informed me that they had.

In an ongoing *qui tam* case against a large healthcare company, privilege disputes have arisen multiple times, causing litigation delays and increased costs. In one instance, after a Magistrate Judge compelled the Defendant to produce *one document*, *United States ex rel. Gill v. CVS Health Corp.*, No. 18 C 6494, 2023 WL 2771166, at *8 (N.D. Ill. Apr. 4, 2023), the Defendant produced thousands more—conceding that their privilege designations were overly-broad. Thereafter, when the judge was highly critical of the boilerplate designations Defendant had made on its privilege log, ordering it to be revamped, *United States ex rel. Gill v. CVS Health Corp.*, No. 18 C 6494, 2024 WL 406510, at *10 (N.D. Ill. Feb. 2, 2024), thousands more documents were produced. Plaintiffs' counsel would have been unable to challenge Defendant's privilege assertions if categorical logs had been used, and it is likely that thousands of documents—critical to the theories of the case—would have never been produced. Unfortunately, because Defendant's privilege assertions, the case has been needlessly delayed.

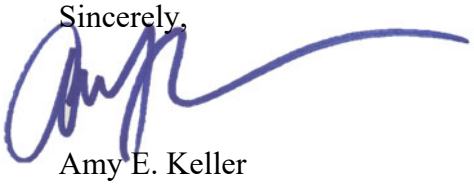
In another case involving a data breach of personal health information, one of the Defendants made productions that were clearly underinclusive and missing many key documents. *In re American Medical Collection Agency, Inc., Customer Data Security Breach Litigation*, No. 2:19-md-02904 (D.N.J.). Only after Plaintiffs brought the issue up to the Court was the Defendant willing to produce a privilege log (previously protesting its creation due to the burden of creating it). Three months later, when the Defendant finally produced the privilege log, it revealed that 3,200 documents were being withheld—three times the number of documents that were produced. The descriptions in the log were generic, missing key information necessary to confirm the basis of the privilege being asserted, and included entries simply because the Defendant had included in-house counsel on business-related communications. When Plaintiffs were able to challenge the privilege log, the Defendant produced another 1,200 documents that were improperly designated. Unfortunately, this has significantly delayed the litigation of the case. Had Defendant only produced a "categorical" log, Plaintiffs would have been without sufficient information to challenge Defendant's designations.

Privilege "logs," themselves, are not necessary, but the party asserting privilege must "expressly make the claim" and "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5). Although disputes over inadequate privilege logs have sometimes lasted for years—much like happened in a privacy case we are currently handling, *In re Google RTB Consumer Privacy Litigation*, No. 4:21-cv-02155 (N.D. Cal.)—that is not because the Courts have ruled that Plaintiffs are being unreasonable in their demands or that Plaintiffs have requested privilege logs that are too burdensome. It is because the Defendant has over-designated documents without providing sufficient explanation or basis for its assertion of the privilege. In the *Google RTB* case, the Magistrate Judge ordered that the Defendant had to re-review all of the disputed entries and provide more robust information to support its assertions of privilege. Thousands of documents were produced as a result of Plaintiffs' privilege challenges.

We understand that there are times when the parties can *agree* on categorical logs for specific types of documents, or when certain documents (such as communications with counsel after litigation is filed) do not need to be logged. That underscores the importance of the proposed amendment to Rules 16(b) and 26(f). But the burden of a party's creation of a privilege log should never outweigh its obligation to demonstrate privilege (an issue of substantive state law) pursuant to Rule 26(b)(5).

On behalf of my firm DiCello Levitt, I think the Committee for allowing me to share this information, and for considering my comments.

Sincerely,



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One Columbus Circle, NE, Room 7-300
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Re: Proposed Amendments to the Federal Rule of Civil Procedure Related to Multidistrict Litigation and Privilege Log Practices

Dear Mr. Byron:

As lawyers for corporations that are frequently engaged with the federal civil justice system, we write to highlight our deep concerns about (1) the problems that arise in the management and resolution of mass-tort multidistrict litigation proceedings (MDLs) caused by unexamined and unsupported claims and (2) the costs and inefficiencies arising out of the expectation that producing parties must log all documents that are withheld from discovery on the basis of privilege and other protections. We urge the Advisory Committee on Civil Rules to revise the "Preliminary Draft"[1] of Federal Rules of Civil Procedure (FRCP) amendments in order to address these problems directly.

MULTIDISTRICT LITIGATION

The MDL "Rules Problem"

Compliance with the FRCP provisions designed to enforce the basic elements of a legal claim, including rules 3, 7, 8, 9, 10, 11, and 12, helps ensure that the constitutional requirements of Article III standing and an actual case or controversy are satisfied. Unfortunately, these rules are not having this effect in mass-tort MDLs. It is a well-observed phenomenon that substantial numbers of claims asserted in mass-tort MDLs do not, upon examination, satisfy the most basic elements, including whether the plaintiff was exposed to the alleged cause of harm. These insufficient claims undermine transferee courts' ability to manage MDLs by complicating early case management decisions, slowing the litigation, impeding bellwether case selection, and requiring significant and unnecessary expenditures of time and money. In addition, they can thwart the possibility of timely resolution by depriving counsel and parties of the information they need to assess litigation risks and valuation. It is fundamentally unfair and contrary to the principles of civil justice to force defendants to defend against—often for many years—claims where the plaintiff did not use the product, did not suffer an injury within the scope of the litigation, did not transact business with the defendants, or when the pertinent statute of limitations has run.

[1] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

The MDL "Rules Solution"

The proposed Rule 16.1 should include a prompt for judges and parties to prevent unexamined and unsupported claims, a new tool that does not currently exist. Unfortunately, as drafted, the proposed Rule 16.1 subsection (c)(4) is inadequate for the task, primarily because it conflates the foundational requirement of claim sufficiency with the separate and subsequent matter of procedures for exchanging discovery information. But a modest edit aimed at establishing the expectation of compliance would serve the profound prophylactic function of deterring unsupported claims. We suggest subsection (c)(4) should be revised along these lines:

> "how and when ~~the parties will exchange~~ sufficient information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's injury ~~about the factual bases for their claims and defenses~~."

This language would not require a claim-by-claim compliance process—just as current FRCP provisions do not do so in non-MDL cases. However, requiring a discussion of the disclosure process would provide assurance that judges and parties will secure better information for making early case management decisions, including discovery, any motion practice, selection of cases for trial.

PRIVILEGE LOGS

The Privilege Log "Rules Problem"

Rule 26(b)(5)(A) requires parties who withhold information under a claim of privilege or other protection to describe the nature of the withheld items "in a manner that … will enable other parties to assess the claim."[2] Many courts and parties misconstrue Rule 26(b)(5)(A) to require document-by-document privilege logs in all cases despite the 1993 Committee Note's observation that detailed privilege logs "may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."[3] Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation. The costs and burdens, which can exceed $1 million for logging in a single case, are increasing dramatically as the volume of data and communications increase exponentially—and the advent of new technology (including artificial intelligence) is not appreciably lowering the costs of preparing privilege logs due to the large increase in data volume.

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[2] FED. R. CIV. P. 26(b)(5)(A)(ii).
[3] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment ("The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.")

Rule 26(b)(5)(A), which was written when most documents were retained in paper form, does not distinguish between appropriate and unduly burdensome logging, and the 1993 Committee Note gets lost in the voluminous notes to the 13 amendments to Rule 26 since 1937.[4] The misinterpretation of Rule 26(b)(5)(A) is imposing unjustifiable expenses by hindering courts and parties from making use of more efficient and less costly alternative methods to comply with the rule (including making use of advanced technology). It is also fostering ancillary disputes about privilege logs as a tactic in litigation to impose increased financial burdens on litigants to force the compromise of claims and defenses without respect to the merits. Privilege log disputes hardly ever result in the production of documents or data that are dispositive of a case or claim.

The Privilege Log "Rules Solution"

To address the Rule 26(b)(5)(A) problem, the Preliminary Draft would amend two other rules, Rule 26(f) and Rule 16(b), to require parties to discuss, and prompt judges to order, the timing and method for compliance with Rule 26(b)(5)(A). Unfortunately, this proposal will not achieve its purpose of ameliorating the excessive costs of preparing logs because it does not make any changes to the source of the problem, Rule 26(b)(5)(A).

We support the suggestion by Facciola and Redgrave[5] and Lawyers for Civil Justice[6] that the Committee should amend Rule 26(b)(5)(A) and accompany such an amendment with a Committee Note clarifying that Rule 26(b)(5)(A) does not specify the method of compliance and further that, absent unusual circumstances, there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation. This suggestion would help ensure that courts and parties turning to Rule 26(b)(5)(A) for guidance will learn that the FRCP require parties to take the initiative in addressing and reaching agreement on the scope, structure, content, and timing of privilege logs at the appropriate time in each case.

CONCLUSION

We respectfully urge the Committee to revise Rule 16.1 subsection (c)(4) to prompt MDL judges and parties to avoid the well-known problems that unexamined and unsupported claims cause in mass-tort MDL proceedings. Doing so would provide a pragmatic tool that MDL judges otherwise do not possess to prevent being overwhelmed with insufficient claims that must be dealt with further down the road. The Committee should also revise the privilege log amendments to address the Rule 26(b)(5)(A) problem by explaining that alternative methods can

[4] To find committee notes to a specific section of the rule, practitioners and courts need to know the year that section was amended. Importantly, the Committee's Proposal does not include a cross-reference in Rule 26(b)(5)(A) referring to the amendments and committee notes to Rules 16(b) and 26(f)(3)(D).

[5] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023) , https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

[6] Lawyers for Civil Justice, *The Direct Approach: Why Fixing the Rule 26(b)(5)(A) Problem Requires an Amendment to Rule 26(B)(5)(A)*, Oct. 4, 2023, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0007.

and should be employed to avoid significant burdens on parties, non-parties, and courts that are not worth the price. An amendment to Rule 26(b)(5)(A) referring to the new Rule 26(f) and 16(b) provisions, together with a Committee Note as described above, will inform and enable courts, parties, and non-parties to customize logging forms and procedures to ensure effective and efficient logging.

Thank you for your consideration.

Sincerely,

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Altria

Bart A. Whitley
Senior Vice President
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February 15, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Members of the Committee on Rules of Practice and Procedure:

Thank you for the opportunity to comment regarding the proposed amendment to Rules 26(f) and 16(b) regarding privilege logs. I am a lawyer in Pennsylvania who litigates cases within both state and federal courts. My practice consists of representing injured plaintiffs in a variety of personal injury and wrongful death actions. I encounter the Federal Rules of Civil Procedure daily as part of my practice.

I support the proposed rule as it allows for an early discussion between the parties and the courts regarding privileged documents. Additionally, I support the proposed rule as it allows for flexibility depending on each individual case. However, I believe that any changes to the rule should make clear that privilege logs should be exchanged early in litigation, updated regularly, and should thoroughly explain each document withheld from discovery. The vast majority of my cases do not constitute large document production. For those reasons, a detailed document-by-document log makes the most sense and allows for the fair resolution of the issues. Oftentimes I litigate tractor trailer cases, bad faith cases, and breach of contract actions in federal court. These cases often end up in federal court due to diversity of citizenship. These cases do not involve a large number of documents being produced. However, many of my cases involve discovery

disputes and I often encounter vital documents being withheld on the basis of privilege. The number of documents easily allow for a document-by-document log that identifies the author, recipients, date, subject matter, and basis for withholding the document. Allowing a categorial privilege log in this situation would be unfair to both parties. This would allow parties to shield documents from production in discovery under the guise of privilege. The document-by-document log contains information to allow the parties and the court to determine whether any documents are improperly designated as privileged. A categorical privilege log does not contain the vital information necessary to allow a party to determine whether a document has been improperly designated as privileged.

I hope the Committee will consider that many cases, such as mine, do not involve large document production. For these smaller cases, a flexible rule allowing for a document-by-document log makes more sense. It is imperative that enough information be provided for the court and the opposing side to determine if privilege does apply. Additionally, it is vital for a privilege log to be exchanged early and updated throughout discovery to allow the parties to determine if there is a dispute and allow the court enough time to adjudicate the dispute.

Thank you for your consideration.

Respectfully submitted,

Mackenzie E. Wilson

Mackenzie E. Wilson

SEEGERWEISS LLP
NEW YORK • NEW JERSEY • PHILADELPHIA • NEWTON, MA

February 16, 2024

VIA EMAIL

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Building
Room 7-240
One Columbus Circle, NE
Washington, DC 20544

Re: Public Comments of Ben Barnett and David Buchanan, Seeger Weiss LLP, Regarding Proposed Amendment to Federal Rule of Civil Procedure 26

Dear Committee Members:

In response to the Committee's invitation dated June 6, 2023, set forth below are our public comments regarding the proposed amendment to Rule 26 of the Federal Rules of Civil Procedure currently pending before the Committee.[1] We appreciate the significant amount of time that Committee members have devoted to considering the amendment to Rule 26, including multiple public hearings and consideration of submissions from other members of the Bar. We also fully recognize that the time for public comments will soon close. That said, we are hopeful that Committee members will give due consideration to our support for the proposed amendment and significant concerns regarding some of the language in the current version of the Advisory Committee Notes accompanying the proposed amendment.

As an initial matter and by way of a brief introduction, we provide a summary of our experience with privilege and privilege log issues, particularly in complex and/or MDL litigation.

Mr. Barnett served as lead discovery counsel and chief strategist for Defendants in a number of significant MDL matters including Baycol, Vioxx, Vytorin, Seroquel, and the Takata Airbag Litigation. He has managed and overseen privilege review teams responsible for preparing, producing, and defending hundreds of privilege logs in these matters. While serving in these roles, with the help of his colleagues, Mr. Barnett developed several proactive procedures aimed at reducing the number of discovery disputes and the costs and fees associated with those disputes, including the pre-production provision of sample privilege logs and the use of drop-down menus for privilege logging to improve consistency and reduce the cost of quality checking privilege logs. As of January 1, 2024, Mr. Barnett became a partner at Seeger Weiss LLP. He is currently involved in four MDL matters representing individual plaintiffs. In certain of these current matters, counsel for Defendants are citing the Committee's draft Advisory Committee notes

[1] The views expressed in these comments are solely those of the signed authors and do not reflect the views, opinions, or beliefs of any other attorney at Seeger Weiss LLP or any of the firm's former, current, for future clients.

to the proposed amendment to Rule 26(f)(3) as a basis to produce a categorical privilege log in lieu of a document-by-document log under Rule 26(b)(5).

Over the past twenty-five years, Mr. Buchanan has served in Court-appointed leadership roles for plaintiffs—*e.g.,* co-lead counsel, liaison counsel, members of various plaintiff steering and executive committees, chair of discovery, and designated plaintiffs' electronic discovery counsel—in several large multi-defendant MDLs (*In re 3M Combat Arms Earplug Prods. Liab. Litig.*, MDL No. 2885; *In re Insulin Pricing Litigation,* MDL No. 3080; *In re Davol, Inc./C.R. Bard, Inc., Polypropyline Hernia Mesh Prods. Liab. Litig.*, MDL No. 2846; *In re Nat'l Football League Players' Concussion Injury Litig.*, MDL No. 2323; *In re Vioxx Prods. Liab. Litig.,* MDL No. 1657). In these and other complex litigations, Mr. Buchanan often serves as the primary spokesperson for plaintiffs on all manner of discovery issues and disputes, including those related to privilege claims.

The Proposed Amendment to Rule 26

We fully support the Committee's proposed amendment to Rule 26(f)(3)(D). Mandating an early discussion of privilege and privilege log issues and requiring that the topic be expressly included and addressed in the parties' joint Rule 26(f) discovery plan should have several significant benefits, including transparency, an investigation and early evaluation regarding the potential volume of privileged materials, and reducing the risks of misunderstandings or privilege disputes down the road. Our support for the amendment is buttressed by the fact that the proposed amendment to Rule 26(f)(3)(D) does not disturb or diminish the requirements set forth in Fed. R. Civ. P. 26(b)(5) for a party seeking to withhold relevant or responsive materials from discovery. In other words, the impact of the amendment to Rule 26(f)(3) for parties in federal court should be limited to the discussion and report mandated by that Rule. Of course, the quality and utility of that early case discussion will be directly dependent on the information that the parties bring to the discussion. In some instances, counsel for the producing party may not know the volume of potentially relevant ESI or documents and what percentage of that universe is likely to be privileged and excluded from discovery.

The Draft Advisory Committee Notes to Rule 26

Our concerns with the proposed amendment to Rule 26 focus specifically on some of the current text of the draft Advisory Committee Notes. The Committee Notes have already been revised once and significantly shortened. Respectfully, we believe the Committee will better serve the federal bench and bar by making further revisions to the Committee Notes. While the current Advisory Notes attempt to address one problem, the so-called "privilege log problem," they unnecessarily plant the seeds for future disputes regarding privilege claims and the format of privilege logs.

Indeed, we respectfully question whether there is a "problem" with privilege logs in federal litigation. As the Committee notes, the mandatory requirement for privilege logs has been in place since 1993. Yet the record before the Committee is devoid of any evidence that the mandatory logging requirements of Rule 26(b)(5) during the past thirty years have prompted any party not to pursue claims in federal court or resolve federal litigation brought against it because the party was obligated to expressly claim privilege and provide a log sufficient to allow opposing counsel to assess their privilege claims under the supervision of a federal court.

The current Advisory Committee notes include several statements that, in whole or part, may tend to act as a finger on the scale in future disputes regarding privilege logs under Rule 26(b)(5). Here are some examples of problematic language in the current version of the Committee Notes and a discussion regarding the potential impact of that language.

> *"Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document privilege log."*

By citing this as the first and most prominent example, the Committee effectively invites corporate defendants to assert in future federal litigation that a document-by-document privilege log envisioned or mandated by the plain language of unamended Rule 26(b)(5) is simply too costly and unjustified. Again, other then anecdotal evidence from some well-regarded eDiscovery defense counsel, nothing supports this sweeping conclusion. Moreover, the costs associated with a privilege review and privilege logging are largely managed and controlled by the producing party, and the party seeking discovery permitted under Rule 26 should not be penalized because the producing party does not have efficient and cost-effective processes in place to make and defend its privilege claims.[2] In fact, the current language in the draft Advisory Committee Notes perversely incentivizes producing parties to adopt costly privilege processes because they may serve to relieve the party from steps otherwise required by Rule 26(b)(5)(A).

In this regard, it is inconceivable that in 2024, the corporate defendants who engage in civil litigation in pursuit of business objectives or who are involved in serial litigation as defendants (which appears to be the concern of the current draft language in the Advisory Committee Note) do not have robust best practices in place with respect to privilege claims and privilege logs.

That has not been our experience. For many years, corporate defendants have focused on reducing the costs associated with eDiscovery and driving consistency across litigation matters. Many corporate defendants have moved portions of the EDRM process in-house or partnered with preferred vendors and designated eDiscovery counsel to specifically address both of these concerns. Moreover, given the potential risk of waiver from the production of privileged or protected information, corporate defendants have tremendous financial and reputational incentives to get privilege and privilege log issues right the first time. No client likes the costs and delays associated with re-doing work, particularly when such efforts tend to erode the client's credibility with courts. Finally, corporate defendants also have the incentive to re-purpose efficient and cost-effective processes and procedures developed in one litigation matter to all their litigation matters regardless of which attorneys serve as external counsel. Thus, to the extent that defendants currently do not have such sensible policies and procedures in place, resulting in "very large costs," the responsibility and burden must fall to the corporate defendant or their external counsel or eDiscovery vendors.

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[2] *See Tera II, LLC v. Rice Drilling D, LLC,* , 2022 WL 1114943, at *6 (S.D. Ohio Apr. 14, 2022) (after inadequate document collection, the court ordered the producing party to employ and pay for third party vendor noting "[t]he costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party."); *Thornton v. Morgan Stanley Smith Barney, LLC*, 2013 WL 1890706, at *2 (N.D. Okla. May 3, 2013)(" The cost of searching and producing does not place an undue burden on Defendant. The cost of review is within Defendant's control and there are reasonable steps Defendant can take to reduce those costs."); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (explaining that the "responding party should *always* bear the cost of reviewing and producing electronic data [because] the producing party has the exclusive ability to control the cost of reviewing the documents").

Moreover, one of the real drivers of costs associated with privilege challenges and privilege logs are corporate defendants who, early in the life of a litigation matter, designate and log documents that do not qualify as privileged or work product under the applicable standards.[3] Too often non-privileged corporate communications are initially claimed to be privileged and logged because they contain sensitive or potentially embarrassing information. When later challenged in litigation, the initial claims are revisited and revised, and the withheld documents are produced. There is certainly a cost associated with re-doing this work—producing the documents and revising the privilege logs. Again, that is a cost rightfully borne by the producing party and provides no basis to reduce the mandatory requirements of Rule 26(b)(5).[4]

One unfortunate recent trend identified and discussed by some federal courts—and seen in several recent MDLs against large corporate defendants—relates to internal corporate policies and programs in which employees are trained and instructed to label everyday business communications as "privileged & confidential" or to routinely include or copy in-house counsel on communications which are neither privileged nor work product. *See In re Google Play Store Antitrust Litig.,* 664 F. Supp. 3d 981, 984 (N.D. Cal. 2023) (discussing Google's employee training policy, which gave instructions on how to make emails and other communications protected by attorney-client privilege). Although defended as appropriate policies to safeguard corporate information, these programs likewise create the risk of thwarting or frustrating the discovery process. To the extent that such programs propagate a multitude of documents with dubious privilege claims, and likewise increase the cost of privilege review, privilege logs, or production of previously withheld files, that cost should be borne solely by the creators of such programs. *See Barnes v. Alves*, 10 F. Supp. 3d 391, 394-95 (W.D.N.Y. 2014) ("[W]here the producing party's own conduct compels a more extensive production of documents, it is appropriate for that party to bear the cost burden of production.").

> *"Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens."*

While we take no issue with the date of adoption or the flexibility built into the rule when amended, the second sentence seems somewhat illogical and pays insufficient deference to the case-by-case determinations by the parties and the presiding judge. If Rule 26(b)(5)(A) was designed to be flexible from the outset, then presumably, the rule was sufficiently flexible to accommodate decisions by federal district courts that a document-by-document log privilege was required under the rule. Moreover, mandating that the parties discuss privilege and privilege log issues and include a summary of that plan in

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[3] *See Urb. 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC,* 2019 WL 5963644, at *3 (N.D. Ill. Nov. 13, 2019)("Inappropriate privilege claims are, unfortunately, commonplace in modern litigation, and are often indiscriminately and improperly used on documents that do not truly qualify for protection.").

[4] *See Nucap Indus. Inc. v. Robert Bosch LLC*, 2017 WL 3624084, at *5 (N.D. Ill. Aug. 23, 2017) (after finding erroneous claims of privilege, the court "directed [the producing party] to conduct a supplemental privilege review and provide [requesting party] with a revised privilege log and document production" at their own expense); *Shopify, Inc. v. Express Mobile, Inc*., 2020 WL 7079090 (D. Del.) (Judge found privilege claims were "frivolous" and ordered a revised log with supporting declaration, "so that I know who to blame should Express Mobile continue to baselessly assert claims of privilege."); *Jones v. Boeing Co.,* 1995 WL 827992 (D. Kan. 1995) (ordering resisting counsel to pay opposing counsel $500 for the costs of a successful motion to compel, where resisting counsel failed to even begin to meet their burden of showing privilege); *Ost-West-Handel Bruno Bischoff GmbH v. M/V Pride of Donegal*, 1997 WL 231126, at p.2-3 (S.D.N.Y.) (describing the unnecessary costs incurred by opponent when three-quarters of documents withheld as privileged "were clearly not covered by the privilege").

the Rule 26(f) report will do little to directly address and resolve whether an alternative format privilege log complies with the letter or spirit of Rule 26(b)(5)(A). The commentary on flexibility (designed from the outset to be flexible but courts have been insufficiently flexible) makes little sense until it is tied to the "undue burden" language. Then the draft language's purpose appears clearer—producing parties can attempt to avoid the obligations of Rule 26(b)(5) by claiming that doing so imposes an undue burden. This language simply invites rather than avoids disputes in the area of privilege and privilege logs.

The current draft language also does not address or acknowledge the high value of document-by-document privilege logs or why such logs are viewed as the standard by nearly all parties and courts in federal litigation. In this regard, it is important to remember that the files being withheld are ***relevant*** to the litigation and are fully available to the producing party. Absent some verification and testing process informed by a detailed document description envisioned by Rule 26(b)(5), there is simply too much room for human error or potential misconduct. This does not mean that defendants cannot use metadata to build an initial draft privilege log or that sensible exclusions can be negotiated regarding date ranges or external counsel retained for the litigation. But these negotiations must be informed by the actual facts in a matter lest files that are neither privileged nor work product be excluded from any review or production. Doing so undermines the entire purpose of civil discovery to properly prepare for trial.

In extreme cases, the use of non-traditional privilege logs may be used to try to insulate evidence relevant to the potential crime-fraud exception from review and analysis by opposing counsel or judicial oversight. In such instances, the requirements of a document-by-document log become more imperative. *See Cozy Inc., v. Dorel Juvenile Group, Inc.*, 2023 WL 8431610, at *2 (D. Mass. July 27, 2023) (allowing an *in-camera* assessment to evaluate the crime-fraud exception after receiving party argued the vague privilege log categories were contradicted by deposition testimony).

In our experience, from a practical project management standpoint, parties must anticipate that ultimately, they will be required to produce a document-by-document privilege log. Given the time required to properly review and log privileged materials, this work must be done in parallel to the work necessary to identify, collect, review, and produce documents. Doing so will allow parties to produce appropriate privilege logs on a rolling basis as the Committee properly notes should be the standard lest privilege disputes arise at the close of discovery.

> *"This amendment also seeks to grant the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials."*

Consistent with the comment above, it is difficult to determine the precise purpose of this draft commentary language. The Committee has already made clear that at the time of adoption, Rule 26(b)(5) was designed to be flexible so that counsel and the court could design and implement sensible procedures for privilege claims and privilege logging. The steps discussed below this language — a document-by-document log, a categorical approach, a presumption of privilege for communications with external counsel, and date restrictions—are available for discussion and potential use in appropriate circumstances by counsel and federal courts now under current Rule 26(b)(5). This commentary language, particularly the reference to "maximum flexibility," appears to expressly invite producing parties to object to creating a document-by-document privilege log and is unlikely to avoid disputes. Rather, the draft commentary language simply moves the disputes up in time to the Rule 26(f) Report. Since the Committee has decided

(or declined) to propose amending Rule 26(b)(5) at this time in terms of privilege log obligations, it should avoid any comments that telegraph to litigants that they can attempt to achieve the same outcome through half measures under a different federal rule. Indeed, in current MDL matters, we are already seeing counsel for defendants rely on this pre-enactment language to argue that they should be relieved from the obligation to provide a document-by-document privilege log in favor of producing a metadata-only log. While metadata can be mined to develop the skeletal elements of a draft privilege log, it is very unlikely that limiting log entries solely to metadata without additional information or any attorney review satisfies a party's obligations under Rule 26(b)(5). We also seriously doubt that corporate defendants rely solely on metadata to determine which files are privileged or work product. Either way, retention of this commentary language will only fuel this trend and do nothing to reduce or avoid disputes on these issues.

The Committee Should Make Further Revisions to the Advisory Committee Notes

The solution to the issues identified above is relatively simple, straightforward, and will not result in any delay in the enactment process. Specifically, the Committee should further revise the Advisory Committee Notes and eliminate all the potentially problematic language discussed above. Doing so will not diminish all the advantages of an early case discussion of privilege and privilege logging issues in the Rule 26(f) Report and will avoid seeding or encouraging potential disputes under Rule 26(b)(5). In this case, less is certainly more.

We again thank the Committee for its time and hard work in considering the present proposed amendment to Rule 26(f)(3) and for the opportunity to provide the Committee with our thoughts, comments, and suggestions based on our direct experience practically addressing the issues of privilege and privilege logs in MDL and federal litigation.

Respectfully Submitted,

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February 16, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendments to Rule 16.1 (Multidistrict Litigation)

Dear Members of the Committee on Rules of Practice and Procedure:

My name is MaryBeth Gibson. I recently founded my own firm, Gibson Consumer Legal Group, LLC. Prior to that, I was the leader of my former firm's Class Action Section that litigated both mass torts and consumer privacy cases. I have argued before the Judicial Panel on Multidistrict Litigation ("JPML") on multiple occasions. I have been appointed co-lead counsel in several MDLs and have also served on Plaintiffs' Steering Committees in many other MDLs. I write to address the proposed new Federal Rule of Civil Procedure 16.1 – Multidistrict Litigation.

It has been my experience over the last decade that the procedure in place for MDL formation and subsequent appointment of leadership works in its current form. Admittedly, there is a certain amount of uncertainty inherent in the creation of an MDL. Early on, the parties do not know what the JPML intends to do with respect to naming a transferee court. But, once a transferee court is appointed, early case management falls into place organically at the hands of the court and counsel. Indeed, it has been my experience that most if not all of the MDLs to which I have been appointed have addressed the items outlined in Rule 16.1(c)(2) *after* the initial case management conference held by the transferee court and *after* appointment of MDL Leadership. Proposed Rule 16.1 is concerning because it, perhaps unintentionally, upends that natural process.

I acknowledge and applaud the Committee's efforts to promote efficient early case management. As evidenced by the comments, the suggested implementation of the Rule in its current form – if at all – has resulted in a cacophony of protest from the Plaintiffs' Bar. This is because to date, the Plaintiffs' Bar has successfully managed early MDL practice without such a rule. The concern that the rule will have the unintended effect of prejudicing future prosecution of a case is legitimate.

Plaintiffs' counsel who have filed cases that are consolidated into an MDL are in the best position to assess the matters that Rule 16.1 seeks to manage. Plaintiffs' counsel routinely coordinate and discuss issues pertinent to the subject matter of the MDL litigation long before the JPML assigns a transferee court. These counsel are in the best position to evaluate the very factors that Rule 16.1 attempts to usurp. Many, if not all of the action items outlined in Rule 16.1(c) occur methodically after leadership has been appointed. To impose or suggest that these action items should be controlled by or dictated by a federal rule usurps the autonomy, discretion and creativity of the plaintiffs' counsel without bound or reason.

For example, Rule 16.1(b) suggests the appointment of a "coordinating counsel." The Rule itself does not propose to *require* such appointment, but it's foreseeable that transferee courts with little or no MDL experience may interpret these guidelines as a requirement. This suggestion or requirement is problematic because Rule 16.1(b) provides no guidance or criteria for the selection of a "coordinating counsel." Moreover, the role of coordinating counsel appears to be a temporary position that will conflict with the subsequent appointment of leadership in the MDL.

Rule 16.1(b) assigns coordinating counsel the job of preparing a report under 16.1(c). The tasks assigned to coordinating counsel purports to usurp the very tasks that the MDL Leadership team routinely cover. This overlap is not only a waste of resources, but also binds subsequent MDL Leadership to agreements that coordinating counsel made for which he did not realize the implications.

Rule 16.1(c) speaks in terms of what "should" be included in a report to the transferee court prior to the initial conference. The rule doles out authority to the "coordinating counsel" to prepare such a report. Rule 16.1(c) states the report "must" address any matter designated by the court, which "may" include any matter listed in Rule 16.1(c), and identifies a laundry list of items that are premature to address at the initial conference when the Plaintiffs' Leadership has not yet been appointed. Committing to paper at this early juncture such items as the principal factual and legal issues likely to be presented in the MDL proceedings, the exchange of information about the factual bases for claims and defenses, a proposed plan for discovery, including methods, and identifying pretrial motions – all before Plaintiffs' Leadership is appointed divests Plaintiffs' counsel of independence to manage, plan and strategize how to litigate their case.

Respectfully, the Committee on Rules should reconsider the suggestion of appointment of "coordinating counsel." And, at a minimum, Plaintiffs' Leadership should be appointed before any of the items in Rule 16.1(c) are considered and pen is placed to paper on these issues. Thank you for the opportunity to submit a comment on this very important issue.

Sincerely,

/s/ MaryBeth V. Gibson

MaryBeth V. Gibson

GCLG
ATLANTA, GEORGIA

PUBLIC SUBMISSION

Comment from Siegel, Charles

Posted by the **United States Courts** on Feb 17, 2024

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I respectfully submit this comment against proposed new FRCP 16.1. I have participated in multiple MDLs and currently am on the plaintiffs' steering committee in the Cook IVC MDL, No. 2570. In my experience, adding another layer of "coordinating counsel" will not measurably aid any MDL judge, but rather will introduce another layer of needless bureaucracy and complexity. Capable plaintiffs' and defense counsel already give MDL judges great guidance, and in my experience no judge needs to hear from another group of lawyers besides those. Judges already are granted wide flexibility on controlling MDLs and another layer of counsel is not needed. I also want to respect oppose comments from defendants and their counsel, urging that plaintiffs be required to adduce more information and evidence about their claims before filing a claim at all or before discovery. This would be an extraordinary departure from the rules governing most claims of any kind in federal or state courts, and would impose enormous cost burdens on plaintiffs and their counsel.

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USC-RULES-CV-2023-0003-0060

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Comment Details | **Submitter Info**

Received Date

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February 16, 2024 FIRST-CLASS MAIL

Federal Rules Committee

Regarding Changes to Rule 16, 26.

Dear Federal Rules Committee:

I write to provide public comment related to the proposed rules on privilege logs. I support the rule as written that allows the parties flexibility to determine what types of logs will suffice in their individual cases.

I am the founder and managing partner of Ember Law PLLC a Plaintiff's litigation firm located in Seattle, Washington. I regularly practice in federal court in the state of Washington. My practice primarily consists of consumer protection and insurance litigation.

Privilege logs must be detailed and complete so parties trying to ascertain the accuracy and appropriateness of the asserted privilege may do so. Over-designation remains a serious problem in litigation and categoric logs can act to conceal bad actors who may be improperly withholding discoverable documents. I believe the rule will assist the parties in ensuring the privilege logs are appropriate and tailored to reveal necessary information to the parties.

Regards,

/s/ Leah Snyder
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February 16, 2024

Mr. H. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington DC 20544

Re: Proposed Federal Rule of Civil Procedure 16.1 Comment

Dear. Mr. Secretary and Committee Members of the Advisory Committee on Civil Rules:

In my practice at **mctlaw** since 2012, I have represented plaintiffs injured by medical devices and pharmaceutical drugs. I have experience litigating these cases in Multi District Litigation as well as state courts. Mostly, my experience has been with cases involving orthopedic implants, both in state and MDL courts.

Currently, I am on the leadership in the Florida coordination of Exactech hip, knee, and ankle cases (*Exactech Master Case*, Case. No. 2022 CA 002670, 8th Judicial Circuit in and for Alachua County, Florida). Of note, this litigation is unique in that the Florida litigation is coordinating closely with the Exactech MDL (MDL 3044) to share discovery and bellwether trial responsibilities. This coordination was made necessary by unique issues specific to this litigation, and certain facts which came to light as the litigation unfolded. The flexibility allowed by both the Florida Rules of Civil Procedure *and* the Federal Rules of Civil Procedure allowed the parties and the courts to make this happen as the needs of the litigation evolved. This flexibility is a great example of how the rules, as they are currently written, *are working*.

I appreciate the Committee's hard work. I also appreciate the continued search for improvements in efficiency in MDL practice. There is certainly room for improvement. However, the proposed addition of Rule 16.1 will create more problems than it solves. To the extent that this Committee feels compelled to enact a Rule 16.1, I would *highly* recommend removing certain subparagraphs so as to avoid an impact that is wholly opposite of what this Committee intends. My suggested changes follow.

1. **Lack of Clarity With Regards To The Problem That The Proposed Rule Seeks To Address**

I appreciate this Committee's attempts to improve the MDL process. By no means do I believe the process is perfect or without problems that need addressing. Respectfully, however, my concern is a lack of clarity as to which problem is sought to be solved in the pursuit of a proposed Rule 16.1. For example, in the Committee Notes to the proposed rule, this Committee states:

> *The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket.* [1]

The Committee Notes do not discuss whether this is perceived as a problem. Moreover, the notes do not discuss whether this is *the* problem that the proposed rule intends to address. The absence of clarity on this issue creates a vacuum for discourse. Those supporting serial defendants therefore have submitted comments pushing for solutions to what they perceive is "the" problem. At the same time, those who – like me – represent plaintiffs in this arena, are left discussing solutions to what we perceive is the problem. Clarity on what the Court sees as the problem would help this discourse greatly.

2. **Rising Numbers Are Not A Problem To Be Solved By The Federal Rules**

Commenters supporting serial defendants in MDL practice cite to rising numbers of MDL filings as something to be perceived both as a problem and as *the* problem that the proposed rule should address. For example, the Defense Resource Institute's comment, filed on October 11, 2023, starts off by first highlighting what it claims is the "exponential growth in the number of matters pending on MDL dockets in district courts around the country."[2] This is not necessarily controversial. After all, this Committee's Notes start off similarly discussing rising numbers of filings.

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[1] Preliminary Draft of Proposed Amendments, Committee Notes to Proposed Rule 16.1, at *127.
[2] DRI, Comment to the Advisory Committee on Civil Rules, October 11, 2023, at *2

However, the implication that *this is a problem to be solved by a rule of civil procedure* is controversial.

The DRI claims that the purported problem of rising numbers is caused by "an unreasonably high number" of what they call "unsupportable claims."[3] This echoes the testimony of Johnson and Johnson's assistant general counsel who stated that "unsubstantiated claims … are clogging the courts and overwhelming the MDLs."[4]

However, such statements are simply not true. I would urge this Committee to review the comments and testimony provided by Mark Lanier and Jennifer Hoekstra.[5] [6] Both Mr. Lanier and Ms. Hoekstra are heavily involved with the 3M litigation. That litigation is a microcosm for this discussion. The high numbers of that litigation alone skew the discussion for MDL practice as whole. What's more, those high numbers are meritorious claims. As Ms. Hoekstra testified, 270,000 claimants in that litigation qualified for settlement based on an identification of use of the product and injury.[7]

The increasing numbers of MDL filings are a product of tortious misconduct, not frivolous or careless filings. The existence of increased filings should not be interpreted as a problem for this Committee to solve. *The system is working when citizens participate in the judicial system to right wrongs*. If this Committee is in search of how to lower the numbers, the solution is simply for the wrongdoers to reduce the incidence of tortious misconduct.

Characterizing rising numbers of filings as a problem is an injustice to those whose claims form the basis of those filings. That's not to say that rising numbers of filings do not represent a challenge. We should shift our approach and think in terms of what we can do to address the challenge without improperly impugning or prejudicing valid claims.

3. <u>What's Really At The Heart Of The Concern: Docket Management Of Increasingly Complex Cases</u>

Managing an MDL is already challenging. However, a federal judge does not manage an MDL in isolation. The work is required *on top of* the judge's already busy federal docket. Further, there is little – if any – additional resources provided to a judge who takes on an MDL in addition to their regular docket. Respectfully, I submit that the real problem that is attempted to be addressed with the proposed

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[3] *Id*.
[4] Kole Oral Testimony, Hearing of the Committee on Rules of Practice and Procedure, at 251:24-252:1 (Oct. 16, 2023)
[5] *See* Lanier, Comment RE: Proposed Rule 16.1 Regarding Multidistrict Litigation, January 23, 2024.
[6] *See* Hoekstra, Comment RE: Proposed Federal Rule of Civil Procedure 16.1 Comment, January 2, 2024.
[7] Hoekstra Testimony Outline & Comment, Hearing of the Committee on Rules of Practice and Procedure at 103-04 of 198 (Jan. 16, 2024); See also FN5, at *4.

Rule 16.1 is the fear of increasing complexity in docket management for our federal judges.

We should empower our federal judiciary with as much flexibility as possible to efficiently manage their MDL docket in addition to their other cases. To that end, I applaud continued efforts to assist our judges. Further, I provide my suggestions below as to what changes to the currently proposed rule I believe will further the goal of sound docket management.

4. **The Implementation of Coordinating Counsel Would Make MDL Docket Management *Less Efficient*, Not More.**

I strongly suggest that the Committee remove Rule 16.1(b) in its entirety. My comments on this mirror both Mr. Lanier and Ms. Hoekstra's. The proposal lacks important context and direction regarding the novel approach to this "coordinating counsel" position.

First, what problem is this attempting to solve? Conceivably, it is the problem of how to organize an assortment of plaintiffs and their disparate counsel. This can be a challenge early in a litigation, certainly. I understand the Court's desire to look for a unifying voice at the genesis of an MDL. However, adopting an underdefined process for a mere placeholder voice is highly concerning. Who is this voice intended to be? Who is this voice intended to represent? Should this person have an interest in the litigation? Should this person be considered for a leadership position upon completion of coordinating duties? Does an opposing party have any input on who the coordinating counsel should be? What happens if there are multiple defendants and there is dispute among the defendants as to whether there should be coordinating counsel for the multiple defendants (and whom it should be)?

The parties and the courts are currently empowered to fashion protocols as necessary depending on the needs of their litigation. This includes how, and how early, to address leadership. For the moment, the language in 16.1(b) is simply not necessary.

Finally, while I can appreciate the Committee's attempts to include permissive language throughout the rule, the inclusion of certain language in the Committee Notes creates doubt as to whether, in certain situations, the adoption of Coordinating Counsel truly would be permissive as opposed to required. To wit, the Notes state:

> *In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.* [8]

[8] Preliminary Draft of Proposed Amendments, Committee Notes to Proposed Rule 16.1, at *129.

One can easily picture a scenario where a party or judge may interpret the above passage as suggesting the inverse: Designation of coordinating counsel is *necessary* where counsel are unable to organize prior to the initial MDL management conference.

Putting aside the above-referenced inefficiencies with coordinating counsel in the first place, the Committee Note results in *less flexibility* for an MDL judge who may feel compelled to designate a coordinating counsel even if the context of that specific MDL would not otherwise necessitate it. This is particularly so with judge who may as of yet be unfamiliar with MDL practice.

Because of these inefficiencies, and because of the *increased disputes* this rule would create, I strongly encourage the Committee to remove 16.1(b) from its proposal.

5. <u>The Committee's Approach to Rule 16.1(c)(1)-(12) *As Written* Would Prejudice Plaintiffs Whom Are At An Information Disadvantage At The Time Of The Initial Conference.</u>

While I appreciate the Committee's intent with including the variety of factors in Rule 16.1(c) for analysis by an MDL judge, the impact of many of the proposed rule's processes (and Committee Notes) would unfairly prejudice predominantly plaintiffs. This is mostly on account of their unequal position with regards to their information disadvantage in the early stages of an MDL. I suggest below certain changes to avoid such prejudice, while adopting as many of the Committee's proposals as possible.

a. Committee Notes Suggest Inflexible Analysis Of All Issues At Initial Conference.

First, while the Committee Notes indicate a permissive nature to Rule 16 and Rule 16.1(c), the Notes also strongly suggest that *all* of the factors in Rule 16.1(c) be addressed and analyzed in every case:

> The court may select which matters listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may also include any other matter, whether or not listed in those rules. Rules 16.1(c) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow. **Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-(12) are often important to the management of MDL proceedings**. [9]

The highlighted language, above, while accurate, fails to distinguish whether all of those factors are reasonably addressed *at the initial conference.* Especially for a

[9] Preliminary Draft of Proposed Amendments, Committee Notes to Proposed Rule 16.1, at *129.

first-time MDL judge, that language may unnecessarily prompt the judge to force the court and litigants to spend needless energy on, for example, settlement or discovery planning in situations where the context of that litigation may call for such discussions to start at other times. MDLs inherently require flexible approaches due to the unique context of each litigation. At the least, the comments should remove the word "however" so as to not suggest all of the factors should be addressed. Further, the comment should make clear that not all of the factors need to be addressed *at the initial conference*.

b. General Support for 16.1(c)(1), (2), (3), (8), (10), and (11) with some minor changes.

I concur with Ms. Hoekstra's comment that Rule 16.1(c)(1) should be limited to the following:

> *(1) Whether leadership counsel should be appointed, procedure for appointment, structure of leadership counsel, and related responsibilities.*

The currently drafted subparts of this rule should otherwise be removed, as the above passage is sufficiently inclusive and, more importantly, *flexible*, to accomplish the court's goals.

For example, as currently drafted, 16.1(c)(1)(C) suggests that the court should discuss leadership counsel's role in settlement activities. For many MDLs, it is entirely too early to discuss this topic at the initial conference. Additionally, 16.1(c)(1)(D)-(F) each discuss topics that are not necessarily applicable in all MDLs at this early stage, either. Taken together with the Committee Notes, the implication that each of these topics should be discussed at the preliminary conference is simply not indicative of the needs of all MDLs. Alternatively, I would suggest moving the factors in (C)-(F) into the Committee Notes, as follows:

> *Transferee judges may also consider, based upon the unique needs of their specific litigation, whether any of the following topics may be appropriate for discussion at this early juncture:*
> *1) Settlement procedures*
> *2) Proposed methods to regularly communicate with and report to the court and nonleadership counsel;*
> *3) Limits on activity by nonleadership counsel*
> *4) Whether and, if so, when to establish a means for compensating leadership counsel.*

I support rule 16.1(c)(2), as written. Further, while I believe (c)(3) is also very helpful, I suggest that the word "potential" be substituted for the word, "principal." This is consistent with my prior comments that it is too early in the litigation for most MDL plaintiffs to be able to identify with any consistent level of confidence

what the "principal" issues may be, without unfairly prejudicing their case down the road. I would therefore suggest the following langauge:

> *(3) identifying the potential factual and legal issues likely to be presented in the MDL proceedings.*

Finally, I would support the adoption of Rules 16.1(c)(8),(10), and (11) as written.

c. Rule 16.1(c)(4)-(7), (9), and (12) Should Not Be Included Due To The Early Context Of the Conference

Consistent with the themes discussed above, subparagraphs (c)(4)-(7), (9), and (12) each delve into issues that require a more advanced understanding of the issues in the case than can be expected by all MDL parties in all circumstances. The suggestion that each of these categories of information be included in the Court's analysis would therefore bias the court's analysis in favor of the party with the information advantage. In a typical product liability MDL where plaintiffs are at an information disadvantage early in discovery, these procedures would place defendants in an unfair position of advantage. For example, subsection (5) discusses whether consolidated pleadings should be prepared to account for multiple actions in the MDL proceedings. A defendant may have intimate knowledge of the involvement of a potential future co-defendant. However, plaintiffs may be unaware of this fact until some initial discovery is exchanged. Likewise, the rules seek a discussion for a proposed plan for discovery, including methods to handle it efficiently. However, a proposed plan for discovery may be inefficient until and unless the parties exchange some preliminary discovery about how each side keeps or maintains information. In sum, while these issues outlined in each of these subparagraphs may be helpful for the court to think about, the suggestion that the earliest juncture of the case is a reasonable juncture at which to analyze *all* of these issues would serve only to unfairly prejudice the party in a position of information disadvantage. These issues should at best be relegated to the Committee Notes and include disclaimers regarding the drawbacks of addressing such issues *too early*.

6. Conclusion

I applaud and appreciate this Committee's work. While I generally think that Rule 16.1, as written, is not necessary to adopt at this time, I do believe that certain of the suggestions, with minor changes as suggested above, can nonetheless be helpful for the parties. Most importantly, I believe that this Committee should review the submitted comments carefully with an eye towards ensuring that the Rule, if adopted, will serve to assist our federal judiciary to manage their dockets more efficiently. The Committee should be careful to ensure that the Rules do not unfairly prejudice parties who are in a position of information disadvantage at the early junctures of a case. Finally, this Committee should ensure that the Rules are

not being enforced in such a way to reduce the numbers of cases filed in the federal courts. That is a not a problem the Federal Rules can, *or should,* solve.

Sincerely,

Ilyas Sayeg
isayeg@mctlaw.com

Briordy Meyers

February 16, 2024

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Briordy Meyers-Personal Submission Regarding Potential Rulemaking on Privilege Logging Practice

Dear Members of the Advisory Committee:

I have worked as a discovery attorney for almost 18 years. In that time, I have practiced at several large law firms where I: advised clients making claims of privilege, drafted hundreds of privilege logs, reviewed millions of privileged documents and led large document review teams where I was responsible for overseeing hundreds of attorneys doing the same. I also led a discovery program at a global pharmaceutical organization where I: managed company wide privilege risks; advised business colleagues on privilege; trained employees on privilege; drafted internal policy guidance on privilege; hired and managed outside counsel and document review vendors working on privilege logs; approved large billing invoices for privilege logs; managed privilege review budgets; and somehow still continued to spend significant time of my own editing privilege logs and managing privilege risk and waiver strategy.

I respectfully submit my personal comments regarding the proposed amendments to the Federal Rules of Civil Procedure (Rules) based on my individual experience. **My comments and opinions are solely my own and do not reflect the opinions or positions of any current or former employer.**

Although well intentioned, the proposed amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) do not go far enough in addressing the very real problem with the privilege or trial preparation materials claim requirements because they do not address the fundamental flaws in logic at the root of Rule 26(b)(5)(A).

Also well intentioned in 1993, Rule 26(b)(5)(A) fails to recognize the core inconsistency of requiring parties to account for information that is by definition outside the scope of discovery as defined in Rule 26(b)(1). The additional legal work generated by Rule 26(b)(5)(A) runs counter to the dictates of Rule 1 and results in ballooning costs and side show disputes dramatically impacting the ability of “the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

While designed to address abuse of privilege claims as a discovery shield and reduce disputes, Rule 26 (b)(5)(A) has unfortunately done the opposite. It has created an entire

sub-industry in the legal profession of attorneys, vendors and legal technology dedicated to addressing claims that go to the heart of the attorney-client relationship and legal ethics and arguably should go unquestioned absent evidence of abuse. It has created new avenues for discovery disputes and distractions, forcing courts and parties to spend hours, weeks, months and even years wrangling with a problem that is completely self-imposed and did not exist in this manner in 1992. In fact, we have become so accustomed to the requirements of privilege logging that almost no one is seriously considering the bigger picture of whether or not the requirement should be removed. Instead our profession is going deeper down the rabbit hole of arguing over which exact version or format of the privilege log would be acceptable and when we should discuss the topic.

Privilege logging is a self-inflicted wound whose history resembles the story of the frog in boiling water. In 1993 the waters appeared inviting enough to attempt to fashion a solution to what in the overall context of civil procedure was a significant, but relatively small problem. As time has gone on the heat has been turned up gradually each year so that we collectively have not appreciated how hot the waters of privilege logging have gotten and are too boiled to jump out of the pot. A well meaning solution has become an enormous new problem for parties, courts and the legal profession.

Over the past 30 years, the volume and complexity of information protected by attorney-client privilege and work product claims has grown at an accelerated pace and morphed from single document questions to analysis over snippets of information found in emails, messages and dynamic “document” types–without the law concurrently advancing to address these new challenges. Perhaps the most alarming issue raised by Rule 26(b)(5)(A), however, is that it creates an unnecessary ethical challenge for practicing lawyers with every single privilege log by asking them to engage in the near impossible task of providing sufficient descriptions about information they are duty bound to protect from disclosure.

Rule 26(b)(5)(A) is, on its face, inconsistent with Rule 26(b)(1) and Rule 1

Rule 26(b)(5)(A) is inconsistent with Rule 26(b)(1)

Rule 26(b)(1) clearly states that the “scope of discovery is as follows: Parties may obtain discovery regarding any **nonprivileged matter** that is relevant to any party’s claim or defense and proportional to the needs of the case…” A reasonable reading of the language of Rule 26(b)(1) is that privileged information is outside the scope of discovery. By definition, it is **not discoverable**. Rule 26(b)(5)(A), however, requires parties to expressly make a privilege or trial-preparation material claim and describe the information being withheld when that information is “otherwise discoverable.” If privileged information under Rule 26(b)(1) is by definition not discoverable, then how could it be “otherwise discoverable” under Rule 26(b)(5)(A)? There is a disconnect in the logic and language that needs to be reconciled.

Reading Rule 26(b)(5)(A) to mean information that is privileged, but otherwise relevant and proportional to the needs of the case dilutes the privilege element in Rule 26(b)(1)’s scope

definition. The plain reading of Rule 26(b)(1) gives equal weight to relevancy, privilege and proportionality considerations as the three elements defining scope. There are no requirements in the Rules to make a claim and describe information withheld as non-relevant but otherwise privileged and proportional. There are also no requirements in the Rules to make a claim and describe relevant and non-privileged information that is withheld as not proportional to the needs of the case.

It might be fairly argued that withholding documents based on relevancy or proportionality is different from withholding documents based on privilege or trial preparation claims since privilege and work product go directly to a party's right to counsel and improper claims shield otherwise discoverable information necessary to a fair resolution of the case. However, there is nothing to keep a responding party from withholding relevant or proportional information if they were inclined to do so and we do not require non-relevant or disproportionate information logs absent evidence of impropriety or for good cause. The logic around trusting a party to produce all relevant, non-privileged and proportional information, but not to properly assess documents for privilege is faulty at best and improperly dilutes the privilege element in the scope definition.

The requirements of 26(b)(5)(A) often lead to additional discovery that, even if relevant, is not proportional to the needs of the case. It ironically forces attorneys to create novel work product–the privilege log–that in any other context would itself be protected by attorney-client and work product claims. Then attorneys are required to voluntarily hand over this work product, steeped in legal analysis and advice, to opposing parties. While it's possible that all other five proportionality factors are fulfilled for a privilege log, the marginal utility element (burden/expense weighed against benefit) rarely justifies exacting privilege log requirements. It is true that it is not uncommon for responding parties to find improperly withheld documents in a privilege log, but it would be overstating the case to argue that there are enough significant documents being withheld improperly that the adjudication of cases is being significantly impacted by this problem on a regular basis.

Rule 26(b)(5)(A) is inconsistent with Rule 1

Requiring courts and parties to consider information outside the defined scope of discovery frustrates the mandate of Rule 1 that the Rules "should be construed, administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Privilege log creation is expensive and slow moving. Diligent responding parties committed to nonfrivolous privilege claims invest significant additional time and expense to construct descriptions that adhere to the requirements of Rule 26(b)(5)(A). This is especially true in matters where "document by document" privilege logs require individualized descriptions for each document logged. Privilege log construction necessarily involves duplicative review of withheld documents by multiple and escalating billable rate resources.

Briordy Meyers-Personal Submission Regarding Potential Rulemaking on Privilege Logging Practice

The most common privilege log workflow involves: first, a "first level review" of documents for responsiveness, privilege, confidentiality and issue code tagging; second, a "second level" or "quality control (QC)" review of a defined sample set of the reviewed universe to ensure accuracy–this usually includes all documents tagged privileged or potentially privileged and a targeted search for documents tagged not privileged but hitting on privileged search terms (law firm and lawyer names, common privilege terms, etc.); third, export of all documents confirmed privilege to a spreadsheet; fourth, another quality control review of the draft privilege log where gaps in fielded information are addressed and narrative descriptions are edited and fleshed out.

The common privilege log workflow is anything but speedy. In addition to the levels described above, the pace at which each reviewing attorney moves is dramatically slower than simple issue spotting for responsiveness to the document request. This is because there is so much at stake if a privileged document is inadvertently produced and privileged communications within client document sets are not always obvious. It often is not until the end of a matter that reviewing attorneys fully understand the context of privileged communications or work product based on the knowledge gained during extended review. What may appear to be non-privileged communications with in-house counsel, for example, may actually be extremely sensitive and privileged based on the review of other documents. What may appear to be a protected work product document on its face, for example, may end up being not privileged based on other communications demonstrating that the document was actually shared with a third party–the client purposefully and voluntarily waiving potential protection for a broader purpose.

The common privilege log workflow is anything but inexpensive. At each successive level of the detailed workflow above, costs increase. First level document reviewers generally are billing at the lowest rates. Second level/QC reviewers are billing at higher rates. By the time you get to privilege log editing, you typically are involving law firm associates and partners billing at the highest rates. At any rate, you are engaging in additional work that otherwise would not exist if you were not required to produce a privilege log.

The common privilege log does not feel just to responding parties, particularly those in asymmetrical litigation where one party is carrying a disproportionate discovery burden. In criminal cases, there is a recognized Sixth Amendment right to counsel under the U.S. Constitution.[1] While there is not a recognized right to counsel in civil cases under the U.S. Constitution, both attorney-client privilege and work product protection are recognized by federal[2] and state common law and legislation in all 50 states. For responding parties and counsel engaged in time consuming and expensive privilege logging *after* hours invested to identify, preserve, collect, review and produce relevant documents, the additional work necessary to preserve a claim that is recognized as either a constitutional right or the basic foundation of the attorney-client relationship feels particularly unjust.

[1] Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963)
[2] Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981)

The refrain that privilege logs lead to discoverable information ignores that such "improper" claims are often the result of the challenge privilege logs represent rather than the intent of the responding party. As noted above, there is no requirement to log documents held as disproportionate or non-relevant. If responding parties were really intent on withholding information based on frivolous or improper privilege claims they could just as easily refrain from making a claim and describing the documents entirely. Being punished for attempting to describe the documents withheld but failing to thread the privilege log needle also feels particularly unjust.

Rule 26(b)(5)(A) has created an entirely new discovery requirement that slows down discovery, escalates costs and leads to additional disputes with little guarantee of securing its goal.

Rule 26(b)(5)(A) creates unnecessary ethical challenges for attorneys

Rule 26(b)(5)(A) creates unnecessary ethical challenges for attorneys by forcing them to thread a very difficult analytical needle on behalf of their client.

Descriptions are difficult

Sufficiently describing the nature of the documents, communications or tangible things withheld without revealing the privileged or protected information itself is extremely difficult. In effect, the requirement amounts to asking a party to "tell me something about something without telling me too much about it." While one might argue that the elements of attorney-client privilege and work product are clear, the truth is that providing sufficient descriptions under Rule 26(b)(5)(A) without violating one's duty of confidentiality is an art. As such, what is acceptable art to one attorney is invariably going to be challenged by another. Compounding this challenge is the fact that modern day privileged information is not standardized. This is no longer the 1993 era of emails and paper documents. Privileged information comes in snippets and is found in both documents that are hundreds of pages long and truncated message components sent through a variety of applications and formats. Work product varies from presentation slides to memorandums to diagrams and images created by new software. The expectation that attorneys will be able to consistently summarize, much less agree on, protected information descriptions in this context is unrealistic at best and a self-inflicted wound of the legal profession at worst.

Descriptions create direct ethical challenges for attorneys

Rule 26(b)(5)(A) is a direct challenge to a lawyer's ethical obligations regarding confidentiality and expedition of litigation.

ABA Model Rule 1.6 (a) (Confidentiality of Information) states that a "lawyer shall not reveal information relating to the representation of a client…" absent exceptions under 1.6 (b) that include compliance with "other law or a court order" under 1.6(b)(5), but do not explictly

include basic discovery requirements. Instead, ABA Model Rule 1.6 (c) requires that a "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[3]

ABA Model Rule 3.2 (Expediting Litigation) states that a "lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[4]

Rule 26 (b)(5)(A)(ii)'s requirement that a party walk the fine line between describing a client's confidential information sufficiently to make a claim of attorney-client privilege or trial preparation materials protection while not revealing information that would violate a lawyer's confidentiality obligation consistently puts lawyers in unnecessary ethical dilemmas. If a lawyer provides too much information in the description, it could violate ABA Model Rule 1.6, which goes to the heart of the lawyer-client relationship. If a lawyer doesn't provide enough information, it could subject the client to challenges to the privilege log under Rule 26 (b)(5)(A)(ii). If the lawyer takes the additional time it requires to walk the fine line and both provide a sufficient description and protect confidential client information, the lawyer could run afoul of their duty to expedite litigation under ABA Model Rule 3.2.

My question for the Advisory Committee is: Is it worth it? Is the obligation that parties–through their attorneys–describe information they are withholding under claims of attorney-client privilege or work product worth forcing the entire legal profession into a recurring ethical dilemma? Especially when the information being described is itself outside the scope of discovery by definition under Rule 26 (b)(1)?

As noted above, it is very often the commitment of diligent attorneys to ensure that they fulfill their duties to both client and court that leads to protracted privilege log efforts rather than purposeful evasion, incompetence or inability to describe documents or communications. It's not that attorneys can't describe the privilege that is the challenge. It's that they are duty bound by professional legal ethics to do so in a way that doesn't betray client confidential information. How does one provide a sufficient summary description in this context?

The assumption behind Rule 26 (b)(5)(A)(ii) appears to not even have considered the ethical dilemma it puts attorneys in and should have been reconsidered or updated at the very least as part of the 2015 amendments to Rule 26.

Existing legal ethics make Rule 26 (b)(5) redundant and unnecessary

Although the Notes of Advisory Committee on Rules-1993 Amendment do not detail the exact reasons for the "new provision" of paragraph 5 under Rule 26, presumably it was

[3] See ABA Model Rule 1.6 available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/; last accessed February 12, 2024.
[4] See ABA Model Rule 3.2 available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_2_expediting_litigation/; last accessed February 12, 2024.

designed to reduce abuse of withholding based on attorney-client privilege and trial preparation material claims as well as "the need for in camera examination of the documents." The root of the problem of purposeful over-withholding as a tactical advantage, however, is not a procedural one but an ethical one that is already covered by existing legal ethics. Both ABA Model Rule 3.3 (Candor Toward the Tribunal)[5] and 3.4 (Fairness to Opposing Party & Counsel)[6] require that attorneys disclose relevant, non-privileged information.

Attempting to solve an ethical problem with procedural rules only exacerbates the issue and slows down court dockets.

The proposed Amendments to Rule 16 (b)(3)(B)(iv) and 26 (f)(3)(D) may lead to worse outcomes

Resolving privilege log formatting and timing issues ahead of time is a near impossible mission

Although the idea of resolving potential timing and privilege log method disputes early in the case is well-meaning, it would again engage lawyers on a nearly impossible mission. Prior to understanding the true scope of discovery for a given matter, they are being forced to make decisions that could dramatically impact the privilege logging burden. Attorneys cannot always know which timing and method is best before they have a sense of the volume and complexity of the privileged information they need to log. Without sufficient information to strategize and meet/confer in good faith, the proposed amendments on their own may cause additional disputes.

The amended rule may provoke disputes in cases where they otherwise would not have existed

Some cases do not require agreement regarding privilege log timing and methods because the scope of discovery is small and/or the number of documents withheld is negligible. Requiring alignment on timing and method forecloses disparate choices by opposing parties, which in some cases may be agreeable to both parties.

Assuming Rule 26 (b)(5)(A) will not be amended to remove the withholding description requirement, it should at least be streamlined

Assuming that Rule 26 (b)(5)(A) is not going to be amended to remove the requirements of expressly making a claim and providing a description, it should at least be amended to

[5] See ABA Model Rule 3.3 available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/; last accessed February 12, 2024.
[6] See ABA Model Rule 3.4 available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel/; last accessed February 12, 2024.

streamline the description process in a manner that reduces the inconsistency with Rule 26 (b)(1) and Rule 1.

I would suggest that allowances regarding presumptively valid formats be provided to speed up privilege descriptions and make them less expensive. Permissive “may” language around options like metadata logs or categorical logs would provide more certainty to responding parties and allow them to both begin and finish privilege logging in a more efficient manner.

I would also suggest that specific allowances for electronic discovery considerations consistent with Rule 26 (b)(2)(B) and Rule 34 (b)(2)(D) and (E) be provided to address the true volume challenges associated with privilege logs. For example, allowing single entries for message threads instead of treating each message as a separate document, would help. Similarly, allowing for single entries of document “families” would streamline the process. Eliminating requirements to describe information withheld through redactions when the remaining information in the produced document sufficiently describes the nature of the information and privilege or trial-protection claim would also save enormous amounts of time.

While I appreciate the Rules avoiding an approach of micro management, if the claim and description requirements are going to remain in Rule 26 (b)(5)(A), it would be best to provide additional presumptive certainty. The truth is that by wading into what is really a legal ethics issue, the existing language is already micromanaging parties and counsel in a manner that is creating additional cost and time absent baseline assumptions and allowances.

Respectfully submitted,
Briordy Meyers
Briordy Meyers

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February 16, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
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Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: **Comment Regarding Proposed Changes to Rules Regarding Privilege Logs—Fed. R. Civ. P. 16(b) and Fed. R. Civ. P. 26(f)**

Dear Members of the Committee on Rules of Practice and Procedure:

My name is MaryBeth Gibson. I recently founded my own firm, Gibson Consumer Legal Group, LLC. I serve as counsel in many complex class action matters. I am also a member of Working Group 1 to The Sedona Conference and am a Drafting Team Member on The Sedona Conference Commentary on Privilege Logs where we discussed for almost two years the balancing act associated with privilege logs and the competing interests of requesting parties and producing parties.

The Rules Committee recognized that there is no "one size fits all" amendment that should be implemented with respect to Rule 26(b)(5). There is a divide between requesting parties and producing parties. A problem persists with respect to privilege logs in complex litigation: the over-designation of documents as privileged by the producing party. We see the argument made for categorical logs on the basis of burden to the producing party that results in over-designation of documents as privileged.

I was appointed to the Plaintiffs' Steering Committee in *In re Marriott International Customer Data Security Breach Litigation*, MDL No. 19-md-2870 (D. Md.), initially before Judge Grimm. I serve on the Discovery Committee and was intimately involved in negotiations of search terms, custodians, document production, and disputes over privilege logs. Judge Grimm appointed Special Master Facciola to oversee the many discovery disputes that arose. As a result of one such discovery dispute, Special Master Facciola ordered that the parties not use categorical logs. Subsequently, Marriott turned over a production of thirteen thousand documents that were

indispensable to the Plaintiffs' case. These documents would not have been produced had the Special Master allowed a categorical log. Because Marriott had to perform a second level review to create its privilege log, the over-designation was discovered.

There may be times where categorical logs are appropriate and the parties may negotiate as much under Rules 16(b) and 26(f). Simply put, burden should not be an excuse to demonstrating privilege on a document-by-document basis pursuant to Rule 26(b)(5).

Thank you for the opportunity to submit a comment on this very important issue.

Sincerely,

/s/ MaryBeth V. Gibson

MaryBeth V. Gibson

SCOTT + SCOTT JOSEPH+GUGLIELMO

February 16, 2024

Mr. H. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re. Proposed Amendments to Fed. R. Civ. P. 16 and 26

Dear Members of the Advisory Committee:

I am writing to offer comment on proposed amendments to Federal Rules of Civil Procedure 16 and 26.

Under the proposed amendments, the parties to a litigation ***must*** in their discovery plan, and the Court ***may*** in its case management order, address "the timing and method for complying with Rule 26(b)(5)(A)," which requires that parties log the documents they are withholding from production and their grounds for withholding them. Proposed Fed. R. Civ. P. 26(f)(3)(d) and 16(b)(3)(B)(iv). The draft Committee notes state that the proposed amendment to Rule 26 "seeks to grant the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials." The notes offer examples of communications that the parties might agree to categorically, and without further explanation, hold back from production: "communications between a party and outside litigation counsel might be excluded from the listing, and in some cases a date range might be a suitable method for withholding some materials from the listing requirement."

In addressing the "privilege log problem," the Committee has identified an area that offers real opportunities for practical compromise between parties. Parties can, and often do, agree that certain categories of document are presumptively privileged. Such agreements – where reached through considered and fully-informed negotiations – can save the parties money and the Courts time.

That said, I believe that the proposed amendments to rules 16 and 26, as drafted, call for and will inevitably result in hasty and premature arrangements based on the imperfect and often asymmetrical information available to the parties at the earliest stages of litigation. An official preference for early resolution of the "privilege log problem" also runs the risk of creating perverse incentives for gamesmanship. Accordingly, I urge that the proposed amendments to Rules 16 and 26 be rejected as they are currently written.

The issue is principally one of timing. The amendments call for privilege log issues to be addressed in the earliest moments of discovery. This is usually well before the nature of a party's relationship with counsel is fully understood; before custodians have been identified; and before the number of potentially privileged documents can be determined with any accuracy. At least one party, and certainly the court, is flying blind in such a situation. Given advances in e-discovery technology, there is no need for this.

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First, circumstances bearing on the appropriate scope of privilege logging vary wildly from case to case and are seldom in any kind of focus as of the initial scheduling conference.

To take the example from the Committee's notes: communications between a party and outside litigation counsel may properly be withheld in the instance where the firm is picked out of a phonebook once litigation seems inevitable. But a more cautious approach to withholding may be warranted where different and disparate counsel at the same firm is advising the same client on transactional matters, taking notes at Board meetings, or responding to government investigations. Legal representation often grows out of longstanding professional relationships in which one group at a law firm feeds another work. Even within a firm, members of a litigation team recently assigned to a case may not fully understand the scope of their colleagues' activities as of the Rule 16 conference. As a practical matter, these activities may not come fully into view until after discovery has progressed. Under such circumstances, an opposing party can hardly agree to categorical exclusions from production before more information is available.

Nor is this the only sort of information manifestly lacking at the time of the Rule 16 conference. A lawyer may "wear two hats," playing a greater or lesser role – and not only a legal role – in the business decisions a company makes. A company's practice, or a department's, or an individual's, may be to copy one or more attorneys on sensitive communications as a matter of course. Conversely, a party may take such limited recourse to legal advice that completing a proper privilege log is not a significant burden, in which case the efficiencies created by a streamlined process may not outweigh the value of the protections surrendered to it.

Typically, very little of this information is available – even to the party that might eventually assert a privilege – before discovery has commenced.

Second, information that is highly relevant to categorical withholding may be readily available later in discovery. Once custodians, search terms, and structured data sources have been identified, the parties to a litigation obtain a clearer idea about the scope of discovery. This includes not just the number of documents in play, but – thanks to the ease with which metadata can be culled from documents – the number of documents shared with lawyers, the number of documents shared exclusively or mainly with lawyers, the number of documents on which lawyers were copied along with many other recipients, the number of emails expressly addressed to certain subject matter, etc. Data like this can provide a concrete basis on which parties can negotiate a reasonable approach to categorical withholding.

Moreover, the preliminary stages of discovery may give a producing party the opportunity to understand the nature of a client's relationship with different counsel and identify categories of communications that are more likely to be presumptively privileged. At the opening if discovery – where the proposed rules require contemplation of what the privilege logs will look like – none of this information is known.

The amended rules, as drafted, therefore encourage parties (and require the courts to encourage parties) to agree to rules for privilege logging at a needlessly premature point in a litigation. The danger is that parties will agree to generic procedures based on a generic appreciation of privilege issues before understanding the particular issues bearing on the assertion of privilege in the case before them.

These are not idle concerns.

For one thing, a hasty agreement on privilege logging can yield large-scale withholding of non-privileged but responsive documents because one party does not fully understand the other's practice regarding, e.g., the inclusion of counsel on email. For example, I have been in litigation where the party opposing my client withheld large numbers of documents because they fit into a presumptively privileged category. Many of the withheld documents did not appear to be

privileged. For another thing, if parties and Courts come to expect that large amounts of information can be withheld on the basis of, e.g., certain metadata features that are identified a priori, bad actors will have a new way to game the system. I refer the Committee to the January 2, 2024 letter that Emily T. Acosta, of Wagstaff Law Firm, sent the Advisory Committee. Therein, Ms. Acosta notes that some litigants try to create "fake privilege" by unnecessarily copying attorneys on business emails. Acosta Ltr. at 7. If the categorical withholding of lawyered email becomes a default rule, the Courts can expect much more gamesmanship of this nature.

I therefore urge the Committee to reject the proposed amendments to Rules 16 and 26. Litigants can and should be encouraged to work together on creative solutions to the "privilege log problem." But this can be achieved without rushing to an agreement before the relevant facts are available.

I thank the Committee for this opportunity to provide comment and look forward to discussing my concerns in greater detail.

Sincerely,

/s/ Joseph P. Guglielmo

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February 16, 2024

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Re: Public Comment of Philip S. Goldberg and Andrew J. Trask, partners at Shook Hardy & Bacon, LLP on Proposed New Rule 16.1(c)(4).

Dear Members of the Committee:

Thank you for the opportunity to submit our comments regarding the discussion the Committee has held over the past few months on the proposed new Rule 16.1(c)(4) and the problems posed by unsupported claims. We have observed all three hearings and reviewed the testimony submitted to the Committee. The written and oral submissions this Committee has received have been thorough and have conclusively demonstrated the widespread existence of unsupported claims, the access to justice problems they create for defendants and other plaintiffs in the MDL, and the availability of simple, appropriate solutions.

These testimonies provided an overwhelming basis for Rule 16.1 to include a mechanism for ensuring a plaintiff whose claim was transferred into an MDL has standing to bring that claim, has provided facts showing he or she used a product involved in the MDL, and has sustained the type of injury at issue in the MDL. Otherwise, that claim does not belong in the MDL.

The objections raised at the hearings to including this mechanism can be boiled down to the following: (1) the defendants as a community must provide the Committee with more proof this problem exists, or the presumption will be that it does not; (2) even if it does exist, it is not the role of the rules governing MDLs to safeguard the civil justice system from the widespread filing of unsupported claims because MDLs focus on common, not case-specific, issues; (3) requiring plaintiffs to provide facts showing their claims belong in the MDL can be too burdensome for some plaintiffs (because that information may not available); and (4) nothing in Rule 16.1 precludes defendants from requesting orders requiring all claims be supported when appropriate, so there is no reason for the rule to require judges to issue such orders in MDLs.

None of these objections provides valid reasons for acquiescing to the continued, systematic transferring of claims into MDLs that have not demonstrated a right to be there.

First, any suggestion that the mass filing of unsupported claims does not exist unless a systemic empirical study establishes its existence ignores the reports from federal judges who have identified these problems in their MDLs, the testimony of every person who works for or represents defendants in MDLs, and the 2018 MDL Subcommittee Report of this Advisory Committee itself. The Committee received and heard testimonies with hard numbers and actual experiences as to how many claims were withdrawn or otherwise found to be unsupported in more than a dozen MDLs, including Pelvic Mesh (24,695 of 46,511 claims filed against Ethicon dismissed for basic factual shortcomings), 3M Combat Arms (126 of 500 Wave 1 cases dropped out without producing evidence; plaintiffs admit 70,000 cases were duplicative filings), Xarelto (4,000 claims dismissed for lacking factual support, most during bellwether preparation), and Zostavax (court dismissed 173 claims with "boilerplate" language unrelated to the case).

At the end of the October 16, 2023 hearing, it was heartening to hear a member of the Committee finally acknowledge this point: "To be clear, we know there's a problem. We understand there's a problem. Now, that doesn't mean we always—it doesn't mean everybody agrees on the size of the problem and the problem shows up in every single products liability MDL, but I'm going to accept for purposes of our hearing today in hearing from you that that is the case. Just so you understand, we're focused on is there a rules-based solution that doesn't create unintended consequences."

That statement was a welcomed, fair summary of the situation. It suggested the next two hearings would provide a platform for a dialogue on how to fashion such a solution. However, when corporate and defense counsel sought to engage in this discussion at those hearings, questions kept going back to what can best be described as a "bucket of steam" errand, suggesting if the business community cannot conduct a comprehensive study of unsupported claims in MDLs—information that no company or organization has public access to—then the Committee can set aside the evidence it does have on the widespread existence of this problem.

As a reminder, this Committee itself, in its 2018 Agenda Book, estimated the proportion of claims falling into this category as often 20–30%, but in some litigations as high as 40–50%. The testimony to this Committee reinforced these numbers. And not one person testified that the numbers put before this Committee were wrong, inaccurate, or inflated.

Second, the Committee heard testimony as to why the mass filing of unsupported claims is a systemic problem in MDLs; there are different

dynamics and incentives around how mass tort claims are generated for MDLs than in individual cases. Plaintiffs' lawyers, including Chris Seeger and Jen Scullion in a February 12, 2024 Law360 article on the Committee's hearings, have said, "the responsibility for vetting cases rests primarily with the plaintiffs bar." That's true.

When a prospective plaintiff meets with a lawyer to bring a case, it is the lawyer's responsibility to ask the client to show they have a case—i.e., they used the product of the company they are suing—and for evidence corroborating any claim injury. With rare exception, this information is in the hands of the plaintiff, not defendant. The economics of contingency-fee representation require gathering and reviewing these records before a lawyer will invest time litigating the case. To be fair, Mr. Seeger and Ms. Scullion have reputations for seeking this information in mass tort cases.

However, as the Committee heard, in mass tort cases many lawyers do not vet their clients' claims. Claimants often respond to an advertisement placed by claim generators. The generators then sell these claims to law firms. Intake meetings rarely take place, resulting in few claimants who even know who their lawyers are. Further, these lawyers find strategic value in stockpiling as many claims as possible regardless of whether support exists for them. For example, the sheer number of claims can be used to seek an MDL, make it appear there is a big problem needing to be solved, leverage a particular lawyer into a leadership position, and pressure defendants into mass settlements that pay unsupported claims.

Some mass-tort plaintiffs' lawyers expressed concern at the hearings that this information can be difficult to obtain in a timely fashion, or limited discovery may be needed to produce this information. Rule 11 concerns aside, these narrow circumstances can be addressed—both in the rule and by lawyers seeking to uphold their responsibility to vet their claims. A plaintiff's lawyer can seek a good faith extension if needed, but these idiosyncratic situations are not excuses for neglecting the widespread filing of unsupported claims.

Third, the Committee heard testimony on the many tangible problems that arise when 20-50% of an MDL docket consists of unsupported claims. Judicial resources are wasted when a plaintiff withdraws a claim for lack of factual support. Defendants spend millions of dollars working up cases for bellwether trials that lack basic support, and global settlements are delayed by the need to weed out unsupported claims. Not one person testified that there is a benefit to keeping these unsupported claims in an MDL.

Finally, because the mass filing of unsupported claims is a creation of the MDL process, it is best addressed by changes to the rules governing MDLs. If judges consistently required this basic information in their MDLs' individual constituent cases on their own, the problem would not be as vast as it is. But

judges do not, as testimony about the Talcum Powder litigation—where basic Rule 8(a) information was not required until 40 months into the case—demonstrated. Waiting to weed out the claims until the final stages of the MDL process, as the Committee heard, is far too late to safeguard the MDL process itself or stop the payment of unsupported claims from global settlements at the MDL stage.

The Federal Rules of Civil Procedure set the expectations for how a case will proceed. Each rule may not be pertinent to each case, but they provide important backstops to facilitate access to justice for plaintiffs and defendants. The Committee should heed the testimony it heard and instruct MDL judges to require claims to be vetted and supported early in the MDL proceedings.

Sincerely,

Philip S. Goldberg
Andrew J. Trask
Partner, Shook Hardy & Bacon, LLP

Google

February 16, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Comments Regarding Potential Rulemaking on Civil Rules 16 and 26 Pertaining to Privilege Logs

Dear Members of the Advisory Committee:

Google is a global technology company with discovery experience in thousands of lawsuits in federal court. Many of Google's cases take place in the Ninth Circuit where approximately 20% of all federal privilege log disputes regarding motions to compel or associated costs have taken place since the 1993 amendments to Fed. R. Civ. P. 26(b)(5)(A).[1] Based on this experience, Google brings a well-informed perspective to the current deficiencies in the Federal Rules of Civil Procedure as they relate to privilege logging.[2]

The proposed amendments offered by the Committee ("the Committee's proposal") recognize that something must be done to address the serious deficiencies in the privilege logging process being forced upon modern litigation. After reviewing the Committee's proposal, however, Google believes the proposed changes do not adequately address the massive challenges associated with privilege logs, and in fact certain Committee Notes will unintentionally exacerbate the problems. As a result, Google respectfully submits this letter to explain its concerns and to offer additional amendments to Rules and relevant Committee Notes. We hope this will assist the Advisory Committee as it continues to discuss and refine approaches for improved handling of privileged material.

I. No Reference to Proportionality

Any proposed amendments to Rules 26 and 16, as well as the modifications to the Committee Notes, should confirm and reflect the fact that the requirement of proportionality in Fed. R. Civ. P. 26(b)(1) applies to the privilege logging process. The timing and method for complying with Fed. R. Civ. P. 26(b)(5)(A) in a particular case can and should be modified based

[1] Based on September 2023 Lexis-Nexis searches across all United States Courts of Appeal and District Courts case decisions hitting on: (("privilege log" and ("motion to compel")) or "cost of privilege log" or "privilege log cost") and dated 12/1/1993 to 9/8/2023 (3,024 out of 13,666 federal cases; 22% Ninth Circuit); and "26(b)(5)A)" and dated 12/1/1993 to 9/8/2023 (476 out of 2,544 federal cases; 19% Ninth Circuit).

[2] References to "privilege" in this submission are intended broadly to include common protections asserted by parties on logs, like the attorney-client privilege and work product doctrine, unless specified otherwise.

on proportionality factors. This is reflected in the history of how proportionality has been addressed in the Rules.

The concept of proportionality dates back to the establishment of the Federal Rules of Civil Procedure and has been directly referenced in Rule 26 since the 1983 Amendments.[3] The 1993 Amendments to the Rules subdivided former paragraph (b)(1) into two paragraphs "for ease of reference and to avoid renumbering paragraphs (3) and (4)."[4] This had the effect of placing the proportionality concept into sub-paragraph (b)(2), which was titled "Limitations," rather than (b)(1), which was titled "In General."[5]

The Advisory Committee Notes to the 2015 Amendments, which added the word "proportional" to the Rule and moved the concept from Rule 26(b)(2) to Rule 26(b)(1), call this out: "The present amendment restores the proportionality factors to their original place in defining the scope of discovery."[6] The Notes also say that the "parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."[7] Several courts have confirmed that proportionality applies to the privilege logging process.[8] In addition, the Sedona Conference made clear in 2018, in *The*

[3] In 1983, Rule 26(b)(1) was amended to limit discovery that was duplicative, unduly burdensome or expensive, "taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." FED. R. CIV. P. 26(b)(1) (1983); 97 F.R.D. 165, 172 (1983 amendments to Rule 26(b)). *See generally, Robertson v. People Mag.*, No. 14 CIV. 6759 (PAC), 2015 U.S. Dist. LEXIS 168525, at *4-5, 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) (noting that proportionality has been a limit on discovery since the 1983 amendments to Rule 26).

[4] Advisory Committee Notes to 1993 Amendment to Rule 26.

[5] *See* 146 F.R.D. 401 at **436-47 and Advisory Committee Note at *638.

[6] Advisory Committee Notes to 2015 Amendment to Rule 26.

[7] *Id*.

[8] *See, e.g., Las Brisas Condo. Homes Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, Case No.: 2:21-cv-41-KCD, 2023 U.S. Dist. LEXIS 62078, at *4-7 (M.D. Fla. Mar. 8, 2023) ("Empire is correct that an itemized privileged log is not always necessary. As with all discovery, Rule 26 requires proportionality. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected.") (internal citations and quotes omitted); *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-CV-2235-SHL-DKV, 2016 U.S. Dist. LEXIS 142332, at *21, 2016 WL 5867268, at *6 (W.D. Tenn. Oct. 5, 2016) (applying the Rule 26(b)(1) proportionality standard to determine appropriate log format); *Finger v. Jacobson*, No. CV 17-2893, 2019 U.S. Dist. LEXIS 225158, at *3, 2019 WL 7557821, at *1 (E.D. La. May 9, 2019) (finding the privilege log "proportional to the needs of the case given the parties' relevant access to the requested materials," that it may also "aid in resolving the issues in this litigation, the burden or expense does not outweigh its likely benefit," and noting it had no evidence of "any of the other proportionality factors under Rule 26" available as evidence") (internal citations omitted); *Norton v. Town of Islip*, No. CV043079PKCSIL, 2017 U.S. Dist. LEXIS 33977, at *26, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017) (determining whether a categorical privilege log is appropriate, courts consider whether its justification is "directly proportional to the number of documents withheld" but not evaluating any of the Rule 26(b)(1) factors specifically); *3rd Eye Surveillance, LLC v. United States*, No. 15-501C, 2021 WL 3828654, at *3 (Fed. Cl. Aug. 27, 2021) (ordering revised privilege descriptions to better articulate common interest doctrine claims but stating "the burden of identifying and logging each and every communication between counsel to the parties to the [joint defense agreement] over six years . . . is not proportional to the needs of the case"); *In re Snap Secs. Litig.*, No. CV1703679SVWAGRX, 2018 U.S. Dist. LEXIS 223305, at *3, 2018 WL 7501294, at *1 (C.D. Cal. Nov. 29, 2018) (concluding that the logging of documents dated after commencement of the litigation was not proportional to the needs of the case,

Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 SEDONA CONF. J. 1, 67 (2018), Comment 2.b., that "***[p]roportionality*** should be considered and applied by the court and parties to all aspects of the discovery and production of ESI including . . . ***preparation of privilege logs***." (Emphasis added.)

The proposed amendments to Rules 26 and 16 and their related Committee Notes make vague reference to proportionality type factors. For example, the Note for Rule 26 says that Rule 26(b)(5)(A) "was adopted in 1993, and from the outset was intended to recognize the need for flexibility. Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens." Undue burden is no longer the complete standard - it is but one of the six proportionality factors, which means to truly promote the flexible use of Rule 26(b)(5)(A), all of the proportionality factors should be applied. In addition, the Note also explains some factors to consider when "designing an appropriate method for identifying the grounds for withholding materials." It would be more accurate to cite Rule 26(b)(1) proportionality and its factors directly.

II. Related Asymmetrical Litigation Issues

Proportionality is particularly important for parties in asymmetrical litigation, when one party has a much higher volume of discoverable information than the other. This imbalance results in the burden of responding to discovery being much greater for the responding party.[9] Furthermore, requesting parties in asymmetric litigation are rarely motivated to agree upon reasonable privilege logging methods, particularly early in the case when case specific information and burdens are ill defined. In our experience, the requesting parties in asymmetric litigation consistently seek the most burdensome and expensive methods of privilege logging and ignore Federal Rule of Civil Procedure Rule 1. Google is often faced with asymmetrical discovery and, in the privilege logging context, this means it has a significantly higher burden than opposing parties. In some cases, aggregate costs for preparing privilege logs can more than double the cost of document review.

More important than the enormous costs for responding parties like Google in asymmetrical litigation is the impact on court dockets and the ability of parties and courts to meet the requirements of Rule 1. While the Advisory Committee Notes to the 2015 Amendments recognized that "information asymmetry" means "that the burden of responding to discovery lies heavier on the party who has more information, and properly so," it also recognized that "consideration of the parties' resources does not foreclose discovery requests

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but no evaluation of the Rule 26(b)(1) factors); *Hosseinzadeh v. Bellevue Park Homeowners Assoc.*, No, C18-13585-JCC, 2020 U.S. Dist. LEXIS 106222, at *7 n.3, 2020 WL 3271769, at *3 n.3 (W.D. Wash. June 17, 2020) (dictum) ("Whether a discovery request is proportional may depend on the costs of generating an expansive privilege log.").

[9] *See generally, Chambers v. Whirlpool Corp.*, 980 F.3d 645, 666 (9th Cir. 2020) ("[C]lass action plaintiffs typically possess no or very limited discoverable materials, while defendants may have reams of documents and terabytes of electronic data. Class action plaintiffs thus have an incentive to seek aggressive discovery . . . without fear of reciprocally burdensome discovery.").

addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party," citing to the 1983 Committee Note cautioning courts to apply standards evenly to both financially weak and affluent parties.[10] Failure to do so could lead to the "use of discovery to wage a war of attrition or as a device to coerce a party."

When one side not only carries a dramatically larger privilege logging burden then the other, but is forced to log each and every document with robust and specific descriptions within a short time period, it necessarily creates a context ripe for a discovery dispute capable of sidetracking the case. Insistence on a document-by-document privilege log protocol–or even a lack of flexibility in privilege log format choices for the responding party–implicitly threatens the "just, speedy, and inexpensive determination of every action and proceeding" in an asymmetrical context. One party has no incentive to require more concise privilege log descriptions or narratives.

III. Insufficient Discussion of Specific Alternative Log Formats

The Federal Rules of Civil Procedure do not require a privilege log and, therefore, do not provide any specifics as to how a log should look if one is used to satisfy the requirements of Rule 26(b)(5)(A). One approach developed by practitioners over the years is a "traditional" document-by-document log, whereby each document withheld for privilege, in whole or in part, is logged with its own entry and includes information like date, sender, recipients, basis for withholding, and a custom narrative description of the document. It is this final item, the custom narrative description, which can cause undue burden and expense in cases involving thousands of entries.

Although the text of the Rules themselves do not provide guidance regarding acceptable privilege log formats, the Advisory Committee Notes have addressed this issue as far back as 1993. When subparagraph (5) was added to Rule 26(b) in 1993, the Advisory Committee Notes explained that a specific format was not required and could vary based on the needs of the case:

> The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection . . . . The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. *Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.*

The proposed Committee Note to Rule 26 acknowledges, as it should, that "Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility" and that "[n]o one-size-fits-all approach would actually be suitable in all cases." The Note then fails, however, to offer sufficient guidance as to how that flexibility can be utilized by parties with

[10] Advisory Committee Notes to 2015 Amendment to Rule 26.

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respect to privilege logs. In fact, despite noting the 1993 amendments, the proposed Note neglects to accurately describe one of the alternatives presented in the emphasized portion of the 1993 Note above—description by categories. This led to the creation of "categorical logs" as a means of potentially reducing the burden of having to draft descriptive narratives for each document.[11] While it's possible, as the proposed Note recognizes, that privilege log protocols also exclude certain categories, the tangible efficiency comes from being able to use standard and repeatable (or single entry) categorical *descriptions* for documents with common attributes in lieu of individualized privilege descriptions for each log entry.[12]

The Southern and Eastern District Courts of New York have a local rule saying categorical logs are "presumptively proper" when asserting privilege "on the same basis with respect to multiple documents." *See* Local Rule 26.2(c) for the Southern and Eastern Districts of New York. These Courts have now proposed amendments to their Local Rule 26 designed to encourage another alternative log format – metadata logs. The proposed amendments[13] to subpart (c) are:

> (c) Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when appropriate, parties should consider the use of a categorical log or metadata log. Unless otherwise provided by a judge's Individual Practices or by Court order,
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> (1) when a party is asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category; ~~. A party receiving a~~

[11] For example, in *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. 3:17-CV-01078, 2020 U.S. Dist. LEXIS 56062, 2020 WL 1532323 (M.D. Tenn. Mar. 31, 2020), the court said that "[w]here a document-by-document privilege log would be unduly burdensome, courts have permitted a categorical log" and then cited the following Advisory Committee Note: "Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." *Shufeldt*, 2020 U.S. Dist. LEXIS 56062, at *14, 2020 WL 1532323, at *5.

[12] *See* the New York City Bar's 2014 Guidance and a Model for Categorical Privilege Logs, for example, which recognized almost a decade ago the need for model categorical privilege logs grouping multiple documents within individual categories into single entries after the Commercial Division of the Supreme Court of New York adopted the default preference for categorical privilege logs in Rule 11-b of Section 202.70(g). https://www2.nycbar.org/pdf/report/uploads/20072891-GuidanceandaModelforCategoricalPrivilegeLogs.pdf (last accessed January 26, 2024). In fact, not only are categorical logs the default practice rule in New York state courts, if requesting parties want document by document logs, responding parties are allowed, "upon a showing of good cause," to "apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log." N.Y. Comp. Codes R. & Regs. Tit. 22 § 202..70(g)).

[13] *See* October 16, 2023 Joint Notice to Bar 2023 at 24-25: https://img.nyed.uscourts.gov/files/local_rules/2023-10-16%20Joint%20Notice%20to%20Bar%202023%20Amendments%20with%20Attachments%20(3).pdf

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(2) where numerous documents are withheld and the party is using review software, preparation of a metadata log may suffice to provide the information required to support the claim of privilege;

(3) a party may not object to a privilege log solely on the basis that it ~~that~~ groups documents by category or metadata ~~or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis,~~ but may object if the substantive information required by this rule has not been provided in a comprehensible form.

For relevant historical context for this Local Rule, consult the Appendix of Committee Notes.

Google acknowledges, as do judicial opinions from the Second Circuit and beyond, that categorical logs can be problematic, and even rejected, if they are not sufficiently descriptive to allow the opposing party to assess the privilege claims based on the circumstances of each case. This does not mean, however, that they are never appropriate or that other alternatives like metadata logs are incapable of satisfying the requirements of Rule 26(b)(5). To the contrary, they can be an important tool in reducing the often onerous burdens of preparing privilege logs.

A metadata log is a table of withheld documents that provides only the metadata fields that can be extracted from the withheld documents, potentially with a designation for privilege bases, but without a substantive privilege descriptive narrative. Because only available metadata is used to generate the log, a metadata log is easier to produce. In many instances, the metadata maintained in the to/from/cc, document type, and email subject/filename fields will provide information synonymous with much of what is contained in a descriptive narrative, which is omitted from metadata logs. They are also consistent with the proposed Committee Notes to Rules 16 and 26, which suggest that producing "rolling" privilege logs may be valuable. There are significant problems with rolling logs, addressed in Section V below, but the spirit of this suggestion becomes more reasonable if the format of the log, at least in the early stages of discovery, is a metadata log, as opposed to the more onerous traditional document-by-document log.

Another alternative to the traditional log format is a "metadata plus topic log." In many respects, it is a hybrid of all the other formats because it combines various available metadata fields with a "topic" that generally will be more descriptive than those used for categorical logs but not so descriptive that it requires the custom entries needed for traditional logs. Examples of topics may be "settlement analysis" or "contract negotiation." For high volume cases, where a categorical or metadata log is not appropriate, the metadata plus topic format is often the best approach to balance all parties' concerns about privilege logs.

All of the alternatives discussed above are being used by practitioners, referenced by courts, and are even encouraged in the local rules or guidelines of various jurisdictions.[14] A

[14] In addition to Local Rule 26 of the Southern and Eastern Districts of New York, *see also* N.Y. Comp. Codes R. & Regs. Tit. 22 § 202.20-a (requiring parties in NY state courts to "meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging"); Delaware Chancery practice guidelines, p. 24 ("Categories of documents that might warrant

flexible approach to privilege log formats is also consistent with the concept of proportionality. We respectfully request that the Advisory Committee consider such options with respect to any amendments to the Federal Rules.

IV. The "Categorical Approach" Needs Clarification

The proposed Committee Note for the Rule 26 amendment says that in "some cases some sort of ***categorical approach*** might be effective to relieve the producing party of the need to list many withheld documents." (Emphasis added.) The phrase "categorical approach" is vague and potentially confusing because it could refer to the use of categories of documents for exclusion from privilege logs or the use of categorical privilege logs. The two are very different. The former ("Privilege Log Exclusions") appears to be the intent of the Note because the Note then provides the example of "communications between a party and outside litigation counsel" as those which "could be excluded from the listing." It becomes confusing at the end of the referenced paragraph when it says, "the use of categories calls for careful drafting and application keyed to the specifics of the action." This sounds more like a concern about categorical privilege logs, which do require some attention to how the categories are drafted to ensure they are defensible.

The confusion between "Privilege Log Exclusions" versus "Categorical Logs" happened multiple times during the Committee's hearing on October 16, 2023. For example:

- Prof. Marcus: "Something that I think you've mentioned and I know the next speaker addresses is what's sometimes called ***categorical exclusions*** or something like that, and just as an inadequate one, suppose the category privileged or otherwise protected as litigation preparation materials therefore is excluded. I'm wondering, since I think the next speaker says something like his experience with ***categorical logging*** is categorically bad, what you can tell us about why it might be good?" (pp. 17:7 - 18:20) (emphasis added) (confusing exclusions with logs);

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such treatment include internal communications between lawyer and client regarding drafts of an agreement, or internal communications solely among in-house counsel about a transaction at issue. These kinds of documents are often privileged and, in many cases, logging them on a document-by-document basis is unlikely to be beneficial."); *6340 NB LLC v. Cap. One, N.A.*, No. 20-CV-02500 (OEM) (JMW), 2023 U.S. Dist. LEXIS 205692, 2023 WL 7924176 (E.D.N.Y. Nov. 16, 2023) (finding categorical log sufficient and citing L.R. 26.2); *Auto. Club of NY., Inc. v. Port Auth. of NY & NJ*, 297 F.R.D. 55 (S.D.N.Y. 2013) (holding categorical logs are adequate if they provide information about the nature of the withheld documents sufficient to enable the requesting party to make an intelligent determination about the validity of the assertion of the privilege); *McEuen v. Riverview Bancorp, Inc.*, No. C12-5997 RJB, 2013 U.S. Dist. LEXIS 192490, 2013 WL 12095581 (W.D. Wa. Oct. 1, 2013) (holding that providing a list of specific metadata fields on a log for documents kept on a withheld hard drive would satisfy privilege log requirements); N.D. Cal. Guidelines for the Discovery of Electronically Stored Information, Guideline 2.02 (requiring parties to discuss at 26(f) conference, "Opportunities to reduce costs and increase efficiency and speed, such as . . . using agreements for truncated or limited privilege logs . . . ."); M.D. Tenn. Admin. Rule 174-1, ¶ 8(b) (providing expectation that parties will "discuss foregoing using traditional document-by-document logs in favor of alternate logging methods, such as identifying information by category or including only information from particular metadata fields (e.g., author, recipient, date)."

- Ms. Olson: "On the ***categorical log***, that's a term I think people can use sort of having different meanings, but, to me, and I have a case right now, it's a large toxic tort case, where we did this. We talked early on and we agreed for ***categories we would not require logging*** of communications between a lawyer and their client after the retention of the lawyer. So we knew that neither side had to worry about post-retention logging, which some people have sort of done and understood, but some people don't necessarily approach it that way." (pp. 162:18 - 163:3) (emphasis added) (confusing logs with exclusions); and
- Ms. Keller: "Fast-forward, you know, several months later, and all of a sudden, the defendant is proposing a ***categorical log***. And, you know, I'm not necessarily opposed to a categorical log, and I agree with the folks from DRI that there are ***some things that you can agree don't have to be logged***. I agree, you don't necessarily have to log communications with counsel after you file litigation. That doesn't make any sense. I don't want to have to log the communications with plaintiffs, right? ***But*** there are some things when it comes to the actual merits of the litigation ***where having a categorical log*** just doesn't make a whole lot of sense because…" (p. 167:7 - 167:20) (emphasis added) (confusing logs with exclusions and then logs again).

"Privilege Log Exclusions" are categories of documents that should not have to be included in a privilege log. Recommended groupings of documents to be excluded altogether are those that are (1) typically privileged across the board or (2) easily evaluated without the need for a privilege log. A common exclusion falling into grouping type 1, and provided as an example in the draft Committee Note, is *communications with counsel (or outside counsel only) after the date of the complaint*.[15] This exclusion is warranted because it is clear from the nature of the communication itself that such documents are very likely privileged and/or work product. Similarly, another example of grouping #1 is *trial-preparation documents created after the commencement of litigation*. An example of grouping #2 is *documents redacted for privilege*, which should be excluded because the unredacted portions of a document provide the context necessary (such as sender/recipient, subject line, and surrounding content) to evaluate the veracity of the privilege claim over the redacted content.[16] This example is missing from the

[15] *See e.g. Towner v. County of Tioga*, 2018 U.S. Dist. LEXIS 30901, at *15-16 (N.D.N.Y. Feb. 27, 2018) ("It is the position of this court that parties [*16] should not be required to list on a privilege log, on an ongoing basis, communications between attorney and client once litigation has commenced. Such a requirement would "be a cumbersome, unwieldy, and ultimately unnecessary task for defendants' retained counsel, and for that matter plaintiff's attorney, to not only document every communication between lawyer and client during the course of the present suit, but consistently update the privilege log with communications that occurred as the litigation progressed."); *Ryan Inv. Corp. v. Pedregal de Cabo San Lucas*, 2009 U.S. Dist. LEXIS 118337, at *3 (N.D. Cal. Dec. 18, 2009) (denying plaintiff's motion to compel the privilege logging of "post-litigation counsel communications and work product" because "counsel's communications with the client and work product developed once the litigation commences are presumptively privileged.")

[16] *See Mid-State Auto., Inc. v. Harco Nat'l Ins. Co.*, No. 2:19-cv-00407, 2020 U.S. Dist. LEXIS 51727, 2020 WL 1488741 (S.D. W. Va. Mar. 25, 2020) (refusing to force revision to privilege logs to note redactions as "an inefficient use of time and resources" because the redactions and reasons for them were clearly identified on the pages where the redacted material appears and for many of the redactions, "Plaintiffs can ascertain from the face of the document all the information necessary" to assess the

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Note and we suggest it be added. While particular documents in an Exclusion grouping may require further information to evaluate a privilege claim, resources can be spent on follow-ups for specific documents, while avoiding significant and unnecessary work for the vast majority of documents.

"Categorical Logs" group documents together in a single entry based on common characteristics. The common characteristic(s) of a category can be based on metadata, such as senders/recipients/dates, subject matter, document type or some combination thereof. As mentioned above, several courts have agreed that categorical logs can meet the requirements of FRCP 26(b)(5)(A) and some jurisdictions even consider them presumptively proper.[17]

Google agrees that Privilege Log Exclusions should be specifically referenced, with multiple examples, in the final Committee Note because they are a common and effective way for parties to reduce what needs to be logged. The reference, however, should be clear and distinct from Categorical Logs, which some parties consider to be problematic.

V. The Discussion of Rolling Privilege Logs is Problematic for Modern Litigation

The draft Committee Note for Rule 26 suggests that production of a privilege log "near the close of discovery period can create serious problems" and, therefore, "[o]ften it will be valuable to provide for 'rolling' production of materials and an appropriate description of the nature of the withheld material." The Note for Rule 16 also intimates that it "may be desirable . . . to provide for 'rolling' production" of privilege logs. These suggestions are problematic for several reasons.

First, the language being used may not reflect the intent of the Committee. There is an important difference between a "rolling" privilege log and a tiered or phased approach to privilege logging. A rolling production of privilege logs means they should be produced at or near the time of the underlying production of documents. In large volume cases, document productions may be happening on a monthly or even bi-weekly basis. This means that producing parties would be expected to produce privilege logs on a similar cadence. In contrast, a tiered or phased approach means that logs will be produced based on a schedule agreed upon by the parties based on the needs of the case.[18]

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privilege claims); *CresCom Bank v. Terry, Case*, 2013 U.S. Dist. LEXIS 106994, at *6-7 (D.S.C. July 31, 2013) (holding non-waiver over redacted documents that were not logged because "the documents themselves provide [Defendant] with enough information to identify the nature of the documents and to assess [Plaintiff's] claim that the redacted portions are privileged").

[17] *See* S.D.N.Y. and E.D.N.Y. Joint Local Rule 26.2(c) ("when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category").

[18] Google notes and agrees with similar comments made at the October 16, 2023 hearing by Robert Keeling (Trans. at 8-9) and Jonathan Redgrave (*id*. at 95-96, 99) suggesting the use of tiered or phased privilege logs.

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Second, the Notes fail to acknowledge that requiring "rolling" productions of privilege logs can create serious problems as well. Privilege review can be complex and time consuming. An email or attachment, which does not appear to be privileged or work product on its face, may, in fact, be so based on further investigation into other documents, witness interviews, etc. A party may also have to look at all various threads, emails strings, and related email families, among other things, to make sure a final privilege call is accurate and consistent across the entire universe of documents. It may not be possible to do all of this for every document at the beginning of a case and/or if a production and log must be completed in accordance with an aggressive production schedule. Producing parties may, therefore, feel compelled to screen for any potentially privileged material and hold it back for review and analysis until later in the case. This will end up delaying the production of certain information to the requesting party and, therefore, have the opposite effect of what the Rule amendments purport to be seeking. Shifting resources and attention to privilege logs during each production may also result in lower quality logs with increased costs, like increased corrections, clawbacks, and throwbacks.

Third, if the Notes appear to be advocating for rolling privilege logs because they are "often" valuable and desirable, requesting parties will attempt to point to that language as support for demanding rolling logs in cases where doing so would not be reasonable or proportional to the needs of the case. This would be inconsistent with other language in the Note for Rule 26, which correctly states that "[n]o one-size-fits-all approach would actually be suitable in all cases." Different cases have different levels of complexity and needs and the determination of when privilege logs should be produced should be tailored to unique circumstances of each case. The Advisory Committee guidance encouraging the provision of rolling privilege logs will lead to increased costs, delays, and unworkable complexity in many large document cases.

The Committee should modify the Advisory Committee Notes to reflect principles that will better address the need to reduce burden, provide flexibility, and promote proportionality. For example a "phased" or "tiered" approach to privilege logging would encourage flexibility and still allow parties to address issues early in cases. Logs would be produced at agreed upon points in the discovery process, which are consistent with the realities of that case. Other options are to encourage the wholesale exclusion of certain categories of documents from needing to be logged at all (discussed further above) and to allow for alternative log formats (also discussed above), which can be easier to create and produce.

In large scale litigation, the more workable approach would be to compile privilege logs after a majority of documents have been reviewed and the reviewing lawyers are most familiar with the relevant facts, issues, and individuals involved. Completion of one or more privilege logs towards the end "phase" of the document production process results in higher-quality privilege logs, while preventing litigants from wasting time and money.

VI. Federal Rule of Evidence 502(d) is Not a Cure-all

A common refrain from requesting parties when producing parties identify the burden of privilege logs is that a Rule 502(d) order would alleviate much of the concern. Rule 502(d) is not a cure-all, for a couple reasons. First, in our experience, the Rule is underutilized, including because many parties and judges do not understand it.[19] Second, although many lawyers claim publicly that parties should enter into Rule 502(d) orders, many do the opposite in their cases. Many requesting parties refuse to enter into a Rule 502(d) order or try to negotiate language designed to water down its effectiveness. This is especially prevalent in asymmetrical litigation, where the requesting party has much less data to produce and, therefore, a much smaller risk of producing privileged information.

VII. Proposed Amendments and Changes

As detailed above, the proposed amendments to Rules 26(f) and 16(b), while laudable in their attempt to prevent privilege log disputes, do not go far enough. They do not address the concept of proportionality in privilege logging, solve for the inherent imbalance of privilege logging burdens in asymmetrical litigation, nor allow for flexible approaches to Rule 26(b)(5)(A) compliance in a manner that best serves the dictates of Rule 1. In large part this is because the solution mirrors the problem unintentionally created by the 1993 amendments: expecting agreement between requesting and responding parties with varied levels of information, resources and strategic positions *before* they understand the full scope of "otherwise discoverable" information, much less relevant privileged information and associated privilege log burdens.

The problem has to be addressed at the source: the language of Rule 26(b)(5)(A). Parties and courts should be empowered to *actually* develop and utilize "[c]omputer based methods of searching…particularly for cases involving large volumes of electronically stored information" and "courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available."[20] In the privilege log context, this means freeing up parties to leverage technology to generate automated privilege logs in flexible formats. This is especially important in an era of dynamic and varied formats where snippets of information–rather than what we historically considered a "document"–are coming to dominate discovery. Allowing local rules, standing orders or dependency on pre-trial negotiations to resolve privilege log disputes or lock parties into specific formats will only continue the trend of privilege log disputes delaying discovery resolution.

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[19] *See generally The Sedona Conference, Commentary on The Effective Use of Rule 502(d) Orders*, 23 SEDONA CONF. J. 3 (2022) ("More than 12 years since the adoption of Rule 502 in 2008, there remains an apparent misunderstanding of the differences between Rule 502(d) and Rule 502(b), resulting in the slow adoption of Rule 502(d) orders as a standard in federal litigation.").

[20] Advisory Committee Notes to 2015 Amendment to Rule 26.

Google

Google alternatively suggests the below additional amendments to the following Rules and Committee Notes.

Federal Rule of Civil Procedure 26(b)(5)(A) should be amended, in relevant part, as follows:

> (5) *Claiming Privilege or Protecting Trial-Preparation Materials*.
>
> (A) *Information Withheld*. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; ~~and~~
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner using any reasonable method or format proportional to the needs of the case that, without revealing information itself privileged or protected, will enable other parties to assess the claim; and
>
> (iii) a party receiving a description of information withheld on the basis of privilege or trial-preparation material claims may not object solely on the basis of the method or format utilized by the party making the claim.

The Advisory Committee Note for the above proposed amendment to Rule 26(b)(5)(A) should include language similar to the below:

> In 1993, amended Rule 26(b)(5)(A) required parties withholding discoverable information under legal privilege to expressly claim and describe the documents. Electronic mail, or "email," emerged that year. In the 30 years since Rule 26(b)(5)(A) was adopted, the volume and complexity of discoverable information have changed significantly.
>
> Recognizing that these increased volumes and format variations represent a direct challenge to the ability of courts and parties to secure the just, speedy, and efficient determination of every action and proceeding is the primary impetus behind this amendment. Additionally, the language of Rule 26(b)(5)(A), although intended to remain flexible, has sowed confusion. Privilege claims and descriptions are increasingly more burdensome and expensive to draft, particularly when courts or requesting parties insist on document-by-document logs, which involve drafting a single custom entry for each and every withheld document. Disputes over privilege logs did not exist prior to 1993 and now drive a significant proportion of discovery disputes.
>
> The amended rule aims to maintain the flexibility while making it clear that objections to privilege logs cannot be based solely on the method or format a party uses to comply with the rule. Document-by-document logs should not be required of responding parties

unless their initial chosen method would be insufficient for a particular claim. Responding parties should be enabled to utilize a method and format that is proportional to the needs of the case and, more broadly, the proportionality factors in Rule 26(b)(1) should apply to the entire privilege logging process. Reasonable methods include the wholesale exclusion of documents from the privilege logging process that are (1) typically privileged across the board or (2) easily evaluated without the need for a privilege log. An exclusion falling into the first grouping is communications with counsel (or outside counsel only) after the date of the complaint. Another example of the first grouping is trial-preparation documents created after the commencement of litigation. An example of the second exclusion is documents produced with redactions where the unredacted portions provide sufficient information to assess the claim (such as sender/recipient, subject line, and/or surrounding content). Reasonable formats include, for example, the use of categorical descriptions, data exports (aka “metadata logs”), single descriptions for electronically stored information grouped together in the ordinary course of business (aka “email threads”), and/or a combination of thereof.

In closing, Google applauds the Federal Rules Advisory Committee for its efforts in considering the burdens associated with privilege logging. We hope our suggestions will aid the Committee in the furtherance of those efforts. Please feel free to contact us if we can be of assistance.

Respectfully submitted,

Google LLC

PUBLIC SUBMISSION

Comment from Keller, Amy

Posted by the **United States Courts** on Feb 17, 2024

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To the Committee on Rules of Practice and Procedure:

After submitting my earlier comment today concerning proposed Rule 16.1, I was reminded by colleagues who routinely handle securities litigation that proposed Rule 16.1 may also create confusion related to the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. 78u-4(a)(3)(B). The PSLRA mandates a procedure by which the court, within 90 days after the date on which a notice is published informing members of the purported class of the pendency of the class action, shall consider and decide any motions to consolidate related actions, appoint lead plaintiff, and approval of lead plaintiff’s selection of lead counsel. As some securities cases have previously proceeded as MDLs (and continue to proceed as MDLs) proposed Rule 16.1 may conflict with the PSLRA, creating confusion between the appointment of lead counsel (per the PSLRA) and "leadership counsel" (per proposed Rule 16.1).

Please allow this brief comment to supplement my comment submitted earlier today concerning proposed Rule 16.1.

Respectfully,

Amy Keller

Comment ID

USC-RULES-CV-2023-0003-0068

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February 16, 2024

Mr. H. Thomas Byron, III, Secretary
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
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VIA EMAIL ONLY TO: RulesCommittee_Secretary@ao.uscourts.gov

RE: Proposed New Rule 16.1 on MDL Proceedings

Dear Members of the Advisory Committee:

A. Designation of Coordinating Counsel—Proposed Rule 16.1(b)

Preliminarily, I do agree that early organization is important to the effective and efficient administration of MDLs. However, I do not believe that proposed Rule 16.1(b), providing for the designation of coordinating counsel serves either of these two purposes. Instead, it seems to provide a second unnecessary overlay of coordination which may well do the opposite – increase inefficiency and make administration more difficult. The result may well be counter to the objectives of 28 U.S.C. § 1407(a) which is to provide for the "just and efficient conduct" of MDL proceedings.

Moreover, overly coordinating class actions is not consistent with Congress's intent. If it was, SEC. 4 (C) (i) of the Class Action Fairness Act could not be explained:

> "Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

Respectfully, the Committee's urge to hasten this coordination through proposed Rule 16.1(b) by providing for the designation of a coordinating counsel should be eliminated even though it is styled as a permissive rather than mandatory and that line 127 of the advisory committee notes does state, "In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that designation of coordinating counsel may not be necessary." (Advisory Committee notes Lines 127-131). Nevertheless, it is clear why these statements have not assuaged the concerns of so many that have commented on the rule change. Once set forth in a formal rule, experience is that it will soon become standard practice even when not expressly mandated.

The reasons for eliminating this are numerous. The reasons for creating this new expedited layer of "coordination" in the first place are sparse.

First, the proposed rule and text leave it ambiguous as to the criteria for choosing the coordinating counsel. Notably, the proposed rule is silent on whether the coordinating counsel needs to even be drawn from the ranks of the lawyers representing the parties. Thus, it is unclear whether this coordinating counsel would be a plaintiffs' attorney who has even filed a case that will be in the MDL or, instead, an attorney who is otherwise not even involved in the MDL's subject matter.

Given that the recently appointed MDL judge may have little experience with the subject matter or those plaintiffs' counsel who are most immersed in the particulars of the litigation, isn't it likely that the court will revert to appointing repeat players from prior leadership slates to this pre-leadership role, particularly larger firms regardless of the firm's intimacy with the litigation. Alternatively, a court might select a local law firm due to personal familiarity. Yet, to have a "coordinating counsel" who may not be sufficiently familiar with the often quite complex cases before the court can possibly result in the consideration of agenda items and even discovery suggestions that while they may be generically appropriate may not be appropriate or useful for the unique issues of the particular litigation.

Alternatively, to the extent the proposed rule suggests that courts should appoint this coordinating counsel even before an initial conference, this could precipitate a race to the courthouse *w*here any attorney may seek this coveted appointment even before the court has issued its first order.

Moreover, while the responsibilities for this counsel are undefined, why should a counsel, coordinating or otherwise, be placed in the position of representing the interests of litigants absent any client interests at all or a stake in the litigation. In the end of the day, despite efficiency, all counsel may only act in a representative capacity. Who would this "coordinating counsel" represent?

Moreover, such Counsel would be charged with participating in the development of the initial case management report, which under proposed 16.1(c) addresses important and consequential matters, including the appointment of permanent leadership, a discovery plan, measures to facilitate settlement, and the identification of factual and legal issues. Can ill-informed coordinating counsel take substantive positions on behalf of plaintiffs? If so, how would a court know whether all of plaintiffs' positions are being correctly represented? If there are competing theories of the case. In these instances, the court may be making a leadership appointment before other substantive recommendations regarding the litigation can be provided to the court.

There is also a failure to consider that most mass tort MDLs also include concurrently filed class actions. Contrary to the open-ended language in proposed Rule 16.1, Rule 23(g) provides the very specific criteria the court "must consider" in appointing interim class counsel (Rule 23(g)(1)(A)) and provides that where multiple lawyers seek appointment—as in most class action MDLs—"the court must appoint the applicant best able to represent the interests of the class" (Rule 23(g)(2)), by considering: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the classes. Fed. R. Civ. P. 23(g)(1)(A)(i-iv). This is entirely inconsistent with the lack of any guidance for selecting "coordinating counsel" under the proposed rules.

While it might be argued that this is distinguished from leadership, the Committee Note unfortunately provides that "performance in that role may support consideration of coordinating counsel for a leadership position." Does this mean that a lawyer with no previous underlying experience in the litigation nor acting in a representative capacity may then be eligible for a leadership appointment merely due to a court appointment?

The bottom line is that the supposed need for a coordinating counsel addresses a problem that really does not need solving. If the reason for the Proposed Rule is to promote efficiency, it does not. The use of a coordinating counsel inserts a two-step process into the selection of leadership without a clear need for doing so. Under the proposed rule, a court must, with or without guidance, make an additional decision about who to appoint as coordinating counsel and before even hearing from attorneys about what is sure to be a complex case. Given the relatively brief time frame between MDL transfer and the appointment of interim lead counsel, adding this interim layer may only serve to frustrate a process that is for the most part already working quite well.

If the goal is efficiency, the solution should be to select and appoint a permanent leadership structure quickly. Moreover, even before this, there is nothing preventing both sides from having productive conversations about how to organize and move the litigation forward even before leadership is formally chosen.

III. Conclusion

I wish to thank the Advisory Committee for their extremely careful consideration of these proposed Rule changes. Notwithstanding the fact that I am making this recommendation to eliminate the proposed change instituting a "coordinating counsel" position from the proposed text, I commend the committee on their careful and thoughtful consideration of this extremely complex topic.

Yours sincerely,

Gerson H. Smoger/s

Gerson H. Smoger, Ph.D., J.D.

GHS/gm

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February 16, 2024

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Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Comment Regarding Proposed Amendment to Civil Rule 26
Related to Privilege Logging Practice

Dear Members of the Advisory Committee,

My name is Patrick Oot. I am a partner at Shook, Hardy & Bacon L.L.P. where I serve as the co-chair of Shook's Complex Litigation Strategic Counseling Group. I would like to begin by thanking the members of this committee for their hard work and continued dedication to explore opportunities to improve our federal judicial process.

Our practice is often involved in some of the largest matters in the United States where the cost of protecting privilege through manual logging and document review has become an excessive burden on litigants. I am writing in support of an amendment and related rules comments that reduce the excessive Fed. R. Civ. P. 26(b)(5)(A) compliance burden on parties and move our litigation process away from an antiquated manual logging process that needlessly increases the cost of litigation.

Spending hundreds of thousands of dollars on efforts to protect attorney-client and work product privileges in the litigation process has become all-too-commonplace under the current framework in complex matters, including multidistrict litigations, which disproportionately affect large data holders nationwide. Throughout my career, I have made great efforts to educate litigants and the courts on available efficiencies and the benefits of modernizing Rules and Comments to align better with Federal Rule 1. History repeats itself. Litigation costs are growing, and I write this comment with new data and a reminder of prior relevant testimony provided to the Rules Committee.

For example, in the beginning of my career, long before joining our law firm, I served as director of electronic discovery and senior litigation counsel at Verizon. After working through several complex matters and a Hart-Scott-Rodino Second

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Request for the acquisition of MCI, the leaders of the Verizon legal department agreed that it would be helpful to educate the Rules Committee about real and actual costs faced by organizations in the litigation and regulatory environment.

On January 29, 2007, I had the opportunity to testify before the Advisory Committee on the Rules of Evidence regarding proposed changes to Federal Rule of Evidence 502.[1] At the hearing, I testified generally that the overall cost of attorney time to review and log documents during a Department of Justice Second Request was around $13 million, nearly **$7.8 million of that was directly related to the cost to protect privilege.**[2] Specifically, the company spent millions on document review and privilege logging by service providers and for the supervision by outside counsel. In that 2007 testimony, I suggested that with Fed. R. Evid. 502(d), litigants could deploy simple technological tools to lower the cost and accelerate the process of protecting privilege. In the presentation, I illustrated how the use of law firm domain names and other privilege keyword search term strategies could identify privileged documents and replace much of the front-end manual review work if Fed. R. Evid. 502(d) were in place to provide a protective non-waiver pathway. At the same time, we discussed how a metadata log and other analytical tools could replace a manual privilege log, again in a world of Fed. R. Evid. 502(d) and its non-waiver provisions. I understand that these data points and strategies were critical in helping the Rules Committee move forward with the proposed rule.

Yet, 17 years later Fed. R. Evid. 502 resolved only part of the problem. While litigants have successfully reduced the risk of waiver, thereby lowering some of the multi-tier document review costs, expensive and inefficient privilege logging processes still need deeper scrutiny. For example, requesting parties often force producing parties into draconian "ESI Protocols" that require a party to conduct manual "document-by-document" privilege logging processes for matters in federal court that needlessly increase the cost of litigation and yield little benefit.[3] Now, in 2024 – just as in 2007 – the data speaks volumes:

- In a litigation involving a pharmaceutical product, our client expended over **$472,608.00** and 4,100 hours of attorney time at service providers and law firms for a "document-by-document" privilege log. When the outside counsel team proposed categorical or metadata logs in these matters, the requesting party objected. Our client ultimately prevailed, after years of litigation and at great financial cost.

[1] Hearing on the Advisory Committee on Evidence Rules, F.R.E. 502, January 29, 2007, at p. 88:16-18.
[2] *Id.*; *see also* Kershaw, Anne E. and Oot, Patrick, "The Real Cost of Privilege Review," 2005.
[3] ESI protocols were never intended to create the additional burdens they now impose.

- Similarly, in another litigation involving a different pharmaceutical product, our client spent over **$401,024.51** and 4,599 hours on attorney time at service providers and law firms for another manual privilege log. Again, when the outside counsel team proposed categorical or metadata logs in these matters, the requesting party objected. Our client ultimately prevailed, again, after years of litigation and massive expense.

- The client ultimately prevailed in both litigations, after unnecessarily being obligated to prepare wasteful manual privilege logs. Annually, outside of these matters, this same client in 2023 spent **$123,896.50** on just two basic matters to manually log documents for privilege.

These simple examples illustrate that the cost of privilege logging now contravenes the spirit of Rule 1 to "secure just, speedy and inexpensive determination of every action and proceeding."[4] As with the amended changes to Fed. R. Evid. 502, the Civil Rules must also evolve with everyday practice so that parties may have access to strategies, techniques and technologies that decrease the cost of litigation without the cost of motion practice. This includes alternatives to conducting a "document-by-document" review, including use of metadata or categorical logs and use of e-mail threading to log only the most inclusive e-mail in a chain,[5] all of which would protect privilege, allow for clarity and have the potential

[4] Fed. R. Civ. P. 1.

[5] Courts have endorsed these cost-saving logging practices:

(1) Metadata privilege logs: *see, e.g.*, *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 19-CV-00783 (DLI) (CLP), 2021 WL 1968325, at *5 (S.D.N.Y. Mar. 31, 2021); *McEuen v. Riverview Bancorp, Inc.*, No. C12-5997 RJB, 2013 WL 12095581, at *3 (W.D. Wash. Oct. 1, 2013).

(2) Categorical privilege logs: *see, e.g.*, *6340 NB LLC v. Capital One, N.A.*, No. 20-CV-02500 (OEM) (JMW), 2023 WL 7924176, at *7 (E.D.N.Y. Nov. 16, 2023); *Rekor Sys., Inc. v. Loughlin*, No. 19-cv-7767 (LJL), 2021 WL 5450366, at *2 (S.D.N.Y. Nov. 22, 2021); *Maxus Energy Corp. v. YPF, S.A.*, Nos. 16-11501, 18-50489, 2021 WL 3619900, at *3 (Bankr. D. Del. Aug. 16, 2021); *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. 3:17-CV-01078, 2020 WL 1532323, at *5 (M.D. Tenn. Mar. 31, 2020); *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, 297 F.R.D. 55, 59–64 (S.D.N.Y. 2013); *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008); *United States v. Magnesium Corp. of Am.*, No. 01-00040, 2006 WL 1699608, at *5–6 (D. Utah June 14, 2006).

(3) E-mail threading for privilege logs: *see, e.g.*, *Muro v. Target Corp. of Am.*, 250 F.R.D. 350, 362–63 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009); *Williamson v. S.A. Gear Co.*, No. 3:15-cv-365-SMY-DGW, 2017 WL 10085017, at *1 (S.D. Ill. June 6, 2017); *EPAC Techs., Inc. v. Thomas Nelson, Inc.*, No. 3:12-cv-00463, 2015 WL 13729725, at *5 (M.D.

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to save producing parties millions of dollars while assuring that a requesting party has sufficient information to understand the nature of the privilege. Further, the increased use of cost allocation should provide additional assurances that the parties work together to reduce cost.

Coincidentally, a few weeks after that January 2007 testimony, Justice Stephen Breyer of the United States Supreme Court spoke on a panel at Georgetown Law regarding the growing cost of litigation and discovery in the United States. In response to the notion that discovery costs could exceed $13 million, Justice Breyer commented that,

> *"If it really costs millions to do that, then you're going to drive out of the litigation system a lot of people who ought to be there. They'll go to arbitration … They will go somewhere where they will write their own discovery rules, and I think that is unfortunate in many ways."*[6]

Justice Breyer's comments should help inform decision making on the current issue before this Committee. As we continue to evaluate our procedures, we must take greater efforts to adhere to Rule 1.

Sincerely,

Patrick Oot

Patrick Oot

Tenn. Dec. 1, 2015); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 641–42 (D. Nev. 2013); *Dawe v. Corr. USA*, 263 F.R.D. 613, 621 (E.D. Cal. 2009).

[6] John Bace, *Cost of E-Discovery Threatens to Skew Justice System*, Gartner Report No. G00148170, April 20 2007.